NO. _____

In The
Supreme Court of the United States

JAMES LATRON SUMTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

W. James Hoffmeyer
Counsel of Record
LAW OFFICE OF W. JAMES HOFFMEYER
125 Warley Street
Florence, South Carolina 29501
(843) 664-0009
jim@hoffmeyerlaw.com

Counsel for Petitioner

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THE LEX GROUP^{DC} ♦ 1050 Connecticut Avenue, N.W. ♦ Suite 500, #5190 ♦ Washington, D.C. 20036
(202) 955-0001 ♦ (800) 856-4419 ♦ www.thelexgroup.com

QUESTIONS PRESENTED

1. WHETHER THE APPELLATE COURT ERRED IN AFFIRMING THE DISTRICT COURT'S RULING NOT ALLOWING SUMTER TO WITHDRAW HIS GUILTY PLEA?

2. WHETHER THE APPELLATE COURT ERRED IN FAILING TO FIND THE FIRST STEP ACT CHANGED THE PRIOR CONVICTION REQUIRED FOR A MANDATORY MINIMUM LIFE SENTENCE AND THUS APPELLANT PLED GUILTY TO AVOID A LIFE SENTENCE HE COULD NO LONGER RECEIVE?

3. WHETHER THE APPELLATE COURT ERRED IN FAILING TO FIND THE SENTENCE GIVEN TO SUMTER CONSTITUTED CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT OF THE UNITED STATES CONSTITUTION?

DIRECTLY RELATED CASES

- United States v. Sumter, 4:18-cr-00772-RBH. U.S. District Court for the District of South Carolina. Judgment entered August 9, 2019.

- United States v. Sumter, No. 19-4585. U.S. Court of Appeals for the Fourth Circuit. Judgment entered April 20, 2020.

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JURISDICTIONAL STATEMENT

The United States District Court for the District of South Carolina asserted subject matter jurisdiction pursuant to 18 U.S.C. § 3231. The District Court entered a final judgment on August 9, 2019. (Pet. App., 5a-10a)

Sumter filed a timely notice of appeal to the United States Court of Appeals for the Fourth Circuit. The appellate court had jurisdiction pursuant to 18 U.S.C. § 3742 and Rule 4(b) of the Federal Rules of Appellate Procedure. On April 20, 2020, the United States Court of Appeals for the Fourth Circuit affirmed Sumter's conviction and sentence.

RULES, STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED IN THE CASE

1. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 846, and 851

2. The First Step Act; and

3. The Eighth Amendment of the United States Constitution.

(Pet. App., 11a-31a)

STATEMENT OF THE CASE

James Latron Sumter ("Sumter") petitions for certiorari review by the United States Supreme Court of the Court of Appeals' unpublished opinion affirming his conviction and sentence.

PROCEEDINGS IN THE DISTRICT COURT

Sumter is the sole defendant named in a single-count indictment filed in the District of South Carolina, Florence Division, on August 15, 2018. The count charged that the defendant knowingly and intentionally did combine, conspire, agree, and have tacit understanding with those others both known and unknown to the Grand Jury to knowingly, intentionally, and unlawfully possess with intent to distribute and to distribute a quantity of cocaine, a Schedule II controlled substance, and a quantity of heroin, a Schedule I controlled substance, and that death and serious bodily injury resulted from the use of such substances, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C), all in violation of 21 U.S.C. § 846. (JA 17–18)[1] On December 7, 2018, pursuant to a written plea agreement, Sumter pled guilty to Count 1 of the indictment without the enhanced penalties of 21 U.S.C. § 851. (JA 34–43) Sumter then sought to withdraw his guilty plea. (JA 44–50) An order filed in District Court on June 17, 2019 denied Sumter's motion to withdraw his guilty plea. (JA 178–193)(Pet. App., 11a-26a) On August 8, 2019, Sumter was sentenced to the mandatory minimum of 20 years.

[1] JA" refers to the Joint Appendix that was filed with the Fourth Circuit in this appeal.

PROCEEDINGS IN THE COURT OF APPEALS

Sumter raised three issues on his appeal, two of which involved the District Court's failure to allow him to withdraw his guilty plea, and the other issue involved violation of the Eighth Amendment of the United States Constitution. Sumter believed the District Court erred in failing to grant his motion to withdraw his guilty plea. Sumter also believed the First Step Act changed the definition of the prior conviction required for a mandatory life sentence after his guilty plea and that he should have received the benefit of that change, and should have been allowed to withdraw his guilty plea as he pled guilty to avoid a potential life sentence. In addition, Sumter believed the sentence of 240 months, even if the statute required a 20-year mandatory sentence, constituted cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution. The United States Court of Appeals for the Fourth Circuit affirmed the District Court in an unpublished opinion filed on April 20, 2020.

STATEMENT OF MATERIAL FACTS

On or about December 29, 2017, at approximately 9 p.m., Charles Raeford Hunt Jr. (hereinafter Hunt) was contacted by Kathleen Capra (hereinafter Capra) to hang out with her. Hunt picked up Capra at her residence in Myrtle Beach, South Carolina and Capra asked Hunt if he could get $100.00 worth of cocaine and heroin for her. Hunt advised he could obtain drugs from an individual called "T," who was subsequently identified as Sumter. According to the Government, Hunt called and texted Sumter in order to obtain the drugs. Thereafter, Hunt and Capra went to a

location where they met Sumter and obtained $100.00 worth of cocaine and heroin. Hunt and Capra returned to Hunt's residence where she used the drugs, and Capra began to fall asleep within minutes of using them. Hunt then drove Capra to her residence but could not wake her, but knew she was alive as he could hear her snoring. Hunt, with Capra in the backseat, then picked Sumter up, and Capra, Hunt, and Sumter traveled in Hunt's vehicle to a bar in Myrtle Beach, South Carolina. At that time, Capra remained in the rear seat of Hunt's vehicle while Hunt and Sumter were inside the bar. After leaving the bar, Hunt dropped Sumter back off at another location and proceeded to drive around with Capra unconscious in the back seat of the car. Eventually, Capra stopped breathing and Hunt was unable to revive her. Hunt then drove just across the border into North Carolina, found a remote, wooded area, and dumped Capra's body in the woods. Hunt then returned to Myrtle Beach and threw Capra's cell phone into the Intercoastal Waterway. He later took some of her personal effects to an individual named Jose Anthony Ortiz, Jr. (hereinafter Ortiz) and paid Ortiz to burn those effects to destroy the evidence. (JA 105–107; 311–313)

The autopsy report indicates Capra died of acute cocaine, heroin, alprazolam, and ethanol toxicity. According to the toxicology report, blood obtained from Ms. Capra's femoral vessel contained the following: 6-monoacetylmorphine, alprozalam, benzoylecgonine, cocaethylene, cocaine, codeine and morphine. The blood tested from Ms. Capra's vena cava found the following: benzodiazepines, caffeine, cocaine

metabolite, dertromethorphan, diphenhydramine, ethanol, nicotine and opiates/opioids. (JA 164–176)

Hunt was initially sentenced to 21 months, and the Government later moved for a downward departure from that sentence, so he ended up with a sentence of 12 months and 1 day. (JA 20–31; 199–204) Ortiz received a sentence of 27 months. (JA 26–31) Sumter received a 240 month sentence – right at 20 times that of Hunt. (JA 235–240)

REASONS FOR GRANTING THE PETITION

I. The petition for writ of certiorari should be granted to determine whether the District Court erred in failing to allow Sumter to withdraw his guilty plea.

When considering a defendant's motion to withdraw his guilty plea, the District Court must consider a variety of factors. *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991). The *Moore* factors to be considered 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 entering of the plea and the filing of the motion; 4) whether the 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.

In considering the *Moore* factors, Sumter has compelling reasons that his motion to withdraw his guilty plea should have been granted.

