

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

UNITED STATES OF AMERICA,

3:16-cr-00051-BR-4

Plaintiff,

ORDER DENYING DEFENDANT
RYAN PAYNE'S MOTION TO
WITHDRAW GUILTY PLEA

v.

RYAN PAYNE,

Defendant.

BROWN, Judge.

This matter comes before the Court on Defendant Ryan Payne's Motion (#1421) to Withdraw Guilty Plea and Proceed to Trial by Jury. The government filed a Response (#1544) to Payne's Motion on November 7, 2016. Payne filed a Reply (#1569) on November 18, 2017, in which Payne made a more specific showing regarding his allegations of newly-discovered evidence. Consequently, by Order (#1571) issued November 18, 2016, the Court directed the government to file a supplemental response addressing the new matter in Payne's Reply. The government filed its Supplemental Response (#1614) on December 13, 2016. Finally, on December 14, 2016, Payne filed a Notice (#1618) re: Motion to Withdraw Guilty Plea in which he updated the Court regarding the status of ongoing proceedings against him in the District of Nevada.

1 - ORDER DENYING DEFENDANT RYAN PAYNE'S MOTION TO WITHDRAW
GUILTY PLEA

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 because the legal arguments are sufficiently developed. For the reasons that follow, the Court **DENIES** Payne's Motion (#1421) to Withdraw Guilty Plea and Proceed to Trial by Jury.

BACKGROUND

On July 19, 2016, pursuant to a Plea Agreement (#905) and Plea Petition (#906), Defendant Ryan Payne 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) and Possession of Firearms and Dangerous Weapons in Federal Facilities (Count 2).¹ At the time Payne was set to proceed to trial on September 7, 2016, with several Co-Defendants.

In the Plea Agreement Payne agreed to plead guilty to Count 1 of the Superseding Indictment, and, in exchange, the government would move to dismiss Count 2, the remaining count against Payne.

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

¹ The Superseding Indictment also charged Payne with Use and Carry of a Firearm in Relation to a Crime of Violence (Count 3). By Order (#671) issued June 10, 2016, however, the Court dismissed Count 3 as to all Defendants named therein.

This plea agreement is between the United States Attorney's Office for the District of Oregon (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 (#905) at ¶ 1.

On July 19, 2016, the Court conducted a change-of-plea hearing pursuant to Federal Rule of Criminal Procedure 11. At the conclusion of that hearing Payne 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]:
The first term is that this agreement is between Mr. Payne and the U.S. Attorney's Office for the District of Oregon only. I'll allow the defense to explain a separate agreement they have with the District of Nevada. But this letter does not cover the agreement with the District of Nevada.

Second, Mr. Payne agrees to plead guilty to Count 1 of the Superseding Indictment, which charges conspiracy to impede federal officers by force, threat, or intimidation.

The maximum penalties for Count 1, are six years in prison, a fine of up to 250,000 dollars, three years of supervised release, and a 100-dollar fee assessment.

The Government agrees not to bring any further charges against Mr. Payne related to this investigation known at this time, and there are no other crimes we're aware of at this time.

Tr. of Proceedings (#965) at 2-3. After summarizing additional terms of the parties' Plea Agreement, the government's counsel also stated on the record two more terms of that Agreement:

First, the parties will jointly request that after this sentencing hearing -- excuse me, after this plea hearing, here this morning, that Mr. Payne be released from the Oregon case.

There is a detainer in the District of Nevada. He would then travel to Nevada. And it's anticipated he would plead guilty in Nevada, be sentenced in Nevada. And then after his Nevada proceedings are complete, he would then come back here to the District of Oregon, probably through a writ, for the final sentencing hearing before this Court.

Second, your Honor -- and this goes to that criminal history piece that I referenced. Because Mr. Payne, under the parties' recommendation, would be sentenced in the District of Nevada first, the Government is agreeing that for purposes of criminal history, nothing about that Nevada case or any points that he would accumulate from the Nevada case would affect the Government's sentencing recommendation.

