NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TODD BRITTON-HARR,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

F. Clinton Broden (Counsel of Record)
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)
clint@texascrimlaw.com

Counsel for Petitioner
Todd Britton-Harr

QUESTION PRESENTED

Does the Court's decision in *Lee v. United States,* 137 S.Ct. 1958 (2017) allow lower courts to require a showing that a "reasonable person" would have proceeded to trial in order to be able to demonstrate prejudice in a case in which trial counsel provides deficient performance in connection with a guilty plea.

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Petitioner, Todd Britton-Harr, respectfully petitions for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINION BELOW

On August 21, 2017, the United States District Court for the Southern District of Texas issued an opinion denying Mr. Britton-Harr's Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255. (App. III) On May 2, 2018, a single judge of the United Sates Court of Appeals for the Fifth Circuit denied Mr. Britton-Harr a Certificate of Appealability. (App. II) On May 21, 2018, upon a Motion to Reconsider by Mr. Britton-Harr, a three judge panel of the Fifth Circuit denied him a Certificate of Appealability. (App. I)

JURISDICTION

A three judge panel for the United States Court of Appeals denied Mr. Britton-Harr a Certificate of Appealability on May 21, 2018. (App. I)

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

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides *inter alia.*:

In all criminal prosecutions, the accused shall...have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

A. Proceedings Below

Todd Britton-Harr was charged by indictment with possession with the intent to distribute over 100 kgs. of marijuana. He ultimately entered a guilty plea to the indictment without a plea agreement. He was sentenced to seventy months imprisonment, a $100 special assessment and four years supervised release.

Mr. Britton-Harr filed a *pro se* Notice of Appeal and was later appointed appellate counsel. The United States Court of Appeals for the Fifth Circuit affirmed his conviction and sentence. *United States v. Britton-Harr*, 578 Fed. Appx. 444 (5th Cir. 2014)

On August 7, 2015, Mr. Britton-Harr filed his Motion to Vacate under 28 U.S.C. § 2255. An evidentiary hearing was held on the motion and then, on August 21, 2017, the District Court denied the motion as well as a Certificate of Appealability. (App. III)

On May 2, 2018, a single judge of the United States Court of Appeals for the Fifth Circuit denied Mr. Britton-Harr a Certificate of Appealability. (App. II) On May 21, 2018, upon a Motion to Reconsider by Mr. Britton-Harr, a three judge panel of the Fifth Circuit denied him a Certificate of Appealability. (App. I)

B. Statement of Relevant Facts

Mr. Britton-Harr's 2255 motion centered around the question of whether he understood that he would be waiving his right to appeal the denial of his *pro se* pretrial motions by entering a guilty plea.

C. Pretrial Motions, Guilty Plea and Notice of Appeal

Prior to pleading guilty, Mr. Britton-Harr filed several *pro se* motions. These included a motion to dismiss the indictment, a motion for production of evidence and a motion to suppress evidence. When the District Court initially denied the motion to dismiss the indictment and the motion for production of evidence, Mr. Britton-Harr filed a *pro se* motion to reconsider those denials. Despite the fact that the motions were filed *pro se*, the District Court held a hearing on those motions on June 19, 2013. Mr. Britton-Harr was so invested in these motions that, even though Mr. Britton-Harr was represented at the hearing by counsel, the District Court allowed Mr. Britton-Harr himself to question the government witness who testified at the hearing. Ultimately, the Court denied the motions on their merits.

The motions hearing ended at 12:02 p.m. on June 19, 2013. At 12:19 p.m. on that same day, Mr. Britton-Harr's counsel announced that Mr. Britton-Harr wanted to plead guilty to the indictment without a plea agreement. At that point, a rearraignment took place at which Mr. Britton-Harr pleaded guilty.

At his sentencing hearing held on August 21, 2013, Mr. Britton-Harr had brought with him a *pro se* Notice of Appeal which he handed to his counsel, Mark

Woerner. Mr. Britton-Harr saw Mr. Woerner read the one page document and file it with the court clerk. The Notice of Appeal made clear that Mr. Britton-Harr desired to appeal "all pretrial rulings" so that this Court would "reverse or overturn the rulings of the District Court to correct a miscarriage of justice."

Prior to his court-appointed appellate lawyer filing his brief in the case in the United States Court of Appeals for the Fifth Circuit, Mr. Britton-Harr filed a document with the Fifth Circuit discussing what he viewed to be erroneous rulings on his pretrial motions and his "intent to appeal" the rulings on these motions. Although Mr. Britton-Harr never spoke to court-appointed appellate counsel, Mr. Britton-Harr's appellate lawyer would later file a brief in the Fifth Circuit acknowledging that Mr. Britton-Harr "pleaded guilty without a reservation of the right to appeal any pre-trial motion" and that "[a] voluntary and unconditional guilty plea waives all non-jurisdictional defects in the prior proceedings, including the right to raise any further objections based on a district court's denial of a motion to suppress."

