

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

vs.

VON RICO WEBBER,

Defendant.

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No. 08-20261

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**RESPONSE IN OPPOSITION TO THE DEFENDANT’S
MOTION TO WITHDRAW GUILTY PLEA**

COMES NOW the United States of America, by and through the United States Attorney and Arun G. Rao, Assistant United States Attorney for the Western District of Tennessee, and files this response in opposition to the Defendant’s Motion to Withdraw Guilty Plea, which was filed and received on March 15, 2010. Since there is no merit to the Defendant’s vague and unsupported claim that his guilty plea “was not an informed, voluntary plea” (Defendant’s Motion to Withdraw Guilty Plea, at p. 1), the Government respectfully requests that the Defendant’s motion be denied and that the case proceed to sentencing.

I. Introduction

The Defendant’s motion begins with the startling claim that the Defendant’s “prior counsel, Autumn Chastain, was shocked to read that [the Presentence Report (“PSR”)] suggested that Mr. Webber had a base offense level 34 because the ‘underlying offense’ was cocaine trafficking.”

(Defendant's Motion to Withdraw Guilty Plea, at p. 1) (emphasis added). As will be discussed in greater detail below, the calculations, reasoning, and conclusions of the PSR could not have come as a shock to defense counsel Chastain. To the extent that the Defendant is implying in his motion that defense counsel Chastain's alleged shock was the result of misrepresentations by the Government, the Government unequivocally denies such allegations, which are entirely without merit. The Government has made no misrepresentations in this case and has fulfilled all of its obligations under the law.

II. Factual Background

A. The Indictment, Discovery, [REDACTED]

On August 12, 2008, a federal grand jury in the Western District of Tennessee returned a one-count Indictment as to the Defendant and co-defendant Ruben Webber, charging the two men with having committed the offense of Money Laundering on or about August 23, 2006, in violation of 18 U.S.C. §§ 1956(a) and 2. (R.2, Redacted Indictment). In the Indictment, the underlying "specified unlawful activities" were described as "distributing controlled substances." (Id.)

On December 18, 2008, the Defendant's initial defense counsel, Jake Erwin, was provided with a copy of a disk entitled "Discovery re: Von Rico Webber, Disc 1 of 1." Among the items on this disk were copies of affidavits for search warrants sworn to by DEA Special Agent Rod Waller on October 8, 2008. As shown below, the affidavits contained detailed descriptions of the Defendant's cocaine and marijuana trafficking activities on August 23, 2006 (and were based upon a review of recorded statements made by the Defendant, Ruben Webber, and Jesus Vara, copies of which also were provided to the Defendant in discovery):

**August 2006 financial transaction among
Jesus Vara, Von Rico Webber and Ruben Webber, Sr.**

8. On August 23, 2006, Jesus Vara and his son Armando Castillo were arrested by the Memphis DEA Resident Office, based on information obtained via a court authorized wire interception in the Western District of Tennessee. The Memphis R.O. learned that Vara and Castillo were the source of large amounts of cocaine and marijuana being delivered to Brian Williams and other individuals in the Memphis area. Vara and Castillo would then return to Texas with the cash derived from the sale of the cocaine and marijuana. Vara and Castillo agreed to cooperate with law enforcement officers after their arrest. They advised that individuals from Memphis would be contacting them to deliver large amounts of cash to pay for past cocaine and marijuana purchases and to ensure the delivery of more cocaine and marijuana in the upcoming days.

9. On August 23, 2006, members of the Memphis R.O. met with Vara in preparation for meeting with the various people who owed money to Vara for narcotics. During the preparations, Vara received a push-to-talk (PTT) call from Von Rico Webber, which was recorded. Vara asked Webber if he was ready because Vara was ready to leave Memphis. Webber said he would be ready in a few minutes and he also had the money for the other "loan." Vara said good and asked how long would it be. Webber said not long because he was waiting on them to get back with him (Webber). Webber asked if Vara had some of the other ones, which I believe to be a reference to drugs. Vara asked Webber to hold on because Vara was receiving another call. Vara later attempted to re-contact Webber but with no luck. Later that day, officers of the DEA obtained a room at the Wyndham Hotel on Third Street in Memphis, to be utilized by Vara as he met with the local narcotics distributors, including Von Rico Webber. The room was equipped with both audio and video recording devices.

