

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Keith Lamont Tutt — PETITIONER
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

U.S. Court of Appeal for the Fourth Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Keith Lamont Tutt #63397-056
(Your Name)

FCI Elkton PO Box 10
(Address)

Lisbon, OH 44432
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

- 1) Whether the district court prejudiced the defendant by denying him due process of a full and fair opportunity to be heard concerning his reasons for wanting to withdraw his guilty plea prior to sentencing?
- 2) Whether the district court abused its discretion in denying the defendant's motion to withdraw his guilty plea prior to sentencing?
- 3) Whether the district court abused its discretion by denying the defendant a three-point reduction in total offense level based on acceptance of responsibility for only reasons based upon defendant's objections he was entitled to challenge concerning his presentence report?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

[] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

TABLE OF CONTENTS

OPINIONS BELOW	1
JURISDICTION.....	
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	
STATEMENT OF THE CASE	
REASONS FOR GRANTING THE WRIT	
CONCLUSION.....	

INDEX TO APPENDICES

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
• Anders v. California 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 388 U.S. 924, 87 S. Ct. 2094, 18 L. Ed. 2d 1377	2, 7
• Brown v. Nucor Corp., 576 F. 3d 149 (4th Cir 2009)	8
• Elliott v. United States 332 F. 3d 753 (4th Cir 2003)	13, 15
• United States v. Hall 664 F. 3d 456 (4th Cir 2012)	12
• United States v. U.S. Gypsum Co., 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 2d 746 (1948)	12
• United States v. DeFreitas 865 F. 2d 80 (4th Cir 1989)	9
 STATUTES AND RULES	
• 18 U.S.C. § 841	1
• 18 U.S.C. § 846	1
• 18 U.S.C. § 924(c)(1)	1
• 18 U.S.C. § 3231 (2017)	2
• 18 U.S.C. § 3742(a) (2017)	2
• 21 U.S.C. § 853	1
• 28 U.S.C. § 1291 (2017)	2
• Rules Fed. R. Crim. P. 32(d)	9
 OTHER	
* Sentencing Guidelines	12
USSC § 3E1.1(a)	13
USSC § 3E1.1 cmt. n.1.	

* See attached * (1-2)

TABLE OF AUTHORITIES

CASES

	<u>Page</u>
<i>Anders v. California</i> , 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493, <i>reh'g denied</i> , 388 U.S. 924, 87 S. Ct. 2094, 18 L.Ed.2d 1377 (1967)	2, 7
<i>Brown v. Nucor Corp.</i> , 576 F.3d 149 (4th Cir. 2009)	8
<i>Elliott v. United States</i> , 332 F.3d 753 (4th Cir. 2003)	13, 15
<i>United States v. Hall</i> , 664 F.3d 456 (4th Cir. 2012)	12
<i>United States v. U.S. Gypsum Co.</i> , 333 U.S. 364, 68 S. Ct. 525, 92 L. Ed. 2d 746 (1948)	12
<i>United States v. DeFreitas</i> , 865 F.2d 80 (4th Cir. 1989)	9
<i>United States v. Dugger</i> , 485 F.3d 236 (4th Cir. 2007)	12
<i>United States v. Haley</i> , 784 F.2d 1218 (4th Cir. 1986)	9
<i>United States v. Jeffery</i> , 631 F.3d 669 (4th Cir. 2011)	12
<i>United States v. Johnson</i> , 617 F.3d 286 (4th Cir. 2010)	8
<i>United States v. Moore</i> , 931 F.2d 245 (4th Cir. 1991)	8, 9

United States v. Nale,
101 F.3d 1000 (4th Cir. 1996)

United States v. Rios-Ortiz,
830 F.2d 1067 (9th Cir. 1987)

STATUTES

18 U.S.C. § 841.....
18 U.S.C. § 846.....
18 U.S.C. § 924(c)(1)

18 U.S.C. § 3231 (2017)

18 U.S.C. § 3742(a) (2017).....

21 U.S.C. § 853.....

28 U.S.C. § 1291 (2017)

RULES

Fed. R. Crim. P. 32(d).....

