APPENDIX

TABLE OF CONTENTS

AO 91 (Rev. 08/09) Criminal Complaint

UNITED STATES DISTRICT COURT

for the

District of Columbia

United States of America)
v.)
EDWARD MAGRUDER) Case No.
)
)
)
)

Defendant(s)

CRIMINAL COMPLAINT

I, the complainant in this case, state that the following is true to the best of my knowledge and belief.

On or about the date(s) of June 8, 2019 in the county of Washington in the _____ District of Columbia, the defendant(s) violated:

Code Section	*Offense Description*
21 U.S.C. § 841(a)(1) and § 841(b)(1)(A)(i)	did unlawfully, knowingly, and intentionally possess with intent to distribute a mixture and substance containing a detectable amount of heroin, a Schedule I narcotic drug controlled substance, and the amount of said mixture and substance was one kilogram or more.

This criminal complaint is based on these facts:

SEE ATTACHED STATEMENT OF FACTS

☑ Continued on the attached sheet.

Complainant's signature

STEVEN WEATHERHEAD, Special Agent
Printed name and title

Sworn to before me and signed in my presence.

Date: 06/10/2019

Judge's signature

City and state: Washington, DC ROBIN M. MERIWEATHER, U.S. Magistrate Judge
Printed name and title

Appendix A

During the course of a Federal Bureau of Investigation (FBI) narcotics investigation that began in the summer of 2018, FBI agents received information that defendant Edward Magruder was involved in the distribution of large quantities of narcotics. In particular, agents learned that defendant Magruder would travel to New York to acquire narcotics and then return to Washington, D.C. with the narcotics. In May of 2019, based on information learned in the investigations, the FBI gained judicial authorization to track the location of cellular telephone number known to be used by defendant Magruder.

On June 7, 2019, the phone traveled from Washington, D.C. to New York. Agents traveled to New York to conduct surveillance on defendant Magruder and learned that he had traveled to New York via Greyhound bus. He arrived at the Port Authority Bus Terminal in Midtown Manhattan at approximately 2:30 PM. Agents observed him as he stood outside of the bus terminal for approximately an hour and made several calls using a flip phone (not the phone that was being tracked.) Defendant Magruder had in his possession a blue backpack.

The following day on June 8, 2019, defendant Magruder departed the Port Authority Bus Terminal and began traveling towards Washington, D.C. He arrived at Union Station in Washington, D.C. at approximately 4:30 PM. He walked off the bus carrying the blue backpack he was seen with the day before. Agents approached defendant Magruder, stopped him, and searched his backpack. At the bottom of the backpack, underneath several items of clothing, was a brick of compressed tan powder, wrapped in duct tape and several plastic bags. The substance field tested positive for the presence of opiates. The brick weighed approximately 1,263.2 grams with the duct tape packaging.

Defendant Magruder was arrested and taken to the MPD 1st District Station. He was advised of his rights which he chose to waive and make a statement. He explained that he had traveled to New York to obtain heroin. He stated that he had traveled to New York several times to receive heroin. He stated that he usually received two bricks at a time and that he sold the heroin in smaller quantities here in Washington. D.C. Each brick consisted of two 600 gram blocks packed together and wrapped in duct tape. Based on my training and experience, I know that the amount of suspected heroin recovered from defendant Magruder is consistent with the intent to distribute

STEVEN WEATHERHEAD, Special Agent
Federal Bureau of Investigation

Subscribed and sworn to before me on this_____, day of June, 2019.

ROBIN MERIWEATHER,
United States Magistrate Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.	Criminal Action No. 19-203 (CKK)

MEMORANDUM OPINION
(July 20, 2020)

In this criminal action, Defendant Edward Magruder pled guilty to unlawful possession with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, Defendant Magruder and the Government agreed that a sentence of 144 months to 180 months of incarceration, followed by five years of supervised release, was an appropriate sentence. Prior to sentencing, Defendant Magruder has filed a Motion to Withdraw Guilty Plea. ECF No. 27. Defendant Magruder argues that he should be permitted to withdraw his guilty plea because he had ineffective assistance of counsel based on his prior counsel's failure to obtain a particular item of discovery and because he was coerced into accepting the Rule 11(c)(1)(C) plea. The Government opposes withdrawal of the guilty plea.

Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a

[1] The Court's consideration has focused on the following documents:
- Def.'s Mot. to Withdraw Guilty Plea ("Def.'s Mot.), ECF No. 27;
- Gov.'s Opp'n to Def.'s Mot. to Withdraw Guilty Plea ("Gov.'s Opp'n"), ECF No. 28;
- Def.'s Reply to Opp'n to Mot. to Withdraw Guilty Plea ("Def.'s Reply"), ECF No. 29;
- Def.'s Suppl. to Mot. to Withdraw Guilty Plea ("Def.'s Supp."), ECF No. 30;
- Gov.'s Suppl. to Opp'n to Def.'s Mot. to Withdraw Guilty Plea ("Gov.'s Supp."), ECF No. 31; and

whole, the Court DENIES Defendant Magruder's Motion to withdraw his guilty plea. The Court concludes Defendant Magruder has not presented a fair and just reason for granting the withdrawal.

I. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 11, a defendant is permitted, before a sentence is imposed, to withdraw a guilty plea if the defendant can show "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). While presentence withdrawal motions should be "'liberally granted,' they are 'not granted as a matter of right.'" *United States v. Thomas*, 541 F. Supp. 2d 18, 23 (D.D.C. 2008) (quoting *United States v. Ahn*, 231 F.3d 26, 30 (D.C. Cir. 2000)). When ruling on a motion to withdraw a guilty plea, courts in this Circuit consider the following factors:[2] "(1) whether the defendant 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. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998) (internal quotation marks omitted). The third factor is viewed as the "most important." *Id.* (internal

- Def.'s Reply to Gov.'s Suppl. to Opp'n to Mot. to Withdraw Guilty Plea ("Def.'s Reply to Supp."), ECF No. 32.

[2] Defendant Magruder argues that these factors are not applicable because they are "considered by the Appellate Court to determine if the court abused its discretion in not permitting a defendant to withdraw his guilty plea." Def.'s Reply, ECF No. 29, 1. While the United States Court of Appeals for the District of Columbia Circuit does consider these factors in such a context, a number of district courts have still applied the factors when determining whether or not a defendant has shown a fair and just reason for withdrawal of a guilty plea. *See, e.g., United States v. Thomas*, 541 F. Supp. 2d 18, 23 (D.D.C. 2008) ("[C]ourts look at [these] factors in deciding whether to grant a motion to withdraw a plea."); *United States v. Sibblies*, 562 F. Supp. 2d 1, 3 (D.D.C. 2008) (same); *United States v. Tolson*, 372 F. Supp. 2d 1, 9 (D.D.C. 2005) ("The D.C. Circuit has recently reiterated this jurisdiction's longstanding rule that a court adjudicating a motion to withdraw a guilty plea prior to sentencing must consider [these factors].").

quotation marks omitted). In the present case, the Government does not claim that it would be "substantially prejudiced" by the withdrawal of Defendant Magruder's guilty plea. Gov.'s Opp'n, ECF No. 28, 9 n.5. Therefore, this analysis focuses on the first and third factors, beginning with the third factor as it is the most influential. *See United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) (adopting "more structured inquiry-focusing first on the most important, indeed determinative factor").

II. FACTUAL BACKGROUND

On June 10, 2019, a criminal complaint was filed against Defendant Magruder, stating that he violated 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) by possessing with intent to distribute a mixture and substance containing one kilogram or more of heroin. ECF No. 1. That same day, Defendant Magruder was arrested and made an initial appearance before Magistrate Judge Robin Meriweather. Defendant Magruder was appointed counsel and was held in temporary detention. On June 13, 2019, a detention hearing was held before Magistrate Judge Meriweather, and Defendant Magruder consented to detention.

On June 24, 2019, this Court held its first status conference with Defendant Magruder. Defense counsel indicated that he had received but had not yet reviewed the discovery and requested an additional 30 days. June 24, 2019 Minute Order. The Court held the next status conference on August 1, 2019, during which Defense counsel requested additional time to review discovery and to determine how to proceed. Aug. 2, 2019 Minute Order. The parties returned to the Court on September 13, 2019. At this time, Defendant Magruder indicated that he intended to proceed to trial and the Court ordered the parties to propose pre-trial deadlines. Sept. 13, 2019 Minute Order. Also on that day, the Court ordered the Probation Office to complete a

criminal history calculation so that the parties would have access to the relevant information on the advisory sentencing guidelines prior to trial. ECF No. 6.

When the parties returned to the Court for a status conference on October 4, 2019, Defense counsel indicated that Defendant Magruder had been provided with a plea offer. Defendant Magruder required additional time to consider the plea offer. Oct. 4, 2019 Minute Order.

On October 8, 2019, the parties conducted another status conference. At this status conference, Defendant Magruder indicated that he intended to accept the Government's plea offer. The plea offer, which was later formally accepted, was a Rule 11(c)(1)(C) plea of 144 to180 months, with a mandatory minimum of 10 years. Oct. 8, 2019 Minute Order. During the status conference, Defense counsel explained that "Mr. Magruder appears to have at least two prior convictions that, if the Government had filed the 851 notices, would have put him in jeopardy of receiving a mandatory minimum term of incarceration of 25 years." Tr. Oct. 8, 2019, ECF No. 19, 4:20-23. Even absent a 21 U.S.C. § 851 notice, the Government stated that if Defendant Magruder pled to the indictment his advisory sentencing guidelines range would be 262 to 327 months, with a mandatory minimum of 10 years. *Id*. at 6:14-15. Defense counsel explained that the plea offer would reduce the incarceration time "a considerable amount." *Id*. at 5:1. Defendant Magruder affirmed that he had received and reviewed the evidence against him. *Id*. at 5:6-9.

During the next October 22, 2019 status conference, the Court explained the Probation Office's findings on Defendant Magruder's criminal history calculation. The Court also stated that, as a career offender, Defendant Magruder would likely be eligible for a 21 U.S.C. § 851

notice by the Government, increasing the mandatory minimum sentence to 25 years. During the status conference, Defendant Magruder expressed some confusion as to the Rule 11(c)(1)(C) plea. Tr. Oct. 22, 2019, ECF No. 20, 7:13-14. The Court explained that Defendant Magruder faced a mandatory minimum of 10 years based on his charge. If the Government filed a 21 U.S.C. § 851 notice, for which it appeared Defendant Magruder was eligible, the mandatory minimum would move up to 25 years. *Id*. at 8:3-20. The Court stated that it had no control over the mandatory minimums and could not sentence Defendant Magruder to a lesser sentence than the mandatory minimum. *Id*. at 9:3-4. The Court further explained that if the Rule 11(c)(1)(C) plea was accepted, Defendant Magruder's sentence would have to be between 144 and 180 months. *Id*. at 8:11-15. The Court explained to Defendant Magruder "this is your decision. Your counsel can go over the evidence with you, can go over what the choices are that you have, what the consequences are, can give you advice; and you can decide to accept it or not." *Id*. at 12:12-15. After reviewing the effect of the plea offer, Defendant Magruder confirmed that all requested discovery had been provided. *Id*. at 12:5-9. Defendant Magruder further stated that he was prepared to go forward with the plea agreement. *Id*. at 13:14-17.

On October 25, 2019, Defendant Magruder was placed under oath and pled guilty, accepting the Rule 11(c)(1)(C) plea agreement, setting a sentence of 144 to 180 months. ECF No. 13. The Court accepted the plea but held in abeyance accepting the proposed sentence until after the Court could review the presentence report.

On November 20, 2019, the Court received a letter from Defendant Magruder which was dated October 25, 2019. ECF No. 17. In the letter, Defendant Magruder stated that he was not satisfied with his prior counsel based, in part, on his counsel's alleged failure to properly

investigate the case. Defendant Magruder also expressed some confusion as to whether or not his plea agreement contained a mandatory minimum of 10 years. *Id*. That same day, Defendant Magruder's counsel filed a motion to withdraw. ECF No. 15.

On December 2, 2019, the Court appointed Defendant Magruder new counsel and set another status conference in the case, allowing new counsel adequate time to prepare. The Court further stayed the deadlines for the sentencing briefing. Dec. 6, 2019 Minute Order. On December 12, 2019, the Court held a status conference where Defendant Magruder was represented by his new counsel. Defendant Magruder expressed that he was satisfied with his new counsel. The Court set a further status conference to allow Defendant Magruder time to speak with his new counsel about how to proceed. Dec. 12, 2019 Minute Order. On January 27, 2020, the Court held another status conference at which Defendant Magruder indicated his intention to file a motion to withdraw his guilty plea. The Court set a briefing schedule. Jan. 27, 2020 Minute Order.

Prior to the filing of a motion to withdraw his guilty plea, Defendant Magruder's new counsel filed a motion to withdraw due to a fundamental disagreement on the posture of the case. ECF No. 21. On March 6, 2020, the Court granted the motion to withdraw and again appointed new counsel for Defendant Magruder. Mar. 6, 2020 Minute Order. The Court further vacated the briefing schedule for the motion to withdraw and set a new status conference date. *Id*.

Prior to the next status conference, the Court was hindered by the COVID-19 restrictions. In Re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic, Standing Order 20-9(BAH), Mar. 16, 2020. The Court ordered Defendant Magruder to file a notice indicating if he intended to proceed with moving to withdraw his guilty plea so that the

Court could set further proceedings. Mar. 17, 2020 Minute Order.

On May 6, 2020, Defendant Magruder filed a Notice indicating his intent to move to withdraw his guilty plea. ECF No. 26. The Court set a briefing schedule for Defendant Magruder's Motion to withdraw his guilty plea, and that motion is currently before the Court. ECF No. 27.

III. DISCUSSION

Defendant Magruder contends that he should be able to withdraw his guilty plea because his prior counsel was ineffective for failing to discover a particular piece of discovery and because he was coerced into accepting a Rule 11(c)(1)(C) plea. The Court concludes that neither argument provides grounds for withdrawing his guilty plea.

A. Tainted Plea

If a plea is tainted because it was entered unconstitutionally, or contrary to Rule 11 procedures, then the "standard [for allowing withdrawal of a plea] is very lenient." *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975). Under such circumstances, pleas "should almost always be permitted to be withdrawn," regardless if the defendant asserted his legal innocence. *Id*. A plea is "constitutionally valid" only if it "represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." *United States v. McCoy*, 215 F.3d 102, 107 (D.C. Cir. 2000) (quoting *Hill v. Lockhart*, 474 U.S. 52, 56 (1985)) (internal quotation marks omitted).

First, Defendant Magruder argues that his plea was tainted because it was not voluntary or intelligent due to his prior counsel's failure to properly investigate at least one piece of discovery. To withdraw a guilty plea on the basis of ineffective assistance of counsel, a

defendant must satisfy the two-prong test introduced in *Strickland v. Washington*, 466 U.S. 688 (1984). First, the defendant must show that the "counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688-89. Second, the defendant must prove that "the deficient performance prejudiced the defense." *Id.* at 687.

As the first step under *Strickland*, Defendant Magruder must show that his prior counsel's performance was deficient. To show deficient performance, Defendant Magruder must demonstrate that his "counsel's performance 'fell below an objective standard of reasonableness' by identifying specific 'acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment.'" *Taylor*, 139 F.3d at 929 (quoting *Strickland*, 466 U.S. at 687-88). It is well-established that an attorney has a "duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Therefore, if the alleged deficient conduct is a failure to fully investigate, then the attorney's decision "must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgment." *Id.*

In the present case, Defendant Magruder represents that his prior counsel was deficient by failing to provide him with the relevant discovery; namely, a May 10, 2019 affidavit that was submitted in support of the warrant to obtain his geolocation data. Def.'s Mot., ECF No. 27, 4-5. Defendant Magruder states that he received the affidavit only after the plea hearing and upon communicating with counsel for the Government. Def.'s Reply, ECF No. 29, 2. Therefore, Defendant Magruder claims that his guilty plea "was not a knowing plea without the full gambit of material which only recently came to light." *Id.*

For purposes of this Memorandum Opinion, the Court will assume that Defense counsel's

failure to provide Defendant Magruder with relevant discovery—the May 10, 2019 affidavit—was deficient. However, the Court finds that Defendant Magruder cannot show the second *Strickland* prong—that he was prejudiced by this error. To show prejudice, the defendant must show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill*, 474 U.S. at 59. In circumstances where the counsel's deficient conduct is a "failure to investigate or discover potentially exculpatory evidence, the determination of whether the error 'prejudiced' the defendant . . . will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea." *Id*. This inquiry "will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial." *Id*.

