No. _____

In the
Supreme Court of the United States

OCTOBER TERM, 2022

JONATHAN LIMBRICK,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

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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QUESTIONS PRESENTED FOR REVIEW

DID THE FIFTH CIRCUIT ERR BY FINDING THAT THE DISTRICT COURT'S DECISION TO DENY MR. LIMBRICK'S MOTION TO WITHDRAW HIS GUILTY PLEA DID NOT CONSTITUTE AN ABUSE OF DISCRETION?

DID THE DISTRICT COURT ERR BY DENYING MR. LIMBRICK'S MOTION TO WITHDRAW HIS PLEA OF GUILTY?

HAVE THE COURTS OF APPEALS, BY CREATING CHECKLISTS OF CONSIDERATIONS FOR THE DISTRICT COURTS TO FOLLOW, 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?

DOES THE FIFTH CIRCUIT'S OPINION CONTRADICT THIS COURT'S OPINION IN *KERCHEVAL V. UNITED STATES*, 274 U.S. 220, 224 (1927) ?

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The decision of the Court of Appeals for the Fifth Circuit is reported as *United States v. Limbrick*, No. 22-40329 (5th Cir. June 6, 2023)(not published). It is attached to this Petition in the Appendix.

JURISDICTION

The decision by the United States Court of Appeals for the Fifth Circuit affirmed the District Court's judgment of conviction and sentence in the Eastern District of Texas.

Consequently, Mr. Limbrick files the instant Application for a Writ of Certiorari under the authority of 28 U.S.C., § 1254(1).

BASIS OF FEDERAL JURISDICTION

IN THE COURT OF FIRST INSTANCE

Jurisdiction was proper in the United States District Court for the Eastern District of Texas because Mr. Limbrick was indicted for violations of Federal law by the United States Grand Jury for the Eastern District of Texas.

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:
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> . . .
>
> (B) the defendant can show a fair and just reason for requesting the withdrawal.

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

On September 17, 2020, the Grand Jury for the Eastern District of Texas, Beaumont Division, returned a 13-count Indictment against Jonathan Limbrick (J Limbrick) and 15 codefendants. ROA. 10-23.[1] J Limbrick was not named in count 3 or counts 5 through 12. He is otherwise charged as follows:

COUNT	DATE	STATUTE	CHARGE
1	01/01/2018-09/14/2020	21 U.S.C. § 846	Conspiracy to Distribute and Possess with Intent to Distribute a Mixture or Substance Containing a Detectable Amount of Methamphetamine
2	9/5/2019	21 U.S.C. § 841(a)(1)	Possession with Intent to Distribute 50 Grams but Less than 500 Grams of Methamphetamine

[1]In the references to the Record on Appeal, references are made according to the pagination assigned by the Clerk of the Court.

4	9/12/2018	21 U.S.C. § 841(a)(1)	Possession with Intent to Distribute a Mixture or Substance Containing a Detectable Amount of Methamphetamine
13	11/20/2018	21 U.S.C. § 841(a)(1)	Possession with Intent to Distribute a Mixture or Substance Containing a Detectable Amount of Methamphetamine

Mr. Limbrick entered a binding plea agreement under Rule 11(c)(1)© of the Federal Rules of Criminal Procedure. In it, he and the government agreed that he would receive a sentence of 144 months in prison if the judge accepted the agreement. ROA.206. On March 18, 2021, Mr. Limbrick appeared before U.S. District Judge Marcia A. Crone and pled guilty to the Count 1 of the Indictment. ROA.203. Judge Crone accepted Mr. Limbrick's plea and deferred acceptance of the Plea Agreement. ROA. 203. Mr. Limbrick was remanded to the custody of the U.S. Marshals Service, pending sentencing. ROA.204.