SENTENCING GUIDELINES

USSG § 3E1.1(a)

USSG § 3E1.1 cmt. n.1

IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☐ For cases from **state courts**:

~~The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is~~

~~☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.~~

~~The opinion of the _____ court appears at Appendix _____ to the petition and is~~

~~☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.~~

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 15th 2018.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

N/A
The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

* See attached * (1-5)

-3-

STATEMENT OF THE CASE

The following facts are taken from the Government's factual basis given at the arraignment hearing (DE 56, pp 35-37). Government law enforcement agents developed evidence showing that Mr. Tutt was part of a Raleigh, North Carolina-based drug trafficking conspiracy run by a man named Mitchell. The Government gathered information from a wiretap that captured conversations between Mr. Mitchell and Mr. Tutt about how the drug trafficking organization would run. The wiretap also revealed how Mr. Tutt would complete cocaine sales on behalf of the conspiracy.

Once Mr. Mitchell was arrested and placed in jail, the Government intercepted jail calls between Mr. Mitchell and Mr. Tutt indicating that Mr. Mitchell seeded the responsibilities for the conspiracy to Mr. Tutt. Mr. Mitchell told Mr. Tutt to take care of certain individuals involved in the organization and directed him on how to further run the organization while Mr. Mitchell was in custody.

The Government also placed a pole camera outside of Mr.

-4-

Tutt's business that he owned with Mr. Mitchell: Elite Auto in Durham, North Carolina. Government agents were able to observe the comings and goings of individuals from the business. They also developed further information from confidential sources about Mr. Tutt's drug trafficking activities.

Government agents subsequently learned that Mr. Tutt was headed to a house containing a large amount of illegal drugs in Raleigh on 27 March 2017. Government agents followed him to that location. After Mr. Tutt entered the house and came back out and got back in his car, a police dog sniffed his car and alerted officers to the presence of drugs. Agents subsequently seized 182 grams of a substance that field-tested positive for cocaine.

After that, Government agents obtained search warrants for Elite Auto and for Mr. Tutt's residence. At Elite Auto, they found a small amount of powder cocaine and Mr. Mitchell's driver's license. At Mr. Tutt's house they found wrappers that had powder residue that field-tested positive for cocaine. They also found three presses used to package kilogram-sized drug packages and a fourth smaller press used to package a brick of heroin. They also

-5-

found a 12-gauge shotgun with a large 20-round drum magazine and two other smaller drum magazines for the shotgun. In a closet, they found two 55-pound tubs of talc powder, which was used to cut and mix cocaine when further distributing pure cocaine into distribution amounts. (DE 56, pp 35-37)

At sentencing on 12 October 2017, Mr. Tutt attempted to withdraw his guilty plea (DE 58, p 3). He said his trial counsel failed to inform him of certain things (DE 58, p 3). The district court denied his request (DE 58, pp 4-6).

Mr. Tutt registered three objections to the presentence report (DE 58, p 8). He denied that the wiretap evidence captured him admitting to being part of a drug trafficking conspiracy (DE 58, p 8). He denied that Mr. Mitchell instructed him on how to run the drug trafficking conspiracy in Mr. Mitchell's absence (DE 58, pp 8-9). And he denied that the shotgun was loaded when found by Government agents (DE 58, p 12).

FBI Task Force Officer Timothy Thomas testified at the sentencing hearing and said he was one of the lead agents in the Mitchell drug conspiracy investigation (DE 58, p 14). He listened

-6-

to the wiretaps and heard the conversations between Mr. Mitchell and Mr. Tutt (DE 58, p 14). The wiretapped conversations showed Mr. Mitchell telling Mr. Tutt who to deal with and who not to deal with in the drug conspiracy (T pp 15-16).

Officer Thomas also testified about the evidence gathered from the pole camera (DE 58, p 16). It showed numerous individuals coming into Elite Auto, staying only a few minutes, and then leaving (DE 58, p 16). The individuals did not appear to be getting their cars worked on (DE 58, p 16).

With respect to the shotgun, Officer Thomas testified that the ammunition drums contained ammunition and were found near the shotgun but were not inserted into the shotgun (DE 58, p 17).

After Officer Thomas testified, the district judge announced he was considering denying a reduction based on acceptance of responsibility (DE 58, p 19). After hearing arguments, the district court found that Mr. Tutt had not accepted responsibility for his criminal conduct and denied the three-point reduction (DE 58, p 24). The district court based the decision on Mr. Tutt's attempt to

-7-

withdraw his guilty plea coupled with his objection to the wiretap evidence (DE 58, p 24).