D. §2255 Evidentiary Hearing

At the evidentiary hearing in this case related to Mr. Britton-Harr's 2255 motion, Mr. Britton-Harr testified as to the subjective importance he placed on appealing the denial of his *pro se* motions and **he further testified that he would not have pleaded guilty had he knew he was giving up his right to appeal the rulings on those motions.** He testified that his trial counsel, Mark Woerner, had told him

that, as long as he pleaded guilty without a plea agreement and did an "open plea," he would be able to appeal the denial of his pretrial motions. Mr. Britton-Harr testified that Mr. Woerner explained to him that an "[o]pen plea means I was not contractually bound and I maintained all my appellate rights to be able to appeal the *Brady* issues and the pretrial motions." Significantly, Mr. Britton-Harr explained as follows:

> Q. **Would you have agreed to enter a plea had you been told that you would not be able to appeal the judge's rulings on the pretrial motions?**
>
> A. **No, sir.** I believe the *Brady* issues are paramount to my defense.
>
> Q. At the time you entered the plea, did you believe you were going to be able to appeal the pretrial motions?
>
> A. Yes, sir, I did.

(emphasis added) At another point in his testimony, Mr. Britton-Harr explained:

> A. ....I would not have done anything unless I was able to appeal the pretrial motions, the *Brady* issues.
>
> Q. I know this retrospective, but any doubt in your mind about that?
>
> A. No, sir. There is no doubt in my mind whatsoever.

(emphasis added)

Mr. Britton-Harr's mother testified that, in May of 2013, Mr. Woerner had sent her a proposed plea agreement for her son that contained a waiver of appeal provision. She wrote an email back to Mr. Woerner stating, "I would be crazy to tell my son to sign such an agreement knowing he would not be allowed to appeal." She

also testified that she met with Mr. Woerner on June 18, 2013 (the day prior to the motion hearing and rearraignment) where Mr. Woerner pushed her to try to get her son to take an "open plea." It was explained to her by Mr. Woerner that "an open plea would preserve [her son's] rights for his pretrial motion when he would enter into the appeal process." Mr. Britton-Harr's mother also explained that she wrote Mr. Woerner an email on June 23, 2013 asking for transcripts and Mr. Woerner responded:

> I will ask about it but I believe as no appeal can be filed at this time there is no right to obtain a free transcript of any hearings. That can be done after the case is over when he is sentenced if he files an appeal or 2255. He is not barred from doing either by the plea since we didn't do the written agreement....

She was adamant that, when talking to Mr. Woerner, her understanding was that, after pleading guilty, her son would be "able to appeal the pretrial motions."

Mr. Woerner testified at the 2255 evidentiary hearing as a government witness. Significantly, Mr. Woerner testified that his practice was primarily in state court where an "open plea" allows a defendant to appeal the denial of any pretrial motions that had been raised in writing prior to a guilty plea.[1] Beyond that, Mr. Woerner essentially claimed a lack of memory. For example, he testified that he did not remember "exactly what we discussed" in relation to Mr. Britton-Harr's ability to appeal from an "open plea." He also testified that he did not know if he read Mr.

[1] *See* Tex. R. App. P. 25.2(a)(2)(A)

Britton-Harr's Notice of Appeal, but finally admitted the he "likely looked at it." When asked directly by the District Judge at the evidentiary hearing whether he ever advised Mr. Britton-Harr "that by entering a plea of guilty without a plea agreement he would be able to appeal his pretrial motions," Mr. Woerner equivocated and responded, "I don't believe I told him that."

REASON FOR GRANTING THE WRIT

Certiorari in this case is appropriate under Sup. Ct. Ru. 10(a), because the lower courts' analysis in this case completely ignored this Court's decision in *Lee v. United States*, 137 S.Ct. 1958 (2017). Indeed, just recently, in *Kaushal v. Indiana*, 138 S.Ct. 2567, this Court granted certiorari, vacated a judgment and remanded a case in which a lower court failed to apply *Lee* despite the fact that *Lee* had been decided almost a month before the lower court decision.

A. Introduction

Mr. Britton-Harr's claim was that his plea was involuntary because he did not understand that he would be waiving his right to have the denial of various pretrial motions reviewed on direct appeal. In denying Mr. Britton-Harr's 2255 motion, the District Court did *not* reach the issue of whether Mr. Britton-Harr pleaded guilty under the belief that he could appeal the denial of his pretrial motions. Instead, it found that Mr. Britton-Harr had not established prejudice. For all intents and purposes, the District Court found that, because it viewed Mr. Britton-Harr's pretrial motions as frivolous, and his likelihood of conviction at trial very high, Mr. Britton-Harr was not prejudiced by giving up his right to appeal the denial of those pretrial motions. *See* App. III at 13-15.

Citing to a 2016 Fifth Circuit decision in *United States v. Batamula*, 823 F.3d 237, 240 (5th Cir. 2016) (*en banc*) and a 2014 Fifth Circuit decision in *United States v. Kayode*, 777 F.3d 719, 725-26 (5th Cir. 2014), the District Court found that "[t]he

assessment of 'prejudice' will depend in part on a prediction of what the outcome of the trial might have been.'" *See* App. III at 13. It also went on to observe:

> On balance, a rational defendant faced with a near certainty of conviction and the prospect of serving an additional 27 months or more imprisonment would not be reasonably likely to go to trial, especially when the only benefit was securing the appellate right to challenge the pretrial rulings here.