Sumter's guilty plea was not knowing and not voluntary. Sumter was 35 years old at the time of the plea, but has an eighth grade education. Further, at the time of

his plea, Sumter was on Vistaril, an anti-anxiety medication. (JA 86) In addition, because the Government filed a notice pursuant to 21 U.S.C. § 851, Sumter had the added pressure and coercive effect of facing a potential life sentence. As early as January 18, 2019, Sumter sent a letter to the Court indicating he wanted to withdraw his guilty plea because he was forced into taking the plea. He also stated he was not guilty, but was informed by his lawyer if he took the case to trial he would lose and get a life sentence. Sumter informed the Court he could not sleep at night knowing that he was not responsible for the victim's death. (JA 44) In another letter filed on January 18, 2019, Sumter explained he had never been through anything like this before and that he wanted to withdraw his guilty plea, a clear indication that his lack of any history with this type of serious charge was adding to his lack of understanding about pleading guilty. Again, he reiterated that his lawyer said if he took the case to trial he would lose and receive a life sentence, so Sumter believed, in essence, that he did not have meaningful trial rights because he believed, based upon his lawyer's assertions, that it was an absolute certainty he would be convicted and would receive a life sentence. (JA 44) Sumter again, in a letter filed April 29, 2019, indicated he felt forced into signing the plea, did not realize what he was doing and was scared for his life, and reiterated that his attorney informed him he would get life if he went to trial. (JA 45–46) In a letter filed April 30, 2019, Sumter even stated he was told if he signed the plea he would get 8 years, 30% off the bottom of the sentencing guideline, which further illustrates Sumter's lack of understanding about his plea. (JA 115–117) In another letter filed May 1, 2019, Sumter indicated he felt forced into signing the plea

and that his attorney told him the Government would get the toxicologist to say whatever they wanted and he was afraid he would never see his kids again if he went to trial. He also reiterated in the letter that his lawyer told him he needed to sign the plea or he would get life. Further, Sumter explained he did not know anything about the law and he was forced into taking the plea although he was not guilty. (JA 118–120) In a letter filed May 15, 2019, Sumter stated that it was not a knowing and intelligently made plea of guilty because he was scared for his life and that he was going to lose because his attorney informed him the Government would pay the toxicologist to say what they wanted. He also indicated he was not in his right mind at the guilty plea and that he is not guilty. (JA 121–123) These same reasons for wanting to withdraw his plea and wanting a new attorney were raised by Sumter at the motion to substitute counsel. (JA 262–273) It is clear Sumter's plea was not entered into freely, knowingly and voluntarily, but was entered into due to his belief he had no meaningful trial rights, and due to coercion, duress and a lack of a true understanding of his plea.

The Government may point to the Rule 11 colloquy as conclusive on this issue; however, if a defendant is under duress or coercion or has a lack of understanding of his plea or does not truly believe he has trial rights but can only plead guilty or get a life sentence, then his responses at the Rule 11 hearing are tainted, and thus are inaccurate and not conclusive on this issue.

The next *Moore* criterion is whether a defendant has credibly asserted their legal innocence. It is clear Sumter not only asserted his innocence, but the autopsy

report indicates the concerns anyone would have about his guilt in this case. The autopsy report indicates the cause of death was acute cocaine, heroin, alprazalam and ethanol toxicity. The autopsy report is not definitive in specifically stating the cocaine and/or heroin were the "but for" cause of death required by *Burrage v. U.S.*, 571 U.S. 204, 134 S. Ct. 881 (2014). Further, the autopsy blood analysis indicated a cocktail of substances in Capra's system. (JA 164–176)

The evidence provided by the Government, and which is set out in the presentence reports, alleged Hunt contacted Sumter to purchase the drugs, then after the purchase Hunt and Capra returned to Hunt's residence where she snorted the cocaine and heroin. Capra began to fall asleep and Hunt placed her in the backseat of his car, buckled her seatbelt and drove her to her residence where he was unable to wake her. She was still alive at that point and Hunt could hear her snoring. According to the Government, Hunt then picked up Sumter from an apartment in Carolina Forest and they went to a bar sometime after midnight. Hunt and Sumter went inside the bar for a period of time, and Capra was still breathing upon their return to the car. Hunt then took Sumter back to his apartment in Carolina Forest, and continued to drive around and attempted to wake Capra. Eventually, Hunt realized that Capra stopped breathing. (JA 312) Not only were the drugs supplied to the victim by Hunt, but Hunt had ample opportunity to save Capra's life by taking her to a hospital or calling 911 and did not. The revised presentence report even indicates in paragraph 19 that Hunt "panicked" because the victim purchased drugs from him and he did not want to get in trouble. (JA 313)

As aforementioned, there was not definitive evidence that the "but for" cause of Capra's death was solely the cocaine and/or heroin Hunt purportedly got from Sumter. Further, the Government's evidence alleged Hunt purchased the drugs from Sumter using Capra's money, but clearly and unequivocally Hunt supplied the drugs to Capra directly. Based upon the autopsy report and evidence surrounding this case, Sumter has credibly asserted his legal innocence and maintains his innocence.

With regard to any delay between entering the plea and filing the motion to withdraw it, the plea was entered into on December 7, 2018 and Sumter indicated he wanted to withdraw it in a letter filed January 18, 2019, which clearly is not a long delay. (JA 44) This case had been ongoing since July 17, 2018, when Sumter was arrested. From Sumter's arrest on July 17, 2018 to the date of the plea was not quite 5 months, and less than a month and a half later Sumter decided he wanted to withdraw his plea. This is not a situation in which the defendant had been unnecessarily drawing out the case or waited a long time before seeking to withdraw his plea. The Government would not be prejudiced by allowing this defendant, who desperately wants a trial, to be granted a trial.

Concerning the close assistance of competent counsel, the issue here is that, based upon his interpretation of plea counsel's remarks, Sumter understandably felt if he went to trial he would be certain to get a life sentence and his options were limited to either pleading guilty or going to prison for life. (JA 44–46)

There would be no prejudice to the Government for Sumter to have a trial, as the Government has all their witnesses and all the evidence necessary to try the case.

All material evidence concerning the incident is still readily available to the Government.

Lastly, as far as inconvenience to the court system and waste of judicial resources, the right to a jury trial under the Sixth Amendment of the United States Constitution is a crucial and vital right. Any trial takes a certain amount of time and resources, but if the basis of saying the withdrawal of the guilty plea is an inconvenience to the court system and a waste of judicial resources simply because a defendant wants desperately to exercise their right to a trial by jury, then anytime someone goes forward with a jury trial it would be an inconvenience and a waste of judicial resources. Procedural due process, substantive due process and the Sixth Amendment demand that if someone wants a jury trial they should receive one.

Given the *Moore* factors, it is clear Sumter's motion to withdraw his guilty plea should have been granted.

II. The petition for writ of certiorari should be granted to determine whether the First Step Act changed the prior conviction required for a mandatory life sentence and thus Sumter pled guilty to avoid a life sentence he could no longer receive.

Upon passage of the First Step Act, there was a change in penalties for certain revisions of 21 U.S.C. § 841. With regard to 21 U.S.C. §§ 841(b)(1)(A) and 841(b)(1)(B), the First Step Act changed the definition related to increased penalties for prior convictions. With regard to a conviction under 21 U.S.C. §§ 841(b)(1)(A) or 841(b)(1)(B), the statute now reads that a prior *serious drug felony* will subject a defendant to a life sentence if death or serious bodily injury results from the use of such substance. In this case, the Government filed a notice pursuant to 21 U.S.C.

§ 851 to increase the mandatory sentence to a life sentence if Sumter were convicted at trial. The conviction that the Government alleges supports the 21 U.S.C. § 851 enhancement is a conviction from September 2011 for possession with intent to distribute marijuana. Sumter's prior conviction does not meet the definition under the First Step Act for a *serious drug felony*, which requires the defendant served a term of imprisonment of more than 12 months and the offense must have been punishable by a term of imprisonment of 10 years or more. Sumter was sentenced to 2 years suspended upon the service of 7 days and 18 months probation. Sumter's probation was terminated on April 17, 2015. Therefore, if someone were convicted under 21 U.S.C. §§ 841(b)(1)(A) or 841(b)(1)(B), which both encompass more significant drug weight and a more significant offense, and had the same prior conviction as Sumter, that defendant could not face a life sentence. In other words, if a defendant dealt multiple kilograms of heroin and/or crack and had the same prior conviction for possession of marijuana with intent to distribute as Sumter, that defendant could not face a mandatory life sentence if someone died or serious bodily injury resulted from the use of drugs that defendant sold to them. However, because the definition of the prior offense was not changed in 21 U.S.C. § 841(b)(1)(C), Sumter, being indicted for a lesser drug offense—a quantity drug offense—faced a life sentence. That part of the statute, 21 U.S.C. § 841(b)(1)(C), was left to read if a defendant was convicted and there was a prior *felony drug offense*, the person convicted shall be sentenced to life imprisonment if death or serious bodily injury resulted. The term "felony drug offense" means an offense punishable by

imprisonment of more than one year under any law of the United States or of a state or foreign country that prohibits or restricts conduct related to narcotic drugs, marijuana, anabolic steroids, or depressant or stimulant substances. 21 U.S.C. § 802(44).