10. At about 2:59 p.m. on August 23, 2006, while at the hotel, Vara received a phone call from 157*601*8056, used by Von Rico Webber. This call was recorded. Vara said he thought that Webber had forgotten about Vara. Webber said he hadn't, and he was at a restaurant finishing lunch. Vara told Webber that Vara needed to leave Memphis that day because his people (source of supply) were mad. Webber said he understood.

11. At approximately 5:25 p.m., the officers had Vara place a

recorded call to Von Rico Webber. Vara told Webber that Vara was falling asleep. Webber asked where he was. Vara told Webber the Wyndham Hotel. Webber said he was going to bring some money to Vara because he did not want to delay Vara. Vara asked Webber if he could do that within an hour. Webber said okay. Vara said he would call Webber within thirty (30) minutes because Vara was going to get something to eat. Webber asked when Vara was coming back and Vara said between 1-2 days. Vara said Webber was holding Vara up, and Webber needed to bring at least half of the money Webber owed to Vara. Webber said okay. Vara said he would call Webber when Vara returned from getting something to eat.

12. Vara placed another recorded call to 157*601*8056 at 5:55 p.m. Vara told Webber that he was back in the room. Vara asked Webber not to take too long like Webber did yesterday. Webber said he would be there in a few minutes, and he was not far from Vara. Vara asked Webber to call him when Webber arrived at the hotel. Webber agreed.

13. At approximately 6:51 p.m., Ruben Webber, Sr. and Von Rico Webber knocked on the door of Vara's room and were let in by Vara. The conversation among the parties was recorded on video and audio. Von Rico Webber laughed about Vara sleeping all day. Vara said he had been taking medicine that was making him sleepy, and that he had been picking up money during the day. Von Rico Webber asked Vara if he had a lot of it. Vara said yes and he was almost finished. Von Rico Webber told Vara that Webber had two "on those" and eight on the "trees." Based on my training and experience, I believe "those" refers to kilograms of cocaine, and I know that "trees" is a common expression for marijuana.

14. Ruben Webber, Sr. said their man, who was buying "the five" from the Webbers, had a nephew who was dealing with a person who got arrested with eighteen (18) pounds (meaning marijuana). Ruben Webber, Sr. added that the person's nephew had "three" (meaning money) that was supposed to go to the Webbers. Ruben Webber, Sr. said the nephew should have it by tomorrow. Ruben Webber, Sr. asked if Vara was leaving tonight. Vara said he was going to send someone else and Vara was going to take care of some work here.

15. Von Rico Webber asked if Vara knew anyone named "E." Vara told the Webbers that Vara did not deal with anyone named "E." Ruben Webber, Sr. added that "E" was a tall black guy who drove a white BMW and a white Infiniti truck. Vara said no. Ruben Webber,

Sr. asked if “Flaco” dealt with “E.” Vara said Flaco would have told Vara if he dealt with “E.” Von Rico Webber said they knew everybody in Memphis who was cool and straight, and they also knew everyone who was not cool and straight. Von Rico Webber asked Vara if Vara remembered the last time Webber was pulling out of the garage at the hotel (meaning The Peabody, during their last meeting). Vara said yes. Webber said he saw “E” pulling into the valet parking that day, which led Webber to believe “E” had been to see Vara. Von Rico Webber said he was not saying “E” was “the police” (e.g., cooperating with authorities), but “E” had a charge (meaning he had been arrested), and Webber was telling Vara this so Vara would know how far Vara could go with “E.” Von Rico Webber said he can't say anything bad about “E,” because Von Rico Webber is cool with “E,” but Von Rico Webber also knows how much to trust “E.” I believe in this part of the conversation Webber was warning Vara not to trust “E,” because he may have been working with the authorities.

