

No. 20-

IN THE
Supreme Court of the United States

TERRY CHARLES CARROLL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the decision of the United States Court of Appeals for the Fifth Circuit (“Fifth Circuit”)—which held plain error would be the standard of review on the defendant’s motion to withdraw a plea of guilty—conflicts with the decisions of this Court on an important matter and therefore the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

Furthermore, whether the decision of the Fifth Circuit—as to whether there was any error, plain or otherwise, on the denial of the motion to withdraw a plea of guilty—conflicts with this Court and therefore the decision by the Fifth Circuit calls for an exercise of this Court’s supervisory powers such that a compelling reason is presented in support of discretionary review by this Honorable Court.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption:

Terry Charles Carroll: Petitioner (Defendant-Appellant in the lower
Courts)

United States of America: Respondent (Plaintiff-Appellee in the lower
Courts)

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PETITION FOR WRIT OF CERTIORARI

Petitioner, TERRY CHARLES CARROLL, respectfully requests this Honorable Court grant this petition and issue a Writ of Certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit, which is in conflict with rulings of this Court and other Circuit Courts, on the issue of the correct standard of review for denial of a motion to withdraw a guilty plea and whether there was error as a result of said denial, such that compelling reasons are presented in support of discretionary review by this Honorable Court.

CITATIONS TO THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

From the Federal Courts:

The Order of the United States Court of Appeals for the Fifth Circuit, *United States v. Terry Charles Carroll*, No. 19-50128 (5th Cir. June 8, 2020), appears at Appendix A to this Petition and is unreported.

The Judgment in a Criminal Case of the United States District Court for the Western District of Texas, Midland Division, appears at Appendix B to this petition and is unreported.

From the State Courts:

None.

GROUND FOR JURISDICTION

On June 8, 2020, the Fifth Circuit affirmed the conviction and sentence imposed on Mr. Carroll. A copy of this Order appears at Appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254. A copy of the Judgment issued by the United States District Court for the Western District of Texas, Midland Division, is attached at Appendix B.

CONSTITUTIONAL PROVISIONS

U.S. CONST. Amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. Amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation: to be confronted with witnesses against him; to have compulsory process for obtaining witnesses in this favor; and to have Assistance of Counsel for his defense.

STATEMENT OF THE CASE

Background:

On January 24, 2018, Mr. Carroll was indicted with five other defendants. ROA.20-21.

The indictment charged:

[B]eginning on or about June 1, 2017 and continuing until on or about the date of this indictment, in the Western District of Texas, the Northern District of Texas, and elsewhere, the Defendants,

.....

did combine, conspire, confederate and agree together, with each other, and with others known and unknown to the Grand Jury to possess with intent to distribute and distribute a controlled substance, which offense involved fifty (50) grams or more of actual methamphetamine, contrary to Title 21, United

States Code, Sections 841(a)(1) and 841(b)(1)(A), in violation of Title 21, United States Code, Sections 846.

ROA.20-21.

On the same day, the Government filed a Sentencing Enhancement Information alleging:

That the Defendant,

5. TERRY CHARLES CARROLL,

is a person who has been convicted of a felony drug offense on the following occasion:

On or about April 3, 2017, the Defendant was convicted of Possession of a Controlled Substance, in a 396th Judicial District Court of Tarrant County, Texas, Cause Number 1477468001.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the Defendant that upon your conviction for the offense charged in Count One of the above-numbered Indictment, the Government will request the court to enhance Defendant's sentence for said offense pursuant to the sentencing provisions of Title 21, United States Code, Section 841(b)(1)(A). Due to the Defendant's prior felony drug conviction, this statute provides for a minimum term of imprisonment of twenty (20) years, for a maximum term of life imprisonment, for a term of supervised release of at least ten (10) years, and that, notwithstanding any other provision of law, the Court shall not suspend the sentence of, or grant a probationary sentence to Defendant, nor shall Defendant be eligible for parole.

ROA.26-27 (emphasis in original).

A. The Plea Agreement:

A plea agreement was filed with the District Court on March 20, 2018. ROA.149-59.

The specifics of the agreement and Mr. Carroll's plea are more specifically discussed in the

amplification portion of this Petition. However, it should be noted the Government sought to obtain the waiver of Mr. Carroll's trial rights and appellate rights. ROA.149-59.

B. The Guilty Plea Hearing:

On March 20, 2018, the Magistrate Judge accepted Mr. Carroll's plea of guilty. ROA.486-517. Relevant to this Petition, the Magistrate Judge explained and asked Mr. Carroll:

Now, as part of your plea agreement, you've waived your right to appeal or to collaterally attack the conviction and sentence you'll receive.

Mr. Carroll, did you understand that you waived your right to appeal or to collaterally attack the conviction and sentence you'll receive?

ROA.492. Mr. Carroll responded: "Yes, sir." ROA.492.

The Court then discussed with Mr. Carroll the charges in the indictment, pursuant to which the following exchange took place:

THE COURT: Mr. Carroll, you're about to plead guilty to a one-count indictment in MO-18-CR-23.

Count 1: That beginning on or about June the 1st, 2017, and continuing on or about January the 24th, 2018, in the Western district of Texas, the Northern District of Texas and elsewhere, that you and others did combine, conspire, confederate and agree together, and with each other, and with others, known and unknown to the grand jury, to possess with intent to distribute and distribute a controlled substance, which offense involved 50 grams or more of actual methamphetamine, contrary to Title 21, United States Code, Section 841(a)(1), and Title 21, United States Code, Section 846.

Mr. Carroll, do you understand what you're being charged with?

DEFENDANT CARROLL: Yes, sir.

THE COURT: Your full range of punishment on the indictment is a minimum of 10 years imprisonment to life imprisonment, five years of supervised

release to life supervised release, up to \$10 million fine, and a \$100 special assessment.

Do you understand the full range of punishment on the indictment?

DEFENDANT CARROLL: Yes, sir.

