No._____

IN THE SUPREME COURT OF THE UNITED STATES

DARWIN POWELL, PETITIONER

V.

UNITED STATES OF AMERICA

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

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QUESTION PRESENTED FOR REVIEW

Whether the courts of appeals, by creating checklists of considerations for the district courts to follow, have improperly narrowed the "fair and just reason" standard that Federal Rule of Criminal Procedure 11(d)(2)(B) sets for evaluating a defendant's request to withdraw a guilty plea.

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Darwin Powell asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 1, 2023

PARTIES TO THE PROCEEDING

The caption of the case names all the parties to the proceedings in the court below.

RELATED PROCEEDINGS

United States v. Powell, U.S. District Court for the Western District of Texas, Number 5:18 CR 00068-OLG-1, Judgment entered April 14, 2022.

United States v. Powell, U.S. Court of Appeals for the Fifth Circuit, Number 22-50294, Judgment entered May 1, 2023.

OPINION BELOW

The opinion of the court of appeals is attached to this petition as Appendix A.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the court of appeals were entered on May 1, 2023. This petition is filed within 90 days after the entry of judgment. *See* Supreme Court Rule 13.1. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The pertinent part of Federal Rule of Criminal Procedure 11 provides:

> (d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:
>
> . . .
>
> (2) after the court accepts the plea, but before it imposes sentence if:
>
> . . .
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.

STATEMENT

Petitioner Darwin Powell was charged with one count of conspiring to possess five kilograms or more of cocaine with the intent to distribute it, one count of money laundering, and two counts of possessing five or more kilograms of cocaine with the intent to distribute it. 18 U.S.C. § 1956(a)(1)(A)(a)(i-ii), (h); 21 U.S.C. § 841(a)(1),

(b)(1)(B) and § 846(A)(ii). Powell and the government reached an agreement under which he would plead guilty to the conspiracy charge.

The case was set for rearraignment on September 25, 2019, but Powell asked in court that day that the matter be reset. Three weeks later, on October 16, 2019, a guilty plea hearing was held before a U.S. magistrate judge. That very day, the magistrate filed a written recommendation that Powell's guilty plea be accepted.

Powell also acted right after the plea hearing. When he was returned to the jail, he called LaSonya West, his assistant at the construction company he owned, and asked her to call his attorney, James Rodriguez, to tell him that Powell wished to withdraw his plea. The next day, Powell himself telephoned attorney Rodriguez; he left a message telling Rodriguez that he wished to withdraw his plea. West testified that she also called Rodriguez that day and left several messages with attorney Rodriguez. Powell testified that Rodriguez vehemently opposed the idea of withdrawing the plea and refused to file the motion.

Although Powell had been advised that he had 14 days to object to the magistrate's recommendation that the guilty plea be accepted, the district court accepted the plea after only five days. *Cf.* Fed. R. Crim. P. 11(d)(1) (defendant may withdraw a plea without reason before district court accepts it). In its adoption order, the court stated that, if any objections were filed within 14 days, it would rescind the adoption order and consider them.

Two weeks after the plea was accepted, Powell sent the district court a letter asking for new counsel and withdrawal of his plea. He explained that appointed counsel's representation had resulted in him "enter[ing] a plea of guilty under `False Pretenses' thus meriting the removal of my current attorney and the withdrawal of said plea." Appendix F.

At a hearing, Powell reiterated his request for new counsel and withdrawal of his guilty plea. Attorney Rodriguez stated that it would be best if new counsel were appointed. The magistrate ruled that new counsel would be appointed, and advised Powell that it would be new counsel's job to file a motion to withdraw the plea.

New counsel filed that motion. At a hearing, Powell testified that, while he had ended up signing a plea agreement, he had told attorney Rodriguez that he was not guilty of some of the allegations set forth in the factual basis of the plea agreement. He also indicated this disagreement to the prosecutor. From conversations with those lawyers, Powell came to believe that changes could later be made to the factual basis and to other parts of the agreement. Because of that belief, Powell went through with the plea hearing, even though he had informed attorney Rodriguez he was uncomfortable and felt under pressure to plead guilty.