Defendant Magruder argues that if he had been provided the May 10, 2019 affidavit, he could have identified two errors. First, that the seven outgoing calls made to the phone of Mr. Jhon Jairo Mosquera-Asprilla, a Colombian drug contact, occurred in March 2019, not in April 2019; and second, that the claimed 16-minute call between Defendant Magruder and Mr. Mosquera-Asprilla on April 22, 2019, actually occurred for 13.5 minutes on March 22, 2019. Def.'s Mot., ECF No. 27, 5. According to Defendant Magruder, the discovery of these errors would have led him to file "a motion to suppress the warrant with a viable *Frank's* issue ultimately defeating the probable cause leading to the signing off on the warrant." *Id*. at 7. Lacking probable cause for a warrant, Defendant Magruder contends that he would have been "in a position to suppress the drugs seized on June 8, 2019, and he would have been in a position to have the charge dismissed against him." *Id*.

The Court disagrees with Defendant Magruder's theory. Under *Franks v. Delaware*, in

order to successfully challenge an affidavit, the defendant must show that the false statements in the document were made by the affiant "knowingly and intentionally, or with reckless disregard for the truth" and that the false statements were "necessary to the finding of probable cause." 438 U.S. 154, 155 (1978). Notably, "[a]llegations of negligence or innocent mistake are insufficient." *Id*. at 171; *see also United States v. Lopez*, No. 1:17-CR-269, 2018 WL 1290415, at *10 (N.D. Ohio Mar. 13, 2018), *aff'd*, 769 F. App'x 288 (6th Cir. 2019) (holding a single false statement is insufficient to support a *Franks* hearing); *United States v. West*, 503 F. Supp. 2d 192, 194 (D.D.C. 2007) (refusing a *Franks* hearing where the mistake in the affidavit was small and not material); *United States v. Ali*, 870 F. Supp. 2d 10, 32 (D.D.C. 2012) (denying a *Franks* hearing where potentially negligent omissions in an affidavit were not material).

Though Defendant Magruder established that the affidavit contained two errors, Defendant Magruder does not cite to any legal authority that suggests these errors would have been sufficient for a *Franks* motion. Defendant Magruder merely alleges that the errors were a "deception on the part of the [affiant], not a reasonable belief." Def.'s Reply, ECF No. 29, 5. Nonetheless, the nature of the errors suggests that they were "typographical errors," as the Government states in its opposition. Gov.'s Opp'n, ECF No. 29, 6 n.4. The affiant wrote "April," rather than "March," and "16-minutes," instead of "13.5 minutes." Defendant Magruder has further failed to show that these small errors were in any way material to the finding of probable cause. That the calls were made a month prior and that one of the calls lasted approximately two and a half minutes less than stated is unlikely to defeat probable cause. Such errors, while avoidable and possibly negligent on the part of the affiant, do not meet the high standard set forth in *Franks*. Therefore, despite Defense counsel's failure to discover these errors, Defendant

Magruder has not proven that he was prejudiced by this failure as his *Franks* motion would have likely been denied. *United States v. Holland*, 117 F.3d 589, 594 (D.C. Cir. 1997) (noting a lawyer is not ineffective if he fails to file a frivolous motion).[3]

In addition to arguing that disclosure of the May 10, 2019 affidavit would have led to the suppression of probable cause for the warrant, Defendant Magruder also argues that if he had seen the affidavit earlier, he could have requested access to his phone records to show that the March 22, 2019, 13.5-minute phone call to Mr. Mosquera-Asprilla did not happen. When Defendant Magruder recently requested his phone records, he was informed that the phone company does not maintain records for more than one year. As such, Defendant Magruder argues that he "lost the chance to defend himself and potentially present to the Court evidence that the Affidavit contained materially false averments resulting in no probable cause for the geolocation data warrant, namely that no call was made in March to Mosquera's number." Def.'s Mot., ECF No. 27, 5.

However, Defendant Magruder provides no evidence in support of his argument that the March 22, 2019, 13.5-minute phone call did not occur. His argument is entirely speculative. The Government has produced telephone records showing that on March 22, 2019, Defendant Magruder called Mr. Mosquera-Asprilla's phone number and that the call lasted approximately 13.5 minutes. *See* Ex. 2, ECF No. 28-2. Defendant Magruder's base speculation is insufficient to

[3] The Court notes that the case cited in Defendant Magruder's supplement, *United States v. Jones*, 565 U.S. 400 (2012), does not change this analysis. *See* ECF No. 30. *Jones* concerned the installation of a Global-Positioning-System ("GPS") tracking device on a vehicle for approximately 28 days without a valid warrant. *See generally* 565 U.S. 400. Defendant Magruder contends that *Jones* stands for the proposition that "even with a warrant, GPS monitoring for more than 28 days is unconstitutional." ECF No. 30, 2. However, Defendant Magruder misreads *Jones* as it made no findings as to the constitutionality of GPS tracking with a warrant.

overcome the Government's evidence that he made a 13.5-minute phone call to the number in question on March 22, 2019. As such, Defendant Magruder has failed to show that he was prejudiced by his inability to access his own phone records due to the lapse in time.

In addition to finding that Defendant Magruder's lack of access to this discovery material does not constitute a *Strickland* violation which tainted his plea, the Court further finds that such violation does not render Defendant Magruder's plea not knowing or voluntary. At the October 25, 2019 plea hearing, the Court conducted a thorough inquiry with Defendant Magruder, explained the rights that he was waiving through pleading guilty, and reviewed the terms of the plea agreement. *See generally* Ex. 3, ECF No. 28-3. The Court ensured that Defendant Magruder was competent. The Court further specifically inquired as to whether or not Defendant Magruder had reviewed the plea materials with Defense counsel. *Id*. at 7:5-11. Under oath, Defendant Magruder affirmed that he was "completely satisfied with the services of [his] attorney." *Id*. at 7: 24-8:1.

Moreover, as has been explained, Defendant Magruder has pointed to no material discovery which was not provided to him. On October 22, 2019, Defendant Magruder affirmed that every item of discovery that he or his prior counsel had requested had been provided. Tr. Oct. 22, 2019, ECF No. 20, 12:1-9. Now, the only specific discovery that Defendant Magruder argues he should have received is the May 10, 2019 affidavit. However, this affidavit, and the errors contained in it, were not material as it does not tend to show that Defendant Magruder was innocent or that probable cause did not exist for the warrant. Additionally, the Government has provided evidence that Defendant Magruder's prior counsel was provided with all the relevant discovery, including the same phone records that were provided to his current counsel for the

purposes of this Motion showing that Defendant Magruder made the calls to Mr. Mosquera-Asprilla. *See* Exs. 5, 6, 7, ECF No. 31-1.[4]

Second, Defendant Magruder argues that his plea was tainted because he was "coerced into accepting the plea because the prosecution threatened to file an 18 U.S.C. § 851 enhancement to his mandatory minimum which would have increased the mandatory minimum he was facing." Def.'s Reply, ECF No. 29, 3. Additionally, Defendant Magruder asserts that he "thought he had no choice but to accept such an offer rather than seek to negotiate an open ended plea which would have given him the chance to argue for a sentence of 10 years rather than be limited to not less than 12 years." *Id*.

Defendant Magruder offers no legal support for the suggestion that the presence of an enhancement would convert a valid guilty plea into an involuntary one. In this Circuit, "[o]nly physical harm, threats of harassment, misrepresentation, or . . . 'bribes' . . . render a guilty plea legally involuntary." *United States v. Pollard*, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (quoting *Brady v. Unites States*, 397 U.S. 742, 750 (1970)). Additionally, other courts have held contrary to Defendant Magruder's proposition. *See, e.g., United States v. Felice*, 272 F. App'x 393, 396 (5th Cir. 2008) ("Threats regarding additional charges or enhanced penalties are accepted practices in plea negotiations and are not considered the kinds of threats which undermine the voluntariness of a guilty plea."); *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (noting that while "confronting a defendant with the risk of more severe punishment clearly may have a

[4] In Defendant Magruder's Reply to the Government's Supplement, Defense counsel contends that she has not received all of the discovery from Defendant Magruder's prior counsel, so she is unsure exactly what discovery material was not provided prior to Defendant Magruder's guilty plea. Def.'s Reply to Supp., ECF No. 32. However, current Defense counsel agrees that the relevant phone records were provided to prior Defense counsel before Defendant Magruder's guilty plea. *Id*.

discouraging effect on defendant's assertion of his trial rights, the imposition of these difficult choices [is] inevitable … and permissible"). Moreover, at his plea hearing, Defendant Magruder answered "no" under oath when asked by the Court if "[a]nyone forced, threatened or coerced [him] in any way into entering this plea of guilty." Ex. 3, ECF No. 28-3, 40:2-4. As a result, Defendant Magruder has failed to establish a claim of coercion.

Additionally, the Government has produced evidence showing that if Defendant Magruder declined to accept the Rule 11(c)(1)(C) plea, the Government intended to file the 21 U.S.C. § 851 enhancement. Ex. 5, ECF No. 31-1. The Government has also provided evidence that Defense counsel asked at least twice if the Government would agree to a plea below 140 to180 months, and the Government stated, "I can't go lower than 12-15." Ex. 4, 2, ECF No. 31-1. The Government noted that even if an enhancement was not filed and Defendant Magruder elected to plead to the indictment, Defendant Magruder's guidelines range would be 262 to 327 months, significantly higher than what was agreed to in the Rule 11(c)(1)(C) plea. Ex. 3, ECF No. 31-1.

And, prior to accepting the plea, Defendant Magruder had multiple opportunities to ask questions about his plea offer. The Court explained to Defendant Magruder the effects of the Rule 11(c)(1)(C) plea on the mandatory minimums. On October 22, 2019, prior to the plea hearing, the Court explained, "As to the two ranges that would be associated for you to make a decision how reasonable it is, frankly, to decide to accept or not accept the 144 to 180. If you do the—if you turn out to be a career offender, you are at offense level 37, category VI; and that's 262 to 327 months, with a large fine." Tr. Oct. 22, 2019, ECF No. 20, 10:1-6. Without career offender status, the guidelines sentence was 120 to 150 months. *Id*. at 10:7-10. The Court

explained that with the Rule 11(c)(1)(C) plea "you are agreeing to something that sort of straddles, to some degree, these." *Id*. at 10:11-12.

Additionally, during the plea hearing Defendant Magruder affirmed that he viewed the plea materials individually and with his prior counsel. Ex. 3, ECF No. 28-3, 7:5-11. He further indicated that he had enough time to review the plea materials and to consider fully the offer. *Id*. at 8:2-7. Defendant Magruder also affirmed that he had discussed with his prior counsel the mandatory minimum and the increased mandatory minimum if the Government filed the enhancement. *Id*. at 25:1-10. Defendant Magruder indicated that he understood that his plea sentencing guideline range straddled the 262 to 327 months he would face as a career offender and the 120 to 150 months he would face if he was not a career offender. *Id*. at 28:4-14. The Court notes that the Probation Office made a finding that Defendant Magruder would qualify as a career offender, and Defendant Magruder did not dispute this finding in any of his hearings or pleadings. As such, Defendant Magruder's status as a career offender is unrebutted. Defendant Magruder also stated that he had talked to his prior counsel about the sentencing guidelines and how they would apply in his case. *Id*. at 28:15-18. Defendant Magruder indicated that he understood that, without the Rule 11(c)(1)(C) agreement, he could be given a different sentence which, if a variance was granted, could be below the sentencing guidelines range but not below the mandatory minimum. *Id*. at 29:15-24. Defendant Magruder stated the ramifications of accepting or not accepting the plea had been explained by his prior counsel. *Id*. at 30:4-8. Defendant Magruder was repeatedly advised of his possible sentencing ranges and the ramifications of accepting his plea. Defendant Magruder has failed to show that his decision to accept the Rule 11(c)(1)(C) plea was not knowing or voluntary.

For these reasons, the Court concludes that Defendant Magruder's plea was not tainted.

B. Viable Defense

Under the first factor, a defendant seeking to withdraw a guilty plea "must make out a legally cognizable defense to the charge against him." *McCoy*, 215 F.3d at 106 (quoting *Cray*, 47 F.3d at 1207) (internal quotation marks omitted). A "general denial" is insufficient; instead, the defendant must "affirmatively advance an objectively reasonable argument that he is innocent, for he has waived his right simply to try his luck before a jury." *McCoy*, 215 F.3d at 106 (quoting *Cray*, 47 F.3d at 1207) (internal quotation marks omitted). In *United States v. Thomas*, the court held that while the defendant claimed to have "steadfastly proclaimed his innocence," the defendant's own "admissions weakened his assertion of innocence." 541 F. Supp. 2d at 28 (noting defendant admitted to knowingly possessing marijuana, selling marijuana to an undercover police officer within 1,000 feet of a school, and possessing a loaded firearm). Conversely, in *United States v. McCoy*, the court found that the defendant had "adequately presented cognizable defenses to the charges against him, " as he "consistently argued that the police mistakenly identified him as the seller," and "maintain[ed] that he did not know [his co-defendant] intended to sell cocaine base." 215 F.3d at 106-07.

Here, Defendant Magruder claims that he asserted a "legally cognizable defense to [his] offense" because "without the evidence law enforcement seized at the time [he] had been stopped and arrested, the government would have had no physical evidence to support their charges." Def.'s Reply, ECF No. 29, 3. In other words, if Defendant Magruder had the opportunity to "review and study the full discovery," he would have "discovered viable arguments to present in a motion to suppress the warrant" that led to the search and seizure of the

drugs and his arrest. *Id.* at 4.

While Defendant Magruder does assert a potential defense—the filing of a *Franks* motion to suppress a warrant—Defendant Magruder's understanding of this factor is misplaced. Even when a court views this factor under the lens of "legally cognizable defense," as opposed to "viable claim of innocence," a defendant still needs to "affirmatively advance an objectively reasonable argument that he is innocent." *United States v. Robinson*, 587 F.3d 1122, 1131 (D.C. Cir. 2009); *see also Cray*, 47 F.3d at 1209 ("A defendant appealing the denial of his motion to withdraw a guilty plea . . . must do more than make a general denial in order to put the Government to its proof; he must affirmatively advance an objectively reasonable argument that he is innocent."); *United States v. Sibblies*, 562 F. Supp. 2d 1, 6 (D.D.C. 2008) (concluding that "deprecating the government's evidence amounts to only a general denial of guilt or an argument that the government could not prove its case").

Here, it is undisputed that Defendant Magruder does not allege actual innocence. Instead, Defendant Magruder argues that but for his prior counsel's ineffective assistance he could have filed a *Franks* motion to suppress the warrant. Without so much as a general denial of guilt, the Court finds that this factor does not support a withdrawal of Defendant Magruder's guilty plea. *See U.S. v. Curry*, 494 F.3d 1124, 1129 (D.C. Cir. 2007) (faulting the defendant where his brief "does not include a single sentence declaring that he is actually innocent or disclaiming his admission of guilty at the plea proceeding").

Even if the Court were to assume that Defendant Magruder is not required to assert actual innocence and that a legally cognizable defense is sufficient, the Court concludes that Defendant Magruder has also failed to assert a legally cognizable defense. As the Court previously

explained, in order to prevail on a *Franks* motion to suppress a warrant, a defendant must show that any false statements in an affidavit were made "knowingly and intentionally, or with reckless disregard for the truth" and were "necessary to the finding of probable cause." *Franks*, 438 U.S. at 155. Here, Defendant Magruder has cited only two mistakes in the May 10, 2019 affidavit. First, that the seven outgoing calls made to Mr. Mosquera-Asprilla's phone occurred in March 2019, not in April 2019; and second, that the claimed 16-minute call between Defendant Magruder and Mr. Mosquera-Asprilla on April 22, 2019, actually occurred for 13.5 minutes on March 22, 2019. Def.'s Mot., ECF No. 27, 5. As the Court previously explained, these mistakes are not material mistakes, and Defendant Magruder has provided no evidence that the mistakes were made knowingly, intentionally, or recklessly. *See Supra* Sec. III.A. As such, Defendant Magruder has failed to show that his potential *Franks* motion was likely to have resulted in a suppression of the warrant and has failed to state a legally cognizable defense. *See Barker*, 514 F.2d at 220 (finding if defendant does not "effectively den[y] his culpability," his "motion to withdraw need not be granted").

Accordingly, the Court finds that Defendant Magruder has failed to show that he has a viable claim of innocence or a cognizable defense to the crime for which he pled guilty.

C. Prejudice

As a final factor, the Court considers whether or not the delay between the guilty plea and the motion to withdraw has substantially prejudiced the Government's ability to prosecute the case. In this case, the Government "does not claim that it would be substantially prejudiced by the withdrawal of the defendant's guilty plea." Gov.'s Opp'n, ECF No. 28, 9 n.5. Because the Government does not argue that it would be prejudiced by Defendant Magruder's withdrawal of

his guilty plea, this factor does not interfere with Defendant Magruder's motion to withdraw.

However, this factor "has never been dispositive in our cases." *Curry*, 494 F.3d at 1128 (upholding denial of withdrawal of guilty plea even though the Government did not argue prejudice) (quoting *United States v. Hanson*, 339 F.3d 983, 988 (D.C. Cir. 2003)). Accordingly, even though the Government does not claim prejudice from the withdrawal, Defendant Magruder's motion to withdraw remains insufficient as he has failed to establish that his plea was tainted or that he has a viable claim of innocence or a cognizable defense.