ROA.493-94. However, the Court then makes this punishment range inapplicable by explaining to Mr. Carroll:

THE COURT: Now, Mr. Carroll, there's been a sentencing enhancement information filed by the United States Attorney. United States Attorney charges that you are a person who'd been convicted of a felony drug offense on the following occasion:

That on about April the 3rd, 2017, you were convicted of possession of a controlled substance in the 396th Judicial District Court of Tarrant County, Texas in Cause No. 1477468001.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the defendant that upon your conviction for the offense charged in Count 1 of the above-numbered indictment, the government will request the Court to enhance the defendant's sentence for said offense pursuant to the sentencing provisions of Title 21, United States Code 841(b)(1)(A). Due to the defendant's prior drug felony conviction, this statute provides for a minimum term of 20 years imprisonment to a maximum of life imprisonment, a term of supervised release of at least 10 years to life of supervised release, up to a \$10 million fine, and \$100 special assessment.

Do you understand your full range of punishment after enhancement of the sentencing under this information?

DEFENDANT CARROLL: Yes, sir.

ROA.494-95.

Further, in the guilty plea proceeding, Mr. Carroll was asked to enter his plea.

ROA.498-500. However, Mr. Carroll was only asked about the indicted charge, to which he then pleaded guilty. ROA.500.

The Court then proceeded to what the Magistrate Judge described as “the sentencing information.” ROA.512. To this end, the Assistant United States Attorney stated:

MR. HARWOOD: The U.S. Attorney charges that the defendant, Terry Charles Carroll, is a person who has been convicted of a felony drug offense on the following occasion:

On or about April 3rd, 2017, the defendant was convicted of possession of a controlled substance in the 396th Judicial District Court of Tarrant County, Texas, Cause No. 1477468001.

Pursuant to Title 21, United States Code, Section 851, the United States Attorney hereby notifies the defendant that upon his conviction for the offense charged in Court 1 of the above-numbered indictment, the government will request the Court to enhance defendant’s sentence for said offense pursuant to the sentencing provisions of Title 21, United States Code, Section 841(b)(1)(A).

Due to the defendant’s prior felony drug conviction, this statute provides for a minimum term of imprisonment of 20 years, for a maximum term of life imprisonment, for a term of supervised release of at least 10 years, and that notwithstanding any other provision of law, the Court shall not suspend the sentence of or grant a probationary sentence to defendant, nor shall the defendant be eligible for parole. Signed, the U.S. Attorney.

THE COURT: All right. Mr. Carroll, did you understand that sentencing enhancing information as read by the U.S. Attorney?

DEFENDANT CARROLL: Yes, sir.

THE COURT: To the felony drug offense that on or about April the 3rd, 2017, that you were convicted of possession of a controlled substance, in the 396th Judicial District Court of Tarrant County, Texas, in Cause No. 1477468001, is that conviction true or not true?

DEFENDANT CARROLL: It’s true.

ROA.512-13.

The Court accepted Mr. Carroll's plea of guilty and directed that a Presentence Investigation Report ("PSR") be prepared. ROA.514-15. Sentencing was set for ninety days. ROA.516.

C. The PSR:

The PSR was filed in its final, revised form on July 25, 2018. ROA.238-61. The offense conduct established the Midland Police Department used a cooperating source to set up a purchase of 1 ounce of methamphetamine on January 5, 2018, from one of Mr. Carroll's co-defendants, David Provencio. ROA.242. Mr. Provencio and two co-defendants were arrested after an attempted delivery of methamphetamine. ROA.243. Through an interview with Mr. Provencio, it was determined that one of the alleged drug couriers was identified as Mr. Carroll. ROA.243-46. A transaction was arranged where Mr. Carroll would deliver 10 ounces of methamphetamine to the confidential source in Midland, Texas. ROA.246.

The PSR established the following happened next:

On January 11, 2018 at approximately 11:30 PM, agents located **Carroll** driving a blue Lincoln Navigator westbound on Loop 250 in Midland, Texas. Detectives maintained surveillance of the vehicle as it traveled to the predetermined meet location. Officers observed several traffic violations and conducted a traffic stop in close proximity to the meet location. **Carroll** was the sole occupant of the vehicle, and he was subsequently detained. A search of the vehicle located a Glock .45 caliber handgun (Serial Number FUE517) and 289.30 grams of actual methamphetamine concealed in the driver side seatbelt panel.

Carroll was transported to the Midland Police Department to be interviewed. Prior to his interview, **Carroll** was read his *Miranda* Warning, and he advised he understood his rights. **Carroll** stated he made three total trips to Midland, Texas, from the Fort Worth area at the direction of the [confidential source]. **Carroll** stated he knew he was transporting actual methamphetamine but he did not know the quantity.

Carroll stated he was paid \$400.00 to transport the methamphetamine from Fort Worth to Midland, Texas.

ROA.246 (emphasis in original, fn 9 omitted). Based on this information, the PSR concluded Mr. Carroll would be held “accountable for at least 289.30 grams of actual methamphetamine.” ROA.247.

D. The PSR Calculations:

Pursuant to U.S.S.G. § 2D1.1(a)(3), the Probation Officer determined that Mr. Carroll’s Base Offense Level was 32. ROA.247. This level was increased by 2 for possession of a firearm under U.S.S.G. § 2D1.1(b)(1). ROA.247. Finally, the adjusted offense level was reduced by 3 levels for acceptance of responsibility. ROA.248. Thus, Mr. Carroll’s total offense level was set at 31. ROA.248. With respect to criminal history, Mr. Carroll was assigned a history score of 15 and a Criminal History Level of VI. ROA.254.

Then, the Probation Officer determined that, with an Offense Level of 31 and a Criminal History Level of VI, Mr. Carroll’s Guidelines range was a sentence of 188 to 235 months in the custody of the Bureau of Prisons. ROA.259. However, because the statutory minimum based on the sentencing enhancement was 20 years confinement, it was concluded the Guidelines term of imprisonment was 240 months. ROA.259.