On May 12, 2022, the District Court held a sentencing hearing in this cause. The District Court accepted the plea agreement between the parties. ROA. 170. Pursuant to the plea agreement, Mr. Limbrick was sentenced to a term of imprisonment of 144 months. ROA. 175. This sentence is to be followed by a term of supervised release of 3 years. ROA.175. No fine was imposed, but Mr. Limbrick was ordered to pay a $100 special assessment. ROA. 175. Thereafter, Mr. Limbrick timely filed a Notice of Appeal. ROA.124-125.

3. Statement of Facts.

Mr. Limbrick is a 44-year old man skilled in construction arts. He was born in Galveston, and was one of eight children. He was raised by his grandmother in the Jasper, Texas, area. He graduated from Jasper High School in Jasper, Texas in 1985. He attended Blinn College in Brenham, Texas, for one year and then attended Angelina Community College in Lufkin, Texas, for another year. Mr. Limbrick then attended two semesters at the University of Central Missouri (UCM) in Warrensburg, Missouri where he played football and studied accounting. He suffered a knee injury while playing football for UCM and unfortunately did not graduate. Mr. Limbrick has construction skills, and worked with his family's construction business throughout the years. Mr. Limbrick is married, and he is the father of nine children.

It is alleged that Mr. Limbrick conspired to Possess with the Intent to Distribute Methamphetamine. The Government alleged that Mr. Limbrick was responsible for 253.314 net grams of methamphetamine "Ice." This is the conduct that comprised the charge to which he entered a plea of guilty. ROA. 203.

After he entered his guilty plea, Mr. Limbrick filed a *pro se* motion to withdraw his plea. ROA.77-78. The Government filed a response to Mr. Limbrick's motion. ROA.83-93.The District Court denied the motion to withdraw the plea. ROA. 95-107.

The PSR assigned Mr. Limbrick a base offense level of 32 for Count One, based on the amount of methamphetamine ("Ice") for which he was responsible.[2] The PSR did not assign a three-level adjustment for acceptance of responsibility. Based upon a total offense level of 32 and a criminal history category of III, the guideline imprisonment range is 151 months to 188 months.

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[2]"PSR" refers to the Presentence Investigation Report filed by the United States Probation Department (under seal).

Mr. Limbrick argued at sentencing that he should have been permitted to withdraw his guilty plea. The District Court conducted the following colloquy on this issue:

> **THE COURT:** All right. Now, you want to address your objection.
>
> **MR. MAKIN**: Yes. Your Honor, Mr. Limbrick re-urges all his prior motions which the Court has ruled on. He restates that his plea was not intelligently or voluntarily made. He has never seen the discovery in this case. He never had any documents fully explained to him where he understood. He saw his attorney two times. The first time was for ten minutes, the second time was at the plea hearing. He had a phone call conference with the U.S. attorney who had spoken with Mr. Limbrick for some minutes prior to Mr. Owens joining the conference. They were not alone. He felt intimidated and coerced at that time. There was no privacy. We feel that that is a violation of his Fifth and Sixth Amendment rights. And he was not fully aware of the direct and punitive consequences of his plea. He never would have pled to the conspiracy charge. And it was never explained to him that if he had pled to everything he was looking at a 108 to 135-month range, which was substantially less than this supposed plea bargain.
>
> **THE COURT:** All right. Does the Government wish to respond?
>
> **MR. JAMES:** Well, Judge, I would just -- I think those arguments are moot at this point. Those matters were addressed in the motion to withdraw plea which the Court has already ruled on. I don't see any need to respond unless you need further explanation from the Government, Your Honor.
>
> **THE COURT:** Well, why don't you just flesh that out a bit.
>
> **MR. JAMES:** Well, first, discovery has been provided to Mr. Limbrick and his attorney. His first attorney and his second attorney, I personally delivered those to them. I know his attorneys have had discovery because I had multiple conversations with them concerning the discovery. We did have, Mr. Limbrick and I, and his attorney met. I was at the jail. Mr. Limbrick was also there. We had to do it by telephone. His attorney was on the other line on speaker the entire time and I didn't enter or exit the room without his attorney present. And the reason his attorney was present that way is becausehe had Covid and we had a plea deadline due and we needed to discuss some matters and that was really the most efficient way to do it at that point. At no time was he coerced. I left the room. He was able to speak to his attorney with my phone and I think those matters were addressed in the motion, Judge. That's all I have, Your Honor.
>
> **THE COURT:** I have reviewed the transcript of the plea hearing. I recall the plea hearing. I wasn't aware of the situation with -- I knew Mr. Owens wasn't available because of the Covid situation. I didn't know about this meeting, but the way that was explained, it seems to me like he did have the assistance of counsel. And then at the plea hearing he mentions nothing about this and