D. Hearing

As a final matter, the Court must decide whether an evidentiary hearing is warranted in this case. Generally, when a defendant seeks to withdraw a guilty plea, "the district court should hold an evidentiary hearing to determine the merits of the defendant's claims." *Taylor*, 139 F.3d at 932. Claims, including ineffective assistance of counsel, "frequently concern matters outside the trial record, such as whether counsel properly investigated the case, considered relevant legal theories, or adequately prepared a defense." *Id.* (internal quotation marks omitted). However, some motions to withdraw a guilty plea "can be resolved on the basis of the trial transcripts and pleadings alone." *Id.* For example, in *United States v. Tolson*, faced with a motion to withdraw based on a claim of ineffective assistance of counsel, the court determined that an evidentiary hearing was unnecessary because the court was "faced with but one or two fairly simple instances of attorney conduct that are alleged to be deficient." 372 F. Supp. 2d 1, 8-9 (D.D.C. 2005), *aff'd*, 264 F. App'x 2 (D.C. Cir. 2008). Thus, the court was able to "easily adjudicate" the merit of the defendant's contentions by relying solely on the pleadings and transcripts. *Id.*; *see also Thomas*, 541 F. Supp. 2d at 22-26 (concluding evidentiary hearing was unnecessary because

defendant's claim was insufficient to render plea invalid even when defendant argued that prior counsel failed to investigate fully); *Robinson*, 587 F.3d at 1127-33 (finding district court did not err in denying evidentiary hearing as the defendants' pleas were not tainted despite alleged coercion by the government).

Here, the Court finds that an evidentiary hearing is unnecessary. Even if the Court credits Defendant Magruder's claim that his prior counsel was deficient for failing to fully analyze the discovery, the Court has found that such deficiency did not prejudice Defendant Magruder as a potential *Franks* motion would not have been successful. An evidentiary hearing would not alter this finding. Additionally, Defendant Magruder's description of the plea process, including his prior counsel's actions during that process, are not controverted and would not be further illuminated by an evidentiary hearing.

Additionally, the Court notes that "[a] district should ordinarily conduct an evidentiary hearing *upon request*." *See Thomas*, 541 F. Supp. 2d at 23 (emphasis added); *Sibblies*, 562 F. Supp. 2d at 3 (reciting same standard). In this case, Defendant Magruder never requested that the Court hold an evidentiary hearing in connection with his motion to withdraw.

For these reasons, the Court concludes that it would not be benefitted by an evidentiary hearing. *See Curry*, 494 F.3d at 1131 (finding that there was "no need for the court to conduct an evidentiary hearing" where the facts were not in dispute).

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant Magruder's [27] Motion to withdraw his guilty plea. Defendant Magruder has failed to show that his plea was tainted or that

he has a viable claim of innocence or a cognizable defense to the charge to which he pled guilty.

An appropriate Order accompanies this Memorandum Opinion.

/s
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.

Criminal Action No. 19-203 (CKK)

ORDER
(July 20, 2020)

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Defendant's [27] Motion to Withdraw Guilty Plea is **DENIED**; it is

FURTHER ORDERED that the parties file a Joint Status Report by AUGUST 3, 2020, proposing deadlines for the next steps in the sentencing process.

IT IS SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.	Criminal Action No. 19-203 (CKK)

MEMORANDUM OPINION
(February 12, 2021)

In this criminal action, Defendant Edward Magruder pled guilty to unlawful possession with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Pursuant to Rule 11(c)(1)(C) of the Federal Rules of Criminal Procedure, Defendant Magruder and the Government agreed that a sentence between 144 months and 180 months of incarceration, followed by five years of supervised release, was an appropriate sentence. Two days before his scheduled sentencing hearing, Defendant Magruder filed his Second Motion to Withdraw Guilty Plea, ECF No. 46. Defendant Magruder argues that he should be permitted to withdraw his guilty plea because he learned after the plea hearing that no return had been filed for one of two warrants authorizing collection of cell phone data. He also argues that the warrant authorized the collection of content from his cell phone that was not supported by probable cause. The Government opposes withdrawal of the guilty plea.

Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a

[1] The Court's consideration has focused on the following documents:
- Defendant's Second Motion to Withdraw Guilty Plea ("Def.'s Mot."), ECF No. 46;
- Government's Opposition to Defendant's Second Motion to Withdraw Guilty Plea ("Gov.'s Opp'n"), ECF No. 47; and
- Defendant's Reply to Opposition to Second Motion to Withdraw Guilty Plea ("Def.'s Reply"), ECF No. 48.

whole, the Court DENIES Defendant Magruder's Motion to withdraw his guilty plea. The Court concludes Defendant Magruder has not presented a fair and just reason for granting the withdrawal.

I. FACTUAL BACKGROUND

On June 10, 2019, a criminal complaint was filed against Defendant Magruder, stating that he violated 21 U.S.C. §§ 841(a)(1) and (b)(1)(A) by possessing with intent to distribute a mixture and substance containing one kilogram or more of heroin. ECF No. 1. That same day, Defendant Magruder was arrested and made an initial appearance before Magistrate Judge Robin Meriweather. Defendant Magruder was appointed counsel and was held in temporary detention. On June 13, 2019, a detention hearing was held before Magistrate Judge Meriweather, and Defendant Magruder consented to detention.

On June 24, 2019, this Court held its first status conference with Defendant Magruder. Defense counsel indicated that he had received but had not yet reviewed the discovery and requested an additional 30 days. June 24, 2019 Minute Order. The Court held the next status conference on August 1, 2019, during which Defense counsel requested additional time to review discovery and to determine how to proceed. Aug. 2, 2019 Minute Order. The parties returned to the Court on September 13, 2019. At this time, Defendant Magruder indicated that he intended to proceed to trial and the Court ordered the parties to propose pre-trial deadlines. Sept. 13, 2019 Minute Order. Also on that day, the Court ordered the Probation Office to complete a criminal history calculation so that the parties would have access to the relevant information on the advisory sentencing guidelines prior to trial. ECF No. 6.

When the parties returned to the Court for a status conference on October 4, 2019, Defense counsel indicated that Defendant Magruder had been provided with a plea offer.

Defendant Magruder required additional time to consider the plea offer. Oct. 4, 2019 Minute Order.

On October 8, 2019, the parties conducted another status conference. At this status conference, Defendant Magruder indicated that he intended to accept the Government's plea offer. The plea offer, which was later formally accepted, was a Rule 11(c)(1)(C) plea of between 144 and 180 months, with a mandatory minimum of 10 years. Oct. 8, 2019 Minute Order. During the status conference, Defense counsel explained that "Mr. Magruder appears to have at least two prior convictions that, if the Government had filed the 851 notices, would have put him in jeopardy of receiving a mandatory minimum term of incarceration of 25 years." Tr. Oct. 8, 2019, ECF No. 19, 4:20-23. Even absent a 21 U.S.C. § 851 notice, the Government stated that if Defendant Magruder pled to the indictment his advisory sentencing guidelines range would be 262 to 327 months, with a mandatory minimum of 10 years. *Id*. at 6:14-15. Defense counsel explained that the plea offer would reduce the incarceration time "a considerable amount." *Id*. at 5:1. Defendant Magruder affirmed that he had received and reviewed the evidence against him. *Id*. at 5:6-9.

During the next October 22, 2019 status conference, the Court explained the Probation Office's findings on Defendant Magruder's criminal history calculation. The Court also stated that, as a career offender, Defendant Magruder would likely be eligible for a 21 U.S.C. § 851 notice by the Government, increasing the mandatory minimum sentence to 25 years. During the status conference, Defendant Magruder expressed some confusion as to the Rule 11(c)(1)(C) plea. Tr. Oct. 22, 2019, ECF No. 20, 7:13-14. The Court explained that Defendant Magruder faced a mandatory minimum of 10 years based on his charge. If the Government filed a 21 U.S.C. § 851 notice, for which it appeared Defendant Magruder was eligible, the mandatory

minimum would move up to 25 years. *Id*. at 8:3-20. The Court stated that it had no control over the mandatory minimums and could not sentence Defendant Magruder to a lesser sentence than the mandatory minimum. *Id*. at 9:3-4. The Court further explained that if the Rule 11(c)(1)(C) plea was accepted by the defendant and the Court, Defendant Magruder's sentence would have to be between 144 and 180 months. *Id*. at 8:11-15. The Court explained to Defendant Magruder "this is your decision. Your counsel can go over the evidence with you, can go over what the choices are that you have, what the consequences are, can give you advice; and you can decide to accept it or not." *Id*. at 12:12-15. After reviewing the effect of the plea offer, Defendant Magruder confirmed that all requested discovery had been provided. *Id*. at 12:5-9. Defendant Magruder further stated that he was prepared to go forward with the plea agreement. *Id*. at 13:14-17.

On October 25, 2019, Defendant Magruder was placed under oath and pled guilty, accepting the Rule 11(c)(1)(C) plea agreement, setting a sentence of 144 to 180 months. ECF No. 13. The Court accepted the plea but held in abeyance accepting the proposed sentence until after the Court could review the presentence report.

On November 20, 2019, the Court received a letter from Defendant Magruder which was dated October 25, 2019. ECF No. 17. In the letter, Defendant Magruder stated that he was not satisfied with his prior counsel based, in part, on his counsel's alleged failure to properly investigate the case. Defendant Magruder also expressed some confusion as to whether or not his plea agreement contained a mandatory minimum of 10 years. *Id*. That same day, Defendant Magruder's counsel filed a motion to withdraw. ECF No. 15.

On December 2, 2019, the Court appointed Defendant Magruder new counsel and set another status conference in the case, allowing new counsel adequate time to prepare. The Court

further stayed the deadlines for the sentencing briefing. Dec. 6, 2019 Minute Order. On December 12, 2019, the Court held a status conference where Defendant Magruder was represented by his new counsel. Defendant Magruder expressed that he was satisfied with his new counsel. The Court set a further status conference to allow Defendant Magruder time to speak with his new counsel about how to proceed. Dec. 12, 2019 Minute Order. On January 27, 2020, the Court held another status conference at which Defendant Magruder indicated his intention to file a motion to withdraw his guilty plea. The Court set a briefing schedule. Jan. 27, 2020 Minute Order.

Prior to the filing of a motion to withdraw his guilty plea, Defendant Magruder's new counsel filed a motion to withdraw due to a fundamental disagreement on the posture of the case. ECF No. 21. On March 6, 2020, the Court granted the motion to withdraw and again appointed new counsel for Defendant Magruder. Mar. 6, 2020 Minute Order. The Court further vacated the briefing schedule for the motion to withdraw and set a new status conference date. *Id*.

Prior to the next status conference, the Court was hindered by the COVID-19 restrictions. *See* In Re: Court Operations in Exigent Circumstances Created by the COVID-19 Pandemic, Standing Order 20-9(BAH), Mar. 16, 2020. The Court ordered Defendant Magruder to file a notice indicating if he intended to proceed with moving to withdraw his guilty plea so that the Court could set further proceedings. Mar. 17, 2020 Minute Order.

On May 6, 2020, Defendant Magruder filed a Notice indicating his intent to move to withdraw his guilty plea. ECF No. 26. Defendant Magruder filed his first motion to withdraw his guilty plea on May 29, 2020. *See* Def.'s Mot. to Withdraw Plea of Guilty, ECF No. 27 ("Def.'s First Mot. to Withdraw"). In that motion, Defendant Magruder argued that his prior counsel was ineffective for failing to provide Defendant with pertinent discovery and that he was coerced into

accepting a Rule 11(c)(1)(C) plea. *See* Def.'s First Mot. to Withdraw; Def.'s Reply in Support of First Mot. to Withdraw, ECF No. 29. The Court denied Defendant Magruder's First Motion to Withdraw on July 20, 2020, concluding that he had not demonstrated that he was prejudiced by any failure by his previous counsel to provide him with relevant discovery. Mem. Op. at 8-9, 12, ECF No. 35. The Court also found that Defendant Magruder had not demonstrated that he had been coerced into accepting a plea. *Id.* at 13-16.

After the Court denied Defendant Magruder's First Motion to Withdraw, the parties jointly proposed a schedule for proceeding with sentencing. *See* ECF No. 35.The Court ordered the parties to file sentencing memoranda in December 2020, and scheduled Defendant Magruder's sentencing hearing for January 7, 2021 at 10:00 a.m. Order, ECF No. 40.

During this time, Defendant Magruder made additional discovery requests to the Government, including requests for two warrants authorizing the FBI to obtain prospective GPS location data from two cell phones. *See* Def.'s Mot. at 1; Gov.'s Opp'n at 2. In responding to these requests, the Government learned that a return had not been filed for one of the two warrants. Def.'s Mot. at 1; Gov.'s Opp'n at 2. The application for the warrant at issue (the "Warrant") and supporting affidavit (the "Affidavit") were filed with the court on May 10, 2019 and granted by the magistrate judge on the same date. *See* Gov.'s Opp'n Ex. 1. The Warrant directs that it must be executed on or before May 23, 2019. *Id.* at 1. The magistrate judge also issued an Order authorizing FBI agents to "ascertain the physical location of the cellular telephone . . . with service provided by Verizon" and requiring "Verizon, the current service provider for the target telephone, [to] assist agents of the FBI by providing all information, facilities, and technical assistance needed to ascertain the Requested Location Information[.]" Gov.'s Opp'n Ex. 3, at 3. Both parties agree that the Warrant allowed law enforcement agents to

track Defendant Magruder on the days leading up to his arrest on June 9, 2019. Def.'s Mot. at 1-2; Gov.'s Opp'n at 2.

On January 5, 2021, two days before his scheduled sentencing hearing, Defendant filed his Second Motion to Withdraw Plea of Guilty based on the "newly discovered evidence" that a return had not been filed for the Warrant and on other purported errors with the Warrant. *See* Def.'s Mot. The Court vacated Defendant Magruder's sentencing hearing and set a briefing schedule on Defendant's motion. Jan. 5, 2021 Minute Order. The Government opposes Defendant's motion.

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 11, a defendant is permitted, before a sentence is imposed, to withdraw a guilty plea if the defendant can show "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). While presentence withdrawal motions should be "'liberally granted,' they are 'not granted as a matter of right.'" *United States v. Thomas*, 541 F. Supp. 2d 18, 23 (D.D.C. 2008) (quoting *United States v. Ahn*, 231 F.3d 26, 30 (D.C. Cir. 2000)).

When ruling on a motion to withdraw a guilty plea, courts in this Circuit consider the following factors: "(1) whether the defendant 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. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998) (internal quotation marks omitted). The third factor is viewed as the "most important." *Id.* (internal quotation marks omitted).

III. DISCUSSION

Defendant Magruder argues that he should be able to withdraw his guilty plea because the Government failed to file a return for the Warrant seeking cell phone location data. Def.'s Mot. at 1. He contends that the lack of return "prejudices" his ability "to ascertain whether law enforcement complied with the warrant and executed the warrant on or about May 23, 2019 . . . as directed by the Warrant." *Id.* Defendant Magruder also argues that materials sought in the Warrant were not addressed in the supporting affidavit, and therefore the Warrant lacked probable cause. *Id.* at 4-5. For the reasons set forth below, the Court finds that neither argument provides a basis for Defendant Magruder to withdraw his guilty plea.

A. Tainted Plea

The Court first considers whether Defendant Magruder's guilty plea "was somehow tainted." *United States v. West*, 392 F.3d 450, 458 (D.C. Cir. 2004) (internal citations omitted). This factor is "the most important" and requires "a showing that the district court's taking of the guilty plea either failed to conform to the requirements of Federal Rule of Criminal Procedure 11 . . . or was in some other sense constitutionally deficient." *United States v. Tolson*, 372 F. Supp. 2d 1, 9 (D.D.C 2005) (internal citations and quotation marks omitted). A defendant's failure to "demonstrate some constitutional or procedural error in the taking of [his] guilty plea . . . will often justify a court's denial of a motion to withdraw that plea even where the movant makes out a legally cognizable defense to the charges." *Id.; see also United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("[A] defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden if he is ultimately to prevail [on withdrawing his plea].").

Defendant does not appear to argue that his plea did not conform to the requirements of Rule 11, or that there was any constitutional defect in the *plea* itself. Rather, Defendant

Magruder's arguments rest solely on purported defects with the Warrant and the lack of return, suggesting that these errors would provide a basis to challenge his arrest and the search of his backpack. *See* Def.'s Mot. at 1-2, 4. Because Defendant Magruder fails to address at all how these purported errors "tainted" his guilty plea, the Court finds that he has failed to carry his burden on this "most important" factor. The Court shall nonetheless consider the remaining two factors.

