

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH O'SHAUGHNESSY,
PETITIONER,

v.

THE UNITED STATES OF AMERICA,
RESPONDENT.

**On Petition For A Writ Of Certiorari To
the United States Court Of Appeals
For the Ninth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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December 13, 2018

Question Presented for Review

The petitioner (criminal defendant below) claimed that his plea was involuntary, so therefore his appellate waiver was involuntary. The District Court denied petitioner's motion to withdraw his plea. Could the Ninth Circuit properly dismiss the appeal, under the circumstances of this case, without articulating the factors it found to base its conclusion that the plea and waiver were voluntary?

Parties To The Proceedings

The parties to the proceedings in the United States Court of Appeals for the Ninth Circuit were the following:

1. Joseph O'Shaughnessy, the petitioner, was the defendant-appellant below.
2. The United States of America, the respondent, was plaintiff-appellee below.

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**On Petition For A Writ Of Certiorari To
the United States Court Of Appeals
For the Ninth Circuit**

Petitioner Joseph O'Shaughnessy respectfully petitions for a writ of *certiorari* to review order of dismissal by the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The Ninth Circuit's Order is attached here as Appendix A. The District of Oregon's decision denying petitioner's motion to withdraw his plea is attached as Appendix B. The District Court's judgment is attached as Appendix C.

Basis for Jurisdiction

The District Court had original subject matter jurisdiction pursuant to 18 U.S.C. § 3231.

The United States Court of Appeals for the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. The Ninth Circuit issued its Order, dismissing the appeal, September 20, 2018.

This Court has jurisdiction under 28 U.S.C. § 1254(1). This petition is being filed within 90 days of the judgment in the Ninth Circuit.

Constitutional And Statutory Provisions

The Federal Rules of Criminal Procedure, Rule 11, provides in relevant part:

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

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

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

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

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

(e) **Finality of a Guilty or Nolo Contendere Plea.** After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

Statement Of The Case

Factual background

A group of protesters took over the Malheur National Wildlife Refuge, in a remote eastern area in the District of Oregon, from January 2, 1016, to February 12, 2016. Twenty-six people were charged with being a part of the occupation of the Refuge.

The lead defendants were two brother, Ammon and Ryan Bundy. The reason for the occupation, and the focus of the concern of the Bundys and their hundreds of supporters, was the earlier sentencing of the Hammonds, father and son. The Hammonds were local cattle ranchers convicted of destroying government property

by burning some rangeland in 2001 and 2006. The District Judge sentenced the Hammonds in 2012, going below the mandatory five-year minimum. The Ninth Circuit reversed. *United States v. Hammond*, 742 F.3d 880 (9th Cir. 2014). The Hammonds were resentenced, and as they prepared to report to prison in late 2015, protests began in Eastern Oregon. The Refuge was occupied for about six weeks, and, towards the the end of that period, the twenty-six occupiers were arrested during a short period, ending February 12, 2016.

At the same time as these defendants were charged in the District of Oregon, six of the Oregon defendants, including the petitioner O'Shaughnessy, were charged for a confrontation, in Bunkerville, Nevada, that took place two years earlier, in 2014. *United States v. Bundy, et al*, 2:16-cr-00046-GMN-PAL.

The simultaneous prosecutions put the petitioner in an “impossible situation,” as his trial lawyer put it. O'Shaughnessy was released in the District of Oregon, but held in the District of Nevada. He could not defend against two charges in two jurisdictions, while in custody on the Nevada charge, with trials set back-to-back. His Oregon lawyer was not even able to contact him for over a month when he was in custody in Nevada. He was facing a lifetime sentence in the Nevada case. The discovery in both cases was vast, measured in gigabytes and terabytes.

The Oregon prosecutors first thought that O'Shaughnessy was a leader of the Refuge occupation, but prosecutors ultimately came to believe that he played a much smaller role. He was offered a plea bargain in Oregon, which anticipated he would serve about one year of incarceration. He was also offered a plea bargain in Nevada. The only term of the Nevada offer that is in this record is that he had to plead in Oregon to receive the bargain in Nevada. He had read almost none of the Nevada discovery, indeed, his Nevada lawyer had not received more than half of it. His Nevada lawyer was not prepared, therefore, to advise him about a plea bargain.

The Oregon prosecutors, and the local and national media, repeatedly reported that the government's evidence was "overwhelming." The petitioner's Oregon lawyer believed the petitioner would be convicted, and advised him to plead. He had a short window to accept the plea bargain, and just before that, his elderly mother had a stroke. He was repeatedly told the plea bargain was "global." He pled guilty on August 16, 2016.

The Oregon defendants were tried in two groups. O'Shaughnessy was in the first group before he pled guilty. The first group was tried in the fall of 2016. The second group was tried starting in February 2017.

After the petitioner pled guilty in August 2016, the first group of defendants, including the purported leaders Ammon and Ryan Bundy, went to trial in September 2016. After a lengthy trial, they all were acquitted by the jury.

O'Shaughnessy moved to withdraw his Oregon plea in January 2017, which the Oregon District Court denied. At that time, an Oregon trial (for the second group) was set in February 2017. O'Shaughnessy could have joined that group of defendants then, and he was willing and prepared to join. That second trial, of the less-involved defendants, resulted in convictions of relatively low-level crimes; those defendants ultimately served a year or two in prison.