Id. at 6. Finally, the government represented:

And then, finally, your Honor, the parties will recommend and specifically, I guess, it's the Government's obligation under this agreement to recommend that the Oregon sentence will run concurrent to any sentence imposed in the Nevada case.

And just for the record, that Nevada case is *United States v. Cliven Bundy*, and it's Nevada Case No.

16-CR-46, of which Mr. Payne is a co-defendant.

Id. at 7-8.

Counsel for Payne began his presentation to the Court as follows:

Good morning, your Honor. As Mr. Gabriel explained, the separate agreement in Nevada, at this point, is only a contemplated agreement. It's been a plea offer extended in -- that's -- the primary reason why we're requesting the Court to set over sentencing to a later date is so that Mr. Payne has an opportunity to be in Nevada with his counsel there and spend some time to finalize the agreement in Nevada.

Id. at 10. Defense counsel also explained the "foundation of the agreement resolving [Payne's] case in both districts" was the intended benefit of obtaining sentences that run concurrent to each other. *Id.* at 11.

The Court then engaged in an extensive colloquy with Payne. The Court confirmed with Payne 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 and, specifically, to consider the risks and benefits of entering into the Plea Agreement as it related to both this case and the case against him in the District of Nevada. *Id.* at 16-19. While emphasizing all of the constitutional rights that Payne would be giving up by pleading guilty, the Court specifically reviewed with Payne his then-existing presumption of innocence and his right to trial by jury.

Payne stated unequivocally that he understood. *Id.* at 22-25.

The Court then advised Payne as follows:

With respect to the terms of the contract, I want to emphasize a few that Mr. Gabriel covered and that are written.

Today's decision is permanent. It's -- it carries the same weight as if a jury found you guilty. You can't, tomorrow or the next day, or whatever, just say, "Well, I want out." Because it's -- it's not allowed. You just make your decision, up or down. And if we go forward, then that's the decision and you get the benefits of the agreement.

If you -- if you changed your mind [right now], then this goes away and you're presumed innocent and you go to trial on September 7th.

I just need you to understand this is a permanent time [sic], one way or the other, under the plea.

Id. at 26-27. Payne again stated he understood. *Id.* at 27. The Court also verified with Payne that he understood the consequences he faced upon conviction of Count 1, a felony, including becoming a "prohibited person" under federal law who would be disqualified from lawfully possessing a firearm in the future. Finally, the Court confirmed with Payne that his decisions to enter into the Plea Agreement and to plead guilty pursuant to its terms were knowing and voluntary and that he was not coerced in any way into deciding to do so.

The Court then had the following exchange with Payne:

THE COURT: Paragraph 24 of the Petition says in part the following:

I represent that I did the following acts and the

following facts are true.

On or about November 5, 2015, and continuing through February 12, 2016, in the District of Oregon, I knowingly and willfully conspired and agreed with others to prevent by force, intimidation, and threats, officers and employees of the U.S. Fish & Wildlife Service and the Bureau of Land Management, agencies within the United States Department of the Interior, from discharging the duties of their office at the Malheur National Wildlife Refuge and other locations in Harney County, Oregon.

Do you understand that statement, sir?

THE DEFENDANT: I understand the statement, your Honor. Yes.

THE COURT: Is it true?

THE DEFENDANT: I would only bring up one contention, which I overlooked previously, and that would be the -- the notion that all three -- force, intimidation, and threats -- were committed, given the -- the word "and" there. And would say --

THE COURT: Would you be satisfied if "and" was replaced by "or"?

THE DEFENDANT: I would.

THE COURT: And does that cause any concern to the Government?

MR. GABRIEL: No objection, your Honor.

THE COURT: Counsel, may I change "and" to "or," as your client indicates?

[DEFENSE COUNSEL] MR. FEDERICO: Yes, your Honor, please do so.

THE COURT: I'll do that, and I'll initial it. All right. And with that change, is that a true statement?

THE DEFENDANT: It is, your Honor.

THE COURT: Go ahead and take a seat, please,
Mr. Payne.

Id. at 37-39.