E. First Motion to Withdraw Plea (Pro Se):

After the PSR was filed and before sentencing, Mr. Carroll filed a handwritten, pro se motion to withdraw his guilty plea. ROA.52-53. This motion alleged:

To The Honorable Judge Mr. Counts;

I'm currently house at Ector County Federal Holding Facility. My Primary purpose for contacting you, is solely for the marginal ineffectualness of counsel.

I; Terry Charles Carroll case no. Mo 18 CR-023 was assigned David G Rogers, as my Attorney.

However, I pled guilty to the pending charge; March 20, 2018 without completely understanding the lack there of.

Judge Counts, I would like to withdraw my plea of guilt. Also seeking approval from you, and the mercy of the Court to be granted New Counsel. Move in the direction of trial, On the violating circumstances; That led to my being arrested.

Thank you for your time, and consideration. . . .

ROA.52.

F. Hearing on Pro Se Motion to Withdraw:

The District Court referred Mr. Carroll's pro se motion to withdraw his guilty plea to a Magistrate Judge. The Magistrate Judge conducted a hearing on the motion on September 11, 2018. ROA.542-58. He noted the purpose of the hearing was to address the issues of removal of counsel and whether Mr. Carroll's plea of guilty could be withdrawn. ROA.543-44.

The Magistrate Judge began with the issue of Mr. Carroll's lawyer. ROA.543. Mr. Carroll noted: "I can't get him to get past me cooperating to somehow—he ain't even explained to me why I'm in jail." ROA.544. Mr. Carroll then added: "I don't even know why I'm here, actually." ROA.544. He also said that he had not received probable cause or the information under the motion for discovery. ROA.544.

However, the issue then changed to removal of Mr. Carroll's lawyer, and Mr. Carroll noted several problems:

I can't get him to see me. I can't talk to him. I can't communicate with him. He tell me, well. You pled out to a minimum of 20 years. I said, okay, but you have yet to tell me why and then, you got the probable—you got my PSR, you brought it, and then, there's nothing there. So I'm like I ain't got no relevance in this deal, so what role am I playing? Man, I want to withdraw my plea and we can go on on the trial it's as simple as that.

Well, then he tells me, well, I'll bring everything. I've never seen him—I ain't seen the man but four months—four times in the whole eight months of my incarceration. I really need something that's going to work for me. I don't need a U.S. marshal or a district attorney, which is what he's acting at—wanting me to cooperate. I'm not a cooperate—I don't understand what I'm here for.

ROA.545-46.

Mr. Carroll's lawyer was then asked to respond. The attorney stated:

- * he had reviewed the discovery with his client, ROA.546;
- * he had showed his client his videotaped confession, ROA.546;
- * he had reviewed the plea agreement with Mr. Carroll, ROA.546;
- * he provided a brief review of facts and evidence that showed Mr. Carroll had delivered methamphetamine from Fort Worth, Texas to Midland, Texas, ROA.547;
- * he discussed with Mr. Carroll that his sentence had been enhanced from a 10-year minimum to a 20-year minimum, ROA.547;
- * he had told Mr. Carroll the only way to reduce his term of punishment was via a signed plea agreement and cooperation, ROA.547;
- * he added Mr. Carroll had signed the plea agreement, ROA.547;
- * he had reviewed the PSR with Mr. Carroll, ROA.547;

- * he determined he could not file objections because the Guidelines range was below the mandatory minimum, ROA.547-48;
- * regardless of this conclusions, he filed some objections at his client's request dealing with possession of a gun and Mr. Carroll's criminal history, ROA.548;
- * he has continued to discuss with Mr. Carroll cooperating and preventing the loss of his acceptance of responsibility, ROA.548;
- * while he was shocked to hear his client's allegations, "we can't communicate" and Mr. Carroll "needs a new counsel," ROA.548-49.

After further discussion, Mr. Carroll concluded: "[H]e ain't done nothing for me." ROA.550.

The Court then turned its attention to Mr. Carroll's motion to withdraw. ROA.550-51.

The Magistrate Judge first noted that he would entertain the motion even though it was filed pro se. ROA.551. However, before the hearing continued, Mr. Carroll's attorney suggested he not answer questions until new counsel was appointed. ROA.552. Based on this, the Court asked Mr. Carroll to respond. ROA.552. He declared:

It's just like he stated then, that I admitted—I guess he said I knew that drugs was there and didn't admit to the gun. I didn't know none of it was there, actually. And then, what I said when they told me I was forced to believe that this conspiracy thing was automatic 10. So I'm like, well, I can't get around the fact of me being in a vehicle at the time, and then, when you're finding the drugs, you know, I'm the only one there, well, yeah, quite naturally, I stated guilt. So I took 10 and then, I get hit with 20. But now, that wasn't the case because then, actually, I was sitting at a residence. I was not in no probable cause. I wasn't stopped at no traffic violation. None of that. None of that had taken place.

ROA.552-53. Mr. Carroll next added: "I'm actually trying to go to trial so I can find out why I'm in jail." ROA.553. Mr. Carroll also admitted he signed the plea agreement and the factual basis, but said he was "not fully understanding what I signed." ROA.554. Under

further questioning, Mr. Carroll continued to declare that he did not realize “what was happening” when he pleaded guilty. ROA.554-55.

The Magistrate Judge next concluded:

The district court—the district judge upstairs accepted that guilty plea. So now you’re in between a guilty plea where you’ve been convicted of a—you’ve been adjudged guilty of a crime and your sentence. And so, there are reasons that you can withdraw a guilty plea. None of which I’ve heard today.

ROA.555-56. The Government’s attorney added:

MS. YOUNG: In regards to entertaining the motion to withdraw the guilty plea, I do not believe the defendant has articulated any of the factors that have been set forth that are precedent from the Fifth Circuit that we fall under, basically what we would typically enumerate that he has to show. The burden is his because the guilty plea has been accepted, and I don’t hear him articulating any of those factors that the Court could withdraw the plea.