Mr. Tutt allocuted and asked for forgiveness. He said he accepted "full responsibilities for his actions" (DE 58, p 28). The district court sentenced him to 192 months in prison (DE 58, p 38; DE 49). Mr. Tutt appealed (DE 45).

REASONS FOR GRANTING THE PETITION

* See attached * (1-8)

POTENTIAL ARGUMENTS

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MR. TUTT'S MOTION TO WITHDRAW HIS GUILTY PLEA.

Standard of Review

The district court's denial of a motion to withdraw a guilty plea is assessed for abuse of discretion. *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991). A district court abuses its discretion when its decision is "guided by erroneous legal principles or rest[ed] upon a clearly erroneous factual finding." *United States v. Johnson*, 617 F.3d 286, 292 (4th Cir. 2010) (quoting *Brown v. Nucor Corp.*, 576 F.3d 149, 161 (4th Cir. 2009)) (internal quotation marks omitted).

Applicable Law

A defendant does not have an absolute right to withdraw a guilty plea. *Moore*, 931 F.2d at 248 (citing *United States v. Rios-Ortiz*, 830 F.2d 1067 (9th Cir. 1987)). Rather, a defendant bears the burden of demonstrating to the district court's satisfaction that a "fair and just reason" supports his request to withdraw.

Fed. R. Crim. P. 32(d); *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989); *United States v. Haley*, 784 F.2d 1218, 1219 (4th Cir. 1986).

Courts typically consider a variety of factors in determining whether a defendant has met his burden under Rule 32(d). The factors include (1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary, (2) whether the defendant has credibly asserted his legal innocence, (3) whether there has been a delay between the entering of the plea and the filing of the motion, (4) whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources.

Moore, 931 F.2d at 248 (citations omitted).

Discussion

At the start of the sentencing hearing, Mr. Tutt attempted to withdraw his guilty plea (DE 58, p 3). He said his trial counsel failed to inform him of certain things but he did not specify what (DE 58, p 3). In denying Mr. Tutt's motion to withdraw his guilty plea, the district judge cited *Moore* and listed the factors he considered in denying the motion (DE 58, p 4). The district judge said the following:

-10-

In this case, the Court finds that the defendant has provided no evidence that his plea was not knowing or voluntary. The Court conducted a very thorough Rule 11 colloquy. The defendant was under oath during that colloquy. The Court explored at length all the rights that he has under the Constitution and laws of the United States. The Court explained the charges against him, the potential penalties he faced, the rights he would be giving up if he decided to plead guilty. The Court also thoroughly examined and discussed with him the plea agreement that he had entered.

At the conclusion of that process, which the Supreme Court has repeatedly declared to be a solemn process undertaken in open court, the defendant entered a knowing and voluntary plea. The Court made findings to that effect on the date of the plea.

The second factor is whether the defendant credibly asserted his legal innocence. The answer to that is no.

The third factor is whether there was a delay between entering the plea and moving for withdrawal. The defendant's plea was entered some time ago. He moved to withdraw here on the date of his sentencing. There was a delay in him doing this.

The fourth factor is whether the defendant had close assistance of competent counsel. Ms. Vavonese is excellent counsel, appears here regularly. The Court finds that he did have the close assistance of competent counsel.

The fifth factor is whether the withdrawal will prejudice the Government. The Court finds that the (sic) withdrawal will prejudice the Government.

4

-11-

The sixth factor is whether the withdrawal will inconvenience the Court and waste judicial resources. The Court has already conducted an extensive colloquy as part of the Rule 11 process. The Court also has prepared for sentencing. We're here on the day of sentencing and Mr. Tutt has made this motion, the motion lacks merit and the motion to withdraw the guilty plea is denied.

(DE 58, pp 4-6)

The district judge appears to have considered all of the factors enumerated in *Moore*. Additionally, the undersigned cannot find that any of the district judge's findings are unsupported by the evidence. Further, all of the findings tend to support a denial of the motion under the current law.

Thus, the undersigned cannot in good faith assert that the district court abused its discretion in denying Mr. Tutt's motion to withdraw his guilty plea. If the Court should determine otherwise, the undersigned asks the Court to give Mr. Tutt the relief he is due.

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN DENYING MR. TUTT A THREE-POINT REDUCTION IN TOTAL OFFENSE LEVEL BASED ON ACCEPTANCE OF RESPONSIBILITY.

