

No. _____

In The
Supreme Court of the United States

JOSHUA AUSTIN KRAMER,

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

Kelly Margolis Dagger
Counsel of Record
Paul K. Sun, Jr.
Ellis & Winters LLP
Post Office Box 33550
Raleigh, North Carolina 27636
(919) 865-7000
kelly.dagger@elliswinters.com
paul.sun@elliswinters.com

Counsel for Petitioner

QUESTION PRESENTED

Whether the district court erred by denying Petitioner's motion to withdraw his guilty plea.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner, who was the Defendant-Appellant below, is Joshua Austin Kramer. Respondent, who was the Plaintiff-Appellee below, is the United States of America.

TABLE OF CONTENTS

	Page:
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS BELOW	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES	v
CITATION OF PRIOR OPINION	1
JURISDICTIONAL STATEMENT	1
FEDERAL RULE INVOLVED	1
STATEMENT OF THE CASE.....	1
MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW.....	10
REASONS FOR GRANTING THE WRIT	10
DISCUSSION	11
THE DISTRICT COURT ERRED BY DENYING MR. KRAMER'S MOTION TO WITHDRAW HIS GUILTY PLEA.....	11
1. Mr. Kramer credibly asserted that his plea was not knowing and voluntary.....	12
2. Mr. Kramer is legally innocent of conspiracy	13
3. The six-week period between arraignment and Mr. Kramer's attempt to withdraw his guilty plea did not warrant denying the motion	15
4. Mr. Kramer did not have the close assistance of competent counsel at the time he entered the guilty plea.....	16
5. Withdrawal of the plea would not have prejudiced the Government	19

6.	Any inconvenience to the court or waste of judicial resources would have been minimal	20
CONCLUSION.....		21
APPENDIX:		
	Opinion, U.S. Court of Appeals for the Fourth Circuit entered July 28, 2022	Appendix A

TABLE OF AUTHORITIES

Pages:

CASES:

<i>Hill v. Lockhart</i> , 474 U.S. 52 (1985)	19
<i>Jones v. Murray</i> , 947 F.2d 1106 (4th Cir. 1991)	17
<i>Strickland v. Washington</i> , 466 U.S. 668 (1984)	16, 19
<i>United States v. Artabane</i> , 868 F. Supp. 76 (M.D. Pa. 1994).....	20
<i>United States v. Bowman</i> , 348 F.3d 408 (4th Cir. 2003)	11, 16
<i>United States v. Burgos</i> , 94 F.3d 849 (4th Cir. 1996)	13
<i>United States v. Craig</i> , 985 F.2d 175 (4th Cir. 1993)	12, 16
<i>United States v. Hackley</i> , 662 F.3d 671 (4th Cir. 2011)	13, 14
<i>United States v. Hankins</i> , No. 2:09-cr-00222, 2010 WL 4642004 (S.D. W. Va. Nov. 8, 2010).....	19, 21
<i>United States v. Hyde</i> , 520 U.S. 670 (1997)	1, 11
<i>United States v. Kramer</i> , No. 21-4424, 2022 WL 2987964 (4th Cir. 2022).....	1, 10, 11
<i>United States v. Lough</i> , 203 F. Supp. 3d 747 (N.D. W. Va. 2016).....	18

<i>United States v. Moore</i> , 931 F.2d 245 (4th Cir. 1991)	9, 12, 16
---	-----------

<i>United States v. Sparks</i> , 67 F.3d 1145 (4th Cir. 1995)	19, 20
--	--------

<i>United States v. Thompson-Riviere</i> , 561 F.3d 345 (4th Cir. 2009)	13
--	----

STATUTES:

18 U.S.C. § 922(g)(1)	3
18 U.S.C. § 924.....	3
18 U.S.C. § 924(c)(1)(A)(iii).....	3
21 U.S.C. § 841(a)(1)	2, 3
21 U.S.C. § 846.....	2
28 U.S.C. § 1254(1)	1

RULES:

Fed. R. Crim. P. 11.....	9, 10
Fed. R. Crim. P. 11(d)	11
Fed. R. Crim. P. 11(d)(2)(B).....	1, 9, 11
Fed. R. Crim. P. 32.....	11
Fed. R. Crim. P. 32(e)	11
S. Ct. R. 10	10

OTHER AUTHORITIES:

<i>Criminal Justice Standards for the Defense Function</i> (Am. Bar Ass’n 4th ed. 2017)	17, 18
--	--------

CITATION OF PRIOR OPINION

The United States Court of Appeals for the Fourth Circuit decided this case in an unpublished per curiam opinion issued on 28 July 2022. *United States v. Kramer*, No. 21-4424, 2022 WL 2987964 (4th Cir. 2022) (per curiam). The Fourth Circuit affirmed Mr. Kramer’s convictions after concluding that the district court did not abuse its discretion by denying Mr. Kramer’s motion to withdraw his guilty plea. The opinion is included in Appendix A.