If the Court would like, we can obviously provide a written memoranda, afterwards, of law regarding that, but he has not met the burden to show this court that he should be allowed to withdraw that guilty plea.

ROA.556.

The Court next determined that Mr. Carroll would receive a new lawyer. ROA.556-57.

On the issue of withdrawing the guilty plea, the Magistrate Judge stated:

Now, the motion to withdraw the guilty plea, my recommendation to the district judge is that’s going to be denied, okay, for a couple of reasons. One, that you filed it pro se and you had a lawyer at the time; and, number two, I don’t think you’ve met any of the factors to withdraw that guilty plea. So you’ve got a sentencing set, I think, October 31st of this year, right? Monica? October 31st is your sentencing date currently, subject to change.

ROA.557. Court was adjourned. ROA.558.

G. Objections to the PSR:

As noted at the hearing on Mr. Carroll's pro se motion to withdraw his guilty plea, Mr. Carroll's subsequently-dismissed attorney filed objections to the PSR. Defense counsel objected to the 2-point enhancement for possession of the gun and asked for a minor role adjustment under U.S.S.G. § 3B1.2. ROA.348. He further objected to the criminal history score and argued to the District Court that under the Guidelines rules the history score was overstated. ROA.348. Finally, based on the Title 18 U.S.C. § 3553 factors, Mr. Carroll's attorney also moved for a downward departure. ROA.348-49.

H. Recommendation on Mr. Carroll's Pro Se Motion to Withdraw his Guilty Plea and Appointment of New Counsel:

On September 19, 2018, the Magistrate Judge recommended that the District Court deny Mr. Carroll's pro se motion to withdraw his guilty plea. ROA.56-62. The Magistrate Judge concluded that "except for briefly during the hearing on the instant motion, Defendant did not assert his innocence despite having many opportunities to do so." ROA.61. He also stated without further explanation that "the Government would be prejudiced by the withdrawal." ROA.61. He found an unacceptable delay "because Defendant waited almost five months before filing the instant motion." ROA.61. The Magistrate Judge also stated that Mr. Carroll "was represented by adequate counsel at all times." ROA.62. He determined "the recording of the plea hearing indicates that Defendant's plea was entered into knowingly and voluntarily." The Magistrate Judge finally concluded without further explanation that "this Court would be substantially inconvenienced by withdrawal," and "withdrawal would waste judicial resources." ROA.62. Accordingly, the Magistrate Judge

recommended to the District Court that Mr. Carroll's motion to withdraw his guilty plea be denied. ROA.62.

In the same report, the Magistrate Judge appointed a new lawyer. ROA.62.

On October 4, 2018, Mr. Carroll's new attorney filed a motion to Withdraw Defendant's Motion to Withdraw Guilty Plea, *i.e.*, Mr. Carroll's previously-filed pro se motion to withdraw his guilty plea. ROA.65-66. This motion provided:

I.

Mr. Carroll was indicted with possession with intent to distribute fifty grams or more of methamphetamine on January 24, 2018. On March 20, 2018, Mr. Carroll pleaded guilty to the indictment. On August 9, 2018, Mr. Carroll filed a letter with the court. This letter was interpreted as a motion requesting new counsel and a motion to withdraw Mr. Carroll's guilty plea. The United States Magistrate Judge granted Mr. Carroll's request for Mr. Carroll to receive new counsel; however, the magistrate court issued an order recommending this District Court deny Mr. Carroll's request to withdraw his guilty plea.

II.

After spending hours meeting with Mr. Carroll, Mr. Carroll has determined he wishes to withdraw his (pro se) Motion to Withdraw Guilty Plea.[fn 1: Mr. Carroll explains his letter to the Court was due to a level of frustration with communication with counsel.]

III.

WHEREFORE, for the reasons set forth above, the defendant respectfully requests the Court grant this motion.

ROA.65-66 (parenthetical added). The Court granted the motion. ROA.7.

I. The Second Motion to Withdraw Mr. Carroll's Guilty Plea:

On November 15, 2018, Mr. Carroll's new lawyer (who had filed the motion to withdraw the first motion to withdraw the guilty plea which Mr. Carroll had filed pro se, which was granted by the Court) filed a second Motion to Withdraw Guilty Plea. ROA.70-75.

After setting forth the above procedural history, the attorney applied the factors set forth in *United States v. Carr*, 740 F.2d 339, 343 (5th Cir. 1984), which govern requests by a defendant to withdraw or set aside a guilty plea. ROA.71-74. Mr. Carroll again requested a hearing on his motion. ROA.74.

J. The Hearing on the Second Motion to Withdraw:

A hearing on Mr. Carroll's second motion to withdraw his guilty plea took place on December 6, 2018. ROA.589-92. No new evidence was introduced. ROA.589-92. Mr. Carroll's attorney argued his client was asserting that he did not commit the offense and was requesting that his guilty plea be withdrawn. ROA.590. The attorney added the "remainder of those arguments that are within the motion." ROA.590.

The Magistrate Judge hearing the motion made the following inquiry and set forth the Court's position:

Is he going to take the witness stand or is he—what's he going to do? I mean, the thing is, I understand—and I'll hear from him. I'll hear from him, but it's not going to go very far with me. But I will hear whatever you—unless there's something Earth-shattering about to be said, I'm pretty sure I know what I'm going to do. So if that gives you any insight.

ROA.590. Mr. Carroll's attorneys stated that Mr. Carroll would not be taking the stand. ROA.590.

At this point, the prosecution reassured the Government's previous arguments. ROA.591. The prosecutor also informed the Court that "[t]he government believes there's been nothing to support that he should be allowed to withdraw that—guilty plea." ROA.591.

The Magistrate Judge then reviewed the previous proceedings. ROA.591-92. The Magistrate Judge stated that he would enter a report “that would be ‘no different than I did before.’” ROA.592. Hence, his recommendation would be to deny the motion. ROA.592.