The Court then directed the government to summarize the elements of Count 1 to which Payne was pleading guilty and the evidence on which the government relied to support that charge. The Court alerted Payne to listen carefully to the government's presentation:

[THE COURT:] The next step is for Mr. Gabriel to summarize the conspiracy charge in a legal way. He'll lay out each of the elements of the charge. This exercise is necessary because I need to be sure you understand that to be found guilty in a jury trial, all 12 jurors would have to find that each element he outlines is true beyond a reasonable doubt or you couldn't be found guilty.

Put another way, if even one juror didn't believe the proof was enough on one element, you couldn't be found guilty in that trial. Now, that doesn't mean you're not guilty. That just means that maybe there's another trial, or whatever. But that's the point of this, his recitation.

And then he's going to describe briefly what he says the Government's evidence is against you in the conspiracy.

Please listen carefully. If he says anything in his presentation that is of concern to you, let your lawyers know, let me know. Don't plead guilty if there's a recitation you have a concern with.

But assuming you understand and are ready to go forward after that, I'll ask you how do you plead to Count 1. And then I'll ask you, "What did you do that you think makes you guilty." All right?

THE DEFENDANT: (Nods head.)

THE COURT: All right. Counsel.

MR. GABRIEL: Thank you, your Honor.

The elements of Count 1 are as follows:

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

The factual basis for the plea and what the Government would prove in trial is as follows:

In January 2016, Mr. Payne occupied the Malheur National Wildlife Refuge, which is here in the District of Oregon.

Mr. Payne and his co-defendants agreed to occupy the refuge and impede federal employees from the Department of Interior from discharging the duties of their office.

Members of the conspiracy used threats and intimidation to prevent U.S. Department of Interior employees from going to work and doing their jobs. Photos and videos show that members of the conspiracy, including Mr. Payne, openly carried firearms while at the refuge. And prior to the occupation, Mr. Payne and others, including Ammon Bundy, met with Harney County Sheriff, David Ward, in November and December 2015 about the Hammond case and about a document known as the Redress of Grievances.

Once the refuge was occupied, Mr. Payne -- who, to his credit, is a veteran of the United States Army -- took on a leadership role by coordinating armed guards and by conducting tactical training with other occupiers.

And that is the basis of the leadership enhancement in the guideline calculation, your Honor.

On January 26th, Mr. Payne was traveling in a truck driven by LaVoy Finicum on a highway north of the refuge in Harney County. A traffic stop was conducted by law enforcement.

Mr. Payne complied with law enforcement orders and got

out of the truck. He was armed with a handgun, and he was taken into custody without incident.

After Mr. Payne got out of the truck -- and it's important to note that he did comply with law enforcement at that time. But after Mr. Payne got out of the truck, Mr. Finicum later drove off, away from that initial traffic stop, and he ran toward -- or drove toward a roadblock, further down the highway.

THE COURT: And so your point is that Mr. Payne was not present when Mr. Finicum was shot?

MR. GABRIEL: That's correct. And the further point is that Mr. Payne complied with law enforcement orders, as others did not.

Thank you.

THE COURT: Thank you.

Counsel, is there anything to add before I speak with Mr. Payne again?

(Pause, Mr. Federico, Ms. Hay, and the defendant conferring.)

MR. FEDERICO: Your Honor, one thing to add.

The distinction regarding the carrying of firearms. Although this has been part of the discussions we've had extensively with Mr. Payne, he's a person who has a permit for open carry. He carried a firearm regularly, all the time in his daily life. And so the distinction between that and doing so in the context, under this offense, he understands that distinction regarding when and where you do it and for what purpose. But I will say that he is a person that holds his right to bear arms, the personal right he has under the Constitution, one that he's held sacred. And he knows, as you've discussed with him, that today he becomes a prohibited person if you accept his guilty plea. But the times when he carried a firearm, it wasn't as if [he] showed up in Oregon all of a sudden carrying a firearm for the first time. That was something that was part of his regular routine and habit.

THE COURT: Okay. I understand that.

Mr. Gabriel, anything else to add to that?

MR. GABRIEL: No, your Honor.