JURISDICTIONAL STATEMENT

This petition seeks review of an opinion affirming Petitioner’s convictions of conspiracy to distribute methamphetamine and distribution of methamphetamine. The petition is being filed within the time permitted by the Rules of this Court. This Court has jurisdiction to review the Fourth Circuit’s opinion pursuant to 28 U.S.C. § 1254(1).

FEDERAL RULE INVOLVED

“A defendant may withdraw a plea of guilty or nolo contendere . . . after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B).

STATEMENT OF THE CASE

Investigation and Arrest

On 3 December 2019, law enforcement officers responded to an emergency call at a home in Jacksonville, North Carolina and found Joshua Austin Kramer with multiple gunshot wounds. J.A. 146. Mr. Kramer initially said he had stopped

to help someone in a car and was then shot; when officers found a firearm in the backyard, Mr. Kramer said he took the firearm from the person who shot him. J.A. 146. Officers searched Mr. Kramer's vehicle and found shell casings, holsters, ammunition, 68.9 grams of methamphetamine, digital scales, a ledger, and other paraphernalia in the vehicle. J.A. 146.

On 19 March 2020, officers from the Jacksonville Police Department used a cooperating defendant to buy 39.52 grams of crystal meth from Mr. Kramer. J.A. 146. On the same date, a confidential informant working with the Onslow County Sheriff's Office also made a controlled purchase of 25.53 grams of crystal meth from Mr. Kramer. J.A. 146. Other sources claimed to have purchased crystal meth from Mr. Kramer on a regular basis, including one source who reported buying more than 1,000 grams of crystal meth over a period of three months. J.A. 146.

Mr. Kramer was arrested on 1 June 2020 after a high-speed chase. J.A. 147. Officers found a small amount of methamphetamine and digital scales in Mr. Kramer's truck. J.A. 147.

Superseding Indictment

Mr. Kramer was charged by a superseding indictment with one count of conspiracy to distribute and possess with the intent to distribute fifty grams or more of methamphetamine, in violation of 21 U.S.C. §§ 841(a)(1), 846 (Count 1); one count of possession with the intent to distribute fifty grams or more of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Count 2); one count of possession of a firearm in furtherance of a crime of violence, with said firearm being

discharged, in violation of 18 U.S.C. § 924(c)(1)(A)(iii) (Count 3); one count of possession of a firearm after having been convicted of a felony, in violation of 18 U.S.C. §§ 922(g)(1), 924 (Count 4); and two counts of distribution of five or more grams of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) (Counts 5 and 6). J.A. 12-14.

Plea Agreement and Arraignment

Mr. Kramer agreed to plead guilty to Counts 1 and 5 of the superseding indictment pursuant to a written plea agreement. J.A. 101; *see* J.A. 101-10. The Government agreed to dismiss the remaining counts. J.A. 108. The parties stipulated that the quantity to be used in determining the base offense level was at least 10,000 kilograms but less than 30,000 kilograms of converted drug weight. J.A. 109. The parties also stipulated that enhancements for possession of a firearm and reckless endangerment during flight applied, and that Mr. Kramer should receive the maximum reduction for acceptance of responsibility. J.A. 110. Mr. Kramer agreed to waive his right to appeal his conviction and sentence on any grounds, except for ineffective assistance of counsel or prosecutorial misconduct not known to him at the time of the plea. J.A. 101.

On 11 February 2021, Mr. Kramer entered his guilty plea at arraignment before Chief United States District Judge Richard E. Myers II. J.A. 6. During the plea colloquy, Mr. Kramer affirmed that he had discussed the charges with his lawyer and that he was fully satisfied with his lawyer's services. J.A. 21. Mr. Kramer indicated that he understood his trial rights and the rights he would give

up if he entered a guilty plea. J.A. 21-22, 36-37. Mr. Kramer stated that he understood his plea agreement, including stipulations to the drug quantity and to enhancements for possession of a firearm and for recklessly creating a substantial risk of death or serious bodily injury during flight. J.A. 28-30. Mr. Kramer denied being threatened or forced to plead guilty. J.A. 30-31.