Powell further testified that he had preferred to assert his innocence and to explore suppression of statements he had made. He believed attorney Rodriguez had not advised him fully about the operation of the plea agreement, the import of the

factual basis, and the possibility of modifications to either the agreement or the factual basis.

Powell testified that he repeatedly told attorney Rodriguez that he was innocent of assertions made in the factual basis. Powell maintained he was innocent of the "largest paragraph" in the factual basis, the one which claimed he had purchased 10 kilograms of cocaine. He also testified that he had neither conspired to possess nor possessed more than five kilograms of cocaine. He explained that he believed, because of the meeting after the September 25 postponement, that the plea agreement's factual basis could be modified to address his concerns.

After the plea, when Powell sought to withdraw his plea, attorney Rodriguez did not file a motion to withdraw the plea. That led Powell to write to the district court on his own to announce his wish to withdraw the plea.

On cross-examination, the prosecutor asked Powell about meetings that he had attended with the investigating agents. Powell said he had been truthful with the agents. The court admitted agent reports the government offered that contained putatively incriminatory statements that Powell had made to the agents.

The magistrate judge recommended that the motion to withdraw be denied. Appendix B. Following the template established by the Fifth Circuit in *United States v. Carr,* 740 F.2d 339, 343-44 (5th Cir. 1984), the magistrate judge went through seven factors, weighing them for or against Powel. The magistrate judge's recommendation leaned heavily on Powell's statements at the plea hearing that he

understood the charge, had signed the plea agreement, and had stated his agreement with the factual basis. Appendix B. The magistrate thought these facts, along with the government exhibit showing statements Powell had made to the agents meant that Powell had not credibly asserted his innocence and had not pleaded unknowingly or involuntarily. Appendix B. Moving through the other *Carr* factors, the magistrate judge also found that the government would be prejudiced by withdrawal of the plea and that the district court itself would be substantially inconvenienced by allowing withdrawal of the plea. Appendix B.

Powell objected to the magistrate judge's recommendation and its weighing of the *Carr* factors. He again asserted innocence. He also argued that the *Carr* test thwarted the language and intent of Rule 11(d)(2)(B)'s declaration that a plea could be withdrawn for a "fair and just reason." The government responded to Powell's objections. Its response included an affidavit in which attorney Rodriguez proclaimed that "[a]t no time during my representation, did Mr. Powell ever assert factual innocence of the crimes in which he had been charged."

Powell also objected to the government's presentation of Rodriguez's affidavit. He argued that he had not waived the attorney-client privilege and that the admission of the affidavit deprived him of his right to confront and cross-examine Rodriguez. The district court, in a conclusory order, adopted the magistrate judge's recommendation and denied the motion to withdraw the guilty plea. Appendix C.

Powell moved for reconsideration. He argued the district court had improperly relied on the post-arrest statements that were obtained from him. Those statements were not the product of a voluntary waiver, but a product of interference with his Sixth Amendment right to counsel. In an affidavit, attorney R.C. Pate testified that he was representing Powell on a forfeiture matter when Powell was arrested. Pate averred that the agents would not let him talk to Powell in private and that Powell therefore invoked his right to remain silent.

The government had argued that the video it had submitted showed a waiver of Powell's right to remain silent after this invocation of silence that Pate witnessed. But that video showed only a waiver at the beginning of a later interrogation. Gov't Withdrawal Hearing Ex. 4. It did not show who initiated contact after Powell had invoked his rights to remain silent and to counsel. *Cf. Minnick v. Mississippi,* 498 U.S. 146 (1990). Powell alleged that the agents had pressured him to speak by denigrating his attorney and discussing the fearsomeness of the federal prosecutor. Powell argued that, because of these facts and because the magistrate judge's adopted recommendation had placed significant weight on his statements to the agents, the order denying the motion to withdraw should be reconsidered.

The magistrate judge held a hearing on the reconsideration motion. Powell's counsel argued that attorney Pate's affidavit regarding Powell's invocation of his right to counsel was the key point of the reconsideration motion. Counsel asked the court to allow him to present witnesses who could testify that, between the time he invoked his rights when Pate was present and the time the video showed him waiving

them before an interrogation, Powell had been cajoled and pressured by the agents. This evidence would show that the videotape the government offered was not the relevant evidence about Powell's purported waiver of his right to remain silent. Counsel argued that these facts formed the basis for a valid motion to suppress and that with the statements suppressed Powell was legally innocent of the charges.