K. The Ruling on the Second Motion to Withdraw:

On December 12, 2018, the Magistrate Judge entered a second Report and Recommendation. ROA.86-89. True to his word, the second Report and Recommendation was not materially different from the first. *See* ROA.89-96. On January 7, 2019, the District Court adopted the second Report and Recommendation, finding its reasoning “to be neither clearly erroneous nor contrary to law.” ROA.97-99. Accordingly, Mr. Carroll’s second motion to withdraw his guilty plea was denied. ROA.99.

L. The Sentencing Hearing and Notice of Appeal:

Mr. Carroll was sentenced on February 11, 2019. ROA.123. It was first noted the Government had filed a motion to withdraw the sentencing enhancement, and that was granted. ROA.124-25.

Mr. Carroll’s attorney then reviewed the objections to the PSR which had been filed. ROA.125. As noted above, these objections involved the firearm, the overstated criminal history, and a proposed two-level reduction for minor role status. ROA.125-28. Should the Court grant his objections, Mr. Carroll’s offense level would be reduced to 29 and his criminal history would be V. ROA.128-29. This would leave Mr. Carroll with a Guidelines punishment range of 140 months to 175 months in custody. ROA.129. Mr. Carroll’s attorney concluded:

But to reiterate, we certainly would argue as far as the objections to the Presentence Report that Mr. Carroll's role from the start of the conspiracy all the way to the date of his arrest was that of a mule, and that this is—Section 3B1.2 has recently been modified to specifically include individuals such as Mr. Carroll, and we would ask the Court to grant the objection.

ROA.129.

The Government claimed Mr. Carroll knew about the gun because the factual basis in the plea bargain includes that he was aware of a Glock .45 handgun. ROA.129-30. Further, the Government asserted Mr. Carroll was more than “a mule” because he delivered methamphetamine from Fort Worth to Midland on three occasions. ROA.130-31. The Government added that Mr. Carroll could not have merely been a mule because he delivered money and was “integrally” involved in the conspiracy. ROA.131.

The District Court overruled Mr. Carroll's three objections to the PSR. ROA.133. The Government made no objections. ROA.133.

The Court also determined the PSR was accurate and set Mr. Carroll's Guidelines punishment range. ROA.133. Mr. Carroll's total offense level was set at 31, with a criminal history category of VI, and a Guidelines range of 188 to 235 months. ROA.133.

Before pronouncing Mr. Carroll's sentence, the Court made the following observations regarding Mr. Carroll's criminal history and the sentencing status of his co-defendants:

One thing I do note, Mr. King [addressing Mr. Carroll's new lawyer], in looking at his criminal history, I see one entry—let me find it again. I do see one entry that's not drug related, as far as I can tell. Maybe a couple, actually. Actually, there are a few. My apologies. There are a few that are not counted for theft, burglary, UUMV. Most of the ones that are counted but for—well, there is a criminal trespass that's not counted. There is a theft that's not counted. But then there is a theft and assault bodily injury that is counted and another theft and I number of narcotics trafficking-related offenses which is obviously what

this is. At 52, Mr. Carroll doesn't seem to have stopped, at least from 22 to 52 he's been sort of in the same business, it would appear.

Mr. King, what would you have the Court consider prior to sentencing Mr. Carroll?

I'm sorry. I am cognizant that Officer Foster has let me know that Mr. Provencio received 360 months, Mr. Morgan received 108 months, Mr. McCalpine received 120 months. So I'm aware of those. We still have Mr. Gee, Mr. Cheeks, and Ms. Lindsay pending sentencing. So I'm trying to look at the entire conspiracy in an equitable fashion, of course.

ROA.134-35.

Mr. Carroll's attorney then addressed the Court. ROA.135. He requested the Court consider reducing Mr. Carroll's sentence under 18 U.S.C. § 3553(a). ROA.135. In doing so, he made the following observation:

Again, based on Mr. Carroll's limited—again, as we argue, his limited role, whether or not he meets the defendant's definition of mule or the government's definition of mule, the facts in the Presentence Report show that out of this total conspiracy, Mr. Carroll was paid \$1,200 for three trips that he went on. That is certainly less than many of the other individuals that were distributing either the source of supply or on the street level distributing those narcotics to individuals.

ROA.135.

Mr. Carroll's attorney further noted the cause of his problems was drug addiction. ROA.135-36. He also observed Mr. Carroll was raised by a physically and verbally abusive grandmother and that Mr. Carroll and his siblings were all placed in foster care at one point. ROA.136. Thus, Mr. Carroll's attorney requested a sentence below 188 months. ROA.136-37.

Significantly, the Government was sympathetic to some of Mr. Carroll's circumstances. ROA.137. The prosecutor explained that Mr. Carroll's case had been subject to considerable delay and confusion on Mr. Carroll's part through no fault of Mr. Carroll:

I understand it is difficult when you think something is resolving and things get put off. And in federal court, we typically tell individuals that's not the case because it's not the case. This is a rarity.

So some of the disagreements with prior counsel and those sort of things, I've attempted to put in some sort of perspective and give Mr. Carroll some, for lack of better term, grace in that sense. That he was in a position where he was on a path and thought something was going on. And then the codefendant arrives and his attorney gets sick, and so things get delayed six and seven months.

ROA.138.

However, the prosecutor further declared "that's where the government's misunderstanding ends." ROA.138. Much of the Government's concerns were based on Mr. Carroll's attempts to withdraw his plea and an apparent claim that he is actually innocent. ROA.138. The Government also took issue with Mr. Carroll's argument that his criminal history was overstated because "that's not the process." ROA.139. The prosecutor also explained that "I can't understand the argument that he's a minor participant." ROA.139. Thus, the prosecutor concluded that the Government was "advocating for a serious sentence here today." ROA.140.

The Court then discussed various issues with Mr. Carroll. ROA.140. The Court first noted Mr. Carroll had spent "a lot of time" in jail. ROA.141. Mr. Carroll indicated that he agreed. ROA.141.

Nonetheless, it was clear Mr. Carroll was struggling to understand the guilty plea.