The district court explained the sentencing process to Mr. Kramer, including how the court would consider the Sentencing Guidelines. J.A. 32-34. Mr. Kramer agreed that he understood that if the court accepted his guilty plea, the court would have the authority to impose the statutory maximum sentence, and Mr. Kramer could not withdraw his guilty plea even if the maximum sentence was imposed. J.A. 34-35. After confirming that he understood he could still enter a plea of not guilty, Mr. Kramer pleaded guilty to Counts 1 and 5, and he told the court that he was guilty of both counts. J.A. 36, 37-38.

The Government made a proffer of the evidence it would have presented at trial, including evidence of the controlled purchase of 39.52 grams of crystal meth, and evidence that cooperating defendants had admitted to purchasing more than fifty grams of methamphetamine from Mr. Kramer over the course of their conspiracy. J.A. 39-41. The court found that the plea was supported by an independent basis in fact as to each essential element of the offenses. J.A. 41-42. The court accepted the guilty plea and explained how the case would proceed to sentencing. J.A. 42-44.

Motion to Withdraw Guilty Plea

Six weeks after arraignment, Mr. Kramer filed a letter with the court about his plea agreement, saying he felt he was forced into accepting a plea agreement because of his fear of the outcome if he did not. J.A. 6; *see* J.A. 112. Mr. Kramer's counsel was allowed to withdraw, and the court appointed new counsel for Mr. Kramer. J.A. 6.

Through his new counsel, Mr. Kramer moved to withdraw his guilty plea to Counts 1 and 5. J.A. 111-15. Mr. Kramer argued that he was not guilty of the conspiracy charged in Count 1. J.A. 112. Mr. Kramer alleged that his former counsel said he would not look at the discovery unless Mr. Kramer went to trial, and that his former counsel encouraged him to accept a plea agreement. J.A. 112. Mr. Kramer explained that he pleaded guilty because he felt he had no other choice. J.A. 113. Mr. Kramer argued that his plea was not knowing and voluntary, that he was not guilty of Count 1 because he only engaged in a buyer-seller relationship with the person identified in the Government's proffer at arraignment, that there was not a factual basis for the drug quantity stipulation in his plea agreement, and that he had not delayed in seeking to withdraw his guilty plea. J.A. 113-14. Mr. Kramer also challenged the adequacy of his former counsel's representation. J.A. 114. Mr. Kramer argued that the Government would not be prejudiced by withdrawal of the plea and that his right to a fair trial outweighed the interest in judicial economy. J.A. 114-15.

The Government opposed Mr. Kramer's motion. J.A. 118-27. The Government argued that Mr. Kramer failed to credibly allege that his plea was not knowing and voluntary. J.A. 123. The Government disputed Mr. Kramer's allegations about his former counsel's failure to review the discovery. J.A. 123-24. The Government argued that Mr. Kramer failed to credibly assert legal innocence. J.A. 124-25. The Government further argued that Mr. Kramer delayed in moving to withdraw his guilty plea, and that withdrawal would prejudice the Government and waste judicial resources. J.A. 126.

The Government later supplemented its response to Mr. Kramer's motion with an affidavit from Mr. Kramer's former counsel. J.A. 133. In the affidavit, Mr. Kramer's former counsel stated that he reviewed the discovery and denied telling Mr. Kramer otherwise. J.A. 133. Mr. Kramer's former counsel discussed his efforts to negotiate a plea agreement with the Government, and he explained that he succeeded in obtaining a plea agreement to charges giving rise to a ten-year mandatory minimum instead of a twenty-year mandatory minimum. J.A. 133-34. Counsel denied that he forced or threatened Mr. Kramer to plead guilty, and denied that he prevented Mr. Kramer from addressing the court at arraignment. J.A. 134. The Government also moved for relief from its stipulation to acceptance of responsibility in the plea agreement. J.A. 136-42.