There is no way to reconcile how a defendant convicted of a greater federal drug offense with the same prior conviction as Sumter would not face a life sentence, but a defendant convicted of a lesser federal drug offense would be required to receive a life sentence if convicted. That leads to an absurd result. It is the District Court's task to effectuate Congressional intent, and it makes no sense that the statute states someone will face a mandatory life sentence if they are convicted of a much lesser offense. Therefore, it was incumbent upon the Court, and based upon the rules of statutory construction and interpretation to avoid an absurd result, to find that while at the time Sumter pled he was under the impression, due to the Government's filing pursuant to 21 U.S.C. § 851, that he would face a mandatory life sentence if he lost at trial, in actuality, due to a change in the law after his guilty plea, that being the First Step Act, he now would not.

While at the time of Sumter's plea, the First Step Act had not been passed and signed into law, it is clear this issue was raised subsequent to his plea in his motion to withdraw his guilty plea. Sumter should receive the benefit of a change in the law, especially given it is specifically set out in paragraph 13 of his plea agreement that he does not waive his rights concerning future changes in the law that affect his

sentence, including those pertaining to the death or serious bodily injury enhancement. (JA 41)

Given the passage of the First Step Act, Sumter's motion to withdraw his guilty plea should have been granted.

III. The petition for writ of certiorari should be granted to determine whether the sentence imposed by the District Court violated the Eighth Amendment of the United States Constitution.

According to the Government's theory of the case, and as is set out in paragraphs 10-13 and 17-19 of the last revised presentence report, Sumter's involvement in this case was being contacted by Hunt who sought to purchase a small quantity of powder cocaine and a small quantity of heroin at Capra's request. Hunt and Capra had spent time together before and had somewhat of a romantic relationship. After obtaining the drugs, Hunt and Capra went to Hunt's apartment where Capra consumed the drugs and, thereafter, she became very drowsy and began to fall asleep. Hunt put Capra in the backseat of his car, buckled her in and took her to her home, but he did not leave her there as he was not able to wake her. Hunt then picked up Sumter and they went to a bar, leaving Capra in the backseat of the car. When they returned to the car, Capra was still breathing and Hunt dropped Sumter off at an apartment. Hunt continued to drive around and attempted to wake Capra, but did not take her to an emergency room, seek any medical assistance or call 911. Sumter was not with Capra when she consumed the drugs and the drugs were provided to Capra by Hunt. After Capra stopped breathing and died, Hunt dumped her body in a wooded area across the North Carolina-South Carolina border, threw

her cell phone into the Intercoastal Waterway, and paid Ortiz to dispose of some of her other belongings. (JA 311–313)

Hunt initially received a sentence of 21 months, however, the Government later moved for a downward departure, and his sentence was reduced to 12 months and 1 day. (JA 20–31; 199–204) Ortiz received a sentence of 27 months. (JA 26–31)

Sumter has a meager criminal record, only having been convicted of failure to yield the right of way when he was 20, for which he paid a fine; public drunk when he was 23, for which he paid a fine; transporting alcohol in a motor vehicle when he was 23 for which he paid a fine; possession of marijuana when he was 24, for which he paid a fine; possession with intent to distribute marijuana, first offense, when he was 27, for which he received a two year sentence suspended upon service of seven days and 18 months probation; and careless operation of a vehicle when he was 27, for which he paid a fine. (JA 315–317) Sumter's criminal history computation score began as a two at sentencing but his objection was sustained to one point he received; therefore, he was left with one point and thus was a criminal history category I.

Sumter, unlike Hunt and Ortiz and despite his meager criminal record, received a lengthy sentence of 20 years. In this case, 20 years is the mandatory minimum. Mandatory minimum statutes, are fundamentally inconsistent with Congress's simultaneous effort to create a fair, honest and rational sentencing system through the use of sentencing guidelines. They transfer sentencing power to prosecutors, who can determine sentences through the charges they decide to bring, and who thereby have reintroduced much of the sentencing disparity that Congress

created the guidelines to eliminate. Mandatory minimums fail to account for the unique circumstances of offenders who warrant a lesser penalty. Unlike guideline sentences, statutory mandatory minimums generally deny a judge the legal power to depart downward no matter how unusual the special circumstances are that call for leniency. Mandatory minimums can also create a circumstance in which the Court is forced to impose a sentence that violates the Eighth Amendment of the United States Constitution.

The Eighth Amendment of the United States Constitution succinctly prohibits "excessive" sanctions. It provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." In *Weems v. United States*, 217 U.S. 349, 30 S. Ct. 544, 54 L. Ed. 793 (1910), the Supreme Court held that a punishment of 12 years jailed in irons at hard and painful labor for the crime of falsifying records was excessive. The Court explained "it is a precept of justice that punishment for crime should be graduated in proportion to the offense." *Id*. at 367, 30 S. Ct. 544. Further, the Court stated they had repeatedly applied this proportionality precept in later cases interpreting the Eighth Amendment. See *Harmelin v. Michigan*, 501 U.S. 957, 997-998, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). Thus, even though "imprisonment for 90 days is not, in the abstract, a punishment which is either cruel or unusual, it may not be imposed as a penalty for the status of narcotic addiction," *Robinson v. California*, 370 U.S. 660, 666-667, 82 S. Ct. 1417, 8 L. Ed. 2d 758 (1962), because such a sanction would be excessive. As Justice Stewart explained in *Robinson*: "even one day in prison would be a cruel and

unusual punishment for the 'crime' of having a common cold." *Id*. at 667, 82 S. Ct. 1417. As Chief Justice Warren explained in his opinion in *Trop v. Dulles*, 356 U.S. 86, 78 S. Ct. 590, 2 L. Ed. 2d 630 (1958): "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man...The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id*. at 100-101, 78 S. Ct. 590. Proportionality review, under those evolving standards, should be informed by "objective factors to the maximum possible extent." See *Harmelin*, 501 U.S. at 1000, 111 S. Ct. 2680.

The Eighth Amendment, which forbids cruel and unusual punishment, contains a narrow proportionality principal that applies to non-capital cases. See *Harmelin*, 501 U.S. 957, 996-997, 111 S. Ct. 2680, 115 L. Ed. 2d 836 (1991). That Constitutional principal of proportionality has been recognized explicitly by the United States Supreme Court. Although the Eighth Amendment prohibition of cruel and unusual punishment has been more often seen as an aspect of Eighth Amendment death penalty jurisprudence rather than a generalized aspect of Eighth Amendment law, the Eighth Amendment still forbids extreme sentences that are grossly disproportionate to the crime. In this case, Sumter's sentence is unconstitutionally disproportionate to the crime of which he was convicted and to his conduct surrounding the crime.

The Eighth Amendment succinctly prohibits excessive sanctions. *Atkins v. Virginia*, 536 U.S. 304, 311, 122 S. Ct. 2242, 153 L. Ed. 335 (2002). The Eighth Amendment states that excessive bail shall not be required, nor excessive fines

imposed, nor cruel and unusual punishments inflicted, and the Supreme Court has held that the Constitution directs judges to apply their best judgment in determining the proportionality of fines. *United States v. Bagakajan*, 524 U.S. 321, 334-336, 118 S. Ct. 2028, 141 L. Ed. 2d 314 (1998). It would not make sense that the Eighth Amendment provides proportionality review in the context of bail and fines but not in the context of other forms of punishment, such as imprisonment. Judges routinely have to exercise their discretion in construing the outer limits of sentencing authority that the Eighth Amendment imposes. Proportionality review is capable of judicial application and is required by the Eighth Amendment. Sumter's mandatory minimum sentence of 20 years raises a gross disproportionality question for the Court.

In this case, even if you take the Government's evidence as true, Sumter never intended anything tragic happen to anyone. Our system of justice, particularly when it comes to crimes for which someone may face 20 years to life, is primarily based upon criminal intent. The fact the statute reads the way it does takes intent out of the equation all together and exposes a defendant to an extremely harsh sentence when the defendant did not purposefully cause someone's death. This was a drug deal arranged by Hunt, who then, according to the Government, provided the drugs to Capra. It was Hunt who took Capra back to his apartment where she used the cocaine and heroin, and it was Hunt who drove her around while she was passed out and did not seek medical assistance or call 911. At one point, Sumter was in the vehicle with Hunt and Capra, and Sumter and Hunt went to a bar, and after leaving, according to

the paragraph 13 of the revised presentence report, Capra was still breathing. (JA 312) Therefore, Sumter would not have been aware of how serious the situation was and Capra was in Hunt's vehicle and with Hunt, the person who knew her and could take care of her. Then, according to the Government, Hunt dropped Sumter off at an apartment and got back in the vehicle. But, instead of taking Capra to a hospital at any point and possibly saving her life, Hunt continued to drive her around. Also, Hunt was with her earlier without Sumter when Capra was having problems and did nothing. Eventually after realizing Capra stopped breathing, Hunt disposed of her body in some woods in North Carolina, threw her phone in the Intercoastal Waterway, and paid Ortiz to dispose of some of her personal effects.