ROA.141-44. The following exchange between Mr. Carroll and the Court took place:

THE DEFENDANT: And as a matter of fact, as far as me having a history of crimes, that's not actually true. And also to read into the record, I spoke with Ms. Kara Foster [Probation Officer] at the time she was doing the presentence investigation. I was really trying to understand this conspiracy theory. I sit here and allowed this thing to keep going, and I never spoke on it. But as far as me coming three times, and I had three thises and three thats, none of that is true. I actually what-what conspiracy actually meant because I didn't understand it.

THE COURT: Right.

THE DEFENDANT: And I'm sitting here and I'm going with it. But then as it's getting going, now it's getting outrageous because now you're making me something that I'm not, and I'm not just going to sit here and allow that to be. And that's not the case.

I asked her exactly. I said, "Excuse me, ma'am. Would you please explain to me what conspiracy is, because I know none of these people."

THE COURT: Right.

THE DEFENDANT: I said, "I'm going to be honest with you. I pled guilty because I was the only individual in the van and whatever"—I've never seen a pistol. I never even seen the drugs.

THE COURT: And you didn't go over your plea agreement before you enter your guilty plea?

THE DEFENDANT: Yeah, she had. She came back with a zero relevance—

THE COURT: Did you go over your plea agreement before you entered your guilty plea?

THE DEFENDANT: No, I didn't have a plea agreement.

THE COURT: So you're—

THE DEFENDANT: No.

THE COURT: Okay.

THE DEFENDANT: She was the only one there. I didn't have my attorney with me.

THE COURT: Before you entered your guilty plea, not when you're talking to Ms. Foster, did you plead guilty pursuant to a plea agreement? Yes or no.

THE DEFENDANT: Yes, sir.

THE COURT: Okay. And before you did that, you signed it. And before you signed it, did you go over it with your lawyer?

THE DEFENDANT: Okay. No, sir.

THE COURT: No. I bet you told that judge downstairs that you did, didn't you.

THE DEFENDANT: No, look here.

THE COURT: No, "no look here." Yes or no. I bet you went over it—you told the judge downstairs that you went over it and you understood it, right?

THE DEFENDANT: Looking at him saying, yes, sir. But like I said, when this went on, the man come to me March 19th. We came down March 20th. And to my understanding, we were going to trial because it was a 20-year plea. We got here the next morning on the 20th, and he go, "Hey, man. Good news. You can help yourself. They want the forward distributor."

I said, "Man, I don't know nothing about that."

Well, they said, "David Provencio."

And I don't know no David Provencio.

"Okay. Sign here and I'll be able to get you."

This is how all this really got out of whack, but now, I mean, it's—and it is what it is. But these three times and this and that and me getting it, none of that.

THE COURT: Well, I did chuckle when you said—and I chuckled because it was funny when you said you're not a criminal. That's not what you do. I mean, I'm looking at your criminal history.

THE DEFENDANT: I said I'm not a criminal.

THE COURT: Yeah, I heard you just a moment ago. You said that's not who I am. Y'all are looking at my criminal history and talking about it, and that's not who I am.

THE DEFENDANT: No, I said that's not what it was. You said 25, 15, those were sentences that ate up that particular charge. That's what I was explaining sir.

THE COURT: Okay, Anything else, Mr. Carroll?

THE DEFENDANT: No, sir.

ROA.141-44.

The District Court sentenced Mr. Carroll to serve 212 months in the custody of the Bureau of Prisons. ROA.104-110. The Judge also added 5 years of supervised release to his sentence. ROA.104-110. Mr. Carroll timely filed a notice of appeal. ROA.104-05.

The Appeal:

Mr. Carroll appealed his conviction and sentence to the Fifth Circuit. On appeal, he argued the District Court erred in denying his motions to withdraw his guilty plea. (Appendix A, page 1).

Initially, the Fifth Circuit observed that “[b]ecause Carroll did not object to the denial of his motion to withdraw his guilty plea, review is for plain error.” (Appendix A, page 1). The Court then declared that Mr. Carroll’s arguments would “still fail even under the abuse of discretion standard applied to preserved errors.” (Appendix A, page 2).

In evaluating the motion to withdraw the guilty plea, the Fifth Circuit considered the totality of the circumstances, which include the seven factors enumerated in *Carr*, 740 F.2d at 343-44. (Appendix A, page 2). To this end, the Fifth Circuit observed that the District Court found that all of the seven factors weighed against Mr. Carroll's request to withdraw his plea. (Appendix A, page 2). Hence, in affirming the District Court's denial Order, the Fifth Circuit concluded "we see no clear or obvious error or abuse of discretion in the district court's decision." (Appendix A, page 2). Mr. Carroll respectfully files this Petition for Writ of Certiorari challenging the decision of the Fifth Circuit.

**ARGUMENTS AMPLIFYING REASONS RELIED ON FOR
ALLOWANCE OF THE WRIT**

I.

The Standard of Review

While the Fifth Circuit applied more than one standard of review to affirm the District Court, it was clear the Appellate Court believed review was for plain error. (Appendix A, pages 1-2). The Court explained that "[b]ecause Carroll did not object to the magistrate judge's report recommending the denial of his motion to withdraw his guilty plea, review was for plain error." (Appendix A, page 2) (citing *Douglass v. United Servs. Auto Ass'n*, 79 F.3d 1415, 1420-23, 1428-29 (5th Cir. 1996) (en banc), *superceded by statute on other grounds*, 28 U.S.C. § 636(b)(1)). Mr. Carroll respectfully requests that this Court grant this Petition to determine the correct standard of review.

It is important that before the Fifth Circuit the Government did not argue review on this issue was for plain error. Rather, the Government claimed review of the denial of the

motion to withdraw the guilty plea in this case was for abuse of discretion. (Government's Brief, page 5) (citing *United States v. Grant*, 117 F.3d 788, 789 (5th Cir. 1997)). While the Court, and not the Government, sets the standards of review, Mr. Carroll submits this observation in support of his position that it is persuasive as to the proper standard of review. Furthermore, it also shows that the issue was not litigated before the Fifth Circuit and, hence, this Court should establish the proper standard of review based on the circumstances of this case.