After his plea in Oregon, O'Shaughnessy was moved to the District of Nevada, and he had an opportunity to review some of the Nevada discovery. He elected not to plead in Nevada. As noted, he moved to withdraw his plea in Oregon, which the District Court denied. Thereafter, the main portion of the Nevada case -- the portion including the Bundys -- was dismissed, due to prosecutorial misconduct. After that, the Nevada U.S. Attorney elected to dismiss O'Shaughnessy's charges, too.

Thus, in the end, the defendants who were minor players were convicted, and the defendants the prosecution claimed were the leaders and organizers, all walked out of two federal courtrooms, without a single conviction.

Reason For Granting The Petition

The petitioner appealed the District Court's denial of his motion to withdraw his plea, on the grounds that it was involuntary. Ninth Circuit dismissed the appeal, concluding that the appellate waiver -- part of the plea agreement -- was valid.

The Ninth Circuit's reasoning for its dismissal is circular. In the Order dismissing the appeal, it cited *United States v. Harris*, 628 F.3d 1203 (9th Cir. 2011). That case held that an appellate waiver is enforceable if it was knowing and voluntary made, and the waiver encompassed a matter that was the subject of the appeal. However, that case is not controlling, as Harris did not contest the voluntariness of his plea.

The Ninth Circuit also relied on *United States v. Rahman*, 642 F.3d 1257 (9th Cir. 2011), but that case, which purports to hold that an appeal waiver covers a claim on appeal that the plea was involuntary, did reach the merits. (The Ninth Circuit there concluded that the defendant had not received ineffective assistance of counsel in this context, leaving that issue to be explored in a later 28 U.S.C. § 2255 case).

In the petitioner's case, the issue was whether the plea, which included an appellate waiver, was knowing and voluntary. But if the plea was not knowing and voluntary, it cannot encompass an appellate waiver.

A plea agreement is, of course, a contract. Given the context, plea agreements are contracts of adhesion. That is particularly the case here, where the petitioner was under threat of a life sentence in a case with terabytes of discovery that neither he, nor his lawyer, had had an opportunity to review. Yet roughly 97% of all federal convictions arise from guilty pleas. This Court has observed that plea bargains have become central to our justice system, the system "is, for the most part a system of pleas, not a system of trials." (Internal citations omitted).

Missouri v. Frye, 566 U.S. 134, 143 (2012).

Particular caution should be used with prospective waivers, such as appellate waivers. In almost all cases, including this one, the plea and the sentence happen at different times. In this case, after the petitioner pled, the events in the larger case were dramatic. Despite the apparent certainty that the Bundy brothers, and their co-defendants, would be convicted in the District of Oregon, they were acquitted by the jury. Despite the apparent certainty that the Bundys, and O'Shaughnessy, would be convicted in the District of Nevada, the Bundys' case was dismissed due to prosecutorial misconduct, and O'Shaughnessy's case was dismissed in the interests of justice. In the end, the parties that the government, for years, contended were the leaders of an anti-government conspiracy, walked away from two cases. The smaller fry, who prudently accepted a plea bargain rather than face "certain" conviction, all now have felony convictions which will affect

the rest of their lives. The District of Oregon judge was aware of the Oregon acquittals when she denied the petitioner's motion to withdraw his plea, even though he could have gone to trial in the second round that was to begin shortly.

It is obviously unfair that the big fish swam free, and the little fry were punished. The petitioner had a fair and just reason to request that he be allowed to withdraw his plea, and it was a miscarriage of justice to denied that request.

Conclusion

For the foregoing reasons, the Court should grant this petition for writ of *certiorari*, and take this opportunity to elucidate when an appellate waiver is valid in the face of the injustice as shown in this case.

Respectfully submitted,

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December 2018

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FILED

SEP 20 2018

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOSEPH O'SHAUGHNESSY, a.k.a. Joseph
D. O'Shaughnessy,

Defendant-Appellant.

No. 18-30058

D.C. No. 3:16-cr-00051-BR
District of Oregon,
Portland

ORDER

Before: LEAVY, HAWKINS, and TALLMAN, Circuit Judges.

Appellee's motion to dismiss this appeal in light of the valid appeal waiver (Docket Entry No. 9) is granted. *See United States v. Harris*, 628 F.3d 1203, 1205 (9th Cir. 2011) (knowing and voluntary appeal waiver whose language encompasses the right to appeal on the grounds raised is enforceable); *see also United States v. Rahman*, 642 F.3d 1257, 1259 (9th Cir. 2011) (waiver of right to appeal any aspect of the conviction extends to appeal from district court's denial of motion to withdraw guilty plea). The record does not support appellant's contention that his plea was not knowing and voluntary. Moreover, the district court did not provide appellant an unqualified advisement of his right to appeal. *See United States v. Arias-Espinosa*, 704 F.3d 616, 619-20 (9th Cir. 2012).

Appellant's motion to take judicial notice is denied as moot.

DISMISSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

3:16-cr-00051-BR-3

Plaintiff,

ORDER DENYING DEFENDANT
JOSEPH O'SHAUGHNESSY'S
MOTION TO WITHDRAW
GUILTY PLEA

v.

JOSEPH O'SHAUGHNESSY,

Defendant.

BROWN, Judge.