Ortiz received 27 months. Hunt ended up with a sentence of 12 months and 1 day. Sumter's sentence is 20 times that of Hunt, who provided the drugs to Capra, could have saved her life, and dumped her body in the woods in another state.

It is clear the District Court judge was extremely troubled with the term of the sentence he was required to impose on Sumter, as evidenced by the following remarks by the Court at Sumter's sentencing:

> "The Court is not – does not have the authority to make charging decisions. The government chose to charge Mr. Sumter one way. Mr. Hunt one way. Mr. Ortiz one way. That's the executive branch's prerogative, not the judicial branch.
>
> I can't make charging decisions. But last night I read a presentence report of another individual, and I just bring this to everybody's attention, not saying that it's right or wrong, I don't know the facts, not the facts but the decisional making process that may be going through any prosecutor's mind.

> You've got reasons for doing things and not doing things, but I've got another individual this afternoon and his presentence report where it's alleged that a death resulted from an overdose and that individual is not – was charged differently.
>
> And, again, I don't – I can't get involved in these charging decisions, but it is a little troublesome and I'm no big fan of mandatory minimum sentences. Mandatory minimum sentences tie my hands with regard to sometimes treating people equitably.
>
> Like I say, you know, you don't have to address it, Mr. McMillian, but I've got another individual where there's an overdose later this afternoon and that individual, I think, had a prior drug conviction and is not looking at nearly the time that Mr. Sumter is looking at, so I say that.
>
> Again, I'm no big fan of mandatory minimums but I've got to impose what the law requires me to do. I made my decision on the motion to withdraw the plea and denied it for the reasons explained in my order and I am still convinced that was the right thing to do and I stand by that order.
>
> But we all need to be concerned with equity and fairness, you know, the guidelines were designed to try and achieve uniformity in sentencing. That's why they made all of those efforts decades ago, but I have no control over charging decisions.
>
> That's the function of the Department of Justice and the executive branch…" (JA 229–231)

The District Court echoed the sentiments of the United States Supreme Court in *Harris v. U.S.* in which the Supreme Court expressed their concern that mandatory minimum statutes are fundamentally inconsistent with Congress's simultaneous effort to create fair, honest, and rational sentencing through the use of guidelines. Mandatory minimums transfer power to prosecutors who can determine sentences through the charges they decide to bring and thus reintroduce much of the sentencing

disparity Congress created the guidelines to eliminate. *Harris v. U.S.*, 536 U.S. 545 at 547, 548 (2002), 153 L. Ed. 2d 524.

In Supreme Court jurisprudence regarding the Eighth Amendment analysis, the Court has referenced various factors that may be taken into consideration. In *Solem v. Helm*, 463 U.S. 277, 103 S. Ct. 3001, 77 L. Ed. 2d 637 (1983), the Court identified three factors that may be relevant to a determination of whether a sentence is so disproportional that it violates the Eighth Amendment. Those factors being the gravity of the offense and the harshness of the penalty, the sentence imposed on other criminals in the same jurisdiction and the sentences imposed for commission of the same crime in other jurisdictions. In addition to those factors set forth in *Solem*, additional sentence related characteristics should be considered as well. See *Ewing v. California*, 538 U.S. 11, 123 S. Ct. 1179. 155 L. Ed. 2d 108 (2003) Those being the length of the prison term in real time, i.e. the time the offender is likely to actually spend in prison, sentence triggering criminal conduct, i.e. the offender's actual behavior or other offense related circumstances and the offender's criminal history. In this case, Sumter was guilty of drug distribution and with no parole in the federal system he will serve 85% or 17 years. Unfortunately, largely, if not totally due to the conduct of Hunt, Capra was not saved but died. There was no intentional conduct by this defendant in terms of seeking to harm Capra. As far as the gravity of the offense, drug distribution is a serious offense but does not rise to the level of an intentional homicide. A mandatory minimum sentence of 20 years is extremely harsh for

someone who has a meager criminal record and sold $100.00 worth of drugs to someone who then provided them to the victim.

Regarding sentences imposed on other criminals in the same jurisdiction, the District Court judge specifically referenced another defendant being sentenced later the same day as Sumter who was not looking at nearly the time that Sumter was facing. That individual was also involved in an offense where there was an overdose. Therefore, the prosecution, by the charge they choose, is allowed to put the court in a position where different sentences are imposed in the same jurisdiction for the same criminal conduct. This ability would apply to other jurisdictions as well, given the executive branch's prerogative to make charging decisions, more specifically, the Department of Justice. Sumter will serve almost the entire 20 years when his actual behavior surrounding the criminal offense was to provide an individual a small amount of drugs who then provided those drugs to another individual who unfortunately overdosed and passed away. Sumter was with her a limited amount of time and it was the co-defendant who could have saved her life. Therefore, his actual behavior was not as outrageous or culpable as is often the case when a death results. In addition, Sumter's criminal history is meager and at sentencing he had one criminal history point and was determined to be a criminal history category I. Sumter's most serious offense was possession with the intent to distribute marijuana for which he received a two year sentence suspended upon service of seven days and eighteen months probation. His other offenses were failure to yield the right away when he was 20, public drunk when he was 23, transporting alcohol in a motor vehicle

when he was 23, possession of marijuana when he was 24, and careless operation of a vehicle when he was 27; all of which he paid a fine to resolve.

The circumstances surrounding Capra's death are both tragic and unique, and should be taken into account in an Eighth Amendment analysis. In addition, Sumter, and what he did and did not do, is unique and should be taken into account as well. Sumter has absolutely no history of violent crimes and no prior convictions for extensive drug trafficking. Sumter has an eighth grade education and has never obtained his GED. (JA 318–320)

Sumter was only in Capra's presence for a small amount of time and, unlike Hunt, did not know her, was not driving her, and was not present when she used the drugs Hunt provided to her or when she used any of the other drugs in her system.

According to the final revised presentence report, Sumter has four daughters with whom he had regular contact until his arrest. Further, he does not have any gang affiliations and had been working full-time with South Carolina Painting and Coating in Florence, SC for the past 14 years. It appears Sumter may have in the past self-medicated with marijuana, Percocet, Xanax and Adderall due to anxiety issues prior to his arrest; however, he has never received any substance abuse treatment or received formal treatment for anxiety. Sumter does suffer from anxiety and was placed on 50 mg of Vistaril once a day by the medical staff at the Dillon County Detention Center.

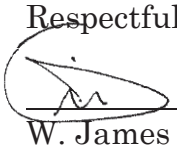
The mandatory minimum in this case fails to account for the unique circumstances of this case and of Sumter and, upon proportionality review, the

sentence of 240 months violates the Eighth Amendment of the United States Constitution.

CONCLUSION

For the foregoing reasons, the Supreme Court should grant James Latron Sumter's Petition for Writ of Certiorari.

Respectfully Submitted,



W. James Hoffmeyer
Counsel of Record
LAW OFFICE OF W. JAMES HOFFMEYER
125 Warley Street
Florence, South Carolina 29501
(843) 664-0009
jim@hoffmeyerlaw.com

Counsel for Appellant

APPENDIX

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4585

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

JAMES LATRON SUMTER, a/k/a T,

Defendant - Appellant.

Appeal from the United States District Court for the District of South Carolina, at Florence. R. Bryan Harwell, Chief District Judge. (4:18-cr-00772-RBH-1)

Submitted: April 10, 2020 Decided: April 20, 2020

Before GREGORY, Chief Judge, and KEENAN and RUSHING, Circuit Judges.

Affirmed by unpublished per curiam opinion.