B. Viable Defense

Because Defendant Magruder does not clarify which of the three factors the purported errors with the Warrant implicate, the Court considers these errors in examining whether he has established "a viable claim of innocence." *See supra* Part II. A defendant seeking to withdraw a guilty plea "must make out a legally cognizable defense to the charge against him." *United States v. McCoy*, 215 F.3d 102, 106 (D.C. Cir. 2000) (quoting *Cray*, 47 F.3d at 1207) (internal quotation marks omitted). The defendant must "affirmatively advance an objectively reasonable argument that he is innocent, for he has waived his right simply to try his luck before a jury." *Id.* (quoting *Cray*, 47 F.3d at 1207) (internal quotation marks omitted). Even when a court views this factor under the lens of "legally cognizable defense," as opposed to "viable claim of innocence," a defendant still needs to "affirmatively advance an objectively reasonable argument that he is innocent." *United States v. Robinson*, 587 F.3d 1122, 1131 (D.C. Cir. 2009).

Here, Defendant Magruder does not allege actual innocence. Though not explicit in his Motion, he instead appears to suggest that had he known about the lack of return and alleged errors with the Warrant, he would have moved to suppress evidence obtained as a result of the Warrant's execution. *See, e.g.*, Def.'s Mot. at 2 ("If the warrant was not executed within [the specified] time frame, law enforcement's actions were illegal in surveilling [Defendant],

stopping and arresting [Defendant] and seizing the drugs found in the backpack he was carrying."). Without so much as a general denial of guilt, the Court finds that this factor does not support a withdrawal of Defendant Magruder's guilty plea. *See United States. v. Curry*, 494 F.3d 1124, 1129 (D.C. Cir. 2007) (faulting the defendant where his brief "does not include a single sentence declaring that he is actually innocent or disclaiming his admission of guilty at the plea proceeding").

Even if the Court were to assume that Defendant Magruder is not required to assert actual innocence and that a legally cognizable defense is sufficient, the Court concludes that Defendant Magruder has also failed to assert a legally cognizable defense based on either of the two Warrant errors he identifies.

First, it is undisputed that the FBI failed to file the return for the Warrant in this case. Def.'s Mot. at 1; Gov.'s Opp'n at 2. Defendant Magruder argues that the lack of return prejudices his ability to ascertain whether the Warrant was executed within the required timeframe. Def.'s Mot. at 2. Defendant Magruder contends that if the Warrant was executed after May 23, 2019, then law enforcement's surveillance, stop, and arrest of Defendant Magruder, and the resulting seizure of drugs from his backpack were illegal. *Id.*

Federal Rule of Criminal Procedure 41(f)(1)(D) requires that an "officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate judge designated on the warrant." Fed. R. Crim. P. 41(f)(1)(D). However, technical violations of Rule 41 do not automatically mandate suppression of evidence. *United States v. Burroughs*, 882 F. Supp. 2d 113, 127 (D.D.C. 2012) (noting that the D.C. Circuit has "squarely rejected the notion that failure to timely return a federal search warrant . . . provide[s] a basis to suppress the results of the search warrant" (citing *United States v. Gerald*, 5 F.3d 563, 567 (D.C. Cir. 1993))); *see*

also United States v. Welch, 811 F.3d 275, 280 (8th Cir. 2016) ("[A Rule 41] procedural violation is not per se an unreasonable search and seizure in violation of the Fourth Amendment."); *United States v. Jacobson*, 4 F. Supp. 3d 515, 523 (E.D.N.Y. 2014) ("Even where government officials violate the requirements of Rule 41, courts must be wary in extending the exclusionary rule in search and seizure cases to violations of Rule 41 alone." (internal citations and quotation marks omitted)). Rule 41 violations may lead to exclusion of evidence only when (1) there was prejudice "in the sense that the search might not have occurred or would not have been so abrasive if the rule had been followed"; or (2) there is evidence of "intentional and deliberate disregard of a provision in the rule." *Jacobson*, 4 F. Supp. 3d at 523; *see also United States v. Motz*, 936 F.2d 1021, 1025 (9th Cir. 1991) ("Failure to comply with Rule 41 requires suppression of property seized only where agents would not have carried out the search had they been required to follow the rule and where they intentionally and deliberately disregarded a provision in the Rule." (internal quotation marks and punctuation omitted)).

Defendant Magruder has failed to establish prejudice or offer any evidence of "intentional and deliberate" disregard of Rule 41. Defendant Magruder claims that the FBI's failure to file the return "prejudices" his ability to determine whether the search was executed by May 23, 2019, as required by the Warrant. Def.'s Mot. at 2 The Government, however, submitted evidence showing that the FBI transmitted the Order authorizing the collection of cell phone location data to Verizon on May 13, 2019—ten days *before* the May 23, 2019 deadline for the Warrant's execution. *See* Gov.'s Opp'n Ex. 3. The Government also submitted an excerpt of the geolocation data provided by Verizon, which includes entries beginning on May 13, 2019, *see* Gov.'s Opp'n Ex. 2, demonstrating that "Verizon began to provide GPS information for the defendant's phone to agents that same day." Gov.'s Opp'n at 4. Defendant counters that although

the spreadsheet submitted by the Government "shows data starting on May 13, 2019," there is no indication that "law enforcement actually began *receiving* the data on May 13." Def.'s Reply at 1 n.1 (emphasis added). Defendant concedes, however, that the FBI's request to Verizon "does request GPS ping data to be provided every 15 minutes," which would indicate "that the data was to be provided as it came in more or less and began on May 13, 2019." *Id.*; *see* Gov.'s Opp'n Ex. 3.

The Court finds that the Government's evidence rebuts Defendant Magruder's speculation that the Warrant was executed outside of the time period specified the Warrant. The FBI sent the Order directing Verizon to collect geolocation data for the subject cell phone on May 13, 2019 and Verizon began collecting data on the same date. *See* Gov.'s Opp'n Ex. 1. Although the failure to file a return does constitute a technical violation of Rule 41, the evidence submitted by the Government demonstrates that the Warrant was executed within the required timeframe.

Defendant Magruder also fails to establish any basis for his contention that the FBI's failure to file the returns "was intentional and deliberate to hide the misconduct of law enforcement in not executing the warrant" within the specified time frame. Def.'s Mot. at 2. Accordingly, the Court concludes that Defendant Magruder has not demonstrated a "viable defense" based on a Rule 41 violation.

Defendant Magruder next argues that the Warrant itself was constitutionally defective because the scope of the materials sought by the Warrant exceeds the scope of the supporting Affidavit, which only related to "information about the *location* of the cellular telephone." Def.'s Mot. at 2-3 (emphasis added). Specifically, the Warrant includes as "property to be seized" two categories of property not requested by the supporting Affidavit: (1) address books, contact and

buddy lists, calendar data, pictures, and files; and (2) text messages including content, destination, and original phone numbers from June 2018 to May 2019. *Id.* at 3. Defendant Magruder argues that the Warrant, therefore, sought material "not supported by probable cause" and "hence all data obtained pursuant to the warrant, including the surveillance, seizure, and arrest of Magruder as well as the search and seizure of the drugs found in the backpack was illegal." *Id.* at 4.

In response, the Government indicates that it did not transmit the *Warrant* containing the list of items cited by Defendant to Verizon. Gov.'s Opp'n at 5. Rather, the FBI transmitted to Verizon only the *Order* issued by the magistrate judge, which explicitly narrowed the permitted search to "ascertaining the physical location of the target telephone" and "expressly exclude[ed] the contents of any communications conducted by the user(s) of the target telephone." *Id.* (citing Gov.'s Opp'n Ex. 3, at 2). And, as a practical matter, the Government indicates that it did not receive any information from Verizon other than location data. *Id.* Accordingly, even if the Warrant contained an erroneous or overly broad list of items to be seized, Verizon did not rely on the Warrant or collect the two categories of information listed by Defendant. *See* Gov.'s Opp'n at 6-7. Rather, Verizon relied on the *Order*, which authorized only disclosure of location data—and the Government received only that information to track Defendant's location. *Id.* Defendant Magruder does not dispute that the location data authorized by the Order was supported by probable cause. *See* Def.'s Mot. at 3 (indicating that the Affidavit seeks "information about the location about this cellular telephone"). Nor does Defendant argue that it was improper for the FBI agents or Verizon to rely on the Order.[2] Def.'s Reply at 2-3. The Court concludes that even

[2] Defendant Magruder argues that it was reasonable to assume that the Warrant was provided to Verizon because it was signed one minute after the Order. *See* Def.'s Reply at 2. The Court is

if the Warrant erroneously listed as items to be seized cell phone content not supported by the Affidavit, the Government has provided sufficient evidence to demonstrate that neither Verizon nor the Government collected information beyond the cell phone's location data.[3]

The Court concludes that Defendant Magruder has failed to demonstrate a legally cognizable defense supporting his motion to withdraw his guilty plea.

C. Prejudice from Delay

As a final factor, the Court considers whether or not the delay between the guilty plea and the motion to withdraw has substantially prejudiced the Government's ability to prosecute the case. In this case, the Government does not argue that it would be prejudiced by Defendant Magruder's withdrawal of his guilty plea, so this factor does not interfere with Defendant Magruder's motion to withdraw. In any event, this factor "has never been dispositive in our cases." *Curry*, 494 F.3d at 1128 (upholding denial of withdrawal of guilty plea even though the Government did not argue prejudice) (quoting *United States v. Hanson*, 339 F.3d 983, 988 (D.C. Cir. 2003)). Accordingly, even though the Government does not claim prejudice from the withdrawal, Defendant Magruder's motion to withdraw remains insufficient as he has failed to establish that his plea was tainted or that he has a viable claim of innocence or a cognizable defense.

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unpersuaded by this assumption, especially in light of the government's representation that it faxed only the Order to Verizon. *See* Gov.'s Opp'n Ex. 3.

[3] Defendant Magruder also argues that because "the proposed search warrant does not authorize the seizure of any tangible property . . . all data obtained pursuant to the [W]arrant, including the surveillance, seizure, and arrest of Magruder as well as the search and seizure of the drugs found in the backpack was illegal." Def.'s Mot. at 3-4. This argument, however, rests on Defendant Magruder's incorrect assumption that Verizon collected and transmitted to the government content other than the cell phone's location—which, as noted, the government has rebutted.

D. Hearing

As a final matter, the Court must decide whether an evidentiary hearing is warranted in this case. Generally, when a defendant seeks to withdraw a guilty plea, "the district court should hold an evidentiary hearing to determine the merits of the defendant's claims." *Taylor*, 139 F.3d at 932. Here, the Court finds that an evidentiary hearing is unnecessary. The Court's conclusions rely on evidence submitted by the Government rebutting Defendant Magruder's arguments of prejudice associated with the errors in the Warrant. An evidentiary hearing would not alter the Court's findings.

Additionally, the Court notes that "[a] district should ordinarily conduct an evidentiary hearing *upon request*." *Thomas*, 541 F. Supp. 2d at 23 (emphasis added). In this case, Defendant Magruder never requested that the Court hold an evidentiary hearing in connection with his motion to withdraw. For these reasons, the Court concludes that it would not be benefitted by an evidentiary hearing. *See Curry*, 494 F.3d at 1131 (finding that there was "no need for the court to conduct an evidentiary hearing" where the facts were not in dispute).

IV. CONCLUSION

For the foregoing reasons, the Court DENIES Defendant Magruder's [46] Second Motion to Withdraw Guilty Plea. Defendant Magruder has failed to show that his plea was tainted or that he has a viable claim of innocence or a cognizable defense to the charge to which he pled guilty. An appropriate Order accompanies this Memorandum Opinion.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.	Criminal Action No. 19-203 (CKK)

ORDER
(February 12, 2021)

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Defendant's [46] Second Motion to Withdraw Guilty Plea is **DENIED**; it is further

ORDERED that the Sentencing of Defendant Magruder shall be held on FEBRUARY 23, 2021 at 11:00 a.m.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.	Criminal Action No. 19-203 (CKK)

MEMORANDUM OPINION
(December 6, 2021)

In this criminal action, Defendant Edward Magruder pled guilty to unlawful possession with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Pursuant to a plea agreement under Federal Rules of Criminal Procedure 11(c)(1)(C), Defendant Magruder and the Government agreed that a sentence between 144 months and 180 months of incarceration, followed by five years of supervised release, was an appropriate sentence.

Since Defendant Magruder pled guilty on October 25, 2019, he has filed two motions to withdraw his guilty plea, both of which have been denied by this Court. After denying Defendant Magruder's second motion to withdraw his guilty plea, the Court scheduled a sentencing hearing to take place on February 23, 2021. The sentencing did not go forward; instead, Defendant Magruder requested permission to file "supplemental briefing" on his second motion to withdraw his guilty plea. The Court permitted Defendant to do so. To date, Defendant Magruder has now filed nine pleadings regarding the same Second Motion to Withdraw his Guilty Plea, arguing that various defects with a warrant authorizing law enforcement to obtain location data from Defendant Magruder's cell phone service provider, Verizon, and the affidavit submitted in support thereof require the Court to invalidate the warrant, his arrest, and his guilty plea under oath. Related to some of the alleged deficiencies with the warrant, Defendant Magruder has also filed a [57] Motion

for an Order to Verizon, in which Defendant Magruder seeks to obtain the materials transmitted to and from Verizon regarding the FBI's court-authorized collection of location data from one of his cell phones. In his supplemental briefing, Defendant Magruder further contends that law enforcement lacked probable cause to arrest him and to search his backpack, which contained two "bricks" of heroin.

Notably missing from any of Defendant Magruder's numerous pleadings is *any* assertion that his plea hearing was tainted or that he is actually innocent of the crime to which he pled guilty under oath. Accordingly, the Court's conclusion from its earlier Memorandum Opinions denying Defendant Magruder's motions to withdraw his plea remains unchanged; he has failed to present a "fair and just reason" for permitting him to withdraw his guilty plea. Upon consideration of the pleadings,[1] the relevant legal authorities, and the record as a whole, the Court **DENIES** Defendant Magruder's motion to withdraw his guilty plea and **DENIES** his motion seeking an order to Verizon.

[1] The Court's consideration has focused on the following documents:

- Def.'s 2d Mot. to Withdraw Guilty Plea, ECF No. 46
- Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea, ECF No. 47;
- Def.'s Reply to Opp'n to 2d Mot. to Withdraw Guilty Plea, ECF No. 48;
- Def.'s Suppl. Mot. to Withdraw Guilty Plea, ECF No. 51;
- Def.'s Add'l Suppl., ECF No. 52;
- Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea, ECF No. 53;
- Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea, ECF No. 58;
- Def.'s Final Suppl. Mot. to Withdraw Plea of Guilt, ECF No. 59;
- Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt, ECF No. 60;
- Def.'s Reply to Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt, ECF No. 61;
- Def.'s Suppl. Reply to Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt, ECF No. 62; and
- Def.'s [2d] Suppl. Reply to Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt, ECF No. 63.

I. BACKGROUND

Pursuant to the Criminal Complaint in this action, filed on June 10, 2019, Defendant Magruder was involved in "the distribution of large quantities of narcotics." Compl. Stmt. of Facts at 1, ECF No. 1-1. The Complaint alleges that Defendant Magruder would travel from Washington, D.C. to New York to acquire narcotics. *Id.* In May 2019, the FBI obtained a warrant and court order authorizing it to collect from Verizon the prospective geolocation data associated with Defendant Magruder's cell phone. *Id.*; *see* Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea Ex. 1, Warrant, ECF No. 47-1.

On June 7, 2019, Defendant Magruder traveled to New York by bus. Compl. Stmt. of Facts at 1. FBI agents "observed him for an hour" making "calls using a flip phone (not the phone that was being tracked)." *Id.* He had a blue backpack. *Id.* On the next day, Defendant Magruder returned to Washington, D.C. by bus. *Id.* Upon his arrival at Union Station, he was stopped by FBI agents who searched his backpack. *Id.* The agents found a "brick of compressed tan powder," weighing approximately 1,200 grams, and "wrapped in duct tape and several plastic bags," which "field tested positive for the presence of opiates." *Id.* Defendant was arrested, and "advised of his rights which he chose to waive and make a statement." *Id.* at 2. He stated that he had traveled to New York "several times" to acquire heroin, which he then sold in smaller quantities in Washington, D.C. *Id.*

Defendant Magruder was charged by Indictment with one count of possessing with intent to distribute a mixture and substance containing one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Indictment, ECF No. 5. Although Defendant Magruder initially expressed interest in proceeding to trial on this charge, *see* Minute Order (Sept. 13, 2019), his counsel subsequently informed the Court that the Government had made a plea offer, and

requested that Defendant Magruder be afforded time to consider it. *See* Minute Order (Oct. 4, 2019). At a status hearing on October 8, 2019, Defendant Magruder indicated that he intended to accept the Government's plea offer. *See* Minute Order (Oct. 8, 2019).