The district court denied Mr. Kramer's motion to withdraw his guilty plea. J.A. 48. The district court first noted that a properly conducted plea colloquy raises a strong presumption that the plea is final and binding; Mr. Kramer did not

challenge the sufficiency of the colloquy. J.A. 47. The district court found that the plea was knowing and voluntary, even if Mr. Kramer pleaded guilty “unenthusiastically.” J.A. 48. The district court concluded that Mr. Kramer failed to credibly assert legal innocence, and rejected Mr. Kramer’s argument that the Government failed to proffer evidence of a conspiracy at arraignment. J.A. 49-51. The court also rejected Mr. Kramer’s allegations that his former counsel was ineffective, noting that Mr. Kramer agreed at arraignment that he was fully satisfied with his former counsel’s services. J.A. 52. The court concluded that Mr. Kramer failed to demonstrate that he did not have the close assistance of competent counsel in the time leading up to his plea and at arraignment. J.A. 54. The court therefore denied Mr. Kramer’s motion to withdraw his plea. J.A. 54. The court held in abeyance the Government’s motion for relief from the acceptance of responsibility stipulation, warning that if Mr. Kramer persisted in denying stipulated facts, including the drug quantity, “the court may conclude that the Government is released from its reciprocal stipulation that Defendant is entitled to an offense-level reduction for accepting responsibility for the offense.” J.A. 49.

Sentencing and Judgment

The Probation Office prepared a presentence investigation report. J.A. 143-59. The Probation Office calculated a criminal history category of VI. J.A. 150. Based on the stipulated drug quantity in the plea agreement, the Probation Office concluded that the base offense level was 34. J.A. 154. Consistent with the stipulations in the plea agreement, the Probation Office applied a two-point

enhancement for possession of a firearm, a two-point enhancement for recklessly creating a substantial risk of injury while fleeing, and a three-point reduction for acceptance of responsibility, for a total offense level of 35. J.A. 154. According to the presentence investigation report, the Guidelines range was 292 to 365 months' imprisonment, and Mr. Kramer faced a mandatory minimum term of ten years. J.A. 154.

Mr. Kramer objected to the drug quantity, arguing that the base offense level should be 30, or at worst, 32. J.A. 158. Mr. Kramer argued that the properly calculated total offense level was 31, yielding a Guidelines range of 188 to 235 months' imprisonment. J.A. 159. Citing the drug quantity stipulation in the plea agreement along with witness statements and other evidence, the Probation Office rejected Mr. Kramer's objections. J.A. 158-59.

The district court held a sentencing hearing on 5 August 2021. J.A. 9, 55. The court agreed with the Probation Office's calculation of the Guidelines range of 292 to 365 months' imprisonment. J.A. 61, 164. In doing so, the court denied the Government's motion for relief from the stipulation to a three-point reduction for acceptance of responsibility. *See* J.A. 63. After hearing arguments from the parties, J.A. 63-74, 160-63, the court imposed a term of 260 months' imprisonment on each of Counts 1 and 5, to run concurrently, and five years' supervised release on each count, also to run concurrently, J.A. 83-85, 93-94. The district court entered judgment on 6 August 2021. J.A. 9; *see* J.A. 91-98. Mr. Kramer timely filed a notice of appeal on 18 August 2021. J.A. 10, 99-100.

Mr. Kramer's Fourth Circuit Appeal

On appeal, Mr. Kramer argued that the district court abused its discretion by denying his motion to withdraw his guilty plea. *See* Op. 1. In an unpublished opinion issued on 28 July 2022, the Fourth Circuit rejected this argument, concluding that the district court did not abuse its discretion in finding that the relevant factors counseled against allowing Mr. Kramer to withdraw his plea. *Id.* 3. First, the Fourth Circuit recognized that, “[t]o withdraw a guilty plea prior to sentencing, a defendant must show a fair and just reason for requesting the withdrawal.” *Id.* 2 (quoting Fed. R. Crim. P. 11(d)(2)(B)). Further, the Fourth Circuit explained that the most important consideration in evaluating a motion to withdraw a plea is the Rule 11 colloquy. *See id.* The Fourth Circuit recited the six factors recognized in its precedent as relevant to determining when there is a “fair and just reason” to allow withdrawal of a guilty plea:

(1) whether the defendant has offered credible evidence that his plea was not knowing or not voluntary, (2) whether the defendant has credibly asserted his legal innocence, (3) whether there has been a delay between the entering of the plea and the filing of the motion, (4) whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources.