W. James Hoffmeyer, LAW OFFICE OF W. JAMES HOFFMEYER, Florence, South Carolina, for Appellant. A. Lance Crick, Acting United States Attorney, Everett E. McMillian, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Florence, South Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

James Latron Sumter pleaded guilty to conspiracy to possess with intent to distribute and distribute cocaine and heroin resulting in death and serious bodily injury, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(C), 846 (2018). On appeal, Sumter contends that the district court abused its discretion by denying his motion to withdraw his guilty plea and that his 240-month sentence amounts to cruel and unusual punishment under the Eighth Amendment. For the following reasons, we affirm.

We review a district court's denial of a defendant's motion to withdraw his guilty plea for abuse of discretion. *United States v. Nicholson*, 676 F.3d 376, 383 (4th Cir. 2012). A criminal defendant may withdraw a plea after it has been accepted by the district court if he "can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). A defendant does not have an absolute right to withdraw a guilty plea, *United States v. Walker*, 934 F.3d 375, 377 n.1 (4th Cir. 2019), and "bears the burden of demonstrating that withdrawal should be granted," *United States v. Thompson-Riviere*, 561 F.3d 345, 348 (4th Cir. 2009) (internal quotation marks omitted). A district court considers a variety of factors when deciding whether the defendant has met his burden, *see United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991), but "a properly conducted Rule 11 guilty plea colloquy . . . raises a strong presumption that the plea is final and binding," *Nicholson*, 676 F.3d at 384 (brackets and internal quotation marks omitted). After reviewing the record on this point, and reviewing all of the *Moore* factors, we conclude that the district court did not abuse its discretion in denying Sumter's motion to withdraw his plea.

Moving to Sumter's challenge to his sentence, because Sumter did not raise his constitutional claim in the district court, we review this issue for plain error. *See United States v. Jackson*, 706 F.3d 264, 270 n.2 (4th Cir. 2013). The Eighth Amendment "forbids only extreme sentences that are grossly disproportionate to the crime." *Graham v. Florida*, 560 U.S. 48, 60 (2010) (internal quotation marks omitted). We are required to engage in a proportionality analysis under the Eighth Amendment only "in those cases involving life sentences without parole, or, alternatively, in cases involving terms of years without parole that are functionally equivalent to life sentences because of the defendant['s] age[]." *United States v. Dowell*, 771 F.3d 162, 168 (4th Cir. 2014) (internal quotation marks omitted). Because Sumter's sentence does not fall within either of those categories, we decline to engage in that analysis here, and therefore conclude that the district court did not plainly err by imposing the mandatory minimum sentence of 240 months' imprisonment.

Accordingly, we affirm the judgment of the district court. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: April 20, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4585
(4:18-cr-00772-RBH-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

JAMES LATRON SUMTER, a/k/a T

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT
District of South Carolina

UNITED STATES OF AMERICA

vs.

James Latron Sumter
a/k/a "T"

JUDGMENT IN A CRIMINAL CASE

Case Number: 4:18-cr-00772-RBH (1)

USM Number: 33632-171

W. James Hoffmeyer, CJA
Defendant's Attorney

THE DEFENDANT:

■ pleaded guilty to count(s) 1 of the Indictment on 12/07/2018 .
☐ pleaded nolo contendere to count(s) _____ which was accepted by the court.
☐ was found guilty on count(s) __after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846	Please see indictment	8/15/2018	1

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____.

☐ Count(s) _ ☐ is ☐ are dismissed on the motion of the United States.

☐ Forfeiture provision is hereby dismissed on motion of the United States Attorney.

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

8/8/2019
Date of Imposition of Judgment

s/R. Bryan Harwell
Signature of Judge

Chief Judge R Bryan Harwell
Name and Title of Judge

8/9/2019
Date

DEFENDANT: James Latron Sumter
CASE NUMBER: 4:18-cr-00772-RBH-1

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of **240 months**.

■ The court makes the following recommendations to the Bureau of Prisons: Defendant be allowed to participate in any and all drug rehabilitation, treatment, or counseling programs of any nature available with the Bureau of Prisons, including the Residential Drug Treatment Program. Defendant be allowed to participate in any and all vocational and educational programs available with the Bureau of Prisons. Defendant serve his sentence at the Bennettsville, SC facility, or the Williamsburg, SC facility, assuming he qualifies.

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

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

☐ at _____ ☐ a.m. ☐ p.m. on _____.

☐ as notified by the United States Marshal.

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

☐ before 2 p.m. on _____.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this Judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: James Latron Sumter
CASE NUMBER: 4:18-cr-00772-RBH-1

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of **3 years**.

While on supervised release, the defendant shall comply with the mandatory and standard conditions of supervision outlined in 18 U.S.C. § 3583(d). The defendant shall also comply with the following special conditions:

1. You must submit to substance abuse testing to determine if you have used a prohibited substance. You must contribute to the cost of such program not to exceed the amount determined reasonable by the court approved "U.S. Probation Office's Sliding Scale for Services," and you will cooperate in securing any applicable third-party payment, such as insurance or Medicaid. This special condition is imposed due to the defendant's history of illegal drug use.

2. You must enroll in and complete an educational program as approved by the U.S. Probation Office, with the objective of obtaining his General Education Development Certificate, unless already obtained during his period of incarceration. This special condition is imposed due to the defendant's eighth grade education.

MANDATORY CONDITIONS

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

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

DEFENDANT: James Latron Sumter
CASE NUMBER: 4:18-cr-00772-RBH-1

STANDARD CONDITIONS OF SUPERVISION

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

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

U.S. Probation Office Use Only

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

Defendant's Signature _____ Date _____

DEFENDANT: James Latron Sumter
CASE NUMBER: 4:18-cr-00772-RBH-1

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	**$ 100**		**$**	**$**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case(AO245C)* will be entered after such determination.

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

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

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
TOTALS	$_____	$_____	

☐ Restitution amount ordered pursuant to plea agreement **$**_____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. §3612(f). All of the payment options on Sheet 5 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. §3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:
- ☐ The interest requirement is waived for the ☐ fine ☐ restitution.
- ☐ The interest requirement for the ☐ fine ☐ restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: James Latron Sumter
CASE NUMBER: 4:18-cr-00772-RBH-1

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ■ Lump sum payment of $ 100 (special assessment) due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐ C, ☐ D, or ☐ E, or ☐ F below: or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____(weekly, monthly, quarterly) installments of $_____over a period of _____ (*e.g., months or years*), to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____(*e.g., weekly, monthly, quarterly*) installments of $_____over a period of _____(*e.g., months or years*), to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within (*e.g., 30 or 60 days*) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of court.

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

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

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

As directed in the Preliminary Order of Forfeiture, filed _____ and the said order is incorporated herein as part of this judgment.

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

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
FLORENCE DIVISION

United States of America Plaintiff, v. James Latron Sumter, Defendant.	Criminal Action No.: 4:18-cr-00772-RBH **ORDER**

This criminal case is before the Court on Defendant James Latron Sumter's motion to withdraw guilty plea. ECF No. 73. For the reasons that follow, the Court denies Sumter's motion to withdraw guilty plea.

Background

On July 16, 2018, a criminal complaint was filed charging Sumter with conspiracy to possess with intent to distribute and to distribute cocaine and heroin in violation of 21 U.S.C. § 846. ECF No. 3. On July 18, 2018, at Sumter's initial appearance, the Court appointed attorney Nicholas Lewis ("plea counsel") to represent Sumter. ECF No. 11.

On August 15, 2018, a federal grand jury indicted Sumter in a single-count indictment for conspiracy to possess with intent to distribute and to distribute a quantity of cocaine and a quantity of heroin with death and serious bodily injury resulting from use of said substances, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), and 846. ECF No. 26. The same day, the Government filed notice pursuant to 21 U.S.C. § 851 that Sumter was subject to enhanced penalties based on a 2011 conviction for "Manufacture, Possession of other Controlled Substance in Schedule I, II, II, with Intent to Distribute." ECF No. 30. Given the 2011 felony, if Sumter was found guilty of the offense charged

in the indictment, he faced mandatory life imprisonment. ECF No. 28; 21 U.S.C. § 841(b)(1)(C).