The Government's plea offer, made under Federal Rule of Criminal Procedure 11(c)(1)(C), included a recommended sentence between 144 and 180 months, with a mandatory minimum sentence of 10 years. *See* Minute Order (Oct. 8, 2019). During the status hearing, Defendant Magruder's then-counsel explained that "Mr. Magruder appears to have at least two prior convictions that, if the Government had filed the [21 U.S.C. §] 851 notices, would have put him in jeopardy of receiving a mandatory minimum term of incarceration of 25 years." Hr'g Tr. (Oct. 8, 2019) at 4:20–23, ECF No. 19. Counsel for the Government stated that, even absent a 21 U.S.C. § 851 notice, if Defendant Magruder pled guilty to the indictment, his advisory sentencing guidelines range would be 262 to 327 months, with a mandatory minimum of 10 years. *Id*. at 6:14–15. Defense counsel noted that the plea offer would reduce the incarceration time "a considerable amount." *Id*. at 4:24–5:1. Defendant Magruder affirmed that he had received and reviewed the evidence against him. *Id*. at 5:6–9.

During the next status hearing on October 22, 2019, the Court explained the Probation Office's findings on Defendant Magruder's criminal history calculation. *See* Order, ECF No. 6; Probation Mem., ECF No. 10. The Court also explained that Defendant Magruder would likely be eligible for a 21 U.S.C. § 851 notice by the Government, increasing the mandatory minimum sentence to 25 years. Hr'g Tr. (Oct. 22, 2019) at 2:8–21, ECF No. 20. During the status hearing, Defendant Magruder, through his counsel expressed some confusion as to the Rule 11(c)(1)(C) plea. *Id.* at 7:13–14. The Court explained that Defendant Magruder faced a mandatory minimum of 10 years based on the charge contained in the Indictment. *Id.* at 8:4–15. If the

Government filed a 21 U.S.C. § 851 notice, for which it appeared Defendant Magruder was eligible, the mandatory minimum would increase to 25 years. *Id*. at 8:16–9:5. The Court stated that it had no control over the mandatory minimums and could not sentence Defendant Magruder to a lesser sentence than the mandatory minimum. *Id*. at 9:3–11. The Court further explained that if the Rule 11(c)(1)(C) plea was accepted by the defendant and the Court, Defendant Magruder's sentence would have to be between 144 and 180 months, of which 120 months would be a mandatory minimum. *Id*. at 8:11–15. The Court explained to Defendant Magruder "this is your decision. Your counsel can go over the evidence with you, can go over what the choices are that you have, what the consequences are, can give you advice; and you can decide to accept it or not." *Id*. at 12:12–15. After reviewing the effect of the plea offer, Defendant Magruder confirmed that all requested discovery had been provided. *Id*. at 12:5–9. He also stated that he was prepared to go forward with accepting the plea agreement. *Id*. at 13:14–17.

On October 25, 2019, Defendant Magruder was placed under oath and pled guilty to a violation of 21 U.S.C. §§ 841(a) and (b)(1)(A), accepting the Rule 11(c)(1)(C) plea agreement, setting a sentence of 144 to 180 months. *See* Minute Entry (Oct. 25, 2019); Plea Agreement § 4, ECF No. 13. In so doing, Defendant Magruder agreed that he had traveled from Washington, D.C. to New York on "at least seven separate occasions" between December 2018 and May 2019. Plea Agreement § 2; Gov.'s Proffer of Proof at 3, ECF No. 12. Before each trip, he "communicated with a person in Colombia." Gov.'s Proffer of Proof at 3. Defendant Magruder agreed that prior to his arrest, he had traveled to New York to "receive heroin," that he usually received "two bricks at a time" and that he then "sold heroin in smaller quantities" in Washington, D.C. *Id.* at 3–4. The Court accepted the plea but held in abeyance accepting the proposed sentence until after the Court could review the presentence report.

On November 20, 2019, the Court received a letter from Defendant Magruder which was dated October 25, 2019. *See* Letter from Def., ECF No. 17. Therein, Defendant Magruder stated that he was not satisfied with his counsel who represented him at the plea hearing based, in part, on his counsel's alleged failure to properly investigate the case. *Id.* Defendant Magruder also expressed some confusion as to whether or not his plea agreement contained a mandatory minimum of 10 years. *Id*. That same day, Defendant Magruder's then-counsel filed a motion to withdraw. *See* Mot. to Withdraw, ECF No. 15.

The Court appointed Defendant Magruder new counsel, scheduled a status conference in the case, allowing adequate time for new counsel to prepare, and stayed the deadlines for the sentencing briefing. *See* Minute Order (Dec. 6, 2019). On December 12, 2019, the Court held a status conference during which Defendant Magruder was represented by his new counsel. Defendant Magruder expressed that he was satisfied with his new counsel. The Court set a further status conference to allow Defendant Magruder time to speak with his new counsel about how to proceed. *See* Minute Order (Dec. 12, 2019). On January 27, 2020, the Court held another status conference during which Defendant Magruder indicated his intention to file a motion to withdraw his guilty plea. The Court set a briefing schedule. *See* Minute Order (Jan. 27, 2020).

Prior to the filing of his first motion to withdraw his guilty plea, Defendant Magruder's new counsel filed a motion to withdraw due to a fundamental disagreement on the posture of the case. *See* Mot. to Appoint New Def. Counsel, ECF No. 21. On March 6, 2020, the Court granted the motion to withdraw and appointed a third new counsel for Defendant Magruder. *See* Minute Order (Mar. 6, 2020). The Court further vacated the briefing schedule for the motion to withdraw the guilty plea and set a new status hearing date. *Id*.

Prior to the next scheduled status hearing, the Court ordered Defendant Magruder to file a notice indicating if he intended to proceed with moving to withdraw his guilty plea so that the Court could set further proceedings. Minute Order (Mar. 17, 2020). On May 6, 2020, Defendant Magruder filed a Notice indicating his intent to move to withdraw his guilty plea. Def.'s Notice, ECF No. 26. Defendant Magruder filed his first motion to withdraw his guilty plea on May 29, 2020. *See* Def.'s (1st) Mot. to Withdraw Plea of Guilty, ECF No. 27. In that motion, Defendant Magruder argued that his prior counsel (who represented him at the time of his plea hearing) was ineffective for failing to provide him with pertinent discovery and that he was coerced into accepting a Rule 11(c)(1)(C) plea. *See id.* The Court denied Defendant Magruder's First Motion to Withdraw on July 20, 2020, concluding that he had not demonstrated that he was prejudiced by any failure by his previous counsel to provide him with relevant discovery. *See United States v. Magruder* ("*Magruder I*"), 19-cr-203 (CKK), 2020 U.S. Dist. LEXIS 127194, at *8–9 (D.D.C. July 20, 2020). The Court also found that Defendant Magruder had not demonstrated that he had been coerced into entering the plea agreement. *Id.* at *13–16.

After the Court denied Defendant Magruder's First Motion to Withdraw, the parties jointly proposed a schedule for proceeding with sentencing, which the Court adopted. *See* Joint Status Rep. ECF No. 39; Order, ECF No. 40. The Court scheduled Defendant Magruder's sentencing hearing for January 7, 2021 at 10:00 a.m. *See* Order, ECF No. 40.

In the interim, Defendant Magruder made additional discovery requests to the Government, including requests for two warrants authorizing the FBI to obtain prospective GPS location data from Verizon as to two cell phones. *See* Def.'s 2d Mot. to Withdraw Guilty Plea at 1; Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea at 2. In responding to these requests, the Government learned that a return had not been filed for one of the two warrants. Def.'s 2d Mot.

to Withdraw Guilty Plea at 1; Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea at 2. The application for the warrant at issue (the "Warrant") and supporting affidavit (the "Affidavit") had been filed with the court on May 10, 2019 and granted by the magistrate judge on the same date. *See* Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea Ex. 1, ECF No. 47-1. The magistrate judge also issued an Order (the "Order") authorizing FBI agents to "ascertain the physical location of the cellular telephone . . . with service provided by Verizon" and requiring "Verizon, the current service provider for the target telephone, [to] assist agents of the FBI by providing all information, facilities, and technical assistance needed to ascertain the Requested Location Information[.]" Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea Ex. 3, at 3, ECF No. 47-4. Both parties agree that the Warrant allowed law enforcement agents to track Defendant Magruder on the days leading up to his arrest on June 9, 2019. Def.'s 2d Mot. to Withdraw Guilty Plea at 1; Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea at 2.

On January 5, 2021, two days before his scheduled sentencing hearing, Defendant filed his Second Motion to Withdraw Plea of Guilty based on the "newly discovered evidence" that a return had not been filed for the Warrant and on other purported errors with the Warrant. *See* Def.'s 2d Mot. to Withdraw Guilty Plea. The Court vacated Defendant Magruder's sentencing hearing and set a briefing schedule on Defendant's motion. *See* Minute Order (Jan. 5, 2021).

The Court denied Defendant's Second Motion to Withdraw Guilty Plea on February 12, 2021, *see United States v. Magruder* ("*Magruder II*"), 19-cr-203 (CKK), 2021 U.S. Dist. LEXIS 27073 (D.D.C. Feb. 12, 2021) and scheduled a sentencing hearing for February 23, 2021, *see* Order, ECF No. 49. The sentencing hearing did not go forward; instead, Defendant Magruder requested supplemental briefing regarding his Second Motion to Withdraw Guilty Plea. *See* Minute Order (Feb. 23, 2021). The Court set a supplemental briefing schedule. *Id.* Upon

review of the pleadings filed in accordance with that schedule, the Court observed that Defendant Magruder raised in his Supplemental Reply "arguments which he has not previously raised in any of his four earlier pleadings regarding the same pending motion." Minute Order (June 1, 2021). The Court ordered Defendant Magruder to "file a FINAL supplement" by June 22, 2021—raising "any and all claims in support of his second motion to withdraw his guilty plea—before eliciting a response to his new arguments from the Government. *Id.* The Court explicitly warned Defendant Magruder that it would "not entertain any future claims from Defendant after this filing on June 22, 2021." *Id.* Defendant Magruder filed his "final" supplement on June 22, 2021. *See* Def.'s Final Suppl. Mot. to Withdraw Plea of Guilt. The Government filed its response on June 24, 2021. *See* Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt.

Notwithstanding the Court's clear order that it would not entertain any claims submitted by Defendant Magruder after his June 22, 2021 filing, Defendant Magruder has filed *three* additional pleadings since that deadline: a reply and *two* "supplemental" replies to the government's June 24, 2021 response. Def.'s Reply to Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt; Def.'s Suppl. Reply to Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt; Def.'s [2d] Suppl. Reply to Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt.

II. LEGAL STANDARD

Under Federal Rule of Criminal Procedure 11, a defendant is permitted, before a sentence is imposed, to withdraw a guilty plea if the defendant can show "a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). Although presentence withdrawal motions should be "'liberally granted,' they are 'not granted as a matter of right.'" *United States v. Thomas*, 541 F. Supp. 2d 18, 23 (D.D.C. 2008) (quoting *United States v. Ahn*, 231 F.3d 26, 30

(D.C. Cir. 2000)). "The decision to grant a withdrawal is within the court's discretion." *Id.* (citing *United States v. Tolson*, 372 F. Supp. 2d 1, 8 (D.D.C. 2005), *aff'd,* No. 05-3102, 2008 WL 441764, at *1 (D.C. Cir. Jan. 24, 2008)).

When ruling on a motion to withdraw a guilty plea, courts in this Circuit consider the following factors: "(1) whether the defendant 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. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998) (internal quotation marks and citation omitted). The third factor is viewed as the "most important." *Id.* (internal quotation marks and citation omitted).

III. DISCUSSION

A. Tainted Plea

The Court first considers whether Defendant Magruder's guilty plea "was somehow tainted." *United States v. West*, 392 F.3d 450, 458 (D.C. Cir. 2004) (internal citations omitted). This factor is "the most important" and requires "a showing that the district court's taking of the guilty plea either failed to conform to the requirements of Federal Rule of Criminal Procedure 11 . . . or was in some other sense constitutionally deficient." *Tolson*, 372 F. Supp. 2d at 9 (internal citations and quotation marks omitted). A defendant's failure to "demonstrate some constitutional or procedural error in the taking of [his] guilty plea . . . will often justify a court's denial of a motion to withdraw that plea even where the movant makes out a legally cognizable defense to the charges." *Id.*; *see also United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("[A] defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden if he is ultimately to prevail [on withdrawing his plea].").

Once again, Defendant Magruder does not argue that his plea did not conform to the requirements of Rule 11, or that there was any constitutional defect in the plea itself. Rather, Defendant Magruder's arguments rest on purported defects with the Warrant, the Affidavit, and law enforcement's probable cause to arrest him and search his backpack, suggesting that these errors would provide a legal basis to challenge his arrest and the search of his backpack. *See, e.g.*, Def.'s 2d Mot. to Withdraw Guilty Plea at 1–2, 4; Def.'s Suppl. Mot. to Withdraw Guilty Plea at 1–2; Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 3–5. Because Defendant Magruder fails to address at all how these purported errors "tainted" his guilty plea, the Court finds that he has failed to carry his burden on this "most important" factor. The Court shall nonetheless consider the remaining two factors.

B. Legally Cognizable Defense

A defendant seeking to withdraw a guilty plea must "affirmatively advance an objectively reasonable argument that he is innocent, for he has waived his right simply to try his luck before a jury." *United States v. McCoy*, 215 F.3d 102, 106 (D.C. Cir. 2000) (quoting *Cray*, 47 F.3d at 1207) (internal quotation marks omitted). Even when a court views this factor under the lens of "legally cognizable defense," as opposed to "viable claim of innocence," a defendant still needs to "affirmatively advance an objectively reasonable argument that he is innocent[.]" *United States v. Robinson*, 587 F.3d 1122, 1131 (D.C. Cir. 2009); *see McCoy*, 215 F.3d at 106 (a defendant seeking to withdraw a guilty plea "must make out a legally cognizable defense to the charge against him"). But "the assertion of a legally cognizable defense, standing alone, does not impel a district court to permit withdrawal of a plea." *United States v. McKoy*, 645 F.2d 1037, 1039 (D.C. Cir. 1981) (citing *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975)). "If withdrawal were automatic in every case where the defendant merely asserts legal innocence . . . the guilty plea

would become a mere gesture, a temporary and meaningless formality reversible at the defendant's whim. In fact, however, a guilty plea is no such trifle, but 'a grave and solemn act' which is 'accepted only with care and discernment.'" *United States v. Basu*, 531 F. Supp. 2d 48, 54 (D.D.C. 2008) (quoting *Barker*, 514 F.2d at 221; *Brady v. United States*, 397 U.S. 742, 748 (1970)).

None of Defendant Magruder's many pleadings contain any assertion that he is "actually innocent" nor do they "disclaim[ ] his admission of guilt at the plea proceeding." *United States v. Curry*, 494 F.3d 1124, 1129 (D.C. Cir. 2007). Without so much as a general denial of guilt, the Court finds that this factor does not support a withdrawal of Defendant Magruder's guilty plea. *See id.*

At most, Defendant Magruder asserts his "legal innocence" suggesting that he would have filed a motion to suppress and/or a motion for a *Franks* hearing and speculating that the Court would have ruled in his favor on both motions, resulting in the invalidation of the Warrant and his arrest, and/or the suppression of the heroin found in his backpack. *See, e.g.*, Def.'s 2d Mot. to Withdraw Guilty Plea at 2; Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 2. But Defendant Magruder's assertion of "legal innocence" on the basis of potentially successful motions is misplaced; "a potentially successful motion to suppress evidence is *not* equivalent to an assertion of legal innocence." *United States v. Yansane*, 370 F. Supp. 3d 580, 591 (D. Md. 2019) (emphasis added); *see United States v. Wintons*, 468 F. App'x 231, 233 (4th Cir. 2012) (holding that "suppression of evidence does not amount to legal innocence"); *United States v. Sanders*, 125 F. App'x 685, 687 (6th Cir. 2005) ("We find no published precedent for the proposition that a motion to withdraw a guilty plea entered 75 days earlier can be supported, absent an assertion of actual innocence, by the claim that a motion to suppress should have been

filed."); *United States v. Neal*, 230 F.3d 1355 (4th Cir. 2000) (holding that a belated desire to file a motion to suppress does not constitute a credible assertion of legal innocence warranting withdrawal of a guilty plea); *Vasquez v. United States*, 279 F.2d 34, 35-37 (9th Cir. 1960) (affirming the denial of a motion to withdraw a guilty plea when the defendant argued that he had discovered after the plea that he might have a meritorious legal defense through a suppression motion). And even in cases "calling only for a legally cognizable defense," the defendant must have "effectively denied his culpability," which Defendant Magruder has not done. *United States v. Leyva*, 916 F.3d 14, 24 (D.C. Cir. 2019). For the reasons below, none of Defendant Magruder's reasons for his claimed "legal innocence" supply a viable legal defense or a reason to permit him to withdraw his guilty plea.