16. Ruben Webber, Sr. put three bags of money on the bed and said two of the bags were for “the two” and the other was for the weed (marijuana). He referred to “\$8,000.” Von Rico Webber said Flaco asked about “E,” and Ruben Webber, Sr. said that when people are charged with a serious charge, you don't know if they are going to run their mouth when the pressure is put on them. Vara said that was good to know. Ruben Webber, Sr. told Vara that they wanted to let Vara know. Von Rico Webber added that they were covering Vara's back. Ruben Webber, Sr. said people would sell their mommas out. Ruben Webber, Sr. said “these people” wanted to ride in the fancy cars and get money, and Von Rico Webber said when the police come knocking at the door, they are going to want out. Ruben Webber, Sr. said Vara needed to be very careful. Von Rico Webber said they were not scared when they (police) come knocking at their door but the Webbers could not say what someone else would do.

17. Ruben Webber, Sr. said Von Rico Webber worked at a bail bonding company. Von Rico Webber said he did affidavits on people, and he checked their backgrounds to see if they were snitching. Von Rico Webber said he was the person who got Flaco out of jail quickly. Von Rico Webber said he did not care who Vara messed with, but Vara should cover himself.

18. Vara said he hoped the Webbers could get some more money tonight. Ruben Webber, Sr. said “some” (cocaine) was out and some money was coming in. He added that his cousin was coming to get

“one” (kilogram) in the morning, so they would have some more money.

19. Von Rico Webber asked Vara if he got his other business worked out. Vara said almost. Von Rico Webber asked Vara if they were good. Vara said yeah but they (Webbers) needed to get it together. Von Rico Webber said that (referring to the money on the bed) was half of it. Vara said it was the money for two (kilograms). Vara said he just gave them two fresh folds, and that they owed for eight (kilograms). The Webbers both said Vara just gave them four (kilograms) the other day. Vara said they owed for four (kilograms). They said they gave Coby Park the money for one (kilogram). Ruben Webber, Sr. said he gave Park “12,5” (referring to \$12,500). Vara asked where that money was. The Webbers said they had all of it and it was going to be okay. Ruben Webber, Sr. told Vara that the money was always going to be here. Vara said he needed at least half of it to take back. Von Rico Webber said if they did not have anyone to buy “them” (referring to kilograms of cocaine), the Webbers were going to sell them. Von Rico Webber said Vara had just gotten those (kilograms) to them on Saturday. Ruben Webber, Sr. said they were rolling; they were selling four and five (kilograms) at a time. Ruben Webber, Sr. said it was better now than what it had been.

20. Ruben Webber, Sr. asked Vara if he would sell them ten (kilograms) if they sold the three or four by tomorrow. Vara said yeah. Ruben Webber, Sr. said Vara must be afraid to drop them off to them. Vara said his people would laugh at him if Vara tried to do anything crazy. Von Rico Webber said they had four earlier and that (the money) is half of what the Webbers owed Vara. Ruben Webber, Sr. said Vara should give them ten instead of four (kilograms). Vara told them to give Vara the money for three (kilograms) and Vara would see what he could do for them. Ruben Webber, Sr. asked if Vara would give them fifteen (kilograms), and Vara replied that he would give them only ten. Ruben Webber, Sr. asked if Vara would get them (ten kilograms) tomorrow. Vara said yes but he needed to talk to his people first and make sure, because it was their decision. Von Rico Webber asked Vara if Vara knew the Webbers were the best thing Vara had going in Memphis. Vara said yes.

21. Von Rico Webber asked where Flaco was. Vara said he could not make it. Ruben Webber, Sr. asked if Flaco did not want to work anymore. Vara said Flaco did not want to come to Memphis anymore, because he was scared. Ruben Webber, Sr. asked how Flaco was going to make money. Vara said Flaco expected Vara to

do everything for Flaco. Ruben laughed and said Vara must have fired Flaco. Von Rico Webber asked if Flaco had done something to Vara. Vara said no. Ruben Webber, Sr. said he would have something (money) for Vara tomorrow and for Vara to have something (cocaine) for them. Ruben Webber, Sr. told Vara to get some rest because he looked bad. The Webbers left the hotel room at approximately 7:05 p.m.