Id. 3 (quoting *United States v. Moore*, 931 F.2d 245, 248 (4th Cir. 1991)). The Fourth Circuit then concluded that as to the most important factors—the first, second, and fourth—the district court did not abuse its discretion in finding that those factors weighed against allowing Mr. Kramer to withdraw his plea. *Id.* In the Fourth Circuit’s view, the record did not support Mr. Kramer’s assertion that his

plea was not knowing and voluntary, Mr. Kramer presented no evidence of his innocence, and Mr. Kramer failed to credibly show that his counsel at the time of the plea was incompetent. *Id.* 3-5. For all of these reasons, and in light of the adequacy of the Rule 11 colloquy, the Fourth Circuit upheld the district court's denial of Mr. Kramer's motion to withdraw his plea, and thus affirmed Mr. Kramer's convictions.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question presented was argued and reviewed below. *See* Appellant's Br. 16-26 (Dkt. No. 29), *United States v. Kramer*, No. 21-4424 (4th Cir. Mar. 14, 2022); Appellee's Br. 12-26 (Dkt. No. 36), *United States v. Kramer*, No. 21-4424 (4th Cir. Apr. 25, 2022). Mr. Kramer's argument is appropriate for this Court's consideration.

REASONS FOR GRANTING THE WRIT

Mr. Kramer acknowledges that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. R. 10. Mr. Kramer nevertheless recognizes that this Court's discretion is not limited by Rule 10. Mr. Kramer respectfully asks the Court to exercise its discretion to review his case although the error involves the misapplication of a properly stated rule of law.

DISCUSSION

THE DISTRICT COURT ERRED BY DENYING MR. KRAMER'S MOTION TO WITHDRAW HIS GUILTY PLEA.¹

A defendant may withdraw a guilty plea after the district court accepts the plea, but before the court imposes a sentence, if “the defendant can show a fair and just reason for requesting the withdrawal.” Fed. R. Crim. P. 11(d)(2)(B); *see United States v. Hyde*, 520 U.S. 670, 671 (1997). A properly conducted plea colloquy, pursuant to Rule 11 of the Federal Rules of Criminal Procedure, raises a presumption that the plea is final and binding. *See United States v. Bowman*, 348 F.3d 408, 414 (4th Cir. 2003). The defendant bears the burden of establishing a fair and just reason for withdrawal. *See Hyde*, 520 U.S. at 671 (under similar circumstances, “a defendant may not withdraw his plea unless he shows a ‘fair and just reason’ under Rule 32(e)”).²

District courts consider a variety of factors in determining whether to exercise their discretion to grant a motion to withdraw a plea, including:

- (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)

¹ Mr. Kramer argued in the Fourth Circuit that the appeal waiver in his plea agreement did not bar appellate review of the denial of his motion to withdraw his guilty plea. *See* Appellant’s Br. 15-16 (Dkt. No. 29), *United States v. Kramer*, No. 21-4424 (4th Cir. Mar. 14, 2022). The Government did not invoke the appeal waiver. Appellee’s Br. 14-15, n.2 (Dkt. No. 36), *United States v. Kramer*, No. 21-4424 (4th Cir. Apr. 25, 2022).

² The *Hyde* Court considered a motion to withdraw a plea under a prior version of the Federal Rules of Criminal Procedure where the “fair and just reason” standard was found in Rule 32. Rule 11(d) is now the applicable rule. *See United States v. Bowman*, 348 F.3d at 411.

whether defendant has had close assistance of competent counsel, (5) whether withdrawal will cause prejudice to the government, and (6) whether it will inconvenience the court and waste judicial resources.

See Moore, 931 F.2d at 248.

According to circuit precedent, an appellate court reviews an order denying a defendant's motion to withdraw a guilty plea "to determine whether the district court abused its discretion in determining that [the defendant] had not shown a 'fair and just reason' for being allowed to withdraw his plea[.]" *United States v. Craig*, 985 F.2d 175, 178 (4th Cir. 1993) (per curiam). Mr. Kramer respectfully contends that the district court abused its discretion by denying the motion in his case.

1. Mr. Kramer credibly asserted that his plea was not knowing and voluntary.

Mr. Kramer concedes that he stated, on the record at arraignment, that he understood the proceedings and that he had not been forced or threatened into pleading guilty. *See* J.A. 30-31. The record nevertheless contains credible evidence that his plea was not knowing and voluntary. *See Moore*, 931 F.2d at 248.

Mr. Kramer asserted in the district court that he was forced into accepting a plea, and that his plea was not knowing and voluntary. *See* J.A. 112-13. As Mr. Kramer stated in his motion to withdraw the plea, Mr. Kramer suffered a traumatic brain injury when he was twenty-two months old. J.A. 114. The information presented in the presentence investigation report further explains how Mr. Kramer could purport to enter a guilty plea when he was not making a knowing and voluntary decision. As a result of his traumatic brain injury, Mr. Kramer continues to suffer from short-term memory loss. J.A. 151. Mr. Kramer also struggles with

post-traumatic stress disorder and dependence on alcohol, marijuana, and methamphetamine. J.A. 151-52.