1. Affidavit

Defendant Magruder first attempts to revive arguments pertaining to purported errors with the Affidavit, which the Court previously rejected as a basis for permitting Defendant Magruder to withdraw his guilty plea. Specifically, Defendant Magruder contends that the Affidavit incorrectly indicates that calls he made to his "Colombian contact" occurred in April 2019, but they actually took place in March 2019. Def.'s Final Suppl. Mot. to Withdraw Plea of Guilt at 4. He argues that the incorrect timing gave the magistrate judge "the improper impression that recent calls had occurred between Magruder and the Colombian contact" and that, in including this incorrect information, the affiant "intentionally mislead [*sic*] the magistrate." *Id.* Defendant asserts that this "deliberate action to deceive" merits a hearing under *Franks v. Delaware*, 438 U.S. 154 (1978) and "warrants suppression of the data recovered from the warrant and dismissal of the charges against Magruder." *Id.* at 4–5.

The Court has previously addressed Defendant Magruder's argument that this factual mistake in the Affidavit warrants any relief, much less "dismissal of the charges" or withdrawal of his guilty plea. *See Magruder I*, 2020 U.S. Dist. LEXIS 127164, at *9–11. Under *Franks*, in order to successfully challenge an affidavit, the defendant must show that the false statements in the document were made by the affiant "knowingly and intentionally, or with reckless disregard for the truth" and that the false statements were "necessary to the finding of probable cause." 438 U.S. at 155. Notably, "[a]llegations of negligence or innocent mistake are insufficient." *Id.* at 171; *see also United States v. Lopez*, No. 1:17-CR-269, 2018 WL 1290415, at *10 (N.D. Ohio Mar. 13, 2018), *aff'd*, 769 F. App'x 288 (6th Cir. 2019) (holding a single false statement is insufficient to support a Franks hearing); *United States v. West*, 503 F. Supp. 2d 192, 194 (D.D.C. 2007) (refusing a *Franks* hearing where the mistake in the affidavit was small and not material); *United States v. Ali*, 870 F. Supp. 2d 10, 32 (D.D.C. 2012) (denying a *Franks* hearing where potentially negligent omissions in an affidavit were not material).

As with his earlier pleadings, Defendant Magruder has failed to cite to any legal authority supporting his position that the date error in the Affidavit would have been sufficient for a *Franks* hearing or that including the correct date would have defeated the magistrate judge's finding of probable cause to collect GPS data. *Magruder I*, 2020 U.S. Dist. LEXIS 127164, at *10. Nor has Defendant Magruder come close to satisfying his burden that the error he identifies was "made knowingly and intentionally, or with reckless disregard for the truth." *United States v. Becton*, 601 F.3d 588, 594 (D.C. Cir. 2010) (quoting *United States v. Richardson*, 861 F.2d 291, 293 (D.C. Cir. 1988) (per curiam)). His allegation of the affiant's "deliberate action to deceive," Def.'s Final Suppl. Mot. to Withdraw Plea of Guilt at 5, rests on mere speculation, unsupported by any "offer of proof." *United States v. Gaston*, 357 F.3d 77, 80 (D.C. Cir. 2004). Accordingly,

Defendant Magruder has failed to demonstrate that he is entitled to a *Franks* hearing, or that the incorrect date included in the Affidavit provides a legally cognizable defense supporting any viable claim of innocence.

2. Warrant & Order to Verizon

Defendant next contends that he is "legally innocent" based on alleged errors with the Warrant, contending that it authorized the collection of content from his phone that was unsupported by probable cause and that it allowed Verizon to collect and transmit such information to the FBI. He also argues that the magistrate judge's probable cause determination rested on stale evidence. As set forth below, neither argument provides a viable legal defense justifying withdrawal of Defendant Magruder's guilty plea.

First, Defendant Magruder reiterates the argument made in his Second Motion to Withdraw that the Warrant is overbroad because the scope of the materials sought by the Warrant exceeds the scope of the supporting Affidavit, which only related to "information about the *location* of the cellular telephone." Def.'s 2d Mot. to Withdraw Guilty Plea at 2–3, ECF No. 46 (emphasis added). He contends that the Warrant lists as "property to be seized" two categories of property not addressed in the supporting Affidavit: (1) address books, contact and buddy lists, calendar data, pictures, and files; and (2) text messages including content, destination, and original phone numbers from June 2018 to May 2019. *Id.* at 3. Defendant Magruder argues that the Warrant, therefore, sought material "not supported by probable cause" and "hence all data obtained pursuant to the warrant, including the surveillance, seizure, and arrest of Magruder as well as the search and seizure of the drugs found in the backpack was illegal." *Id.* at 4.

In response, the Government indicated that it did not transmit the *Warrant* containing the list of items cited by Defendant Magruder to Verizon. Gov.'s Opp'n to Def.'s 2d Mot. to

Withdraw Guilty Plea at 5. Rather, the FBI transmitted to Verizon only the *Order* issued by the magistrate judge, which explicitly narrowed the permitted search to "ascertaining the physical location of the target telephone" and "expressly exclude[ed] the contents of any communications conducted by the user(s) of the target telephone." *Id.*; *see id*, Ex. 1, Order at 2, ECF No. 47-2 (ordering that "agents of the FBI. . . may obtain the Requested Location Information concerning the target telephone . . . All of said authority is expressly limited to ascertaining the physical location of the target telephone and expressly excluding the contents of any communications conducted by the user(s) of the target telephone."); Ex. 2, Verizon Wireless Carrier Request Form, ECF No. 47-4 (indicating "Criminal Court Order" as source of "legal authority" for obtaining "GPS Pings"). Accordingly, even if the Warrant contained an erroneous or overly broad list of items to be seized, Verizon did not rely on the Warrant or collect the two categories of information listed by Defendant. Gov.'s Opp'n to Def.'s 2d Mot. to Withdraw Guilty Plea at 6–7. Rather, Verizon relied on the *Order*, which authorized only disclosure of location data—and the Government received only that information to track Defendant's location. *Id.* The Court previously concluded that even if the Warrant erroneously listed as "items to be seized" cell phone content that was not addressed in the Affidavit, the Government had provided sufficient evidence to demonstrate that neither Verizon nor the Government collected information beyond the cell phone's location data. *See Magruder II*, 2021 U.S. Dist. LEXIS 27073, at *20.

Since the Court's prior ruling, the Government has provided to Defendant Magruder's counsel additional "email communications from the FBI, in which the FBI noted that they believe they only sent over [to Verizon] the GPS Order[.]" Def.'s Suppl. Mot. to Withdraw Guilty Plea at 2 n.1; Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 5. Notwithstanding these communications and the Court's previous conclusion, Defendant Magruder insists that "the

Warrant documents were . . . separately sent to Verizon," that "Verizon complied and sent the requested material directly to [FBI] Agent Weatherhead," and that this was done to "hide that material was obtained pursuant to the Warrant documents which law enforcement should not have received." Def.'s Suppl. Mot. to Withdraw Guilty Plea at 2 n.1. The basis for Defendant Magruder's speculation derives from a letter his counsel sent to him, summarizing her conversation with the Government's counsel in which she conveyed that "the phone company accepted the Order and the Warrant documents and did not question or request further documents, or an additions to Attachment B [to the Warrant], to provide the prospective geolocation data." Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea Ex. 3, ECF No. 56-4. Defendant Magruder contends that this letter shows that "the warrant documents themselves" were provided to Verizon. *See* Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 1–2. The Government disputes Defense counsel's characterization of the conversation. *See* Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 5.

Regardless of the content of counsel's conversation, Defendant Magruder has provided no basis beyond mere speculation that information *other than location data* was ever provided by Verizon to the FBI or that the FBI ever relied on any such "extra" information to track Defendant Magruder's location during the time leading to his arrest. Defendant Magruder's "adamant belief" that Verizon collected and provided information beyond the location data expressly indicated in the Order is insufficient to rebut the evidence on the record that only the Order was transmitted to the FBI, and that only the information authorized by the Order was collected by Verizon and provided to the Government. *See Magruder II*, 2021 U.S. Dist. LEXIS 27073, at *19–20; *see* Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea Exs. 1, 4, ECF

Nos. 53-1, 53-4; Def.'s Suppl. Mot. to Withdraw Guilty Plea at 2 n.2. It is also insufficient to permit Defendant Magruder to engage in a fishing expedition in an effort to verify his "belief," and so the Court shall deny his Motion Seeking an Order to Verizon, ECF No. 57. Defendant Magruder has offered no new arguments or evidence to change the Court's previous conclusion that even if the Warrant erroneously listed as items to be seized cell phone content not supported by the Affidavit, the Government has provided sufficient evidence to demonstrate that neither Verizon nor the Government collected information beyond the location data authorized by the Order—information which he does not dispute was supported by probable cause. *See Magruder II*, 2021 U.S. Dist. LEXIS 27073, at *20.

In the alternative, Defendant Magruder argues that it was error for the FBI to provide Verizon *only* the Order without the Warrant because a "warrant is required to obtain the GPS data requested." Def.'s Add'l Suppl. at 1. But none of the cases cited by Defendant stand for the proposition that the Warrant must be transmitted to a cell phone service provider in order for the collection of GPS data to pass constitutional muster. *See id.* (citing *United States v. Carpenter*, 138 S. Ct. 2206 (2018); *United States v. Jones*, 565 U.S. 400 (2012); *United States v. Maynard*, 615 F.3d 544, 562 (D.C. Cir. 2010)). And although Rule 41(f)(C) requires an officer to "make reasonable efforts to serve a copy of the warrant" on "the person . . . who possessed the information that was seized or copied," the Court has previously explained that technical violations of Rule 41 do not automatically mandate suppression of evidence. *See Magruder II*, 2021 U.S. Dist. LEXIS, at *15–16; *see also United States v. Welch*, 811 F.3d 275, 280 (8th Cir. 2016) ("[A Rule 41] procedural violation is not per se an unreasonable search and seizure in violation of the Fourth Amendment."); *United States v. Jacobson*, 4 F. Supp. 3d 515, 523 (E.D.N.Y. 2014) ("Even where government officials violate the requirements of Rule 41, courts must be wary in extending the

exclusionary rule in search and seizure cases to violations of Rule 41 alone." (internal citations and quotation marks omitted)).

Finally, Defendant Magruder argues that the Warrant rests on "stale" evidence that was insufficient to support a finding of probable cause. *See* Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 3–4. For example, the Affidavit "notes that the last time Magruder traveled to New York was December 8, 2018, yet the warrant sought GPS data some 5 months later," in May 2019. *Id.* He also notes that, as discussed above, the Affidavit indicates that Defendant Magruder made several phone calls to his "Colombian contact" in April 2019, which actually took place in March 2019. *Id.* Defendant Magruder argues that given the lapse of time between his trip or calls, and the efforts to obtain a Warrant, the information provided to the magistrate judge was stale. *Id.*

This argument too is a non-starter. As relevant here, "[c]ourts have been considerably more lenient in assessing the currency of information supporting probable cause in the context of extended conspiracies than in the context of single-incident crimes." *United States v. Webb*, 255 F.3d 890, 905 (D.C. Cir. 2001). "Staleness" is less likely to defeat the existence of probable cause where the affidavit alleges ongoing criminal activity. *See United States v. Abboud*, 438 F.3d 554, 573 (6th Cir. 2006); *United States v. McElroy*, 587 F.3d 73, 77–78 (1st Cir. 2009); *United States v. Kennedy*, 427 F.3d 1136, 1142 (8th Cir. 2005); *United States v. Riddick*, 156 F.3d 505, 509 (3d Cir. 1998); *United States v. Harris*, 20 F.3d 445, 450 (11th Cir. 1994) (collecting cases). Drug conspiracies, for example, represent "the very paradigm of continuing enterprises for which the courts have relaxed the temporal requirements of non-staleness." *United States v. Rowell*, 903 F.2d 899, 903 (2d Cir. 1990). Here, the Affidavit describes Defendant Magruder's ongoing efforts to acquire narcotics in New York and return to Washington, D.C. to sell them. *See* Aff. ¶¶

9–19, ECF No. 28-1; *see* Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt at 3–4. These facts provided the magistrate judge a "substantial basis" for concluding that probable cause existed to obtain prospective GPS information from Defendant Magruder's phone. *See Illinois v. Gates*, 462 U.S. 213, 238–39 (1983) ("[T]he duty of a reviewing court is simply to ensure that the magistrate had a 'substantial basis for . . . conclud[ing]' that probable cause existed.").

Moreover, in accepting the Government's plea offer, Defendant Magruder agreed that "between December 2018 and May 31, 2019, [he] had traveled to New York from Washington, D.C. on at least *seven* separate occasions," that he "stayed in New York for only a short period of time (a few hours generally) and then returned to Washington, D.C. and that "[s]hortly before each trip, pen register information showed that he had communicated with a person in Colombia." Gov.'s Proffer of Proof at 3. He further agreed that he "traveled to New York to obtain heroin" "several times" and then "sold the heroin in smaller quantities here in Washington, D.C." *Id*. at 3–4. These facts demonstrate that Defendant Magruder was involved in ongoing criminal activity, countering his contention that any lapse in time between a particular trip to obtain drugs and the FBI's efforts to obtain a GPS warrant rests on stale evidence.

For these reasons, Defendant Magruder has failed to demonstrate that any of the purported errors with the Warrant or Order give rise to a legally cognizable defense that would supply a fair and just reason for permitting him to withdraw his guilty plea.

3. Arrest and Search

Finally, Defendant Magruder argues that the FBI lacked probable cause to arrest him and to search his backpack. *See* Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 4. He contends that these alleged Fourth Amendment violations require that the

drugs discovered in his backpack be suppressed—and that suppression of this evidence supports his assertion that he is "legally innocent" of the crime to which he pled guilty. *Id.* at 3–4; Def.'s Final Suppl. Mot. to Withdraw Plea of Guilt at 1–4. But Defendant Magruder is incorrect; "suppression of evidence does not amount to legal innocence." *Wintons*, 468 F. App'x at 233; *see also United States v. Jones*, 74 F. App'x 664, 665 (7th Cir. 2003) (distinguishing between "legal innocence" and successful suppression motion, noting that "[the defendant] does not insist that he is innocent-rather, he seeks to suppress probative evidence of his guilty by litigating his suppression motion."). Defendant Magruder has identified no precedent for the proposition that a motion to withdraw a guilty plea "can be supported, absent an assertion of actual innocence, by the claim that a motion to suppress should have been filed." *Sanders*, 125 F. App'x at 687. Rather, "numerous unpublished decisions state the contrary." *Id.*; *see, e.g.*, *Winton*, 468 F. App'x at 233 ("[S]uppression of evidence does not amount to legal innocence."); *Jones*, 74 F. App'x 664, 665 (7th Cir. 2003) ("[T]here is no support for [the defendant's] assertion that courts should follow a *per se* rule that defendants can withdraw guilty pleas if Fourth Amendment issues remain to be litigated. To the contrary it is well-established that defendants waive such defenses by pleading guilty."); *United States v. Quijada*, 40 F. App'x 344, 345 (8th Cir. 2002) (per curiam) (holding that the defense counsel's "failure to seek suppression of [the defendant's] custodial statements . . . does not provide a fair and just reason to allow [the defendant] to withdraw his guilty plea."); *United States v. Schmidt*, No. 5:02CR0227, 2003 WL 22225583, at *2–3 (N.D.N.Y. Aug. 13, 2003) ("Defendant's belated desire to move to suppress evidence seized from his residence evinces nothing more than a revaluation of the Government's case against him.").

Moreover, "as the D.C. Circuit has observed, '[a] knowing and voluntary guilty plea ordinarily waives all constitutional claims, including those arising under the Fourth Amendment,

relating to the deprivation of rights occurring prior to the entry of the plea.'" *United States v. Flynn*, 411 F. Supp. 3d 15, 48 (D.D.C. 2019) (quoting *United States v. Fincham*, No. 99-3062, 2000 WL 274210, at *1 (D.C. Cir. Feb. 15, 2000)). Rather, "[b]y entering an unconditional guilty plea, [the defendant] waive[s] his right to object to the constitutionality of the search and seizure." *Fincham*, 2000 WL 274210, at *1 (internal citations omitted); *see also United States v. Wright*, 452 F. App'x 253, 254 (4th Cir. 20111) ("To the extent Wright seeks to raise a Fourth Amendment challenge to the initial car stop which led to his arrest, his valid guilty plea waives all nonjurisdictional antecedent defects, including constitutional challenges to the pretrial proceedings."); *United States v. Marholz*, No. 95-50366, 1996 WL 285704, at *1 (9th Cir. May 29, 1996) ("[A] defendant is not entitled to withdraw a valid plea of guilty on the basis of alleged constitutional violations that occurred before entry of the plea."); *United States v. Hudak*, No. 02CR853, 2003 WL 22170606, at *5 (S.D.N.Y. Sept. 19, 2003) ("By pleading guilty Hudak waived the right to challenge the constitutionality of the search of his home.").