This matter comes before the Court on Defendant Joseph O'Shaughnessy's Motion (#1607) to Withdraw Guilty Plea. The government filed a Response (#1678) to O'Shaughnessy's Motion on January 6, 2017. O'Shaughnessy filed a Reply (#1751) on January 20, 2017.

Following a thorough review of the record on this Motion, the Court finds there are not any disputed issues of material fact and oral argument is not necessary to resolve this Motion

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WITHDRAW GUILTY PLEA

because the legal arguments are sufficiently developed. For the reasons that follow, the Court **DENIES** O'Shaughnessy's Motion (#1607) to Withdraw Guilty Plea.

BACKGROUND

On August 1, 2016, pursuant to a Plea Agreement (#963) and Plea Petition (#964), Defendant Joseph O'Shaughnessy pled guilty to Count 1 of the Superseding Indictment (#282) in which he was charged with Conspiracy to Impede Officers of the United States (Count 1). At the time O'Shaughnessy was set to proceed to trial on September 7, 2016, with several Co-Defendants.

In the Plea Agreement O'Shaughnessy agreed to plead guilty to Count 1 of the Superseding Indictment, and, in exchange, the government agreed to recommend a sentence at the low-end of U.S. Sentencing Guidelines Total Offense Level 13 with any sentence in the District of Oregon to be served concurrently with any sentence imposed in the District of Nevada.

The Plea Agreement identified the parties to the Agreement as follows:

This plea agreement is between this United States Attorney's Office (USAO) and defendant, and thus does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority. This agreement does not apply to any charges other than those specifically mentioned herein.

The defendant expressly understands that the United

States Attorney's Office for the District of Nevada is not a party to this agreement and that the United States Attorney's Office for the District of Nevada is not entering into any agreement with defendant or making any promises to defendant with respect to District of Nevada Case No. 2:16-CR-00046-GMN-PAL or any other matter, under this letter. Defendant further expressly understands that he is potentially exposed to separate penalties and consecutive sentences on any convictions obtained against him in the District of Nevada.

Plea Agreement (#963) at ¶ 1.

On August 1, 2016, the Court conducted a change-of-plea hearing pursuant to Federal Rule of Criminal Procedure 11. At the conclusion of that hearing O'Shaughnessy pled guilty to Count 1 of the Superseding Indictment consistent with the Plea Agreement.

At the beginning of that hearing counsel for the government summarized some terms of the Plea Agreement as follows:

[ASSISTANT UNITED STATES ATTORNEY CRAIG J. GABRIEL]:
First, this agreement is between Mr. O'Shaughnessy and the U.S. Attorney's Office for the District of Oregon only. It does not bind any other party. It does not bind the Court. And it does not bind, by this letter, the U.S. Attorney's Office for the District of Nevada.

Mr. O'Shaughnessy has entered into plea negotiations with the U.S. Attorney's Office in the District of Nevada. I'll allow Ms. Baggio to speak to that. They have a separate agreement. But this agreement specifically states that it only binds Mr. O'Shaughnessy and the U.S. Attorney's office here.

Tr. of Proceedings (#1271) at 2-3.

Counsel for O'Shaughnessy began her presentation to the Court by explaining the status of plea negotiations in the

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District of Nevada:

I think, if I may, just for clarification of the Nevada case, your Honor, while the Oregon plea agreement is just to resolve the Oregon case, Mr. O'Shaughnessy has entered into an agreement to resolve the Nevada case as well. And the Nevada case agreement requires him to plead guilty in this case.

So we are pleading guilty here. The expectation is after this guilty plea takes place, he will be transported by the marshals to Nevada for a change of plea and sentencing in that case. And then the parties expect Mr. O'Shaughnessy to then be returned to Oregon for sentencing in this matter.

Id. at 6.

The Court then engaged in an extensive colloquy with O'Shaughnessy. The Court confirmed with O'Shaughnessy that he had adequate time to consult with counsel and to consider the available options to resolve the Oregon case against him, including his absolute right to a jury trial in this matter. *Id.* at 8-17. While emphasizing all of the constitutional rights that O'Shaughnessy would be giving up by pleading guilty, the Court specifically reviewed with O'Shaughnessy his then-existing presumption of innocence and his right to trial by jury. O'Shaughnessy stated unequivocally that he understood. *Id.*

The Court also had the following exchange with O'Shaughnessy about his ability to consider his decision to plead guilty and to obtain satisfactory advice of counsel:

THE COURT: I can see Ms. Baggio is your lawyer. The paper says you and she have discussed your case fully.

I need to be sure, from your perspective, you believe

you've had enough time with Ms. Baggio to make the important decision you're about to make. Have you?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you met with her more than once about the terms of this plea agreement and how that interacts with the issue in Nevada?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you reviewed with Ms. Baggio the Government's theories in prosecuting you, the approaches that might be available to you if you went to trial, and so forth? Have you done that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you weighed and evaluated with her advice the risks that you may be minimizing if you plead guilty versus going to trial and being found guilty without the benefit of the Government's recommendations here?

THE DEFENDANT: Yes, your Honor.

THE COURT: Have you asked her all of the questions you wanted to ask her?

THE DEFENDANT: Yes, your Honor.

THE COURT: Has she answered them?

THE DEFENDANT: Yes, she has, your Honor.

THE COURT: Are you satisfied with her advice and services?

THE DEFENDANT: Yes, I am.

THE COURT: Are you thinking clearly today?