Standard of Review

The determination of whether a defendant is deserving of an acceptance of responsibility adjustment is a factual issue and thus reviewed for clear error. *United States v. Dugger*, 485 F.3d 236, 239 (4th Cir. 2007). A factual finding is “clearly erroneous” when the reviewing court is “left with the definite and firm conviction that a mistake has been committed.” *U.S. v. Hall*, 664 F.3d 456, 462 (4th Cir. 2012) (quoting *U.S. v. U.S. Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 2d 746 (1948)).

Applicable Law

Section 3E1.1 of the U.S. Sentencing Guidelines (“USSG”) Manual provides for a two-level reduction for a defendant who “clearly demonstrates acceptance of responsibility for his offense.” *United States v. Jeffery*, 631 F.3d 669, 678 (4th Cir. 2011) (quoting USSG § 3E1.1(a)). To merit this reduction, the defendant must establish by a preponderance of the evidence “that he has clearly

-13-

recognized and affirmatively accepted personal responsibility for his criminal conduct.” *United States v. Nale*, 101 F.3d 1000, 1005 (4th Cir. 1996). “[A] denial of relevant conduct is inconsistent with acceptance of responsibility.” *Elliott*, 332 F.3d at 761 (internal quotation marks omitted); see USSG § 3E1.1 cmt. n.1.

Discussion

At the start of the sentencing hearing, Mr. Tutt registered three objections to the presentence report (DE 58, p 8). He denied that the wiretap evidence captured his admission to being part of a drug trafficking conspiracy (DE 58, p 8). He denied that Mr. Mitchell instructed him on how to run the drug trafficking conspiracy in Mr. Mitchell’s absence (DE 58, pp 8-9). And he denied that the shotgun was loaded when found by Government agents (DE 58, p 12).

Regarding these objections, the district judge found as follows:

All right. In connection with the objections, the first objection has been withdrawn.

7

-14-

The second objection is overruled. I do find – I credit the agent's testimony in Government Exhibit 1 that Mr. Tutt did receive instructions from Maurio Mitchell concerning the drug transactions as outlined in paragraph 6 and 8, both in the March 2016 wire and then additionally after Mitchell's arrest and while incarcerated. Mitchell himself is an absolutely relentless drug dealer whose sentencing day is coming. So that objection is overruled.

Paragraph 11 is clarified that the shotgun found at Tutt's stash house where law enforcement officers seized 864 grams of cocaine, digital scales containing cocaine and heroin residue, four empty kilogram wrappers of cocaine, and a weapon, as well as large quantities of packaging material and a cutting agent, that the agents also had two loaded, high-capacity 20-round drum-style magazines that were there. So that part is sustained as clarified.

(DE 58, pp 23-24)

Regarding acceptance of responsibility, the district judge ruled as follows:

As for the topic of acceptance of responsibility, I don't think that Mr. Tutt has accepted responsibility. I think the second objection and his request to withdraw his plea here both independently reflect the fact that he has not accepted responsibility. He has not clearly demonstrated acceptance of responsibility for his criminal behavior. I've already quoted the provisions in the commentary that seem to me particularly relevant and so he loses acceptance of responsibility.

(DE 58, p 24)

Since the district judge based denial of an acceptance of responsibility reduction on Mr. Tutt's denial of relevant conduct and since the evidence tended to support the existence of that relevant conduct, the caselaw and USSGs support the district judge's ruling. *Elliott*, 332 F.3d at 761 (a district court's denial of acceptance of responsibility can be based on the defendant's denial of relevant conduct).

Mr. Tutt's plea agreement does not afford him any relief either (DE 28). It does contain language indicating that the parties agreed that Mr. Tutt was due a three-point reduction for acceptance of responsibility (DE 28, p 8). However, that same provision contains language indicating that the agreed-upon reduction is "not binding on the Court in its application of the advisory Guideline range[.]" (DE 28, p 8) Thus, Mr. Tutt signed a plea agreement indicating he knew the three-point reduction for acceptance of responsibility was subject to approval by the district court. He cannot argue that his plea was somehow unknowing, which would actually pertain to Argument I above.

CONCLUSION

**See attached* (1)*

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Keith / [Signature]

Date: 06 / 10 / 2018

CONCLUSION

After repeated and close examination of the record and review of the relevant law, the undersigned is unable to identify issues with sufficient merit to support relief on appeal. The undersigned respectfully asks that this Court conduct a full examination of the record for possible prejudicial error and decide if any justiciable issues exist and if so, grant Mr. Tutt the relief he is due.