THE COURT: All right. Mr. Payne, would you stand, please.

Did you understand Mr. Gabriel's presentation?

THE DEFENDANT: I did.

THE COURT: All right. So the charge at issue is Count 1, the conspiracy to impede officers of the United States charge, which is in the Superseding Indictment. It actually covers two pages -- full pages, in its full allegations. And you're entitled to have me read it all back to you if you want before I ask you how you plead, or you can waive that reading. Let me know what you would like to do.

THE DEFENDANT: I don't think it needs to all be read again, your Honor.

THE COURT: All right. Do you understand the charge against you?

THE DEFENDANT: I do understand the charge.

THE COURT: How do you plead to the Count 1 conspiracy charge?

THE DEFENDANT: I plead guilty, your Honor.

THE COURT: What did you do, Mr. Payne, that you think makes you guilty of the charge?

THE DEFENDANT: Ah, your Honor, the very first adult decision that I ever made was when I was 17, to join the military of the United States. And in so doing, I took an oath to uphold and defend the Constitution.

I traveled to Harney County, here in Oregon, under the pretense that this was my intent. That I was coming to uphold and defend the Constitution.

In pursuing that effort, I understand I -- I have come to understand that folks who were -- who work for the Government, that that Constitution ordained, perceived my actions as threatening or intimidating. And, thereby, I -- I understand myself to have been guilty of the charge that I'm charged with.

THE COURT: So referring back to the elements then, as Mr. Gabriel recounted them, a conspiracy requires an agreement of one or two -- of at least two people knowingly and willfully to engage in certain conduct with an intention at the other end. So I want to be sure you understand that.

Do you agree that you agreed with at least one other person to -- I'll use the word "occupy" the refuge in the time period indicated?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And in the course of that agreement as it was performed, to occupy the refuge, did you intentionally engage in conduct that actually impeded federal officers in the performance of their duties?

THE DEFENDANT: As it has been presented to me, it is my understanding that I did, your Honor.

THE COURT: Now, the conspiracy crime itself doesn't require proof that they were impeded. The crime is committed with the agreement. An agreement between two people intentionally to engage in conduct that would impede by, in this case, intimidation or threat. I noted Mr. Gabriel left out the word "force" here.

So do you understand that the conspiracy crime itself is the agreement intentionally to engage in conduct that has a result, but the result doesn't have to happen?

THE DEFENDANT: Yes, ma'am.

THE COURT: Did you do that?

THE DEFENDANT: I did, your Honor.

Id. at 39-45.

The Court thereafter found Payne's guilty plea was knowing, intelligent, and voluntary and found Payne guilty of Count 1 pursuant to his guilty plea. *Id.* at 45.

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

Payne asserts he has fair and just reasons to withdraw his guilty plea due to (1) intervening circumstances in the District of Nevada, (2) newly-discovered evidence, and (3) his equivocation about the factual basis for the plea at the plea hearing.

I. Intervening Circumstances in the District of Nevada

Payne contends intervening circumstances in the District of Nevada provide a fair and just reason sufficient for the Court to

permit him to withdraw his guilty plea. Payne states on the day he entered his plea in this case, he had only seen a draft version of a proposed plea agreement to resolve his case in the District of Nevada and that plea negotiations in Nevada broke down after he arrived in the District of Nevada. In particular, Payne stated the Nevada plea negotiations broke down over differences between the parties regarding the statement of facts in the plea agreement in that District. Payne, therefore, concludes "[o]n the date he entered a guilty plea in Oregon, had Mr. Payne known all the terms of the deal in Nevada, he would not have signed the deal in Oregon."

The government, on the other hand, contends the Plea Agreement in the District of Oregon was independent of the prospective plea agreement in the District of Nevada and the agreement in the District of Nevada was only "contemplated" at the time that Payne entered his plea in Oregon. In particular, the government argues the terms of the Plea Agreement in the District of Oregon do not depend on a plea agreement in the District of Nevada because the Oregon Plea Agreement provides for a concurrent sentence with any sentence in the District of Nevada regardless whether that sentence is derived from a guilty plea or a finding of guilt at trial.