THE DEFENDANT: Yes, your Honor.

THE COURT: Is anything going on with you at all - physically, mentally, emotionally - that could be distracting you or interfering with your ability to

make a good decision?

THE DEFENDANT: No, your Honor.

Id. at 10-11.

The Court then addressed with O'Shaughnessy the relationship of his plea in this District with his agreement in the District of Nevada:

THE COURT: Now, this business in Nevada is relevant here, as Ms. Baggio points out, because part of the agreement you've made in Nevada, evidently, is that you plead guilty here.

Is that how you understand it?

THE DEFENDANT: Yes, your Honor.

THE COURT: All right. Now, the Nevada court won't be allowed -- won't allow you to plead guilty there unless the judge there is satisfied you're acting voluntarily there. So the two cases are interrelated in that respect.

So I need to ask you whether this decision to plead guilty here, with its connection to Nevada, is in fact your own personal voluntary decision.

THE DEFENDANT: Yes, your Honor.

Id. at 23-24. The Court then ensured O'Shaughnessy understood everything in the Plea Agreement and voluntarily entered into and signed the Agreement.

Counsel for the government then summarized the elements of the offense and the factual basis as follows:

First, two or more persons agreed to prevent another person from discharging any duties of the United States by force, threat or intimidation.

And the only relevant part of that final element for Mr. O'Shaughnessy is intimidation.

I'll be very brief with the factual basis for the plea, your Honor.

In January 2016, in the District of Oregon, Mr. O'Shaughnessy agreed with others to provide security to the armed occupiers of the Malheur National Wildlife Refuge. In agreeing to provide security, Mr. O'Shaughnessy intended to keep federal law enforcement officers as well as Department of Interior employees from entering the refuge and performing their duties.

Id. at 28.

O'Shaughnessy stated he understood the government's summary of the elements and factual recitation and pled guilty to the charge. *Id.* at 28-29. When the Court asked O'Shaughnessy what made him guilty of the charge, O'Shaughnessy engaged in the following exchange with the Court:

THE DEFENDANT: On January of 2016, people known to me and unknown to me occupied the Malheur National Wildlife Refuge. Although I did not participate in the actual occupation of the refuge, I did support their message and, therein, felt a duty to provide security for these individuals. And -- and by providing that security, I'm aware that it -- it intimidated and impeded federal officers from doing their duty.

THE COURT: So you entered into an agreement with at least one other person? That's the conspiracy. The conspiracy crime is agreeing two or more people agreeing to do something that ultimately is a crime.

THE DEFENDANT: Yes, your Honor.

THE COURT: And in fact it isn't necessary that anyone was actually even intimidated or prevented. It is necessary there be an agreement that a person intentionally participates in that agreement knowing

that the object is the prevention of the federal officers and employees from performing their duties by any of those other means.

Do you understand?

THE DEFENDANT: Yes, your Honor.

THE COURT: And you did that?

THE DEFENDANT: Yes, your Honor.

THE COURT: Here in Oregon?

THE DEFENDANT: Yes.

THE COURT: Acting intentionally? You knew what you were doing?

THE DEFENDANT: Yes, your Honor.

Id. at 29-30.

The Court thereafter found O'Shaughnessy's guilty plea was knowing, intelligent, and voluntary and found O'Shaughnessy guilty of Count 1 pursuant to his guilty plea. *Id.* at 30.

After O'Shaughnessy returned to the District of Nevada, he ultimately chose not to plead guilty in that case because he determined the government's case against him in that District was weak after he reviewed further discovery.

STANDARD

"Federal Rule of Criminal Procedure 11(d)(2)(B) provides that a defendant may withdraw a plea of guilty prior to sentencing if he "can show a fair and just reason for requesting

the withdrawal.'" *United States v. Mayweather*, 634 F.3d 498, 504 (9th Cir. 2010). "The defendant has the burden of demonstrating a fair and just reason for withdrawal of a plea." *United States v. Davis*, 428 F.3d 802, 805 (9th Cir. 2005). "'Fair and just reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence, intervening circumstances, or any other reason for withdrawing the plea that did not exist when the defendant entered his plea.'" *Mayweather*, 634 F.3d at 504 (quoting *United States v. Ortega-Ascanio*, 376 F.3d 879, 883 (9th Cir. 2004)). "'While the defendant is not permitted to withdraw his plea 'simply on a lark,' the 'fair and just standard' is generous and must be applied liberally.'" *Mayweather*, 634 F.3d at 504 (quoting *United States v. McTiernan*, 546 F.3d 1160, 1167 (9th Cir. 2008)).

A defendant "does not have to prove that his plea is invalid in order to establish a fair and just reason for withdrawal before sentencing." *United States v. Davis*, 428 F.3d 802, 806 (9th Cir. 2005). *See also Mayweather*, 634 F.3d at 504. When a defendant's reason for seeking to withdraw a guilty plea is newly-discovered evidence, "the generous 'fair and just reason' standard does not require that the defendant show that the new evidence exonerates him or that there is a reasonable probability he would not have been convicted had the case gone to trial."

United States v. Garcia, 401 F.3d 1008, 1011 (9th Cir. 2005). Even if newly-discovered evidence provides the basis for the withdrawal of a guilty plea, however, the defendant must still demonstrate the "evidence was relevant evidence in [the defendant's] favor that could have at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty had he known about the evidence prior to pleading." *Id.* at 1011-12.