App. III at 14-15. This is completely contrary to this Court's opinion in *Lee.*

B. *Lee v. United States*

The Court decided *Lee v. United States*, two months prior to the District Court's decision in this case. Nevertheless, the District Court did not address *Lee*.

Lee pleaded guilty not knowing that his plea would result in his automatic deportation. *Lee*, 137 S.Ct. at 1963. When he learned of this fact, he filed a 2255 motion challenging his plea. *Id*. The District Court denied the 2255 motion finding that Lee was not prejudiced by any misadvice he was given regarding the deportation consequences of his decision. It found:

> "In light of the overwhelming evidence of Lee's guilt," Lee "would have almost certainly" been found guilty and received "a significantly longer prison sentence, and subsequent deportation," had he gone to trial.

Id, *quoting*, Order in No. 2:10–cv–02698 (WD Tenn.) The Sixth Circuit affirmed:

> [N]o rational defendant charged with a deportable offense and facing "overwhelming evidence of guilt" would proceed to trial rather than take a plea deal with a shorter prison sentence.

Lee v. United States, 825 F.3d 311 (6th Cir. 2016), *rev'd*, 137 S.Ct. 1958 (2017) (citation omitted).

In a 6-2 decision, the Court reversed. It first rejected the argument of the dissent–the very same argument made by the District Court in the instant case– that to establish prejudice the defendant needed to show that he would have been better off going to trial. *Lee*, 137 S.Ct. at 1965. Instead, the Court held that to determine prejudice the key factor was what the individual defendant's subjective decision making would have been had he received correct advice regarding the effects of his guilty plea. *Id*. at 1967.

In sum, the District Court's prejudice analysis in the instant case consisted of an objective weighing of the likelihood Mr. Britton-Harr would have obtained relief on appeal versus the benefits of pleading guilty. Instead, under *Lee*, any prejudice analysis was required to focus on the question of what Mr. Britton-Harr himself would have done had he knew he was giving up his right to appeal the denial of his pretrial motions by pleading guilty. Indeed, it should have looked "to contemporaneous evidence to substantiate [Mr. Britton-Harr's] expressed preferences." *Lee*, 137 S.Ct. at 1967.

C. Instant Case

In looking at the "contemporaneous evidence" in this case, it is abundantly clear that Mr. Britton-Harr placed paramount importance- rightly or wrongly- on the hopes of being vindicated by rulings on his pretrial motions. First, he filed the motions *pro se* when his lawyer presumably refused to file the motions. Second, when some of the motions were denied without an evidentiary hearing, he filed a

motion to reconsider with full briefing. Third, he actively participated in the motions hearing making arguments to the judge and personally cross-examining the government's witness. Fourth, he had been unwilling to plead guilty until he obtained and preserved rulings on his pretrial motions. Fifth, while Mr. Woerner was equivocal in his testimony, both Mr. Britton-Harr and his mother testified that Mr. Britton-Harr only pleaded guilty after he was assured that, by doing an "open plea," he could appeal the denials of the pretrial motions. Sixth, before he knew that he could not appeal the denial of his pretrial motions, Mr. Britton-Harr's *pro se* Notice of Appeal expressly referenced his intent to appeal the denial of the pretrial motions. Seventh, before he knew that he could not appeal the denial of his pretrial motions, Mr. Britton-Harr filed his pleading in the Fifth Circuit- discussing his desire to appeal the denial of his pretrial motions.

Indeed, Mr. Britton-Harr single-minded focused on his pretrial motions. Moreover, while admittedly not "contemporaneous evidence," one cannot help but note that Mr. Britton-Harr has completed the imprisonment portion of his sentence. Nevertheless, his desire to have an appellate ruling on the denial of his pretrial motions is so strong he is willing to return to square one just to have that opportunity. That in and of itself speaks volumes.

In conclusion, rather than view Mr. Britton-Harr's decision to plead guilty or go to trial through the lens of Mr. Britton-Harr's subjective view of the importance of obtaining appellate review of his numerous pretrial motions, the District Court,

instead, viewed Mr. Britton-Harr's decision to plead guilty or go to trial through the lens of a judge who had already denied the pretrial motions and who likely found them to have no merit applying an objective standard. In doing so, the District Court failed to cite *Lee* much less apply its analysis.

CONCLUSION

For the foregoing reasons, the Writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Fifth Circuit in *United States v. Britton-Harr,* No. 17-41018 and a Certificate of Appealability should be issued.

DATED: September 14, 2018

Respectfully submitted,

F. Clinton Broden
Broden & Mickelsen
2600 State Street
Dallas, Texas 75204
214-720-9552
214-720-9594 (facsimile)
clint@texascrimlaw.com

Counsel for Petitioner
Todd Britton-Harr