As a final point, in contending that the FBI lacked probable cause to arrest him, Defendant Magruder focuses only on his actions in the hours leading up to his arrest. *See* Def's Reply to Gov.'s Resp. to Def.'s Suppls. to 2d Mot. to Withdraw Guilty Plea at 4. But he ignores the extensive investigation in the months preceding his arrest. As recounted by the Government, the arresting officer in this case had detailed knowledge about Defendant Magruder's relationship and contacts with an identified drug trafficker (including based on intercepted wiretaps), his pattern of contacting that person before he traveled to New York, and his repeated trips from Washington, D.C. to New York, each of which lasted only a short duration. *See* Gov.'s Resp. to Def.'s Final Suppl. to 2d Mot. to Withdraw Plea of Guilt at 7–8. Defendant Magruder does not dispute any of these facts; he agreed to each of them in pleading guilty. Gov.'s Proffer of Proof at 2–4.

Defendant Magruder's challenges to his arrest and the search of his backpack do not support a finding that he is "legally innocent" of the charge to which he pled guilty, and do not provide a basis for permitting him to withdraw his guilty plea.

C. Prejudice from Delay

As a final factor, the Court considers whether or not the delay between the guilty plea and the motion to withdraw has substantially prejudiced the Government's ability to prosecute the case. This factor "has never been dispositive in our cases." *Curry*, 494 F.3d at 1128 (upholding denial of withdrawal of guilty plea even though the Government did not argue prejudice) (quoting *United States v. Hanson*, 339 F.3d 983, 988 (D.C. Cir. 2003)). Although the Government here does not argue that it would be prejudiced by Defendant Magruder's withdrawal of his guilty plea, his motion to withdraw remains insufficient as he has failed to establish that his plea was tainted or that he has a viable claim of innocence or a cognizable defense.

The Court further observes that more than two years have passed since Defendant Magruder's plea hearing, and the Court has allowed Defendant Magruder multiple opportunities to raise arguments in support of his efforts to withdraw his guilty plea—and has even considered his pleadings filed *after* the Court's explicit directive that it would not entertain any additional claims submitted by Defendant Magruder. *See* Minute Order (June 2, 2021). The Court shall not permit Defendant Magruder to further delay his sentencing in this case, and shall require the parties to submit a joint status report proposing next steps for proceeding with sentencing, as indicated in the accompanying Order.

D. Hearing

Generally, when a defendant seeks to withdraw a guilty plea, "the district court should hold an evidentiary hearing to determine the merits of the defendant's claims." *Taylor*, 139 F.3d at

932. Here, the Court finds that an evidentiary hearing is unnecessary. As detailed above, the Court's conclusions rely on evidence submitted by the Government, whereas Defendant Magruder's claims hinge largely on speculation unsupported by any evidence in the record. An evidentiary hearing, therefore, would not alter the Court's findings.

IV. CONCLUSION

For the foregoing reasons, the Court **DENIES** Defendant Magruder's Motion to Withdraw Guilty Plea and **DENIES** Defendant's Motion for an Order to Verizon. Defendant Magruder has failed to show that his plea was tainted or that he has a viable claim of innocence or a cognizable defense to the charge to which he pled guilty. An appropriate Order accompanies this Memorandum Opinion.

Date: December 6, 2021

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.	Criminal Action No. 19-203 (CKK)

ORDER
(December 6, 2021)

For the reasons set forth in the accompanying Memorandum Opinion, it is hereby

ORDERED that the Defendant's [46] Second Motion to Withdraw Guilty Plea[1] is **DENIED**; it is further

ORDERED that the Defendant's [57] Motion Seeking an Order to Verizon is **DENIED**; and it is further

ORDERED that the parties shall file a joint status report by no later than **DECEMBER 20, 2021**, proposing dates for proceeding with sentencing.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

[1] As indicated in the accompanying Memorandum Opinion, the Court previously denied Defendant's Second Motion to Withdraw Guilty Plea in a Memorandum Opinion and Order, dated February 21, 2021. *See* ECF Nos. 49, 50. At a subsequent hearing, Defendant requested permission to file supplemental briefing on the same motion, which the Court granted. *See* Minute Order (Feb. 23, 2021). Although Defendant styled his supplemental brief as a "supplemental motion," the operative motion is Defendant's Second Motion to Withdraw Guilty Plea, ECF No. 46, as supplemented by Defendant's pleadings listed in footnote 1 of the accompanying Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA v. EDWARD MAGRUDER, Defendant.	Criminal Action No. 19-203 (CKK)

MEMORANDUM OPINION & ORDER
(March 15, 2022)

In this criminal action, Defendant Edward Magruder pled guilty to unlawful possession with intent to distribute one kilogram or more of heroin, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). Pursuant to a plea agreement under Federal Rules of Criminal Procedure 11(c)(1)(C), Defendant Magruder and the Government agreed that a sentence between 144 months and 180 months of incarceration, followed by five years of supervised release, was an appropriate sentence.

Since Defendant Magruder pled guilty under oath on October 25, 2019, he has filed multiple motions (encompassing fifteen pleadings[1]) to withdraw his guilty plea, all of which have been denied by this Court. *See* ECF Nos. 33, 49, 64. Defendant Magruder has now filed a pleading entitled [67] "Arguments for Motion to Withdraw Plea of Guilt"—which is effectively an additional motion to withdraw his guilty plea. As the Court has observed in prior Memoranda Opinions, notably missing from any of Defendant Magruder's numerous pleadings is *any* viable assertion that his plea hearing was tainted or that he is actually innocent of the crime to which he pled guilty under oath. Accordingly, the Court's conclusion from its earlier Memorandum Opinions denying Defendant Magruder's motions to withdraw his plea remains unchanged; he has failed to present a "fair and just reason" for permitting him to withdraw his guilty plea.

[1] *See* ECF Nos. 27, 29, 30, 32, 46, 48, 51, 52, 56, 57, 58, 59, 61, 62, 63.

Accordingly, Court shall (once again) **DENY** Defendant Magruder's [67] motion to withdraw his guilty plea.

"The decision to grant a withdrawal is within the court's discretion." *United States v. Thomas*, 541 F. Supp. 2d 18, 23 (D.D.C. 2008) (citing *United States v. Tolson*, 372 F. Supp. 2d 1, 8 (D.D.C. 2005), *aff'd,* No. 05-3102, 2008 WL 441764, at *1 (D.C. Cir. Jan. 24, 2008)). When ruling on a motion to withdraw a guilty plea, courts in this Circuit consider the following factors: "(1) whether the defendant 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. Taylor*, 139 F.3d 924, 929 (D.C. Cir. 1998) (internal quotation marks and citation omitted). The third factor is viewed as the "most important." *Id.* (internal quotation marks and citation omitted).

On several previous occasions, the Court has recounted in detail the factual and procedural background of this case. The Court incorporates those prior Memorandum Opinions in full, and shall not repeat the same discussion here. *See* Mem. Op. (July 20, 2020), ECF No. 34; Mem. Op. (Feb. 12, 2021), ECF No. 50; Mem. Op. (Dec. 6, 2021), ECF No. 65. Instead, the Court shall briefly address the two arguments raised in Defendant Magruder's latest motion.

First, Defendant Magruder argues the plea colloquy was defective because "there was no inquiry as to whether there were any viable motions [to suppress] to file in this case." Def.'s Mot. at 2. Glaringly absent from Defendant Magruder's pleading is *any* citation to legal authority in support of this contention; there is *no* requirement in Rule 11 requiring the Court to advise Defendant Magruder of any right to file a suppression motion. As the Court has previously concluded, Defendant Magruder has failed to demonstrate that his plea hearing was "somehow tainted." That failure alone warrants denial of his motion. *See Tolson*, 372 F. Supp. 2d at 9 (a

defendant's failure to "demonstrate some constitutional or procedural error in the taking of [his] guilty plea . . . will often justify a court's denial of a motion to withdraw that plea even where the movant makes out a legally cognizable defense to the charges"); *see also United States v. Cray*, 47 F.3d 1203, 1208 (D.C. Cir. 1995) ("[A] defendant who fails to show some error under Rule 11 has to shoulder an extremely heavy burden if he is ultimately to prevail [on withdrawing his plea]."). In any event, as discussed more below, the Court disagrees with Defendant Magruder that there was any "viable" motion to suppress.

Second, Defendant Magruder argues that the search of his backpack was unconstitutional, and his previous attorney was ineffective for failing to advise him of a viable motion to suppress. *See* Def.'s Mot. at 2. The Court has previously addressed similar arguments regarding Defendant Magruder's claim that his previous attorney was ineffective by purportedly failing to provide him with discovery that would have made Defendant Magruder aware of a potential motion to suppress. *See, e.g.*, Mem. Op. at 8-12, ECF No. 34; Mem. Op. at 9-10, ECF No. 50. Nothing Defendant Magruder raises in his present motion compels a different outcome.

As the Court has previously explained, "the assertion of a legally cognizable defense, standing alone, does not impel a district court to permit withdrawal of a plea." *United States v. McKoy*, 645 F.2d 1037, 1039 (D.C. Cir. 1981) (citing *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975)). Defendant Magruder's motion *again* contains no claim that he is "actually innocent" nor does it they "disclaim[ ] his admission of guilt at the plea proceeding." *United States v. Curry*, 494 F.3d 1124, 1129 (D.C. Cir. 2007). "[A] potentially successful motion to suppress evidence is *not* equivalent to an assertion of legal innocence." *United States v. Yansane*, 370 F. Supp. 3d 580, 591 (D. Md. 2019) (emphasis added); *see United States v. Wintons*, 468 F. App'x 231, 233 (4th Cir. 2012) (holding that "suppression of evidence does not amount to legal

innocence"); *United States v. Sanders*, 125 F. App'x 685, 687 (6th Cir. 2005) ("We find no published precedent for the proposition that a motion to withdraw a guilty plea entered 75 days earlier can be supported, absent an assertion of actual innocence, by the claim that a motion to suppress should have been filed."); *United States v. Neal*, 230 F.3d 1355 (4th Cir. 2000) (holding that a belated desire to file a motion to suppress does not constitute a credible assertion of legal innocence warranting withdrawal of a guilty plea); *Vasquez v. United States*, 279 F.2d 34, 35-37 (9th Cir. 1960) (affirming the denial of a motion to withdraw a guilty plea when the defendant argued that he had discovered after the plea that he might have a meritorious legal defense through a suppression motion). And even in cases "calling only for a legally cognizable defense," the defendant must have "effectively denied his culpability," which Defendant Magruder has not done. *United States v. Leyva*, 916 F.3d 14, 24 (D.C. Cir. 2019). The absence of any denial of guilt counsel against the Court permitting Defendant Magruder to withdraw his guilty plea.

Moreover, Defendant Magruder *again* fails to recognize that "*suppression of evidence does not amount to legal innocence.*" *Wintons*, 468 F. App'x at 233 (emphasis added); *see also United States v. Jones*, 74 F. App'x 664, 665 (7th Cir. 2003) (distinguishing between "legal innocence" and successful suppression motion, noting that "[the defendant] does not insist that he is innocent-rather, he seeks to suppress probative evidence of his guilty by litigating his suppression motion."). Defendant Magruder has identified no precedent for the proposition that a motion to withdraw a guilty plea "can be supported, absent an assertion of actual innocence, by the claim that a motion to suppress should have been filed." *Sanders*, 125 F. App'x at 687. Rather, "numerous unpublished decisions state the contrary." *Id.*; *see, e.g.*, *Winton*, 468 F. App'x at 233 ("[S]uppression of evidence does not amount to legal innocence."); *Jones*, 74 F. App'x 664, 665 (7th Cir. 2003) ("[T]here is no support for [the defendant's] assertion that courts should follow a

per se rule that defendants can withdraw guilty pleas if Fourth Amendment issues remain to be litigated. To the contrary it is well-established that defendants waive such defenses by pleading guilty."); *United States v. Quijada*, 40 F. App'x 344, 345 (8th Cir. 2002) (per curiam) (holding that the defense counsel's "failure to seek suppression of [the defendant's] custodial statements . . . does not provide a fair and just reason to allow [the defendant] to withdraw his guilty plea."); *United States v. Schmidt*, No. 5:02CR0227, 2003 WL 22225583, at *2–3 (N.D.N.Y. Aug. 13, 2003) ("Defendant's belated desire to move to suppress evidence seized from his residence evinces nothing more than a reevaluation of the Government's case against him."). Moreover, "as the D.C. Circuit has observed, '[a] knowing and voluntary guilty plea ordinarily waives all constitutional claims, including those arising under the Fourth Amendment, relating to the deprivation of rights occurring prior to the entry of the plea.'" *United States v. Flynn*, 411 F. Supp. 3d 15, 48 (D.D.C. 2019) (quoting *United States v. Fincham*, No. 99-3062, 2000 WL 274210, at *1 (D.C. Cir. Feb. 15, 2000)). Rather, "[b]y entering an unconditional guilty plea, [the defendant] waive[s] his right to object to the constitutionality of the search and seizure." *Fincham*, 2000 WL 274210, at *1 (internal citations omitted); *see also United States v. Wright*, 452 F. App'x 253, 254 (4th Cir. 20111) ("To the extent Wright seeks to raise a Fourth Amendment challenge to the initial car stop which led to his arrest, his valid guilty plea waives all nonjurisdictional antecedent defects, including constitutional challenges to the pretrial proceedings."); *United States v. Marholz*, No. 95-50366, 1996 WL 285704, at *1 (9th Cir. May 29, 1996) ("[A] defendant is not entitled to withdraw a valid plea of guilty on the basis of alleged constitutional violations that occurred before entry of the plea."); *United States v. Hudak*, No. 02CR853, 2003 WL 22170606, at *5 (S.D.N.Y. Sept. 19, 2003) ("By pleading guilty Hudak waived the right to challenge the constitutionality of the search of his home.").

Finally, the Court is not persuaded that Defendant Magruder would have succeeded on his latest basis for a suppression motion. Defendant Magruder argues that his previous counsel should have filed a motion to suppress the drugs obtained from his backpack when he was arrested, claiming that the search of his backpack was unconstitutional. Def.'s Mot. at 2. The Court has previously rejected Defendant Magruder's argument that FBI agents lacked probable cause to arrest him. *See* Mem. Op. at 20-22, ECF No. 65. And it is well-established that that "the police may conduct a warrantless search of a lawfully arrested person and the area within his immediate control, both for weapons and for fruits and instrumentalities of the crime which might be concealed or destroyed." *United States v. Battle*, 510 F.2d 776, 778 (D.C. Cir. 1975); *see also United States v. Holmes*, 385 F.3d 786, 791 (D.C. Cir. 2004) ("When the police make a lawful arrest, the Fourth Amendment permits them to search the arrestee and the area within his immediate control.").

In an earlier pleading, Defendant Magruder admits that "[w]hen law enforcement came upon [him]," at a bus station, "they observed him carrying a backpack." ECF No. 63, at 1. He contends that because the law enforcement agents did not "immediately" search his backpack, but instead had him "follow them at least 100 yards away" and took the backpack 15-20 yards away from Defendant Marguder before searching it, that the search violated the Fourth Amendment. *Id.* at 1-2. None of the legal authority cited by Defendant Magruder stands for such a proposition. He relies on *United States v. Myers*, 308 F.3d 251 (3d Cir. 2022) and *United States v. Willis*, 320 F.3d 140 (D.D.C. 2018), but neither of those cases addresses searches incident to arrest. In *Myers*, the court concluded that law enforcement lacked probable cause to *arrest* the defendant in the first place and invalidated the ensuing search. 308 F.3d at 255. Similarly, in *Willis*, the court determined that a search of the defendant's bag was not a valid *Terry* frisk, and proceeded to

consider whether the unlawful search could be redeemed by the inevitable discovery doctrine. 320 F. Supp. 3d at 141–42. Neither cases stands for the proposition for which Defendant Magruder cites them.

***

For the foregoing reasons, it is this 15th day of March 2022 **ORDERED** that Defendant Magruder's [67] Motion to Withdraw Guilty Plea is **DENIED**.

Date: March 15, 2022

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 11, 2024 Decided January 21, 2025

No. 22-3025

UNITED STATES OF AMERICA,
APPELLEE

v.

EDWARD MAGRUDER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cr-00203-1)

Bruce H. Searby, appointed by the court, argued the cause and filed the briefs for appellant.

Michael E. McGovern, Assistant U.S. Attorney, argued the cause for appellee. With him on the brief were *Matthew M. Graves*, U.S. Attorney, and *Chrisellen R. Kolb*, *John P. Mannarino*, and *Nihar R. Mohanty*, Assistant U.S. Attorneys.

Before: HENDERSON, MILLETT, and CHILDS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* HENDERSON.

KAREN LECRAFT HENDERSON, *Circuit Judge*: In October 2019, Edward Magruder pleaded guilty to possession with intent to distribute more than a kilogram of heroin. He later sought to withdraw his plea but the district court denied the motions. On appeal, Magruder contends that the district court erred in two respects. First, he argues that the district court applied an erroneous legal standard by requiring him to assert his innocence as a prerequisite to granting a withdrawal. Second, he asserts that his plea was tainted because he received ineffective assistance of counsel based on his counsel's failure to mount several Fourth Amendment challenges to the evidence against him. As detailed *infra*, we affirm the district court.