The Supreme Court has cautioned that a "'guilty plea is no . . . trifle, but a grave and solemn act, which is accepted only with care and discernment'" and that permitting the withdrawal of a guilty plea "on a lark" would "degrade the otherwise serious act of pleading guilty into something akin to a move in a game of chess." *United States v. Hyde*, 520 U.S. 670, 676-77 (1997)(quoting Fed. R. Crim. P. 32 advisory committee's note to 1983 Amendments). See also *United States v. Ensminger*, 567 F.3d 587, 590 (9th Cir. 2009). Moreover, "[p]rejudice to the government is one factor to be considered by the district court in its evaluation of the merits of the defendant's motion to withdraw his plea." *United States v. Vasquez-Velasco*, 471 F.3d 294, 294 (9th Cir. 1973)(*per curiam*). See also *Hyde*, 520 U.S. at 676-77 (noting "'there is no reason to view pleas . . . as merely 'tentative' subject to withdrawal before sentence whenever the

government cannot establish prejudice'")(quoting Fed. R. Crim. P. 32 advisory committee's note to 1983 Amendments); *Ensminger*, 567 F.3d at 593 (referencing prejudice to the government as a relevant factor).

DISCUSSION

O'Shaughnessy asserts he has fair and just reasons for withdrawing his guilty plea due to (1) intervening circumstances in the District of Nevada, (2) newly-discovered evidence, and (3) ineffective assistance of counsel.

I. Intervening Circumstances in the District of Nevada

O'Shaughnessy contends he should be permitted to withdraw his guilty plea in the District of Oregon because pleading guilty in Oregon was a requirement of his tentative plea agreement in Nevada that he later chose not to enter into. O'Shaughnessy contends the deadlines imposed to accept the guilty pleas in the two Districts, together with the incomplete production of discovery and his inability to fully assess the government's case in the District of Nevada at the time he pled guilty in the District of Oregon, are fair and just reasons to withdraw his guilty plea in Oregon.

As noted, "[f]air and just reasons for withdrawal include inadequate Rule 11 plea colloquies, newly discovered evidence,

intervening circumstances, or any other reason for withdrawing the plea *that did not exist when the defendant entered his plea.*" *Mayweather*, 634 F.3d at 504 (quoting *Ortega-Ascanio*, 376 F.3d at 883)(emphasis added)). At the time that O'Shaughnessy entered his guilty plea in this case he was fully aware of the then-existing status of his case in the District of Nevada. Indeed, O'Shaughnessy acknowledges both his Nevada and Oregon counsel were advising him during this period and were involved in negotiating a potential universal resolution of both cases. To the extent that O'Shaughnessy believed he needed additional time to obtain and to review discovery in the District of Nevada before he pleaded guilty in Oregon, he could have chosen to forego a universal resolution and sought to resolve his cases otherwise. He also could have expressed concerns to this Court at his change-of-plea hearing that he was not, in fact, certain about his desire to plead guilty in Oregon. He did neither.

In any event, as the government emphasizes, the Plea Agreement in this case explicitly provides it is independent of any agreement in the District of Nevada:

This plea agreement is between this United States Attorney's Office (USAO) and defendant, and thus does not bind any other federal, state, or local prosecuting, administrative, or regulatory authority. This agreement does not apply to any charges other than those specifically mentioned herein.

The defendant expressly understands that the United States Attorney's Office for the District of Nevada is

not a party to this agreement and that the United States Attorney's Office for the District of Nevada is not entering into any agreement with defendant or making any promises to defendant with respect to District of Nevada Case No. 2:16-CR-00046-GMN-PAL or any other matter, under this letter. Defendant further expressly understands that he is potentially exposed to separate penalties and consecutive sentences on any convictions obtained against him in the District of Nevada.

Plea Agreement (#963) at ¶ 1. Although O'Shaughnessy now states he did not understand the Plea Agreement in the District of Oregon was independent from the agreement in the District of Nevada (see Declaration (#1752) of Joseph O'Shaughnessy), that assertion is not credible in light of the plain language of the Plea Agreement and O'Shaughnessy's repeated assertions at the change-of-plea hearing that he had sufficient time to consider his decision to plead guilty and that he understood the terms of the Plea Agreement.

Thus, although O'Shaughnessy apparently expected to enter into a universal resolution of both of his cases, the fact that he later changed his mind with regard to pleading guilty in the District of Nevada does not undermine his Plea Agreement and guilty plea in the District of Oregon.

On this record, therefore, the Court finds O'Shaughnessy's later decision not to plead guilty in the District of Nevada does not provide a fair and just reason for the Court to permit O'Shaughnessy to withdraw his guilty plea in this case.

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II. Newly-Discovered Evidence

O'Shaughnessy next contends newly-discovered evidence provides a fair and just reason for the Court to permit him to withdraw his guilty plea. In particular, O'Shaughnessy contends subsequent revelations regarding the background and compensation of the government's confidential human sources (CHSs) provide fair and just reasons for the Court to permit O'Shaughnessy to withdraw his guilty plea.