Powell also argued that the denial of the motion to withdraw should be reconsidered because it was improper for the district court to have considered the affidavit from attorney Rodriguez. He observed that the court had made no ruling that he had waived attorney-client privilege and so it was improper for attorney Rodriguez to give an affidavit and for the government to use the affidavit.

The magistrate judge recommended that the motion to reconsider be denied. He found that the use of the Rodriguez affidavit could not be grounds for reconsideration because the district court had implicitly rejected that argument when overruling the objections to the recommendation on the original motion to withdraw. The magistrate alternatively found that, even if the challenge to the Rodriguez affidavit were considered, the totality of the record showed that Powell had not made a credible assertion of innocence. In making that finding on a credible assertion of innocence, the magistrate relied on the statements Powell had made to agents after his arrest–the very statements Powell contended should have been suppressed. Appendix D.

Over Powell's objections, the district court denied the motion to reconsider. Appendix E. Powell appealed. He argued that he had presented a fair and just reason for withdrawing his plea and that the district court had erred by concluding otherwise. He also argued that the Fifth Circuit's *Carr* test was contrary to Rule 11(d)'s fair-and-just-reason test. The Fifth Circuit disagreed and affirmed his conviction. Appendix A.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO PROVIDE GUIDANCE ON THE MEANING OF THE "FAIR AND JUST" STANDARD SET FORTH IN FEDERAL RULE OF CRIMINAL PROCEDURE 11(d)(2)(B).

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Federal Rule of Criminal Procedure 11(d)(2)(B) allows a defendant to withdraw his plea of guilty after it is entered, but before he is sentenced, for a "fair and just reason[.]" In a criminal justice system that "is for the most part a system of pleas," *Lafler v. Cooper,* 566 U.S. 156, 170 (2012), Rule 11's fair and just standard provides a critical safeguard for defendants who, under the stress of being prosecuted, agree to a plea that further reflection shows to have been poorly thought-out, poorly counseled, or made on incomplete information. As the Court put it long ago, guilty pleas that "have been unfairly obtained or given through ignorance, fear or inadvertence" may be vacated. *Kercheval v. United States,* 274 U.S. 220, 224 (1927). The trial courts must have discretion to allow a defendant to "substitute a plea of not guilty and have a trial if for any reason the granting of the privilege seems fair and just." *Id.*

A. The courts of appeals have effectively erased the fair-and-just-reason standard and replaced to with a narrower, more rigid analysis that unduly limits a defendant's opportunity to withdraw a guilty plea.

The *Kercheval* standard was cited by the advisory committee notes to Federal Rule of Criminal Procedure 32 in 1983, when Rule 32(e) was amended to add a fair-and-just withdrawal standard. The advisory committee observed that courts had often relied on the *Kercheval* standard, as shown by cases such as *United States v.*

Strauss, 563 F.2d 127 (4th Cir. 1977) and *United States v. Barker,* 514 F.2d 208 (D.C. Cir. 1975). In 2002, the substance of Rule 32(e) was moved to Federal Rule of Criminal Procedure Rule 11(d). Rule 11(d)(2)(B), by its plain terms, preserved the right of a defendant to have his plea withdrawal request reviewed for fairness and justness by a district court exercising its full discretion. The rule was intended to be generous and liberally applied. *See United States v. Bonilla,* 637 F.3d 980, 983 (9th Cir. 2011).

The "fair and just" language in the rule affirmed the considerable district court discretion that *Kercheval* taught was necessary to ensure justice and access to a trial. 274 U.S. at 225. Over the years, however, the courts of appeals have created checklists of considerations for district courts to run through when deciding whether to grant a request to withdraw a guilty plea. The effect of these checklists has been to put the focus on the list, not on whether it is fair or just to allow a defendant to retract his plea and proceed to trial. The checklists have acted to limit the discretion granted to the district courts by Rule and to make it considerably more difficult for defendants to withdraw guilty pleas.