The Fourth Circuit overlooked the record when it rejected any argument about Mr. Kramer's brain injury in a footnote. *See* Op. 4, n.*. Contrary to the Fourth Circuit's conclusion, this information about Mr. Kramer's background provided credible evidence that his plea was not knowing and voluntary.

2. Mr. Kramer is legally innocent of conspiracy.

Mr. Kramer also maintains that he is legally innocent of the drug distribution conspiracy charged in Count 1 of the superseding indictment, and that he credibly asserted legal innocence before the district court. *See* J.A. 113-14.

To credibly assert legal innocence, the defendant must “present evidence that (1) has the quality or power of inspiring belief, and (2) tends to defeat the elements in the government's prima facie case or to make out a successful affirmative defense.” *United States v. Thompson-Riviere*, 561 F.3d 345, 353 (4th Cir. 2009) (quotations and citation omitted). To prove conspiracy under Fourth Circuit law, the Government must show that (1) an agreement to distribute and possess with the intent to distribute controlled substances existed between two or more persons; (2) the defendant knew of the conspiracy; and (3) the defendant knowingly and voluntarily became a part of this conspiracy. *See United States v. Burgos*, 94 F.3d 849, 857 (4th Cir. 1996) (en banc). Evidence of a buyer-seller arrangement alone does not establish a conspiracy to distribute controlled substances; rather, distribution and conspiracy are separate offenses. *See United States v. Hackley*, 662

F.3d 671, 681 (4th Cir. 2011). Mr. Kramer admits to distributing methamphetamine, J.A. 112, but contends that there was insufficient evidence to support a guilty plea to the conspiracy charge, see J.A. 113-14.

The district court erred by ruling that Mr. Kramer did not credibly assert legal innocence. *See* J.A. 50-51. Contrary to the district court's finding that Mr. Kramer failed to present evidence tending to defeat the conspiracy charge, J.A. 51, Mr. Kramer asserted through counsel that he had "purely" a buyer-seller relationship with the individuals he supplied, J.A. 113-14. If Mr. Kramer only engaged in buyer-seller relationship, that fact would tend to defeat the existence of the agreement element of the Government's conspiracy charge. *See Hackley*, 662 F.3d at 681.

The Government's proffer at arraignment did not show more than a buyer-seller arrangement. *See* J.A. 39-41. Although "evidence of a continuing buy-sell relationship when coupled with evidence of large quantities of drugs, or continuing relationships and repeated transactions, creates a reasonable inference of an agreement," the Government did not proffer evidence of a continuing relationship plus large quantities of drugs. *See Hackley*, 662 F.3d at 679 (quotation omitted). The Government proffered only that a cooperating defendant said the defendant had supplied at least fifty grams of methamphetamine over an unspecified period of "months," the cooperating defendant made a controlled purchase from Mr. Kramer under law enforcement supervision, and two other individuals stated that Mr. Kramer supplied "ounce quantities" of crystal meth to them from December 2019 to

some time in 2020. J.A. 39-41. The Government did not say whether, on individual occasions, these individuals purchased user amounts from Mr. Kramer; the Government described the quantities purchased over time in the aggregate. *See* J.A. 39-41. The Government did not proffer evidence that any of the individuals agreed to distribute methamphetamine with Mr. Kramer. *See* J.A. 39-41.

In rejecting Mr. Kramer's argument on appeal, the Fourth Circuit noted that Mr. Kramer did not claim to be innocent of the distribution charge to which he pleaded guilty. Op. 4. Although Mr. Kramer does not contend that he is legally innocent of drug distribution, the guilty plea he sought to withdraw was based on a plea agreement that included the conspiracy charge of which Mr. Kramer contends that he *is* innocent. *See* J.A. 106. Mr. Kramer asserted a basis to defeat the Government's conspiracy charge, and the Government's proffer exposes the lack of evidence that Mr. Kramer conspired to distribute methamphetamine as charged in Count 1. Mr. Kramer respectfully contends that his showing of legal innocence on Count 1 weighed in favor of allowing him to withdraw his plea.

3. The six-week period between arraignment and Mr. Kramer's attempt to withdraw his guilty plea did not warrant denying the motion.