22. At the conclusion of the meeting between Vara and the Webbers, officers recovered the recordings of the meeting. The money left by the Webbers was also recovered, given an exhibit number, and stored until it was taken to First Tennessee Bank for an official count, which was \$41,515.

(Disk entitled “Discovery Re: Von Rico Webber, Disc 1 of 1, at WEBBER-01681.TIF - WEBBER-01686.TIF) (emphasis added). The affidavits for these warrants thus included a detailed description of the Defendant’s involvement in trafficking kilogram quantities of cocaine. In addition, the disk contained copies of several DEA reports, including a sixteen-page report by DEA Special Agent Waller dated September 14, 2006, which also described the financial transaction that occurred between the Defendant, the co-defendant, and Jesus Vara on August 23, 2006. (Id., at WEBBER-01588.TIF - WEBBER-01603.TIF). The report laid out the agents’ interpretation of events: that the Defendant and the co-defendant were making a payment for kilogram quantities of cocaine, and that the Defendant and the co-defendant previously had been involved in trafficking numerous kilograms of cocaine.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

B. The Change of Plea Hearing

On September 17, 2009, the Defendant appeared before the Court and entered a guilty plea to the sole count of the Indictment. The plea agreement (which was signed by the Defendant, defense counsel Chastain, and AUSA Ritz) did not contain any provisions regarding the nature of the underlying offense. (R.53, Plea Agreement).

At the Change of Plea Hearing, the Defendant described himself as a “good reader” and indicated that he had read the plea agreement himself and understood it. (R.68, Transcript, Change of Plea Hearing, at pp. 5-6). The Defendant also expressed satisfaction with the representation and advice provided by defense counsel Chastain. (Id., at p. 7). The following exchange between the Defendant and the Court then occurred:

Q. Mr. Webber, I have also been handed a plea agreement in this case or a document that is entitled memorandum of plea agreement. Did you read and discuss this document with your counsel before you signed it?

A. Yes, sir.

Q. Does the plea agreement represent the complete agreement that you have with the United States?

A. Yes.

Q. Has anyone made any promise or given you any assurance that is not in the plea agreement to persuade you to accept the plea agreement?

A. No, sir.

(Id., at pp. 7-8). AUSA Ritz then reviewed the terms of the plea agreement on behalf of the Government. Specifically, AUSA Ritz noted:

Neither the government nor any law enforcement officer can or does make any promise or representation as to what sentence will be imposed by the court.

And finally, this writing contains the entire plea agreement between the defendant and the government. No additional promises, representations, or inducements other than those referenced in this agreement have been made to the defendant or to his attorney with regard to the plea, and none will be made or entered into unless in writing and signed by all parties.

(Id., at pp. 9-10). After AUSA Ritz concluded his review of the plea agreement, the Court and the Defendant engaged in the following colloquy:

Q. Mr. Webber, Mr. Ritz has read over the entire plea agreement in this case as presented to the court. Is that the agreement as you understand it?

A. Yes, sir.

Q. Has anyone made any other promise to you in order to get you to plead guilty?

A. No, sir.

Q. Do you understand that the maximum penalty in this case under Count 1 is 20 years in prison and a \$500,000 fine plus three years of supervised release and a hundred dollar special assessment. Do you understand that is the maximum penalty in the case?