In evaluating this Petition, Mr. Carroll respectfully urges this Court to consider how this Court has recently addressed the issue of what is necessary to preserve a matter for review. In reversing the Fifth Circuit on what was the proper standard of review to be applied, this Court in *Holguin-Hernandez v. United States*, 140 S.Ct. 762, 764 (2020), explained that, to preserve a claim of error for appellate review, a party must inform the Trial Judge “of [1] the action the party wishes the court to take, or [2] the party’s objection to the court’s action and the grounds for that objection.” (citing FED. R. CRIM. P. 51(b)). Errors which are not brought to the Court’s attention are reviewed for plain error. *Id.*

This Court’s application of these rules for preservation of error is instructive in this case. “By ‘informing the court’ of the ‘action’ he ‘wishes the court to take’ . . . ‘a party ordinarily brings to the court’s attention his objection of a contrary decision.’” *Id.* at 766 (quoting FED. R. CRIM. P. 51(b), citing FED. R. CRIM. P. 52). In this regard, “nothing more is needed to preserve the claim.” *Id.* Thus, it is clear that once the specific factual and legal matters are presented to the District Court, nothing more is required to preserve an

argument under the abuse of discretion standard of review. *See id.* Respectfully, Mr. Carroll submits *Holguin-Hernandez* is persuasive authority that this Petition should be granted.

Moreover, the Fifth Circuit relied on a civil case, *Douglass*, 79 F.3d at 1419-22, to find that plain error was the appropriate standard of review. However, the complete issue in *Douglass* was whether the potential error was waived or forfeited for the purpose of appellate review, *id.* at 1421, which was not the issue in this case. Further, the analysis involved an intertwined discussion of the Federal Rules of Civil Procedure, the Federal Rules of Criminal Procedure, and 28 U.S.C. § 636(b)(1). *Id.* at 1419-22. Ultimately *Douglass* is irrelevant because it addresses waiver of an issue on appeal in the civil context as opposed to the standard of review on a motion filed by a criminal defendant. Therefore, the Fifth Circuit's opinion is without sufficient legal authority and this Petition should be granted.

Finally, the unique factual circumstances in this case establish Mr. Carroll took careful steps to put the Court on notice of his arguments for full review. Thus, the Fifth Circuit could fairly evaluate the factual predicate and legal principles in this case. In fact, considering that Mr. Carroll was proceeding pro se and changing attorneys throughout this litigation on his motions shows he has more than complied with the rules of presentation of claims such that an abuse of discretion review is in order. Indeed, that he motions were urged and litigated on two separate occasions by two separate lawyers demonstrates that the District Court was aware of the arguments that would have been merely duplicated in any formal objections to the reports and recommendations. In other words, the District

Court was on full notice of Mr. Carroll's attorney's objections to the denial of the motion to withdraw the guilty plea. Thus, this Petition should be granted for this Court to determine that abuse of discretion is the correct standard of review for this appeal.

II.

Error on Denial of the Motions to Withdraw the Guilty Plea

The Fifth Circuit relied on *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984), to evaluate the District Court's decision. (Appendix A, page 2). The Court in *Carr* established seven factors the District court should address in considering whether the permit withdrawal of a plea. 740 F.2d at 343-44. Specifically, as the Fifth Circuit explained, these factors include: (1) whether the defendant asserted his actual innocence; (2) whether withdrawal would prejudice the Government; (3) the extent of the delay, if any, in filing the motion to withdraw; (4) whether withdrawal would substantially inconvenience the Court; (5) whether the defendant had the benefit of close assistance of counsel; (6) whether the guilty plea was knowing and voluntary; and (7) the extent to which withdrawal would waste judicial resources. *Id.*

In *United States v. Still*, 102 F.3d 118, 124 (5th Cir. 1996), the Fifth Circuit clarified that “[n]o single factor or combination of factors mandates a particular result.” Hence, “the district court should make its determination based on the totality of the circumstances.” *Id.* However, the “district court is not required to make explicit findings as to each of the *Carr* factors.” *United States v. Lord*, 915 F.3d 1009, 1014 (5th Cir. 2019) (citing *United States v. Powell*, 354 F.3d 362, 370 (5th Cir. 2003)).

Here, the Fifth Circuit concluded there was no error because the District Court had considered all of the factors under *Carr*. (Appendix A, page 2). Specifically, the Fifth Circuit noted the District Court had found each of the seven factors weighed against Mr. Carroll. (Appendix A, page 2). Mr. Carroll respectfully submits that the Fifth Circuit should have reversed the District Court’s decisions to deny Mr. Carroll’s motions to withdraw his guilty plea. Hence, this Petition should be granted.

As noted above, the first factor is assessing whether the defendant asserted his actual innocence. *Carr*, 740 F.3d at 343. In his letter to the Court, which was construed as a motion to withdraw his guilty plea, Mr. Carroll said he wanted to withdraw his guilty plea because he “pled guilty to the pending charge; March 20, 2018 without completely understanding the lack there of.” ROA.52. He said he wanted a trial. ROA.52.

At the hearing on the motion, Mr. Carroll said he did not know anything about any “forward distributor” the Government wanted and he did not know anyone named David Provencio. ROA.552. Mr. Carroll said he pled guilty because he was the only individual in the van, he never saw a pistol, and he never saw any drugs. ROA.552-53. Indeed, he declared he wanted a trial so he “could find out why I’m in jail.” ROA.553. When it came to the factual basis for his plea, Mr. Carroll stated that he did “not know what they [referring to the Government] are talking about.” ROA.554. At the hearing on his second motion to withdraw his guilty plea, Mr. Carroll again asserted his innocence. ROA.590.