As the Court found in its Order (#1642) Denying Defendant Ryan Payne's Motion to Withdraw Guilty Plea, however, the government provided CHS information to Defendants on July 1, 2016, a month before O'Shaughnessy pled guilty.¹ Moreover, the primary issue with respect to the Count 1 conspiracy charge in this case is not a question of who-did-what, but rather is an assessment of whether one or more of the 26 Defendants (including O'Shaughnessy) conspired with another with the intent to impede officers of the United States by force, intimidation, or threat. The largely unidentified background information and compensation of CHSs on which O'Shaughnessy now relies to support his

¹ The Court also notes by Order (#1453) issued October 18, 2016, that the Court denied Defendant Ammon Bundy's Motion (#1423) to Compel Information Regarding Government's Use of Informants, found the redacted reports did not omit any information that was "relevant and helpful" to any defense (see *United States v. Henderson*, 241 F.3d 638, 645 (9th Cir. 2000)), and concluded the CHS disclosures made by the government were sufficient.

contention that the Court should permit him to withdraw his guilty plea, therefore, is not the sort of information that "could have at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty had he known about the evidence prior to pleading." See *Garcia*, 401 F.3d at 1011-12. Moreover, the Court concludes O'Shaughnessy's personal involvement in the occupation of the MNWR and in providing "security" to those who were occupying the MNWR consistently put O'Shaughnessy in a significantly superior position to the government in assessing what evidence existed to support the government's charge and its theory of the conspiracy case against him.

Accordingly, on this record the Court concludes O'Shaughnessy has not identified any newly-discovered evidence that would provide a fair and just reason for the Court to allow him to withdraw his guilty plea.

III. Ineffective Assistance of Counsel

Finally, O'Shaughnessy contends he should be permitted to withdraw his guilty plea because he received ineffective assistance of counsel.

"Erroneous or inadequate legal advice may . . . constitute a fair and just reason for withdrawal of a plea." *United States v. Yamashiro*, 788 F.3d 1231, 1237 (9th Cir. 2015). "A defendant who

moves to withdraw a guilty plea 'is not required to show that he would not have pled, but only that the proper legal advice of which he was deprived could have at least plausibly motivated a reasonable person in [the defendant's] position not to have pled guilty.'" *Id.* (quoting *United States v. Bonilla*, 637 F.3d 980, 983 (9th Cir. 2011)).

In his Motion O'Shaughnessy cryptically argues:

Mr. O'Shaughnessy states that he received ineffective counsel for certain reasons. In particular, he asserts that he received information related to the case and discovery from his lawyer before entry of plea that, he says, later turned out to be untrue. He states that he detrimentally relied on such information, and such reliance caused him to enter a guilty plea. He also asserts that he felt forced and coerced into entering a plea of guilty and that his lawyer contributed to the coercion.

Because these allegations and others that Mr. O'Shaughnessy has or may have involve him and his former lawyer, and neither current counsel, nor the AUSAs, nor this Court can objectively address such allegations, counsel suggests that the parties and the Court take them up a date and time to be set for a hearing on this motion (assuming the Court sets a hearing). At that date and time, Mr. O'Shaughnessy is free to make his claims of ineffective assistance of counsel on the record, and the Court can thereafter develop the record, if required, through presentation of testimony and other evidence.

Def.'s Mot. (#1607) at 10-11. In addition, O'Shaughnessy filed a Declaration (#1752) on January 20, 2017, together with his Reply Memorandum, in which he further explains his claim of ineffective assistance of counsel and contends his former counsel "misled" and coerced him into pleading guilty.

16 - ORDER DENYING DEFENDANT JOSEPH O'SHAUGHNESSY'S MOTION TO WITHDRAW GUILTY PLEA

O'Shaughnessy's Declaration, however, contradicts his sworn statements at the change-of-plea hearing in many respects, including as to the time that he had to consider his decision to plead guilty and his relationship with his former counsel. "Statements made by a defendant during a guilty plea hearing carry a strong presumption of veracity in subsequent proceedings attacking the plea." *United States v. Ross*, 511 F.3d 1233, 1236 (9th Cir. 2008). *See also Yamashiro*, 788 F.3d at 1237. Notably, O'Shaughnessy only moved to withdraw his guilty plea on December 11, 2016, which was more than four months after he pled guilty and after the jury in the trial that began September 7, 2016, returned Not Guilty Verdicts as to each of O'Shaughnessy's Co-Defendants tried at that time. The Court, therefore, does not find O'Shaughnessy's contentions in his Declaration to be credible and concludes they do not overcome the clear statements he made at his change-of-plea hearing that he had sufficient time to decide whether to plead guilty and that his former counsel's representation was adequate.

On this record, therefore, the Court concludes O'Shaughnessy's assertion of ineffective assistance of former counsel does not provide a fair and just reason to permit him to withdraw his plea of guilty.

IV. Subsequent Not-Guilty Verdicts for Co-Defendants

17 - ORDER DENYING DEFENDANT JOSEPH O'SHAUGHNESSY'S MOTION TO WITHDRAW GUILTY PLEA

Although O'Shaughnessy does not raise in his Motion the issue of the Not Guilty Verdicts returned at the conclusion of the September 7, 2016, trial, the Court, nonetheless, concludes it is appropriate to address whether those Verdicts should have any impact on the Court's analysis as to whether O'Shaughnessy has a fair and just reason to withdraw his guilty plea.