A. Yes, sir.

(Id., at pp. 10-11). The Court and the Defendant also discussed the events of August 23, 2006:

Q. . . . Were you exchanging the money for anything?

A. Yes, sir.

Q. Was it drug-related?

A. Yes, sir.

(Id., at p. 20). After talking to the Defendant, the Court then asked the Government to explain what “the proof would have been,” and AUSA Ritz stated:

Your Honor, had this matter gone to trial, the government would have introduced proof to show on August the 23rd of 2006, the defendant, Von Rico Webber, met with Jesus Vara at a hotel in Memphis in the Western District of Tennessee. In the meeting, Mr. Von Rico Webber delivered \$41,515 in United States currency to Mr. Vara. The money constituted proceeds of and profits from a previous shipment of illegal controlled substances by Mr. Vara to Mr. Webber who had redistributed them. The payment was made with the intent to promote the further distribution of controlled substances. The meeting was audio and video recorded by law enforcement, and this occurred, again, in the Western District of Tennessee.

(Id., at pp. 20-21). Asked by the Court whether the Defendant had any objection or correction to the statement of facts, defense counsel Chastain replied, “No, Your Honor. No, Your Honor.” The Court then formally accepted the Defendant’s plea.

C. The Presentence Report

On November 12, 2009, a Presentence Report (“PSR”) was prepared. As explained in the PSR, the Base Offense Level was derived from “the offense level for the underlying offense from which the laundered funds were derived.” (PSR at para. 30). The Base Offense Level was set at Offense Level 34, corresponding to at least fifteen kilograms but less than 50 kilograms of cocaine.

(Id.). The basis for this conclusion was described in the PSR:

Von Rico Webber indicated to Vara that they had now paid Vara for half of what they owed Vara for the cocaine. Vara replied that they

owed him for 8 kilograms of cocaine. Von Rico Webber and Ruben Webber responded that they had paid him for 4 kilograms of cocaine, to which Vara agreed. Ruben Webber added that he had just given Coby Park \$12,500 the other day for another kilogram they had received.

Ruben Webber next asked Vara if he could get them 15 kilograms of cocaine (instead of just 10). Vara replied he could get them 10, probably by tomorrow but Vara would have to first make a phone call. Von Rico Webber next asked Vara if Vara knew that the Webbers were the best thing Vara had going in Memphis, to which Vara agreed.

(PSR at 9, 11). The information contained in the PSR was consistent with both the previously-described search warrant affidavits of DEA Special Agent Waller and the DEA reports that the Government had provided in discovery.

D. Defense Counsel Autumn Chastain's Motion to Withdraw

On December 31, 2009, defense counsel Autumn Chastain filed a motion to withdraw as counsel. In support of her request, defense counsel Chastain made the following assertions:

5. During counsel's representation, counsel met with her client on several occasions advising him of his exposure in this case.
6. Counsel based her calculations and exposure on statements made prior to client's decision to change his plea.
7. After receiving the PSR, counsel has discovered that her representations to client were based on information provided by the Government, which were subsequently learned to be inaccurate.
8. This discrepancy in the information relied upon, now exposes the Defendant to significantly more time.
9. It is this counsel's opinion that based on the foregoing, the Defendant may have a strong basis for an ineffective assistance of counsel petition, and in such, this counsel finds need to withdraw as she is not in a position to continue advising her client.

(R.64, Motion to Withdraw as Counsel, at pp. 1-2) (emphasis added). After receiving the motion, the Government sought to obtain clarification of these statements via electronic mail on January 4, 2010. (R.73, Response of the United States to Defendant's Motion to Withdraw, Attachment 1 (Redacted Response)). Defense counsel Chastain telephoned AUSA Ritz and left a message stating that, based on alleged discussions with AUSA Ritz before the plea, she understood that the Defendant's plea agreement contemplated that he would only be held accountable for a certain type and amount of drugs at sentencing. (Id.) Specifically, she indicated that it was her understanding that the parties had agreed that the Defendant would only be held accountable for a small amount of marijuana. (Id.) On January 4, 2010, the Government filed a response to defense counsel's Motion to Withdraw, in which the Government stated, "To the extent that the defense alleges in its motion that the United States has made misrepresentations to the defense regarding sentencing exposure or anything else in this case, the United States firmly denies such allegations, which are without merit." (Id.) The Government also pointed out that the discovery, the plea agreement, and all conversations between AUSA Ritz and defense counsel Chastain were consistent with the Government's position that the Defendant and the co-defendant trafficked in kilogram quantities of cocaine, along with smaller amounts of marijuana. (Id.)