Mr. Kramer first expressed a desire to withdraw his plea in a pro se letter to the court filed six weeks after arraignment. J.A. 6. Although Mr. Kramer acknowledges that there was some delay, during those six weeks after arraignment, Mr. Kramer continued to be represented by the same counsel who represented him at the arraignment, and who counseled Mr. Kramer to plead guilty. *See* J.A. 6. Mr. Kramer alerted the court and the Government to his desire to withdraw the plea on

the same day his then-counsel moved for leave to withdraw. *See* J.A. 6. Mr. Kramer's action was timely given that he could not expect the lawyer who represented him at arraignment to file a motion to withdraw the plea. In any event, the six-week interval between arraignment and Mr. Kramer's letter did not cause prejudice, and thus did not warrant denying Mr. Kramer's motion to withdraw the plea. *See, e.g., Bowman*, 348 F.3d at 415-16 (discussing district court's determination that three-month delay was not prejudicial).

In its opinion, the Fourth Circuit did not rule otherwise. *See Op. passim*. Rather, the Fourth Circuit considered only the first, second, and fourth factors recited in *Moore*. *Id.* 3-5. Mr. Kramer contends that any delay in filing his motion was insignificant, and not a basis for the district court to deny his motion to withdraw the plea.

4. Mr. Kramer did not have the close assistance of competent counsel at the time he entered the guilty plea.

Ineffective assistance of counsel of "constitutional magnitude" can "constitute a 'fair and just reason' for allowing plea withdrawal." *Craig*, 985 F.2d at 179. Counsel's performance must have fallen below an objective standard of reasonableness, and it must have prejudiced the defendant. *See id.*; *see also Strickland v. Washington*, 466 U.S. 668, 687 (1984) (requiring showing of both deficient performance and prejudice to make out ineffective assistance claim). As shown below, Mr. Kramer was denied effective assistance of counsel when his counsel failed to review and discuss the discovery with Mr. Kramer to assist him in

connection with his guilty plea, and counsel's ineffective assistance was prejudicial. *See* J.A. 112, 114.

Counsel's performance is evaluated under "prevailing professional norms." *Jones v. Murray*, 947 F.2d 1106, 1110 (4th Cir. 1991) (quotation omitted). Professional standards require that defense counsel "communicate and keep the client informed and advised of significant developments and potential options and outcomes." *Criminal Justice Standards for the Defense Function* § 4-1.3(d) (Am. Bar Ass'n 4th ed. 2017); *see also Jones*, 947 F.2d at 1110 (citing *Criminal Justice Standards* as setting professional norms). Defense counsel "should keep the client reasonably and currently informed about developments" in the case, "including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense." *Criminal Justice Standards for the Defense Function* § 4-3.9(a). When assisting a client in considering a guilty plea, defense counsel should discuss with the client and analyze multiple factors, including "the prosecution's evidence." *Id.* § 4-6.1(b).

According to Mr. Kramer, his counsel did not review the discovery to help Mr. Kramer consider the guilty plea; instead, counsel said he would review the discovery only if the case went to trial. J.A. 112. Mr. Kramer acknowledges that counsel disputed Mr. Kramer's account. *See* J.A. 133. However, even if Mr. Kramer's former counsel reviewed the discovery, nothing in counsel's affidavit suggests that counsel discussed the discovery *with Mr. Kramer* to assist Mr. Kramer in evaluating the plea offer. *See* J.A. 133-35.

Further, Mr. Kramer’s statement at arraignment that he was satisfied with his counsel’s services, J.A. 21, does not show that those services were constitutionally sufficient. Mr. Kramer, as a non-lawyer, was not in a position to tell the district court whether his counsel’s advice was constitutionally effective. *See, e.g., United States v. Lough*, 203 F. Supp. 3d 747, 752-54 (N.D. W. Va. 2016) (finding that defendant did not have close assistance of competent counsel despite defendant’s statements at arraignment that he was satisfied with counsel’s services).

The Fourth Circuit concluded that Mr. Kramer “failed to credibly show that his attorney was incompetent,” citing the fact that the attorney negotiated a plea where four of six charges were dropped, including a firearm charge that carried a consecutive ten-year mandatory minimum sentence. Op. 5. But the record does not show why those charges—in particular, the firearm charge—were dropped. Speculation that the charges were dropped due to savvy negotiation by Mr. Kramer’s counsel, as opposed to any other reason, including the weakness of the evidence, cannot overcome Mr. Kramer’s showing that his counsel did not review and discuss the discovery with him.