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 Payne entered his guilty plea in this case, whether a plea agreement in the District of Nevada would be finalized was a "known uncertainty." As noted, Payne's counsel stated at the plea hearing:

As Mr. Gabriel explained, *the separate agreement in Nevada, at this point, is only a contemplated agreement.* It's been a plea offer extended in -- that's -- the primary reason why we're requesting the Court to set over sentencing to a later date is so that Mr. Payne has an opportunity to be in Nevada with his counsel there and spend some time to finalize the agreement in Nevada.

Tr. of Proceedings (#965) at 10 (emphasis added). Moreover, Payne did not condition his guilty plea in Oregon on the finalization of an acceptable plea agreement in the District of Nevada. Accordingly, the known uncertainty surrounding Payne's Nevada plea agreement at the time that Payne entered his guilty plea in this case is not a "fair and just reason" to permit Payne to withdraw his plea. *See Mayweather*, 634 F.3d at 504.

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:

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 (#905) at ¶ 1.

Thus, although Payne apparently desired to enter into agreements that would resolve both this case and the case against him in the District of Nevada, the Plea Agreement and guilty plea in this case were, as noted, explicitly independent of any contemplated or anticipated agreement in the District of Nevada.

On this record, therefore, the Court concludes the breakdown of the plea negotiations in the District of Nevada does not provide a fair and just reason for the Court to permit Payne to withdraw his guilty plea in this case.

II. Newly-Discovered Evidence

Payne next contends newly-discovered evidence provides a fair and just reason for the Court to permit him to withdraw his guilty plea. In particular, Payne contends additional information regarding the background information and compensation of the government's confidential human sources (CHSs) should have been provided by the government before Payne pled guilty, and, in any event, subsequent revelations regarding the background and compensation of the CHSs are sufficient to provide a fair and

just reason for the Court to permit Payne to withdraw his guilty plea.

Payne, nevertheless, concedes that on July 1, 2016, the government provided him with the redacted reports of all 15 CHSs that the government used during the occupation of the Malheur National Wildlife Refuge (MNWR).² The government, therefore, produced all of the CHS information that it was required to disclose to Defendants more than two weeks before Payne pled guilty.

The Court notes 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 Ryan Payne) 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 Payne now relies to support his 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

² The Court also notes by Order (#1453) issued October 18, 2016, 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.

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 Payne's personal involvement in all of the main events preceding and during the occupation of the MNWR consistently put him 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 Payne.

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

III. Adequacy of the Plea Colloquy

Finally, Payne contends his Rule 11 plea colloquy was deficient, and, therefore, he has a fair and just reason to withdraw his guilty plea. In particular, Payne contends "[i]t is clear from his responses at the change of plea hearing that Mr. Payne had serious misgivings and reservations regarding the factual basis for his plea" and that his responses were "equivocal, at best, regarding the factual basis and whether he believed he was really guilty of the crime." Def.'s Mot. (#1421) at 9.

Payne's contention is without merit. Although it was clear

to the Court from Payne's demeanor throughout the plea hearing that he had conflicting feelings about the decision whether to plead guilty, that is not surprising in light of Payne's close relationships with Ammon Bundy and some of the other occupiers, his leadership role in the occupation of the MNWR, and the fact that his guilty plea would have been perceived by some as a betrayal of the causes that he sought to advance with Bundy and the other occupiers. Nevertheless, after assuring the Court that he had sufficient time to consider, with the advice of counsel, his decision to plead guilty, Payne ultimately chose to do just that. Contrary to Payne's argument concerning the factual basis for his plea, Payne unequivocally represented twice that he entered into an agreement with another to impede officers of the United States with the requisite intent.

First, Payne agreed in the Plea Petition that

[o]n or about November 5, 2015, and continuing through February 12, 2016, in the District of Oregon, I knowingly and willfully conspired and agreed with others to prevent by force, intimidation, [or] threats, officers and employees of the United States Fish and Wildlife Service and the Bureau of Land Management, agencies within the United States Department of the Interior, from discharging the duties of their office at the Malheur National Wildlife Refuge and other locations in Harney County, Oregon.