The Court held a hearing on defense counsel's Motion to Withdraw on January 6, 2010. At the hearing, defense counsel Chastain stated, "I think I potentially could be a witness in the future." (R.78, Transcript, Motion Hearing, 1/6/10, at p. 3). The Court and defense counsel Chastain also engaged in the following exchange:

MS. CHASTAIN: And if you look at my motion, specifically I think paragraph seven is the one that they're concerned with—

THE COURT: That is exactly what we have all been looking at.

MS. CHASTAIN: And that's part of my concern with, I worked very carefully to try to draft that so as to not make accusations, my attempt was to say that I made representations to my client—

THE COURT: I understand.

MS CHASTAIN: — based on information. That information, not saying it was false, but the information I provided to my client was inaccurate information, and because of that, it affected what he has done, and I have to, I feel, step back and withdraw. That was the point of my paragraph seven.

(Id. at pp. 8-9). The Court granted the motion and permitted defense counsel Chastain to withdraw.

However, the Court emphasized that no determination had been made with respect to the allegations contained in defense counsel Chastain's motion to withdraw:

MS. DONELSON: The United States' concern is this, Your Honor, I understand granting the motion, but the basis for granting the motion, it is not— I would assume, it is not because of the allegations or statements contained in Ms. Chastain's motion are considered to be true.

THE COURT: No, it's not.

MS. CHASTAIN: Exactly.

THE COURT: It's not. It's only that Ms. Chastain appears now to be a witness, is that how you understand this?

MS. DONELSON: Yes. But the— I understand that. I wanted to make clear because there's a public record that has been— there's a document that has been filed.

THE COURT: It's not that I'm determining that paragraph seven is true, and I'm not even sure that Ms. Chastain is making that assertion. She is asserting perhaps two things, but one of them would include the fact that— that the relationship with her client is adversely affected and that there may be a lack of confidence by the client—

MS. CHASTAIN: Yes, Your Honor.

THE COURT: — in her representation, and I am going to ask Mr.

Webber, is it your preference that now a new attorney be appointed and that Ms. Chastain be excused?

THE DEFENDANT: Yes, sir.

THE COURT: And so I think that that is the reason that we need to proceed in this way. I'm making no determination at all, and the record does not reflect a determination by the court adverse in any way to the AUSA, it is not.

MS. DONELSON: Because our response—

THE COURT: I need that to be absolutely clear.

(Id. at pp. 10-11).

III. Argument

With respect to a motion to withdraw a guilty plea, the burden is on a defendant to prove that withdrawal should be granted. *United States v. Ward*, 2009 WL 4795898, at *1 (6th Cir. 2009) (citing *United States v. Dixon*, 479 F.3d 431, 436 (6th Cir. 2007)). In this case, the Defendant has not met his burden. Federal Rule of Criminal Procedure 11(d)(2)(B) allows a defendant to withdraw a plea prior to sentencing for “a fair and just reason”— “[t]he purpose of Rule 11(d) is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.” *Id.* (quoting *Dixon*, 479 F.3d at 436 (internal quotation omitted)). Here, the Defendant is attempting to do precisely what is forbidden— tactically withdraw his guilty plea.

The factors considered under Rule 11(d) include:

(1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the

failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

Ward, 2009 WL 4795898, at *2 (quoting *United States v. Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994), *abrogated on other grounds by statute as recognized in United States v. Caseslorete*, 220 F.3d 727, 734 (6th Cir. 2000)); *Dixon*, 479 F.3d at 436. The relevance of each of the listed factors “var[ies] according to the circumstances surrounding the original entrance of the plea as well as the motion to withdraw.” *Id.* (quoting *United States v. Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2008) (internal quotation omitted)). In this case, none of these factors weigh in the Defendant's favor.