The exact number of considerations these checklists set out varies between the circuits, *compare United States v. Doe,* 537 F.3d 204, 210-11 (2d Cir. 2008) (three factors) with *United States v. Hamilton,* 510 F.3d 1209, 1214 (10th Cir. 2007) (seven factors), but there are commonalities among them and all the lists act to narrow the meaning of what is a fair-and-just reason to withdraw a guilty plea. The circuits have done this, despite the reality that a plea-withdrawal decision requires "an idiocratic, particularistic, factbound assessment—an assessment which is facilitated because

the judge has overseen pretrial proceedings, conducted the Rule 11 inquiries, accepted the original guilty plea, and heard at first hand the reasons bearing upon its withdrawal." *United States v. Pellerito,* 878 F.2d 1537, 1538 (1st Cir. 1989). The First Circuit further acknowledged that appellate courts "lack the district judge's `feel' for the case[,]" a feel that necessarily informs the conclusion about what is fair and just. *Id.*

Nonetheless, the First Circuit has laid down a checklist for the district court to tick through, then tabulate the totals in determining whether a defendant should be allowed to withdraw his guilty plea. In *United States v. Tilley,* the court set out five factors: "(1) the timing of defendant's change of heart; (2) the force and plausibility of the reason; (3) whether the defendant has asserted his legal innocence; (4) whether the parties had reached (or breached) a plea agreement; and (5) most importantly, whether the defendant's guilty plea can still be regarded as voluntary, intelligent, and otherwise in conformity with Rule 11." 964 F.2d 66, 72 (1st Cir. 1992). These checklist factors, not the district court's "feel" for, experience with, or sense of justice about the defendant's case now govern whether a plea can be withdrawn under Rule 11(d)(2). *See, e.g., United States v. Bruzon-Velazquez,* 475 F.Supp.3d 86, 89 (D. Puerto Rico 2020) (working through checklist before denying defendant's request).

The Fifth Circuit has taken perhaps the most pronounced narrowing approach. Its list of seven factors for the district courts to run through seems to focus more on convenience and ease than fairness and justice. These factors are (1) whether the defendant asserted his innocence; (2) whether the plea was knowing and voluntary;

(3) whether defendant was assisted by counsel; (4) whether the defendant delayed filing his motion and, if so, why,; (5) whether withdrawal would prejudice the government; (6) whether withdrawal would substantially inconvenience the court, and (7) whether withdrawal would waste judicial resources. *United States v. Carr,* 740 F.2d 339, 343-44 (5th Cir. 1984). The district court in this case proceeded through the factors and, when more of them favored denial under the checklist test, refused Powell's request to withdraw his plea. Appendices B and C. *See also United States v. Bravo de la Cruz,* 375 F.Supp.3d 707, 723-24 (S.D. Tex. 2019) (working through checklist before denying defendant's request). The Rule 11(d)(2) process now plays out very similarly in the Tenth Circuit, which has adopted those factors. *See, e.g., United States v. Reed,* 2020 WL 6743099 (D N.M. 2020) (citing list from *United States v. Hamilton,* 510 F.3d 1209, 1214 (10th Cir. 2007)).

These checklists have moved the Rule 11 plea-withdrawal analysis away from its underlying premise: that a defendant should be able to "substitute a plea of not guilty and have a trial *if for any reason the granting of the privilege seems fair and just*." *Kercheval,* 274 U.S. at 224. *Kercheval* and Rule 11(d)(2)(B) left the determination of what was fair and just to the trial court and its understanding of the particular case. *Id.* The checklists created by the circuits take the focus from fairness and justness and put it on an approved appellate template.

The checklists take the focus from the defendant's particular case and put it on fitting the case into pre-formed categories. These pre-formed categories limit the district court's discretion; they also tilt the decision-making process away from

openness and liberality, *Bonilla,* 637 F.3d at 983, and toward affirming the status quo of essentially always maintaining the guilty plea that was entered. The checklists appear to favor the interests of the prosecutor and the courts in finality over the rights of defendants to trial by jury. The effect of the checklists has been to blinker the district courts' review of whether the defendant has put forth circumstances showing a fair and just reason to withdraw his plea.