Plea Petition (#906) ¶ 24. See also Tr. of Proceedings (#965) at 37-39. Indeed, Payne so thoroughly considered this portion of the Plea Petition that during the plea hearing he personally

requested (and the government agreed) to change "force, intimidation, and threats" in the text of his Plea Petition to "force, intimidation, or threats." See Tr. of Proceedings (#965) at 37-39.

Second, as noted, during the plea hearing the Court engaged in the following exchange with Payne:

THE COURT: So referring back to the elements then, as Mr. Gabriel recounted them, a conspiracy requires an agreement of one or two -- of at least two people knowingly and willfully to engage in certain conduct with an intention at the other end. So I want to be sure you understand that.

Do you agree that you agreed with at least one other person to -- I'll use the word "occupy" the refuge in the time period indicated?

THE DEFENDANT: Yes, ma'am.

THE COURT: All right. And in the course of that agreement as it was performed, to occupy the refuge, *did you intentionally engage in conduct that actually impeded federal officers in the performance of their duties?*

THE DEFENDANT: *As it has been presented to me, it is my understanding that I did, your Honor.*

THE COURT: Now, the conspiracy crime itself doesn't require proof that they were impeded. The crime is committed with the agreement. An agreement between two people intentionally to engage in conduct that would impede by, in this case, intimidation or threat. I noted Mr. Gabriel left out the word "force" here.

So do you understand that the conspiracy crime itself is the agreement intentionally to engage in conduct that has a result, but the result doesn't have to happen?

THE DEFENDANT: *Yes, ma'am.*

THE COURT: *Did you do that?*

THE DEFENDANT: *I did, your Honor.*

Tr. of Proceedings (#965) at 44-45 (emphasis added).

Finally, other than insisting on the change of "or" to replace "and," and despite being alerted by the Court to "listen carefully to the government's presentation," Payne did not in any way contest or challenge the factual account that the government's counsel recited on the record. The Court subsequently relied on that unchallenged factual basis when it accepted Payne's guilty plea.

Accordingly, the Court finds meritless Payne's arguments that his factual statements in support of his guilty plea were equivocal. To the contrary, Payne's factual statements supporting his guilty plea were both thorough and unequivocal.

On this record, therefore, the Court concludes Payne's Rule 11 colloquy was sufficient and does not provide a fair and just reason for the Court to permit Payne to withdraw his guilty plea.

IV. Subsequent Not-Guilty Verdicts for Co-Defendants

Although Payne 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 consider whether those verdicts should have any

impact on the Court's analysis as to whether Payne has any fair and just reason to withdraw his guilty plea.

The Court notes the Ninth Circuit has held the acquittal of co-defendants of the same conspiracy charge is a reason that a district court *may* consider in determining whether to permit a defendant to withdraw a guilty plea to that charge. *United States v. Schwartz*, 785 F.2d 673, 678 (9th Cir. 1986).

Other courts, however, have concluded the acquittal of co-defendants or co-conspirators does not necessarily create a fair and just reason for a defendant to withdraw a guilty plea. For example, in *United States v. O'Hara* the Second Circuit affirmed the trial court's denial of a defendant's motion to withdraw his guilty plea even though the defendant's co-conspirators were ultimately acquitted. 960 F.2d 11, 14-15 (2d Cir. 1992). The Second Circuit concluded that requiring a court to permit a defendant to withdraw his guilty plea in such circumstances "would allow defendants such as O'Hara to have it both ways" because "the government gave up its right to include him in the joint trial" and the defendant "presumably saw immediate benefits in pleading that outweighed the costs and gamble of going to trial." *Id.* at 14. The Second Circuit also stated such a rule would "deprive the government of its part of the bargain by requiring it to institute a new trial solely for [the defendant]"

or let him escape the charges." *Id.* See also *United States v. Giorgio*, 802 F.3d 845, 848-50 (6th Cir. 2015)(affirming denial of motion to withdraw guilty plea despite acquittal of co-conspirators).