I. BACKGROUND

In 2018, the FBI collaborated with the Colombian National Police (CNP) to investigate a drug-trafficking organization with ties to the New Orleans, Louisiana area. The investigation revealed that Juan Carlos Mosquera-Amari, a New Orleans resident, was part of a drug-trafficking conspiracy connected to Colombia. By wiretapping Mosquera-Amari's telephone, the FBI identified his Colombian contact and, with the help of the CNP, further identified Jhon Jairo Mosquera-Asprilla as the Colombian-based source of the drugs. Through a CNP wiretap on Mosquera-Asprilla's telephone, the FBI intercepted communications between Mosquera-Asprilla and an individual with a U.S. telephone number discussing (in coded language) various aspects of drug processing and sales. The FBI then obtained a search warrant under the Stored Communications Act (SCA), 18 U.S.C. § 2703, from a magistrate judge of the U.S. District Court for the Eastern District of Louisiana to obtain geolocation data for that telephone number; the data ultimately associated the number with Magruder, a District of Columbia (D.C.) resident.

The geolocation data obtained between December 2018 and May 2019 showed that Magruder traveled at least seven times between D.C. and New York. Each trip lasted no more than a few hours in New York and before each trip Magruder communicated with Mosquera-Asprilla. During that period, the FBI learned that Magruder previously had been convicted of drug distribution and, while imprisoned, placed in the same facility as Mosquera-Asprilla (who was deported following his incarceration). By March 2019, the FBI obtained a search warrant from the D.C. federal district court authorizing interception of communications to Magruder's telephone. *See infra* n.3. At that point, FBI agents had also determined that Magruder had switched to a second telephone with a new number. They obtained geolocation tracking authorization for the new number but did not yet have authority to intercept communications at the time of Magruder's arrest.

On June 7, 2019, Magruder again traveled to New York and was put under FBI observation as soon as he arrived. While in New York, he made several calls on a telephone (which the FBI could not intercept) and was observed carrying a bright blue backpack. The next day, he returned to D.C. When he got off the bus carrying a bright blue backpack, FBI agents stopped him and searched the backpack. They discovered two duct-taped blocks of heroin and arrested Magruder.

On June 10, 2019, Magruder was charged with Unlawful Possession with Intent to Distribute One Kilogram or More of Heroin, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(i). After Magruder's initial appearance, court-appointed counsel guided Magruder through the discovery process. On September 13, Magruder informed the district court that he wished to proceed to trial. Less than a month later, however, Magruder changed his position and accepted the Government's

plea offer. Under the plea agreement, the Government agreed not to file enhancement papers based on Magruder's past convictions under 21 U.S.C. § 851—such filing would have increased Magruder's mandatory minimum sentence from 10 to 25 years. Instead, the parties agreed to a recommended sentencing range of 12 to 15 years of imprisonment.

Before the October 25, 2019 plea hearing, Magruder had at least four discussions with his counsel regarding the relevant sentencing calculations and discovery process. At the plea hearing, Magruder expressed his satisfaction with his counsel's representation and acknowledged that he waived his right to appeal any issue other than ineffective assistance of counsel. J.A. 56, 59–61. The district court accepted Magruder's guilty plea.[1]

Nevertheless, later that same day Magruder advised the district court by letter that he was dissatisfied with his counsel's services, alleging that counsel had inadequately investigated the case. At a January 27, 2020 hearing, Magruder's new court-appointed counsel affirmed that Magruder wished to withdraw his plea and would soon file a motion to that effect. Before so moving, however, Magruder's second court-appointed counsel withdrew his representation and a third court-appointed counsel assumed Magruder's representation soon thereafter. Magruder subsequently filed sixteen pleadings seeking to withdraw his guilty plea, all of which were denied by the district court. J.A. 276.

On April 22, 2022, the district court sentenced Magruder to 180 months of imprisonment followed by 60 months of supervised release. This appeal followed.

[1] Neither party disputes that the October 25, 2019 plea hearing complied with Rule 11 of the Federal Rules of Criminal Procedure.

II. ANALYSIS

A. Rule 11(d)(2)(B) Plea Withdrawal

We review for abuse of discretion the district court's denial of a motion to withdraw a guilty plea before sentencing. *Everett v. United States*, 336 F.2d 979, 983 (D.C. Cir. 1964).

Under Fed. R. Crim. P. 11(d)(2)(B), a defendant may withdraw a previously accepted guilty plea if "the defendant can show a fair and just reason for requesting the withdrawal." Withdrawal "is liberally granted, although . . . not granted as a matter of right." *United States v. Ford*, 993 F.2d 249, 251 (D.C. Cir. 1993) (citing *United States v. Russell*, 686 F.2d 35, 38 (D.C. Cir. 1982)). In deciding whether such reason exists, the court considers 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 by a violation of Rule 11." *United States v. Leyva*, 916 F.3d 14, 22 (D.C. Cir. 2019) (quoting *Ford*, 993 F.2d at 251) (internal quotation marks omitted). The first factor requires the defendant to offer a viable claim of innocence, which this court has sometimes characterized as requiring, at a minimum, a "legally cognizable defense" that effectively denies a defendant's culpability. *See id.* at 24 (citing *United States v. Curry*, 494 F.3d 1124, 1129 (D.C. Cir. 2007)). A guilty plea found invalid under the third factor "is all but dispositive." *Id.* at 22 (citing *United States v. Cray*, 47 F.3d 1203, 1207 (D.C. Cir. 1995)). The "validity of a guilty plea" turns on "whether the plea represents a voluntary and intelligent choice" by the

defendant. *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citations omitted).[2]

B. District Court's Application of First *Ford* Factor

Magruder correctly asserts that we do not require every defendant seeking to withdraw his guilty plea before sentencing to satisfy *Ford*'s first factor by asserting a "viable" innocence claim, especially if the third factor weighs heavily in the appellant's favor. Indeed, we are "very lenient when the plea was entered unconstitutionally or contrary to Rule 11 procedures. Such pleas should almost always be permitted to be withdrawn . . . regardless of whether the movant has asserted his legal innocence." *United States v. Barker*, 514 F.2d 208, 221 (D.C. Cir. 1975). But, without deciding whether Magruder is correct in his assertion that the district court "shut down consideration of the withdrawal of the plea because of the lack of a claim of actual innocence," we affirm the district court because the error, if any, would be harmless. Appellant's Br. 53.

In his series of motions to withdraw his guilty plea, Magruder made various Fourth Amendment challenges in district court. In some, he argued that his claims rendered him innocent under the first *Ford* factor; in others, he argued that his counsel's failure to raise his claims amounted to ineffective assistance of counsel sufficient to taint his plea under the third

[2] The Government does not claim that the seven-month delay between Magruder's plea and his first motion to withdraw "substantially prejudiced" its "ability to prosecute the case." *Ford*, 993 F.2d at 251 (citation omitted). Because that factor "has never been dispositive," the district court rightly focused its analysis on the first and third factors, as we do here. *Curry*, 494 F.3d at 1128 (quoting *United States v. Hanson*, 339 F.3d 983, 988 (D.C. Cir. 2003)).

Ford factor. In rejecting these claims as meritless, the district court noted that "Defendant Magruder *again* fails to recognize that '*suppression of evidence does not amount to legal innocence.*'" J.A. 279 (quoting *United States v. Wintons*, 468 F. App'x 231, 233 (4th Cir. 2012)). Although this statement may have suggested the court's refusal to entertain an asserted Fourth Amendment violation as the basis of an innocence claim, it would amount to, at most, harmless error. For the reasons discussed *infra*, Magruder could not have succeeded in withdrawing his plea based on the suppression motions he claims his counsel failed to assert. *See United States v. Washington*, 969 F.2d 1073, 1079 (D.C. Cir. 1992) (affirming a defendant's conviction because even though the "trial court abused its discretion . . . the error was harmless.").

C. Magruder's Ineffective Assistance of Counsel Claims

Magruder asserts that his original retained counsel rendered ineffective assistance by failing to raise at least two suppression claims under the Fourth Amendment. Were he correct, his guilty plea could then be considered tainted under the third *Ford* factor. *See Hill*, 474 U.S. at 56. The general test for ineffective assistance is set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *See Curry*, 494 F.3d at 1129. Specifically, a criminal defendant asserting ineffective assistance of counsel bears the burden of showing (1) "that counsel's performance was deficient" (i.e., below an "objective standard of reasonableness") and (2) "that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687–88. If the defendant asserts that counsel improperly failed to challenge a search warrant under the Fourth Amendment, a showing of *Strickland* prejudice requires both that the defendant's "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have

been different absent the excludable evidence." *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). Neither of the Fourth Amendment claims Magruder asserts his counsel should have raised would have been successful and so they fail to satisfy *Strickland*'s prejudice requirement. Accordingly, there was no taint to Magruder's guilty plea under the third *Ford* factor.

1. *Backpack Search*

Magruder first claims that the district court erred in finding his counsel's failure to move for suppression of the backpack search did not constitute ineffective assistance. Magruder bases this claim on his assertion that the FBI agents had no intention of arresting him until *after* they discovered the heroin and thus they did not conduct a proper search incident to arrest. Relatedly, he asserts that the agents lacked probable cause before their search to believe Magruder was guilty of possessing with intent to distribute over a kilogram of heroin, the charge he ultimately faced. Both of Magruder's arguments are without merit.

"Where the formal arrest followed quickly on the heels of the challenged search of [defendant's] person, we do not believe it particularly important that the search preceded the arrest rather than vice versa." *Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) (citing *Bailey v. United States*, 389 F.2d 305, 308 (D.C. Cir. 1967) ("Even if the formal arrest was not made until after the search, the search will be upheld so long as there is probable cause for an arrest before the search is begun.")). The Government asserts, Magruder does not contest and the district court had earlier found that, when the FBI stopped Magruder, probable cause existed to believe that Magruder was part of an ongoing conspiracy to traffic heroin.[3] Moreover,

[3] The March 2019 search warrant, issued less than three months before Magruder's arrest, was based on "probable cause to believe

Magruder's unusual travel patterns between New York and D.C., coupled with the associated telephone calls with Mosquera-Asprilla, a known drug dealer, created a substantial likelihood that Magruder was actively engaged in the furtherance of that conspiracy as he stepped off the bus in D.C. Having thus established probable cause for arrest before the search, and with the formal arrest promptly following the search, we conclude that the arrest was lawful. Nor does it matter whether the agents subjectively intended to arrest Magruder before the search or whether they announced that Magruder was under arrest before conducting the search. *See Whren v. United States*, 517 U.S. 806, 813 (1996) ("Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis."). *Cf. United States v. Thornton*, 733 F.2d 121, 123, 128 n.9 (D.C. Cir. 1984) (characterizing a search as properly incident to arrest when an officer with probable cause to arrest stated during the initial search that the defendant was not yet under arrest but then placed the defendant under arrest upon discovering narcotics).

It is also of no consequence that Magruder was not charged with conspiracy, the crime for which probable cause was most clearly established at the time of the search. As this Court has said, "even if probable cause does not support arrest for the offense charged by the arresting officer, an arrest (and search incident thereto) is nonetheless valid if the same officer had probable cause to arrest the defendant for another offense." *United States v. Bookhardt*, 277 F.3d 558, 565 (D.C. Cir. 2002). With probable cause to believe *some* crime existed before searching Magruder, as was patently the case here, the FBI agents could stop and search Magruder and his backpack

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that [Magruder] . . . [was] committing . . . violations of . . . Possession with Intent to Distribute and Distribution of Controlled Substances," conspiracy to commit the same violations and money laundering. J.A. 205.

immediately before formally arresting him and were not required to charge Magruder with the same offense that supported the initial probable cause.[4]

2. *Louisiana Search Warrant*

For the first time on appeal, Magruder argues that his counsel failed to challenge both the Louisiana magistrate judge's jurisdiction to issue a warrant under the SCA as well as that district's venue status. Magruder presupposes that, because the FBI identified him only using the fruits of this allegedly invalid warrant, if his counsel had made the challenge and presumably succeeded, the proper remedy would have been suppression of the evidence. His counsel's failure to do so thus constitutes prejudice under the *Strickland* definition thereof and, accordingly, tips the scale in favor of a "tainted" guilty plea withdrawal under *Ford.*

But the contraband evidence would not have been suppressed. Without deciding whether the warrant satisfied the venue and jurisdictional requirements under the SCA, or whether a violation of those provisions requires suppression under the Fourth Amendment, we conclude that, even if Magruder is correct and the Louisiana magistrate acted in error, the evidence is admissible under the good-faith exception.

"[T]he marginal or nonexistent benefits produced by suppressing evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot

[4] Although both sides dispute which party bears the burden to show that the FBI agents had, or lacked, probable cause to arrest when the alleged lack of probable cause supports an ineffective assistance of counsel claim, we need not decide this question. Under either proof assignment, the FBI agents had probable cause to arrest at the time of the backpack search.

justify the substantial costs of exclusion." *United States v. Leon*, 468 U.S. 897, 922 (1984). And notwithstanding not every reliance is objectively reasonable, "'a warrant issued by a magistrate normally suffices to establish' that a law enforcement officer has 'acted in good faith in conducting the search'" and therefore that the evidence should not be suppressed. *Id.* (quoting *United States v. Ross*, 456 U.S. 798, 823 n.32 (1982)). The warrant that led agents to Magruder was supported by an affidavit that established probable cause to connect Magruder's telephone number to the drug-trafficking conspiracy operating in New Orleans. That affidavit systematically laid out the ties between Magruder's telephone number and Mosquera-Asprilla, a leader in a Colombian drug-trafficking conspiracy, along with that organization's ties to Mosquera-Amari, a known New Orleans drug trafficker. It is well-established that "a conspiracy prosecution may be brought in any district in which some overt act in furtherance of the conspiracy was committed by any of the co-conspirators," *United States v. Rosenberg*, 888 F.2d 1406, 1415 (D.C. Cir. 1989), and thus there is nothing unreasonable about FBI agents relying on a Louisiana magistrate judge's probable cause finding to believe that the telephone number targeted by the warrant was subject to his jurisdiction.

Nor is there merit to Magruder's argument that the Louisiana search warrant was void *ab initio*. Several years ago, the Sixth Circuit held that a search warrant issued by a magistrate judge lacking the requisite legal authority is void *ab initio* and cannot be relied upon under the good-faith exception. *See United States v. Scott*, 260 F.3d 512, 515 (6th Cir. 2001). That holding was subsequently rejected. *See United States v. Master*, 614 F.3d 236, 243 (6th Cir. 2010) ("[W]e believe that the Supreme Court's evolving suppression rulings in Fourth Amendment cases require clarification or modification of our precedent in *Scott*."). The Tenth Circuit also rejected the void

ab initio argument. *See United States v. Workman*, 863 F.3d 1313, 1318 (10th Cir. 2017) (the argument that a warrant "is essentially non-existent (void ab initio) when the judge lacks authority to issue the warrant . . . is foreclosed by the Supreme Court's opinions" after *Leon*). Like our sister circuits, we have no reason not to apply the good-faith exception even if the Louisiana search warrant was defective.

Finally, Magruder failed to make a Sixth Amendment claim based on the Louisiana warrant in district court but "this court does not remand every ineffective assistance of counsel claim that is initially raised on appeal." *United States v. Green-Remache*, 97 F.4th 30, 34 (D.C. Cir. 2024). We routinely do not remand if "the record conclusively shows the defendant was not prejudiced, [because] no factual development could render the claim meritorious." *Id.* (quoting *United States v. Marshall*, 946 F.3d 591, 596 (D.C. Cir. 2020)). For the reasons set forth *supra*, the record plainly requires no factual development for us to determine that Magruder's claims based on the Louisiana search warrant are meritless.

* * *

For the foregoing reasons, the judgment of the district court is affirmed.

So ordered.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3025 **September Term, 2024**

FILED ON: JANUARY 21, 2025

UNITED STATES OF AMERICA,
APPELLEE

v.

EDWARD MAGRUDER,
APPELLANT

Appeal from the United States District Court
for the District of Columbia
(No. 1:19-cr-00203-1)

Before: HENDERSON, MILLETT, and CHILDS, *Circuit Judges*

J U D G M E N T

This cause came to be heard on the record on appeal from the United States District Court for the District of Columbia and was argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED** that the judgment of the District Court appealed from in this cause be affirmed, in accordance with the opinion of the court filed herein this date.

Per Curiam

FOR THE COURT:
Cliff B. Cislak, Clerk

BY: /s/

Daniel J. Reidy
Deputy Clerk

Date: January 21, 2025

Opinion for the court filed by Circuit Judge Henderson.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22-3025 **September Term, 2024**

1:19-cr-00203-CKK-1

Filed On: February 12, 2025

United States of America,

Appellee

v.

Edward Magruder,

Appellant

BEFORE: Henderson, Millett, and Childs, Circuit Judges

O R D E R

Upon consideration of appellant's petition for panel rehearing filed on February 4, 2025, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Clifton B. Cislak, Clerk

BY: /s/
Daniel J. Reidy
Deputy Clerk