B. Powell's case is a good vehicle for addressing the issue.

Powell's case illustrates well how the checklist approach obscures the fair-and-just reason inquiry. His case involved a number of unusual, even disconcerting facts, yet the courts did not actually engage with those facts. The magistrate judge tracked the *Carr* factors, Appendix B, the district court summarily adopted the magistrate's tracking memorandum, Appendix C, and the court of appeals affirmed under *Carr,* Appendix A. The court of appeals' opinion shows clearly how the checklist factors displace fair-and-justice analysis. Powell spent several pages in his briefing explaining why the use of the attorney Rodriguez affidavit was wrong under the rules governing attorney/client relationship and why its use violated his rights under the Sixth Amendment to cross-examine witnesses. He asked that the case be remanded for the district court to evaluate these facts in relation to his motion to withdraw. Powell Br. 21-27; Powell Reply Br. 7-9. The Fifth Circuit hurried past Powell's arguments, Appendix A at 3, without actually addressing them and then declared that the affidavit was not harmful because the district court had stated that its consideration "of the *Carr* factors would not have been impacted if the affidavit had

been excluded." Opinion 3-4. That, at each step, the *Carr* checklist, not the unusual and compelling circumstances of Powell's case, were what the courts examined and dwelled upon demonstrates that the checklist, not the fair-and-just reason test, is what matters in the checklist-sanctioned analysis.

That is also demonstrated by the district court's orders and the magistrate judge's recommendations. Powell's case contained multiple factors that should have been fully considered in determining whether a fair-and-just reason existed for withdrawal of his plea. Instead, the orders and recommendations forced the facts into the procrustean box of the *Carr* checklist and declared a good-enough fit to allow the plea to stand. Appendices B, C, D, and E.

Powell's complaints about his counsel were numerous and substantial. Powell testified that he had asked his attorney to move to withdraw the guilty plea the day after it was entered. Counsel did not so move. That cost Powell his absolute right to withdraw his plea, *see* Federal Rule of Criminal Procedure 11(d)(1), and eventually because of the application of the *Carr* checklist, his right to a trial. Powell's counsel did not move to suppress statements before a plea was entered, despite facts giving rise to arguable suppression issues and thus a defense of legal innocence. When Powell did move to withdraw his plea, his now-former attorney cooperated with the government and gave an affidavit against Powell's interests, though no court had found that Powell had waived the attorney-client privilege. *See, e.g., United States v. Neal,* 27 F.3d 1035, 1048 (5th Cir. 1994) (explaining privileged communications); *United States v. Melvin,* 650 F.2d 641, 645 (5th Cir. 1981) (disclosure of confidential

communications may violate Sixth Amendment). The use of the affidavit also deprived Powell of an opportunity to cross-examine the attorney about his claims in the affidavit. *Cf. Davis v Alaska,* 415 U.S. 308, 316 (1974) (cross-examination constitutes "the principal means by which the believability of a witness and the truth of his testimony are tested.").

All of these circumstances affected the fairness and justice of the plea Powell had entered and the merits of his request to withdraw it. The *Carr* checklist asked only whether Powell had counsel with him leading up to the plea, and so the district court focused only on the fact that Powell had counsel with him during the plea proceedings, rather than on what counsel failed to do and failed to tell Powell leading up to the entry of the plea and in the time immediately following the plea. See Appendices B and C.

Yet, the failure of counsel to respond to Powell's wishes and file the withdrawal-of-right motion that Powell requested would appear to satisfy any basic conception of the fair-and-just reason standard. That fact alone showed a fair-and-just reason to grant Powell a release from his plea and the restoration of his right to trial. The suppression and the affidavit issues only heightened the justice of Powell's request to withdraw his plea. The magistrate judge and the district court had been instructed however, to run through the *Carr* checklist, and that checklist asked not what had happened in the particular case, but could the case be fit into the pre-formulated boxes. In directing district courts to divide and slot plea-withdrawal requests, rather than looking for what was fair and just, the checklist approach

appears to run contrary to the spirit and letter of Rule 11(d)(2)(B). The Court should decide whether the checklist approach can continue, and Powell's case presents a good vehicle for resolving the question.

Conclusion

FOR THESE REASONS, Petitioner asks that this Honorable Court grant a writ of certiorari and review the judgment of the court of appeals.

/s/ PHILIP J. LYNCH
Counsel of Record for Petitioner

DATED: June 16, 2023.