This Court finds persuasive and directly applicable to this matter the reasoning of *O'Hara* and concludes 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 Payne to withdraw his guilty plea.

In this case the Court concludes the acquittal of seven of Payne's 25 Co-Defendants does not amount to a fair and just reason to permit Payne to withdraw his guilty plea (especially in light of the fact that 11 Defendants, including Payne, chose to plead guilty pursuant to individualized Plea Agreements before that trial took place). This is not a case in which there is a new question as to Payne's factual innocence after the trial of his Co-Defendants. Indeed, it remains undisputed that Payne was a leader of the occupation of the MNWR. Payne knew at the time he pled guilty that the primary question at trial was how the jury would assess the government's evidence regarding the state-of-mind element as to each of the Defendants; *i.e.*, whether the jury would find the government proved beyond a reasonable doubt that a particular Defendant joined the conspiracy with the

specific intention to help accomplish the object of the conspiracy to impede officers of the United States by force, intimidation, or threat. See Final Jury Instructions (#1509) at 15-18. The chance that the jury might find Payne did not have the requisite intent, therefore, was a possibility known to Payne at the time that he pled guilty.

As noted, however, Payne chose to give up the chance that a jury might make such a finding as to him when he elected to plead guilty:

THE COURT: When the Government took the case to the grand jury, and -- and obtained the original charges and then the Superseding Indictment, they had and still have the burden to prove you guilty.

The Indictments themselves are simply notices of charges. They don't prove anything. Once that Indictment was presented to you, you became protected with the constitutional presumption of innocence. That protection is still in full force and effect right now. There are only two ways to lose it. One is the road you're on this morning. *If you go forward, you'll be giving it up. I'll find you guilty. There won't be any trial. And you're giving up any chance, however slight that might be, that a jury would find you not guilty.*

On the other hand, if you changed your mind and decided not to plead guilty, then that presumption of innocence would stay with you. We would go to trial. And the only other way you could lose it is if the Government succeeded in overcoming it, literally, with evidence and proof that a jury found was beyond any reasonable doubt, showing that every element of the charge or, in your case, charges against you was true.

Each charge would be tried separately. Within that trial, the jury would be required to evaluate the evidence on one charge, make a decision; and then

separately on another charge.

Do you understand that protection of the presumption of innocence?

THE DEFENDANT: I do.

Tr. of Proceedings (#965) at 22-24 (emphasis added). As noted, when pleading guilty Payne twice stated under oath that he, in fact, intentionally agreed with another to impede officers of the United States by force, intimidation, or threat. See Tr. of Proceedings (#965) at 37-39, 44-45. See also Plea Petition (#906) ¶ 24. On this record, therefore, the Court concludes the jury's Not Guilty verdicts as to seven of Payne's co-Defendants do not undermine Payne's representations under oath that he, in fact, had the requisite intent to be guilty of Count 1.

Accordingly, the Court concludes the acquittal of seven of Payne's co-Defendants does not provide a fair and just reason to permit Payne to withdraw his guilty plea.

V. Prejudice to the Government

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

The government contends it would be prejudiced if the Court permitted Payne to withdraw his guilty plea because doing so would require the government to try this case possibly for a

third time. As noted, Payne was set to proceed to trial on September 7, 2016. That date was selected in part to permit that trial to conclude in time for Payne and the other Defendants who were also charged in the District of Nevada to travel to that District to prepare for trial that was then set to begin in February 2017. Because the upcoming February 14, 2017, trial date for the remaining Defendants in this case conflicted with Payne's then-set February 2017 trial in the District of Nevada, the government argues it would be prejudiced because it would be required to try Payne in a third trial later in 2017.

In a Notice (#1618) filed after the government's Supplemental Response, however, Payne stated he is no longer scheduled to proceed to trial in the District of Nevada in February 2017. Payne explains the Nevada case (in which 17 defendants are named) has been split into three groups for trial and that his trial is set to begin in the second of the three groups, which will be 30 days after the completion of the first trial set to begin February 7, 2017. Accordingly, Payne contends the government's assertion of prejudice is speculative and, in any event, likely incorrect because Payne contends the latest scheduling of Payne's Nevada trial obviates any potential conflict between the upcoming February 14, 2017, trial in this case and the proceedings in Nevada.