The Government made three plea offers to Sumter. The first offer, made on September 25, 2018, was based upon the mandatory life sentence, but contained a cooperation provision allowing Sumter the opportunity to earn time off his sentence. ECF No. 95 at 3. The second offer was based on a penalty of twenty years to life imprisonment (the penalty applicable to the crime on which Sumter was indicted if there was no previous felony). *Id.* at 4; 21 U.S.C. § 841(b)(1)(C). Under the second offer, made November 27, 2018, the Government agreed to withdraw the enhanced penalty applicable under 21 U.S.C. § 851; the second offer also provided Sumter the ability to earn time off his sentence by cooperating. ECF No. 95 at 4. Sumter was to decide by the pretrial conference on December 3, 2018, whether he wished to plead guilty or go to trial. *Id.*

At the December 3, 2018 pretrial conference, the Court conducted a hearing pursuant to *Missouri. v. Frye*, 566 U.S. 134 (2012), at which time Sumter indicated he understood his options, and the Court extended by several days the deadline for Sumter to decide whether to accept the second plea offer. ECF No. 95-2. Following the *Frye* hearing, the Government extended a third plea offer to Sumter. ECF No. 95 at 4. The third offer allowed Sumter to plead guilty and receive a stipulated sentence in the range of 168-216 months pursuant to Fed. R. Crim. P. 11(c)(1)(C). *Id.* Over the next few days, plea counsel and the Government negotiated changes to the second offer, including reserving a right for Sumter to appeal the enhancement for serious bodily injury or death. *Id.*

On December 7, 2018, Sumter pled guilty to count one of the indictment pursuant to a written plea agreement which took the form of the revised second offer. ECF Nos. 95 at 5, 59, 60. Under the plea agreement, Sumter agreed to plead guilty to count one of the indictment without the enhanced penalties under 21 U.S.C. § 851; he was thus facing possible imprisonment of twenty years to life. ECF

No. 59. ¶ 1. The plea agreement provided an opportunity for Sumter to earn time off his sentence through cooperation and specifically reserved a right for Sumter to appeal his sentence or raise a post-conviction relief challenge based upon future changes in the law regarding the enhancement for death or serious bodily injury. *Id.* ¶¶ 9, 13.

At the December 7, 2018 hearing, the Court conducted a complete plea colloquy under Fed. R. Crim. P. 11. The Court confirmed plea counsel had explained to Sumter the charge against him, the possible punishments, and Sumter's rights, that plea counsel thought Sumter understood these things, and that plea counsel felt the Government could produce sufficient evidence to meet its burden of proof. ECF No. 95-3 at 5. Plea counsel indicated no mental evaluation had been done for his client and he had no doubts regarding his client's competence. *Id.* at 5-6. The Court then placed Sumter under oath. *Id.* at 6. The Court confirmed with Sumter that he had no impairments impacting his ability to understand what he was doing and he understood he was pleading guilty. *Id.* at 7-8. The Court also confirmed Sumter was fully satisfied with plea counsel's representation. *Id.* at 8-9.

The Court reviewed the sentencing guidelines, relevant conduct, the Court's discretion to vary from the guidelines, and the statutory sentencing factors under 18 U.S.C. § 3553(a). *Id.* at 9-11. The Court explained that parole had been abolished, the basics of supervised release, and the consequences of pleading guilty to a felony. *Id.* at 12-13. The Court spoke about the rights Sumter would have at trial and that Sumter was giving up those rights by pleading guilty. *Id.* at 13-15. Having reviewed all of that, the Court confirmed Sumter was pleading guilty freely and voluntarily, was not being forced to plead, and no one had promised him anything not in the plea agreement to get him to plead guilty. *Id.* at 15-17.

The Court confirmed Sumter had received a copy of the indictment, reviewed it with plea

counsel, and told plea counsel everything he needed to know about the case. *Id.* at 17. The Court reviewed the indictment and the elements of the offense with Sumter; Sumter admitted to each of the elements of the offense. *Id.* at 17-19. The Court also went through the potential penalties for the offense; Sumter stated he understood the possible penalties and had reviewed them with plea counsel. *Id.* at 19-20. The Government summarized the plea agreement and Sumter confirmed he had reviewed the agreement, entered it freely and voluntarily, and understood it. *Id.* at 20-26. The Government withdrew the information it had filed pursuant to 21 U.S.C. § 851. *Id.* at 24.

The Government provided a factual basis for the case. *Id.* at 26-30. According to the Government, the victim contacted a cooperating witness and asked him to help her obtain $100 worth of heroin and cocaine which the witness said he could do via an individual later identified as Sumter. *Id.* at 27. The witness called and texted Sumter regarding the drug deal and took the victim to a location where Sumter provided $100 worth of heroin and cocaine. *Id.* The victim used the drugs, subsequently suffered an overdose, and died. *Id.* at 27-28. Sumter was not present when the victim died; following the victim's death, the cooperating witness disposed of the victim's remains in a remote wooded area, destroyed her cellphone, and took some of her personal effects to another individual who burned them to destroy the evidence. *Id.* at 28.

If the case were to proceed to trial, the Government advanced it would provide a text message recovered from the witness's phone; the message between the witness and Sumter detailed the drug transaction and corroborated phone calls. *Id*. at 28. The cooperating witness would also testify that he had previously served as middleman in drug transactions where he bought drugs from Sumter and then provided the drugs to other individuals. *Id.* at 28-29. Several other witnesses would testify regarding their drug activities with Sumter. One witness would testify that in early 2017. he purchased

heroin from Sumter, used the heroin, and suffered an overdose leading to hospitalization. *Id.* at 29.

Following the Government's summary of the facts, Sumter generally agreed with the Government's summary of what he did, admitted to the elements of the offense, and stated he was - in fact - guilty of the offense. *Id.* at 30-31. Sumter's sole objection to the Government's summary was regarding the final potential witness who had purportedly suffered an overdose in early 2017 after using heroin sold by Sumter; Sumter said he knew nothing about that. *Id.* at 30.

The Court found Sumter competent and capable of entering a plea, found his plea was a knowing and voluntary plea with facts to support each of the elements of the offense, and accepted Sumter's guilty plea. *Id.* at 30-31.

Starting in mid-January, 2019, Sumter filed a number of letters asking to withdraw his guilty plea. ECF Nos. 62, 63, 65, 67, 96, 97, 98, 99, 100. On February 11, 2019, the Clerk of Court docketed Sumter's *pro se* motion to substitute attorney. ECF No. 69. On February 12, 2019, plea counsel filed a motion to withdraw Sumter's guilty plea, ECF No. 73, and - upon Sumter's request - filed a motion to substitute attorney, ECF No. 72.

On February 19, 2019, the Magistrate Judge held a hearing on the motions to substitute counsel. ECF No. 80. The Magistrate Judge found plea counsel had not done anything wrong but granted the motions to substitute counsel. ECF Nos. 80, 104 at 11-12.[1] The Court then appointed attorney W. James Hoffmeyer ("post-plea counsel") to represent Sumter. ECF No. 81.

1 At the hearing on Sumter's motion to withdraw guilty plea, Sumter's then-counsel moved to admit the transcript of the hearing on the motions to substitute attorney. The Court admitted the transcript of the February 19, 2019 hearing without objection. The transcript was filed under seal. ECF No. 104.

On April 18, 2019, the Government filed a response in opposition to Sumter's motion to withdraw guilty plea. ECF No. 95. On May 29, 2019, the Court held a hearing on Sumter's motion to withdraw guilty plea. ECF No. 102. The Court heard argument from the parties, admitted five exhibits,[2] and took the matter under advisement. ECF Nos. 102, 103. Accordingly, this matter is now ripe before the Court.

Discussion

A. Legal Standards

Rule 11 (formerly Rule 32) of the Federal Rules of Criminal Procedure permits withdrawal of a guilty plea if "the defendant can show a fair and just reason for requesting the withdrawal." Fed. R. Crim. P. 11(d)(2)(B). When considering whether to allow a defendant to withdraw a guilty plea, the district court must consider a variety of factors. *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991). The *Moore* factors to be considered 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 the 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.

Id.

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2 The five exhibits were: (1) the autopsy report on the victim (Defendant's exhibit one); (2) a recording of a phone call Sumter placed from jail on the night he pled guilty (Government's exhibit one); (3) the autopsy report on the victim with Bates numbers attached (Government's exhibit two); (4) a recording of a phone call Sumter placed from jail on December 2, 2018 (Government's exhibit three); and (5) a recording of a phone call Sumter placed from jail on December 5, 2018 (Government's exhibit four). ECF No. 103.

Although all the *Moore* factors must be given appropriate weight, the key to determining whether the motion to withdraw a guilty plea should be granted is whether the Rule 11 hearing was properly conducted. *United States v. Puckett*, 61 F.3d 1092, 1099 (4th Cir. 1995). "[A]n approrpriately conducted Rule 11 proceeding . . . must be recognized to raise a strong presumption that the plea is final and binding." *United States v. Lambey*, 974 F.2d 1389, 1394 (4th Cir. 1992).