For the reasons explained fully in its Order (#1642) Denying Defendant Ryan Payne's Motion to Withdraw Guilty Plea, this Court may, but is not required, to consider the fact of the Co-Defendants' acquittals at the September 7, 2016, trial when determining whether the Court should permit O'Shaughnessy to withdraw his guilty plea.

For the same reasons the Court stated when it found the intervening Not Guilty Verdicts did not provide a fair and just reason to permit Defendant Payne to withdraw his guilty plea, the Court also concludes the acquittal of seven Co-Defendants does not provide a fair and just reason to permit O'Shaughnessy to withdraw his plea of guilty.

V. Prejudice to the Government

Finally, in addition to concluding there is not any fair and just reason for the Court to permit O'Shaughnessy to withdraw his guilty plea, the Court finds O'Shaughnessy's withdrawal of his plea at this juncture would prejudice the government.

O'Shaughnessy's absence from the trial that began September 7, 2016, unquestionably affected the government's presentation of evidence and potentially affected the manner in which the jurors assessed the evidence. For example, during the September 7, 2016, trial and after vociferous objections by Defendants, the Court excluded from evidence a photograph of O'Shaughnessy and several other individuals dressed in military-style clothing and holding military-style firearms that was taken at "The Narrows," the trailer community at which O'Shaughnessy admits he stayed in order to provide security for those at the MNWR, because there was not a sufficient nexus between those pictured in the photograph and the Defendants then on trial to overcome issues of unfair prejudice under Federal Rule of Evidence 403. If O'Shaughnessy had been a Defendant in the September 7, 2016, trial, this photograph together with evidence of O'Shaughnessy's involvement would have been admissible both as to O'Shaughnessy and likely as to all Defendants.

Thus, permitting O'Shaughnessy to withdraw his guilty plea in this unusual, multi-Defendant conspiracy case after O'Shaughnessy was otherwise set for trial creates an "on-again, off-again" plea status that likely affected the government's presentation and the jury's assessment of the evidence in the first trial. This is precisely the sort of result that has the potential to "degrade the otherwise serious act of pleading

guilty into something akin to a move in a game of chess." See *Hyde*, 520 U.S. at 676-77. In other words, just as with Defendant Payne, to permit O'Shaughnessy to avoid the September 7, 2016, trial date and then to deprive the government of the benefit of the bargain that it struck with O'Shaughnessy creates substantial and potentially irreparable prejudice to the government.

In the end, just as with Defendant Payne, the Court concludes O'Shaughnessy's desire to withdraw his guilty plea on this record is another classic example of "buyer's remorse." Although the separate proceedings in the District of Nevada have not developed as he had hoped, O'Shaughnessy stands today in materially the same position as he did on the day that he pled guilty in this case.

Because O'Shaughnessy has failed to provide a fair and just reason for the Court to permit him to withdraw his guilty plea and because the government would be prejudiced by the withdrawal of O'Shaughnessy's plea, the Court denies O'Shaughnessy's Motion to Withdraw Guilty Plea and Proceed to Trial by Jury.

CONCLUSION

For these reasons, the Court **DENIES** Defendant O'Shaughnessy's Motion (#1607) to Withdraw Guilty Plea and Proceed to Trial by Jury. The Court directs counsel for

O'Shaughnessy and the government to confer and to file a single, joint status report **no later than February 27, 2017**, that sets out their updated proposals regarding O'Shaughnessy's sentencing date.

IT IS SO ORDERED.

DATED this 30th day of January, 2017.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge

21 - ORDER DENYING DEFENDANT JOSEPH O'SHAUGHNESSY'S MOTION TO WITHDRAW GUILTY PLEA

**UNITED STATES DISTRICT COURT
DISTRICT OF OREGON**

UNITED STATES OF AMERICA

Plaintiff,

v.

JOSEPH O'SHAUGHNESSY

Defendant.

JUDGMENT IN A CRIMINAL CASE**Case No.: 3:16-CR-00051-3-BR****USM Number: 79403-065**Anthony C. Schwartz,
Defendant's AttorneyCraig J. Gabriel,
Assistant U.S. Attorney**THE DEFENDANT:**pleaded guilty to count(s) 1 of the Superseding Indictment.

The defendant is adjudicated guilty of the following offense(s):

<u>Title, Section & Nature of Offense</u>	<u>Date Offense Concluded</u>	<u>Count Number</u>
18:372 CONSPIRACY TO IMPEDE OFFICERS OF THE UNITED STATES	Beginning on or about 11/5/2015 and continuing until 2/12/2016	1s


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

The defendant has been found not guilty on count(s) and is discharged as to such count(s).The original Indictment is dismissed as to this Defendant on the motion of the United States.The defendant shall pay a special assessment in the amount of \$100.00 for Count(s) 1 payable immediately to the Clerk of the U.S. District Court. (See also the Criminal Monetary Penalties Sheet.)

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States Attorney of any material change in the defendant's economic circumstances.

March 15, 2018

Date of Imposition of Sentence



Signature of Judicial Officer

Anna J. Brown, U.S. Senior District Judge

Name and Title of Judicial Officer

March 16, 2018

Date

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Judgment in a Criminal Case - DISTRICT OF OREGON CUSTOMIZED (Rev. 9/2017)
Sheet 2 - Imprisonment

DEFENDANT: JOSEPH O'SHAUGHNESSY
CASE NUMBER: 3:16-CR-00051-3-BR

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IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a term of **TIME SERVED**.