Mr. Kramer respectfully contends that his counsel at the time of arraignment rendered constitutionally deficient performance when counsel failed to review and discuss the Government’s discovery with Mr. Kramer before he entered his plea. *See Criminal Justice Standards for the Defense Function* §§ 4-1.3(d), 4-3.9(a), 4-6.1(b). Mr. Kramer was prejudiced by this failure—his motion to withdraw his

guilty plea established that he would have insisted on going to trial. *See Hill v. Lockhart*, 474 U.S. 52, 59 (1985) (to show *Strickland* prejudice, “the defendant must show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty and would have insisted on going to trial”).

5. Withdrawal of the plea would not have prejudiced the Government.

“Because withdrawal of a guilty plea almost invariably prejudices the government to some extent and wastes judicial resources, the fifth and sixth factors can weigh in the defendant’s favor so long as she shows that the magnitudes of the prejudice and inconvenience are small; the defendant need not show that the effects will be nonexistent.” *United States v. Sparks*, 67 F.3d 1145, 1154, n.5 (4th Cir. 1995). A court will not find prejudice because the Government will incur “costs that would inevitably attend the trial of a particular case even in the absence of a withdrawn guilty plea.” *United States v. Hankins*, No. 2:09-cr-00222, 2010 WL 4642004, at *5 (S.D. W. Va. Nov. 8, 2010) (quotation omitted). The Government “must identify some costs specifically resulting from the entry and subsequent withdrawal of the plea.” *Id.*

Mr. Kramer showed in his motion to withdraw the plea that the Government would not be prejudiced because there were no missing witnesses and there was no loss of evidence. J.A. 114. In response, the Government made only a conclusory assertion of prejudice, arguing that it had relied on Mr. Kramer’s guilty to plea and “allowed the sentencings of other cooperators who might be needed to testify against [Mr. Kramer at trial] to go forward.” J.A. 126. The district court, and not the

Government, decided when sentencing hearings would be held. The fact that other witnesses had been sentenced did not make them unavailable to the Government; rather, based on the Government's description of those individuals as "cooperators," it appears that the witnesses likely were bound by their plea agreements to be available to testify if called. *See* J.A. 126. Therefore, any prejudice to the Government resulting from the withdrawal of Mr. Kramer's plea would have been slight. *See, e.g., United States v. Artabane*, 868 F. Supp. 76, 79 (M.D. Pa. 1994) (mere assertion of prejudice to government was insufficient to warrant denial of motion to withdraw plea where witnesses were local and readily available for trial); *see also Sparks*, 67 F.3d at 1154, n.5 (defendant need not disprove all prejudice to government).

The Fourth Circuit did not reach the issue of prejudice to the Government because it considered only the first, second, and fourth *Moore* factors. *See* Op. 3-5. Mr. Kramer respectfully asks that this Court consider, in deciding whether there are compelling reasons to grant the writ of certiorari, that the district court rejected Mr. Kramer's motion to withdraw his plea in the absence of a showing of prejudice to the Government.

6. Any inconvenience to the court or waste of judicial resources would have been minimal.

The sixth factor also can weigh in favor of the defendant even if there will be some inconvenience to the court or waste of judicial resources. *See Sparks*, 67 F.3d at 1154, n.5. Allowing Mr. Kramer to withdraw his plea would have required some additional expenditure of judicial resources in the form of further proceedings and

trial. However, the cost of additional proceedings, including trial, was outweighed by the interest in allowing Mr. Kramer to hold the Government to its burden of proof at trial. *See Hankins*, 2010 WL 4642004, at *6 (allowing withdrawal of plea where defendant had legitimate interest in testing possibility of acquittal by holding government to its burden of proof). Therefore, concern for inconvenience to the court and judicial economy did not warrant denial of Mr. Kramer's motion.

The Fourth Circuit likewise did not reach this issue. *See Op. passim*. If this Court reviews Mr. Kramer's case, Mr. Kramer will contend that this factor did not support the district court's decision to deny Mr. Kramer's motion to withdraw his guilty plea.

CONCLUSION

For the foregoing reasons, petitioner Joshua Austin Kramer respectfully requests that the Court grant this petition and issue a writ of certiorari to review the opinion of the Fourth Circuit in this case.

This the 27th day of September, 2022.

/s/ Kelly Margolis Dagger
Kelly Margolis Dagger
N.C. State Bar No. 44329
Paul K. Sun, Jr.
N.C. State Bar No. 16847
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
Telephone: (919) 865-7000
Facsimile: (919) 865-7010

Attorneys for Petitioner Joshua Austin Kramer