B. Analysis

When Sumter's letters, the formal motion, and the arguments at the motion hearing are read together, Sumter asserts he was forced/coerced into signing the guilty plea and is not guilty. Sumter claims plea counsel was ineffective. Sumter then advances the delay in filing to withdraw his guilty plea was not excessive, the Government would not be prejudiced if the Court were to grant his motion, and there would be no waste or inconvenience if the motion was granted. The Government asserts all six of the *Moore* factors weigh in favor of holding Sumter to his plea agreement and the Court should thus deny Sumter's motion to withdraw guilty plea. The Court will analyze each of the *Moore* factors in turn.

1. Factor One: Whether Defendant Has Offered Credible Evidence His Plea Was Unknowing or Involuntary.

Sumter asserts his plea was unknowing or involuntary because: (1) he felt undue pressure to plead guilty; (2) he only saw the autopsy report on the victim five minutes before pleading guilty; and (3) the First Step Act renders his plea unknowing or involuntary. His arguments are unavailing.

Sumter first claims his plea was unknowing or involuntary because he felt undue pressure to plead guilty. *See*, *e.g.,* ECF No. 65 at 1 ("I feel like I was forced into a plea."). That argument, however, runs counter to Sumter's sworn statements at the plea colloquy. The Court held a thorough

Rule 11 colloquy. At the plea hearing, Sumter testified under oath he was pleading guilty freely and voluntarily, no one was forcing him to plead guilty, no one had pressured him or threatened him to cause him to plead guilty, and other than what was in the plea agreement, no one had promised him anything to induce his guilty plea. ECF No. 95-3 at 15-17. In accepting his plea, the Court found Sumter competent and capable of pleading guilty, and held his plea was knowing and voluntary and supported by facts containing the elements of his offense. *Id.* at 32. Sumter's instant claim, which runs counter to his statements at the plea hearing, does not provide credible evidence his plea was unknowing and/or involuntary. *See United States v. Cline*, 286 Fed. App'x. 817, 819 (4th Cir. 2008) (indicating the key to the first *Moore* factor is whether the Court conducted a proper Rule 11 colloquy).

Sumter next advances he only saw the autopsy report on the victim five minutes before he pled guilty and thus did not know there was an issue to be raised under *Burrage v. United States*, 571 U.S. 204 (2014), regarding whether the drugs he allegedly sold were the but-for cause of the victim's death. *See, e.g.,* ECF No. 65 ("I didn't see the autopsy report until five minutes before I [signed] the plea and [the report] did say the cause of death was unknown."). As a result, Sumter argues his plea was unknowing or involuntary.

Sumter's argument regarding when he first saw the autopsy and/or knew there was a *Burrage* argument to be made is refuted by multiple sources. First, the Government argued at the motion hearing that *Burrage* was one of the first issues plea counsel raised in his representation of Sumter, and that the Government provided the autopsy report to plea counsel in October, 2018. In fact, at the *Frye* hearing on December 3, 2018 - several days before Sumter's guilty plea - plea counsel discussed the *Burrage* case in Court with Sumter present. ECF No. 95-2 at 16. The Government also introduced at

the motion hearing two phone calls Sumter placed from jail.[3] In the first call, placed on December 2, 2018, five days before Sumter pled guilty, he can be heard discussing the autopsy report. In the second call, placed December 5, 2018, two days before the plea colloquy, Sumter can be heard at various points discussing the autopsy report, the fact the autopsy shows the victim had multiple drugs in her system, and the *Burrage* case. Additionally, and importantly, plea counsel and Sumter reserved in the plea agreement the right to appeal or raise in any post-conviction action "any future changes in the law pertaining to the 'death or serious bodily injury enhancement' set forth in 21 U.S.C. § 841(b)(1)(C)." ECF No. 59 ¶ 13. This enhancement is precisely the one at issue in *Burrage*. The right to appeal or challenge any changes in this enhancement language was negotiated in the days between the December 3, 2018 *Frye* hearing and the December 7, 2018 plea colloquy. ECF No. 95 at 4. The evidence thus shows Sumter knew about the autopsy report and the possibility of making an argument pursuant to *Burrage* well before pleading guilty.

Finally, Sumter argues the First Step Act changed the level of predicate felony which qualifies to enhance the sentence for his crime, and he thus pled guilty assuming his predicate crime qualified for an enhancement when it would not do so under the First Step Act. The Government argues the First Step Act did not modify the language of 21 U.S.C. § 841(b)(1)(C), the section under which Sumter pled guilty.

As a preliminary matter, the Court notes Sumter pled guilty with his original plea counsel on December 7, 2018. The First Step Act was not enacted until December 21, 2018, two weeks after Sumter pled guilty. First Step Act of 2018, Pub. L. No. 115-931, 132 Stat. 5194 (2018). Even if

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3 The Government presented argument about both phone calls at the motion hearing, and the Court admitted the calls as Government exhibits, ECF No. 103. The Government played the December 2, 2018 phone call at the hearing. It provided the December 5, 2018 phone call and a description of said call to chambers the day following the hearing. ECF Nos. 104, 105.

Sumter had pled guilty after the First Step Act was enacted, however, the Act would not help Sumter because it does not change the felonies which qualify to enhance the sentence for a conviction under 21 U.S.C. § 841(b)(1)(C). *See id.* (increasing the level of drug felonies which qualify as predicate felonies for enhanced sentences under 21 U.S.C. §§ 841(b)(1)(A)-(B), but not impacting 21 U.S.C. §§ 841(b)(1)©- the section under which Sumter pled guilty). While he argued the unfairness or inequity in Congress changing the level of the enhancement drug felonies for 21 U.S.C. §§ 841(b)(1)(A)-(B) but not 21 U.S.C. § 841(b)(1)©, post-plea counsel conceded at the motion hearing that the First Step Act did not modify the language of 21 U.S.C. § 841(b)(1)©. Accordingly, Sumter's argument with regard to the First Step Act fails.

For the foregoing reasons, Sumter has failed to provide credible evidence his guilty plea was unknowing and/or involuntary. Further supporting this finding is the fact that Sumter received and negotiated multiple plea offers. Accordingly, the first *Moore* factor weighs in favor of the Government.

2. Factor Two: Whether the Defendant Has Credibly Asserted Legal Innocence

Sumter asserts he is not guilty of the crime to which he pled guilty. The Government contends Sumter's claim fails. The Court agrees with the Government.

Sumter advances he is innocent because he did not commit the crime, was not present when the victim was sold the drugs and did not dispose of the victim's body. *See, e.g.*, ECF No. 96 at 1 (asserting he did not realize that by signing his guilty plea, "I was signing something that says I am responsible for the life of a female that passed away. I didn't sell the female any drugs neither was I there when she passed away and the [witness] . . . dumped her body in the woods, also threw away her cell phone in the river, and burned all the rest of her belongings . . ."). The Government advances Sumter's claim fails because it runs counter to his testimony at the Rule 11 colloquy and a jail call

intercepted the night of the guilty plea. The Government also avers Sumter's arguments are complaints that others involved in the incident are receiving shorter sentences rather than assertions of Sumter's legal innocence.

At the Rule 11 colloquy, the Court reviewed with Sumter the elements and potential penalties of the offense of conspiracy to possess with intent to distribute and to distribute a quantity of cocaine and a quantity of heroin with death and serious bodily injury resulting from the use of such substances. ECF No. 95-3 at 17-20. Sumter admitted to each of the elements of the offense and testified he understood the potential penalties he faced. *Id.* at 19-20. The Government summarized the plea agreement, including Sumter's agreement to plead to the charge the Court had just reviewed; Sumter stated he had reviewed the plea agreement, understood it, and signed it freely and voluntarily. *Id.* at 20-25. The Government detailed the factual basis for the charge, including Sumter providing the drugs involved, the victim using the drugs, and the victim's subsequent death from an overdose. *Id.* at 27-28. Sumter agreed with the Government's summary of what he did and stated he was guilty of the offence; his sole objection to the Government's factual basis was to a witness who claimed to have overdosed after ingesting drugs sold by Sumter at an earlier date. *Id.* at 30-31. Because Sumter asserted under oath at the plea hearing that he understood what he was pleading to and agreed with the Government's summary of what happened, his instant claims he did not commit the offense are not credible assertions of legal innocence.