The Court concludes, however, that Payne is too optimistic

about the feasibility and practicality of transporting him to the District of Oregon for him to prepare adequately for the February 14, 2017, trial and then to return him to the District of Nevada in time for him to prepare adequately for trial proceedings in that District. The Court notes as a result of the parties' joint request, this Court released Payne from custody in Oregon while he awaited sentencing here so that he could default to his custodial hold in the District of Nevada, could be transported to that District, and could prepare for the Nevada proceedings. See Order (#914) issued July 20, 2016.

Accordingly, returning Payne at this point to the District of Oregon in time for the February 14, 2017, trial would not necessarily permit him to be ready in the six weeks remaining. Moreover, the first of the three trials to take place in the District of Nevada is expected to be the shortest, and Payne is set to begin his trial only 30 days after that first trial is complete. See Def.'s Notice (#1618), Attach. A at 26. As a result, considering the time that it ordinarily takes to transport criminal defendants between districts, the February 14, 2017, Oregon trial (which is expected to last until mid-to-late March) likely presents an irreconcilable conflict with Payne's proceedings in the District of Nevada.

Accordingly, the Court concludes permitting Payne to withdraw his guilty plea would likely prejudice the government in

this case because it would increase the likelihood that the government would have to conduct a third trial in Oregon. Nonetheless, the Court notes if Payne had provided sufficient reasons for withdrawing his guilty plea, that prejudice to the government would not have been insurmountable; *i.e.*, under appropriate circumstances the Court would have considered setting a third trial.

The Court emphasizes, however, that the prejudice to the government goes beyond the mere burden of having to conduct a third trial. As noted, it is undisputed that Payne was a leader of the occupation of the MNWR that gave rise to the charges in the Superseding Indictment. Payne's absence from the trial that began September 7, 2016, (when at least two other leaders of the occupation were tried) unquestionably affected the government's presentation of evidence and potentially affected the manner in which the jurors assessed the evidence. Notably, since the conclusion of that trial one juror publicly identified Payne's absence from that trial as a material hole in the government's case.³

³ See Maxine Bernstein, *Transcript of Juror 4's emails: His explanation for Ammon Bundy verdict*, OregonLive (Nov. 3, 2016, 5:00 AM), http://www.oregonlive.com/oregon-standoff/2016/11/transcript_of_juror_4s_emails.html ("I expected that there must be proof of conspiracy between Ammon and Ryan Payne (most logical link, owing to their initial visit to the Hammond's place in early November) but he wasn't even called for either side, nor were there any phone calls, emails, etc. that would demonstrate

Thus, permitting Payne to withdraw his guilty plea in this unusual, multi-Defendant conspiracy case after Payne 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, to permit Payne to avoid the September 7, 2016, trial date, but then to deprive the government of the benefit of the bargain that it struck with Payne, creates substantial and potentially irreparable prejudice to the government.

In the end the Court concludes Payne's desire to withdraw his guilty plea on this record is merely a classic example of "buyer's remorse." Although the separate proceedings in the District of Nevada have not developed as he had hoped, Payne stands today in materially the same position as he did on the day that he pled guilty in this case. Because Payne 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 Payne's plea, the Court denies Payne's Motion to Withdraw Guilty Plea and Proceed to Trial by

agreement here. These two major holes in the evidence record proved to cause insurmountable doubt for me.").

Jury.

CONCLUSION

For these reasons, the Court **DENIES** Payne's Motion (#1421) to Withdraw Guilty Plea and Proceed to Trial by Jury. The Court directs counsel for Payne and the government to confer and to file a single, joint status report **no later than January 27, 2017**, that sets out their updated proposals regarding Payne's sentencing date.

IT IS SO ORDERED.

DATED this 28th day of December, 2016.

/s/ Anna J. Brown

ANNA J. BROWN
United States District Judge