In his motion, the Defendant emphasizes the fourth factor– that his guilty plea was not knowing, intelligent, or voluntary. Specifically, the Defendant claims that previous defense counsel Autumn Chastain “had only discussed the possibility that Mr. Webber's advisory guideline imprisonment range would be calculated based upon the fact that the underlying offense for the monetary transaction was marijuana trafficking,” rather than cocaine trafficking, and that “[b]ased upon the discussions Mr. Webber had with his appointed counsel, Ms. Chastain, prior to pleading guilty . . . Mr. Webber did not ‘knowingly, voluntarily, and intelligently’ enter a guilty plea as required.” (Defendant's Motion to Withdraw Guilty Plea, at p. 3).¹ The Defendant's argument is

¹ Curiously, the Defendant never explicitly states how he and defense counsel Chastain reached the conclusion “that the ‘underlying offense’ which would be used to calculate his advisory guidelines was marijuana.” (Defendant's Motion to Withdraw Guilty Plea, at p. 2). The Defendant suggests that the reason for the alleged mistaken belief is unimportant, and that his motion ought to be granted “regardless of the reason.” (*Id.*) Close scrutiny of the record, however, demonstrates that the Defendant and defense counsel Chastain had no reasonable basis to conclude that the underlying offense would be limited to marijuana. Consequently, only one conclusion can be reached: the Defendant's belated claim regarding his alleged mistaken belief is dishonest.

entirely without merit.

First, the discovery materials provided to the Defendant placed him on notice that the Government believed that the events of August 23, 2006 involved both cocaine trafficking and marijuana trafficking. The Defendant received the recording made on August 23, 2006, numerous DEA reports (including the sixteen-page report by DEA Special Agent Waller, dated September 14, 2006, detailing the financial transaction that occurred between the Defendant, the co-defendant, and Jesus Vara on August 23, 2006) and search warrant affidavits (including the affidavits of DEA Special Agent Rod Waller, dated October 8, 2008, also describing the events of August 23, 2006). The Defendant has not alleged that he was unaware of any of these materials. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Next, the plea agreement signed by AUSA Ritz, defense counsel Chastain, and the Defendant did not contain any provisions regarding the nature of the underlying offense. During the Change of Plea Hearing, the Defendant answered in the affirmative to the question of whether the plea agreement represented “the complete agreement . . . with the United States.” (R.68, Transcript, Change of Plea Hearing, at p. 8). When the Defendant was asked whether anyone had “made any promise or given you any assurance that is not in the plea agreement to persuade you to accept the plea agreement,” the Defendant denied having received any other promises or assurances. (Id.) In addition, the record clearly reflects that AUSA Ritz accurately described the terms of the plea agreement to the Defendant, including the fact that “[n]either the government nor any law enforcement officer can or does make any promise or representation as to what sentence will be

imposed by the court” and that “[n]o additional promises, representations or inducements other than those references in this agreement have been made to the defendant or to his attorney with regard to the plea.” (Id., at pp. 9-10). The Defendant also properly was advised of the statutory penalties for the offense. (Id., at p. 11). While the Defendant correctly observes that neither the indictment nor the basis in fact specified the nature of the controlled substances at issue (Defendant’s Motion to Withdraw Guilty Plea, at p. 3), the elements of the charged offense do not require specification of the type or amount of drugs involved. Moreover, at no time during the Change of Plea Hearing did either the Defendant or defense counsel Chastain make any reference to their alleged belief that the Defendant’s “advisory guideline imprisonment range would be calculated based upon the fact that the underlying offense for the monetary transaction was marijuana trafficking,” as the Defendant now asserts. Simply put, the record in this case provides absolutely no support for the Defendant’s claim. *See Brady v. United States*, 397 U.S. 742, 756, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970) (“A defendant is not entitled to withdraw his plea merely because he discovers long after the plea has been accepted that his calculus misapprehended . . . the likely penalties attached to alternative courses of action.”); *United States v. Stephens*, 906 F.2d 251, 253 (6th Cir.1990) (“[T]he mere fact that an attorney incorrectly estimates the sentence a defendant is likely to receive is not a ‘fair and just’ reason to allow withdrawal of a plea agreement.”).