At sentencing, Mr. Carroll’s claim of his innocence was undisputed. ROA.139. The Government duly noted that Mr. Carroll was claiming throughout the proceeding that he was

innocent. ROA.139. In fact, he continued to claim he had no knowledge of the conspiracy theory or any of the people involved. ROA.141, 142. Mr. Carroll made his innocence claim at all proceedings from his motions to withdraw to his sentencing hearing. Hence, Mr. Carroll was asserting his factual innocence and this factor weighed heavily in favor of allowing withdrawal of the plea of guilty.

Regarding the second *Carr* factor, the Magistrate Judge stated, without explanation, the Government would be prejudiced by the withdrawal. ROA.55. This conclusion is without evidentiary support because the Government did not provide evidence or argument as to how a withdrawal of the plea would prejudice the Government. Indeed, when the second motion was filed one of Mr. Carroll's co-defendants had not pleaded guilty and was set for trial. ROA.73. Thus, Mr. Carroll could be tried without any inconvenience to the Government or the Court. Moreover, two other co-defendants had not yet been sentenced and were therefore available to testify. ROA.73. Accordingly, this factor weighed in favor of permitting the withdrawal.

The third *Carr* factor addresses any delay in filing a motion to withdraw the guilty plea. 740 F.2d at 344. Mr. Carroll waited almost 5 months to file his motion. ROA.61. The delay in the *Lord* case was 6 months, and this Circuit has been at odds with even shorter delays. *See United States v. Thomas*, 13 F.3d 151, 153 (5th Cir. 1994) (describing six week delay as "significant"); *United States v. Rinad*, 956 F.2d 85, 88-89 (5th Cir. 1982) (finding sixty-nine day delay weighed against defendant). Mr. Carroll respectfully submits that, while this factor weighed against him, it should not have weighed too heavily because he was

having difficulties with his attorney—as was established when the Court appointed a new lawyer. Such difficulties prevented Mr. Carroll from timely filing a request to withdraw his plea. ROA.138. As the prosecutor explained:

I understand it is difficult when you think something is resolving and things get put off. And in federal court, we typically tell individuals that's not the case because it's not the case. This is a rarity.

So some of the disagreements with prior counsel and those sort of things, I've attempted to put in some sort of perspective and give Mr. Carroll some, for lack of better term, grace in that sense. That he was in a position where he was on a path and thought something was going on. And then the co-defendant arrives and his attorney gets sick, and so things get delayed six and seven months.

ROA.138.

The fourth factor addresses the issue of whether a withdrawal would substantially inconvenience the Court. *Carr*, 740 F.3d at 344. The Magistrate Judge briefly addressed inconvenience when discussing the seventh factor, and reached the conclusion that “this Court would be substantially inconvenienced by the withdrawal,” without indicating how or why. ROA.62 Mr. Carroll submits as an initial matter this brings into question the validity of the District Court’s ruling. Regardless, this factor weighed against denying the request to withdraw. This was a straight forward trial on a one count indictment with very little evidence. ROA.12-13, 20-21. As noted above, it is also true that another co-defendant was waiting for trial and hence Mr. Carroll could be tried without any inconvenience. Hence, this factor weighed heavily against the denial of the motion to withdraw the guilty plea.

The Fifth factor under *Carr* focuses on whether the defendant had close assistance of counsel. 740 F.3d at 344. The record in this case establishes Mr. Carroll was not able to

work with his lawyer and hence the attorney was relieved of his duties. ROA.57-58. Mr. Carroll repeated this conclusion at sentencing. ROA.141-44. From this, it can only be concluded that Mr. Carroll did not close assistance of counsel before the plea and thus this factor should weighed heavily in favor of granting the motion to withdraw the guilty plea.

The sixth factor concerns the knowing and voluntary nature of the plea. *Carr*, 740 F.3d at 344. The record as a whole establishes Mr. Carroll always claimed that had no knowledge of a conspiracy. His request to withdraw his plea, the hearing on this request, and his concerns at sentencing show that the knowing and voluntary nature of his plea was not established. Further, the voluntary nature of the plea was questionable because Mr. Carroll was clearly not understanding the process and did not feel he was receiving adequate legal advice, an opinion he voiced from his request for new counsel and again at sentencing. Therefore, this factor weighed in favor of a conclusion that his request to withdraw his guilty plea should have been granted.

The seventh and final factor *Carr* addresses whether the granting of the motion would be a waste of judicial resources. 740 F.3d at 744. The Magistrate Judge concluded the “withdrawal would waste judicial resources” without any explanation as to how the withdrawal of the plea would waste such resources. ROA.62. However, because another co-defendant was to be tried after the hearing on Mr. Carroll’s second motion to withdraw, there would be no waste of judicial resources. While this Court has deferred to the Court on these rulings, Mr. Carroll respectfully submits the impact of this factor against granting the motion is minimal in the absence of an explanation and particularly in light of the

procedural posture of this case vis a vie the straightforward nature of the one count indictment and the necessity of a trial for another co-defendant. ROA.73.

Respectfully, with regard to all of these factors, it was reversible error for the Fifth Circuit to affirm the District Court's decision denying the motions to withdraw the plea. The Magistrate Judge appeared to be clearly frustrated with Mr. Carroll. The statement that what Mr. Carroll had to say "would not go very far" with the Court and that any new information needed to be "Earth-shattering," ROA.590, should be reevaluated by this Court. Mr. Carroll submit that when the entire record is viewed and the *Carr* factors are correctly applied, this Court should conclude that the District Court abused its discretion and committed reversible error in refusing to grant Mr. Carroll's motions to withdraw his guilty plea. Accordingly, this Petition deserves encouragement to proceed further.

CONCLUSION

For these reasons, Mr. Carroll respectfully requests that this Court grant this Petition so the decision of the Fifth Circuit in this case does not conflict with decisions of this Court. Mr. Carroll also respectfully requests such other relief to which he may be entitled under the law and in equity.

WHEREFORE, Petitioner, TERRY CHARLES CARROLL, respectfully requests that this Honorable Court grant this Petition and issue a Writ of Certiorari and review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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