To the extent Sumter seeks to assert he is innocent and only pled guilty because he was pressured into pleading, that claim fails for the reasons detailed in relation to factor one. Further supporting the idea Sumter was not pressured into pleading guilty is a jail call from the evening of his guilty plea. In this call, introduced by the Government at the motion hearing, Sumter never alleges he

was pressured into pleading guilty. For those reasons, factor two weighs towards denying Sumter's motion to withdraw guilty plea.

3. Factor Three: Delay Between Entry of Plea and Filing a Motion to Withdraw

Sumter advances there has been no excessive delay in filing to withdraw his guilty plea. The Government disagrees. The Court holds there has been relatively minimal delay here.

Sumter entered his guilty plea on December 7, 2018. ECF No. 60. The first of Sumter's letters seeking to withdraw his guilty plea was filed by the Clerk of Court on January 18, 2019. ECF No. 62. Plea counsel filed a formal motion to withdraw the guilty plea on February 12, 2019. ECF No. 73. Accordingly, the delay between plea and notice of intent to withdraw the guilty plea was approximately five and a half weeks. This delay is relatively minimal. *See Moore*, 931 F.2d at 248 (finding a six week delay before "giving notice of [] intent to move to withdraw" a guilty plea did not weigh in favor of granting defendant's motion to withdraw). This factor thus weighs slightly in favor of granting Sumter's motion. This single factor, however, is insufficient to justify withdrawal of a guilty plea, even when it weighs in favor of defendant, if the remaining factors weigh heavily against granting the motion. *See United States v. Ubakanma*, 215 F.3d 421, 425 (4th Cir. 2000).

4. Factor Four: Did Defendant Have the Close Assistance of Competent Counsel?

Sumter maintains plea counsel was ineffective in his representation and coerced Sumter into pleading guilty. The Government advances Sumter had the close assistance of competent counsel.

To prevail on this factor, the defendant must demonstrate that "(1) that his counsel's performance 'fell below an objective standard of reasonableness' and (2) that he was prejudiced in the sense that 'there [was] a reasonable probability that, but for counsel's error, he would not have pleaded

guilty and would have insisted on going to trial.'" *United States v. DeFreitas*, 865 F.2d 80, 82 (4th Cir. 1989) (quoting *Hill v. Lockhart*, 474 U.S. 52, 57, 59 (1985)). Under this standard, the court's inquiry is limited to whether the defendant's counsel "was reasonable 'under prevailing professional norms,' and in light of the circumstances." *Carter v. Lee*, 283 F.3d 240, 249 (4th Cir. 2002) (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *see also Hill*, 474 U.S. at 57-59 (holding that the two-part *Strickland* test applies to motions to withdraw guilty pleas based on ineffective assistance of counsel).

Here, Sumter is unable to meet either part of the *Strickland* test. First, he cannot show plea counsel's assistance fell outside the "wide range of reasonable professional assistance" considered acceptable. *Strickland*, 466 U.S. at 689. Further, Sumter's assertion plea counsel's performance was deficient runs counter to Sumter's statements at the plea colloquy and to the earlier finding of this Court plea counsel had done nothing wrong. At his plea hearing, Sumter testified under oath plea counsel had done everything he should have or could have done, had not failed to do anything Sumter asked him to do, there was nothing further Sumter wanted plea counsel to do before he pled guilty, he was fully satisfied with plea counsel's services, and he had no complaint about plea counsel. ECF No. 95-3 at 8-9. To the extent Sumter claims plea counsel pressured him into pleading guilty, that likewise runs counter to Sumter's sworn statements at the plea hearing. *Id.* at 15-17 (stating Sumter was pleading guilty freely and voluntarily and was not pleading guilty due to pressure, threat, force, or promise beyond what was in the plea agreement). Having sworn at the plea colloquy he was fully satisfied with plea counsel's performance and was not pressured or coerced into pleading guilty, Sumter may not now allege plea counsel's performance was deficient. The Court further notes, in deciding the motions to substitute counsel, the Magistrate Judge found no evidence plea counsel had performed deficiently and simply exercised his discretion and appointed Sumter new counsel. ECF No. 104 at 11. Sumter is thus

unable to meet the first prong of *Strickland*.

Even if Sumter could show defense counsel's performance was deficient, there is not a reasonable probability that but for counsel's performance, Sumter would have insisted on proceeding to trial. As noted above, absent the plea agreement, Sumter faced a mandatory life sentence if convicted of the charge in the indictment with the enhancement under 21 U.S.C. § 851. Thus, proceeding to trial rather than accepting a twenty years to life sentence range with the opportunity to earn time off for cooperating would have been unreasonable. Accordingly, Sumter fails to meet the second prong of *Strickland*. Because Sumter is unable to meet either prong of *Strickland*, this factor weighs in favor of the Government.

5. Factor Five: Will Withdrawal Prejudice the Government?

Sumter argues the withdrawal of his guilty plea will not prejudice the Government. The Government counters that because there was a delay between the entry of the guilty plea and the motion to withdraw the guilty plea, it would be prejudiced if the Court allows Sumter to withdraw his plea. Specifically, the Government advances the passage of time may have led to the fading of witness memories in the approximately one and a half years that have passed since the incident at issue.

The Court agrees: the Government would be prejudiced by allowing Sumter to withdraw his guilty plea. The Government would have to prepare for trial after having negotiated multiple plea offers with Sumter, extended him a plea offer he ultimately accepted, and participated in a *Frye* hearing and a lengthy plea colloquy with Sumter. That prejudice, however, would likely not be great given the relatively short amount of time which elapsed between the plea hearing and Sumter filing his letters and his motion to withdraw guilty plea. As a result, this factor is neutral between the parties.

6. Factor Six: Will Withdrawal Inconvenience the Court and Waste Judicial Resources?

Sumter argues there would be no inconvenience or waste stemming from allowing him to withdraw his plea. The Government contends withdrawal of the plea would inconvenience the Court and waste judicial resources. The Court agrees with the Government.

The Court first notes it has already spent a significant amount of time adjudicating Sumter's case, including both a *Frye* hearing and a thorough Rule 11 colloquy. At his plea hearing, Sumter admitted his guilt under oath multiple times. *See, generally,* ECF No. 95-3. In light of those admissions, allowing Sumter to withdraw his guilty plea would be a waste of judicial resources. *See United States v. Nicholson*, 676 F.3d 376, 384 (4th Cir. 2012) ("As to the sixth [*Moore*] factor, we agree with the district court that a trial in this case would be a waste of judicial resources and time, particularly given Nicholson's repeated admission of guilt."). Accordingly, this factor weighs in favor of the Government.

In summary, four of the *Moore* factors (involuntariness of the plea, innocence, competence of counsel, and inconvenience to the Court) support the denial of Sumter's motion to withdraw guilty plea. One of the factors (prejudice to the Government) is neutral between the parties. The final *Moore* factor (delay in moving to withdraw) leans slightly in favor of granting Sumter's motion. That single factor, however, is an insufficient basis upon which to grant Sumter's motion where, as here, the remaining factors weigh in favor of denying the motion. Further, while all the *Moore* factors are important, the key to deciding whether a motion to withdraw guilty plea should be granted is whether a proper plea colloquy was conducted.. *Puckett*, 61 F.3d at 1099; *Lambey*, 974 F.2d at 1394. The Court here held a complete plea colloquy.

Conclusion

Because the Court held a thorough, proper Rule 11 colloquy in Sumter's case, and because a majority of the *Moore* factors weigh in favor of the Government, Sumter has failed to show "a fair and just reason" supports his request for withdrawal as required under Fed. R. Crim. P.11(d)(2)(B). Accordingly, the Court **DENIES** Sumter's motion to withdraw guilty plea. ECF No. 73. Sumter's counsel is **DIRECTED** to file objections - if any - to the Presentence Investigation Report in this case within ten (10) days of the date of entry of this Order.

IT IS SO ORDERED.

Florence, South Carolina
June 27, 2019

s/ R. Bryan Harwell
R. Bryan Harwell
Chief United States District Judge

21 U.S.C. § 841(a)(1)

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.

21 U.S.C. § 841(b)(1)(C)

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 851

(a) Information filed by United States Attorney

(1) No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the

person) stating in writing the previous convictions to be relied upon. Upon a showing by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction

If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part.

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations

No person who stands convicted of an offense under this part may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.

The First Step Act

On December 21, 2018, President Trump signed into law the First Step Act (FSA) of 2018 (P.L. 115- 391). The act was the culmination of a bi-partisan effort to improve criminal justice outcomes, as well as to reduce the size of the federal prison population while also creating mechanisms to maintain public safety.

U.S. Const. amend. VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.