The position of the Government in this case has always been that the Defendant and the co-defendant trafficked in kilogram quantities of cocaine, along with smaller amounts of marijuana, and that the payment on August 23, 2006, consisted mostly of payment for kilogram quantities of cocaine. The discovery materials, plea agreement, and plea colloquy all are consistent with this position. As a result, there is no reasonable basis to conclude that the Defendant honestly believed

that his “advisory guideline imprisonment range would be calculated based upon the fact that the underlying offense for the monetary transaction was marijuana trafficking.” (Defendant’s Motion to Withdraw Guilty Plea, at p. 3). The Defendant’s unsupported claim is simply not credible.

With respect to the remaining factors, none weigh in the Defendant’s favor. First, as previously noted, the Defendant’s guilty plea was entered on September 17, 2009, and the PSR was received less than one month later, on November 12, 2009. The Defendant’s Motion to Withdraw Guilty Plea was filed on March 15, 2010— almost six months after the guilty plea was entered and five months after the PSR was received. The Sixth Circuit has frequently upheld denials of motions to withdraw in cases involving much shorter delays. *See, e.g., United States v. Durham*, 178 F.3d 796, 799 (6th Cir.1999) (77 day delay); *United States v. Baez*, 87 F.3d 805, 808 (6th Cir.1996) (67 day delay); *United States v. Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988) (55 day delay); *United States v. Spencer*, 836 F.2d 236, 239 (6th Cir.1987) (35 day delay). In the instant case, the considerable amount of time that elapsed between the Defendant’s guilty plea and his motion to withdraw his guilty plea weighs against his motion.

In addition, as previously noted, “The purpose of Rule 11(d) is to allow a hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.” *Ward*, at *1 (quoting *Dixon*, 479 F.3d at 436 (internal quotation omitted)). In this case, the Defendant’s motion to withdraw is purely tactical: having received and reviewed the PSR, he now believes that he made a bad choice in pleading guilty. This is an impermissible basis for the Defendant to withdraw his guilty plea.

The Defendant’s background and prior experience in the criminal justice system also do not

weigh in his favor. There is no indication in the record that the Defendant was unable to understand the implication of the plea proceedings. Although the Defendant concedes that “he has some contacts with the local state criminal justice system,” he notes that “this is his initial contact with the *federal* criminal justice system.” (Defendant’s Motion to Withdraw Guilty Plea, at p. 6) (emphasis in original). The Defendant offers no support for the proposition that the distinction he draws— experience with the state criminal justice system, as opposed to the federal criminal justice system— is relevant to the calculus. In fact, Sixth Circuit case law makes no such distinction. *See Dixon*, 479 F.3d at 437 (finding prior experience factor weighed against defendant who “has a prior state conviction and is familiar with the criminal justice system”); *United States v. Davis*, 331 F. App’x 356, 362 (6th Cir. 2009) (finding that defendant was not “a stranger to the proceedings” given his numerous convictions and that his argument about stricter federal sentences as compared with state sentences was unconvincing).

Finally, with respect to the question of prejudice to the Government should the Defendant be permitted to withdraw his guilty plea, the Government notes that granting the Defendant’s unsupported and baseless motion will result in the needless waste of the Government’s limited time and resources (especially since, at this point, the co-defendant’s case has not been set for trial and may never be set for trial) and also would encourage other defendants to make similar tactical decisions to enter guilty pleas, wait until the PSR is received, and then withdraw their guilty pleas if faced with unfavorable guideline calculations in the PSR. The Court should not encourage this type of behavior.

As the Defendant has not met his burden, the Government respectfully requests that the Court deny the Defendant’s Motion to Withdraw Guilty Plea.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Arun G. Rao, Assistant United States Attorney for the Western District of Tennessee, hereby certify that a copy of the foregoing Response in Opposition of the United States has been delivered to counsel for the defendant, Michael J. Stengel.

This the 2nd day of April, 2010.

s/Arun G. Rao

ARUN G. RAO
Assistant United States Attorney