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

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

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

at _____ on _____.

as notified by the United States Marshal.

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

before _____ on _____.

as notified by the United States Marshal.

as notified by the Probation or Pretrial Services Office.

The Bureau of Prisons will determine the amount of prior custody that may be credited towards the service of sentence as authorized by Title 18 USC §3585(b) and the policies of the Bureau of Prisons.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By: _____
DEPUTY UNITED STATES MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years. The Court directs that Supervision be transferred to the District of Arizona. Defendant may request early termination of probation after 1 year.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
 - The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. You must participate in an approved program for domestic violence. *(check if applicable)*

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

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____

Date _____

SPECIAL CONDITIONS OF SUPERVISION

1. You must submit your person, property, house, residence, vehicle, papers, or office to a search conducted by a United States probation officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. The probation officer may conduct a search under this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.
2. You must not knowingly purchase, possess, distribute, administer, or otherwise use any psychoactive substances (e.g., synthetic marijuana, bath salts, etc.) that impair a person's physical or mental functioning, whether or not intended for human consumption, except with the prior approval of the probation officer.
3. You must not go to, or remain at any place where you know controlled substances are illegally sold, used, distributed, or administered without first obtaining the permission of the probation officer. Except as authorized by court order, you must not possess, use or sell marijuana or any marijuana derivative (including THC) in any form (including edibles) or for any purpose (including medical purposes). Without the prior permission of the probation officer, you must not enter any location where marijuana or marijuana derivatives are dispensed, sold, packaged, or manufactured.
4. If the judgment imposes a financial penalty, including any fine or restitution, you must pay the financial penalty in accordance with the Schedule of Payments sheet of this judgment. You must also notify the court of any changes in economic circumstances that might affect your ability to pay this financial penalty.
5. You must provide the probation officer with access to any requested financial information and authorize the release of any financial information. The probation office may share financial information with the U.S. Attorney's Office.
6. You must not incur new credit charges, or open additional lines of credit without the approval of the probation officer.
7. You must not make application for any loan, or enter into any residential or business lease agreement, without the prior approval of the probation officer.
8. You must not communicate, or otherwise interact, with any co-defendant, either directly or through someone else, without first obtaining the permission of the probation officer.
9. You must not occupy, reside on, or camp in any federal land without the prior approval of the probation officer.
10. Except for the purpose of traveling on public roads, you must not enter onto any federal lands managed by the U.S. Bureau of Land Management, the U.S. Fish and Wildlife Service, the National Park Service, or the U.S. Forest Service without the prior approval of the probation officer.

AO 245B

Judgment in a Criminal Case - DISTRICT OF OREGON CUSTOMIZED (Rev. 9/2017)
 Sheet 5 - Criminal Monetary Penalties

DEFENDANT: JOSEPH O'SHAUGHNESSY
 CASE NUMBER: 3:16-CR-00051-3-BR

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CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the Schedule of Payments set forth in this judgment.

	<u>Assessment</u> <u>(as noted on Sheet 1)</u>	<u>Fine</u>	<u>Restitution</u>	<u>TOTAL</u>
<u>TOTALS</u>	\$100.00		\$7,000.00	\$7,100.00

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* will be entered after such determination.

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

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

<u>Name of Payee</u>	<u>Amount of Restitution</u> <u>Ordered</u>
Friends of the Malheur Refuge Attn: Jerry Moore, Treasurer P.O. Box 513 Bend, OR 97709	\$7,000.00

If applicable, restitution amount order pursuant to plea agreement: \$_____.

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

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

The interest is waived for the restitution.

The interest requirement for the fine and/or restitution is modified as follows:

Any payment shall be divided proportionately among the payees named unless otherwise specified.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment¹ of the total criminal monetary penalties shall be as follows:

- A. Lump sum payment of \$7,100.00 due immediately, balance due
 - not later than _____, or
 - in accordance with C, D, or E below; or
- B. Payment to begin immediately (may be combined with C, D, or E below); or
- C. If there is any unpaid balance at the time of defendant's release from custody, it shall be paid in monthly installments of not less than \$ _____, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately upon release from imprisonment.
- D. Any balance at the imposition of this sentence shall be paid in monthly installments of not less than \$, or not less than 10% of the defendant's monthly gross earnings, whichever is greater, until paid in full to commence immediately.
- E. Special instructions regarding the payment of criminal monetary penalties:

Unless the Court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties, including restitution, shall be due during the period of imprisonment as follows: (1) 50% of wages earned if the defendant is participating in a prison industries program; (2) \$25 per quarter if the defendant is not working in a prison industries program.

It is ordered that resources received from any source, including inheritance, settlement, or any other judgment, shall be applied to any restitution or fine still owed, pursuant to 18 USC § 3664(n).

All criminal monetary penalties, including restitution, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the Clerk of Court at the address below, unless otherwise directed by the Court, the Probation Officer, or the United States Attorney.

**Clerk of Court
 U.S. District Court - Oregon
 1000 S.W. 3rd Ave., Ste. 740
 Portland, OR 97204**

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Case Number

Defendant and Co-Defendant

Names

(including Defendant number)

Total Amount

Joint and Several Amount

Corresponding Payee, if appropriate

The defendant shall pay the cost of prosecution.

The defendant shall pay the following court costs:

The defendant shall forfeit the defendant's interest in the following property to the United States:

¹ Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.