goes along with the questions as if there is no problem at all. He doesn't bring up -- I asked if he is satisfied with counsel. He is satisfied is counsel. If he understands the factual basis. Yes, he understands and agrees with it. That talks about a conspiracy. And he agreed that the decision to plead guilty was based on discussions between the Government's attorney, his attorney and himself. And then he admitted to the conspiracy with regard to the methamphetamine and he talked about that he made an agreement to distribute methamphetamine. And he made it with others. And the total -- and he talked about the total amount and I just -- I don't see there's any irregularity here. Perhaps it's not the sentence that he would like, but it's -- it seems to be the sentence to which he agreed. I mean, I think at first he had a public defender, he chose not to use the services of the public defender and hired outside counsel. That's his decision and that was who represented him. Maybe that was not a wise decision, but that was the decision he made and so I think that I see nothing -- he was also given an opportunity, I always ask, "Mr. Limbrick, do you have any questions you would like to ask about the charges, your rights, the sentencing possibilities or anything else regarding this matter." He says, "No, ma'am, Your Honor." And, "Are you entering your plea of guilty and plea agreement knowingly, freely, voluntarily and with the advice of counsel?" "Yes, ma'am, Your Honor." "How do you plea as to the offense charged in Count 1 of the indictment, guilty or not guilty?" "Guilty." "Are you pleading guilty because you are guilty?" "Yes, ma'am, Your Honor."I see nothing that would cause any concern about this. I think now it's buyer's remorse; he didn't like the plea agreement. But, of course, now since he tried to withdraw, it is below the guideline range. The 144-months is below the guideline range. So I find the objection to be without basis. It is overruled. To the extent the Court previously deferred acceptance of the plea agreement, it is now accepted and the judgment and sentence will be consistent with it. The Court finds the information contained in the presentence report has sufficient indicia of reliability to support its probable accuracy. The Court adopts the factual findings, undisputed facts and guideline applications in the presentence report. Based upon a preponderance of the evidence presented and the facts in the report, while viewing the Sentencing Guidelines as advisory, the Court concludes that the total offense level is 32, the criminal history level is III which provides for an advisory guideline range of 151 to 188 months, but in this case there is an agreed sentence of 144 months. I also noted there was a pending state charge that was dismissed because he pled guilty to this. So that could have taken him to more time of imprisonment in state court. That was not dismissed until after he pled so that theoretically could have put him above the guidelines. So I don't know what the ramifications of that were, but that was part -- apparently part of the agreement. So he may have benefitted from that.

MR. MAKIN: Again, Mr. Limbrick was not informed of that as part of any kind of plea agreement. He was told, frankly, at the plea hearing to not ask you any questions or say anything.

THE COURT: Well, I don't know what he was told, but I asked him if he had any questions. I don't think he looks like an individual who would be so

> intimidated to ask me questions. I don't think I'm that scary, but who knows. But I would urge people to ask questions if they have them if they are asked to do that.
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> **MR. MAKIN:** I have gone over that many times with him, Your Honor, but he just felt that he should follow the little bit of advice he got to not ask any questions.
>
> **THE COURT:** Well, I mean I don't know what advice he was given, but I certainly asked him if he had any and I repeatedly asked him if he had questions about different things. So that's just -- the objection is overruled. ROA. 166-171.

The District Court followed the plea agreement and subsequently sentenced Mr. Limbrick to a 144- month term of imprisonment. ROA. 177.

The notice of appeal was then timely filed. On June 6, 2023, the Fifth Circuit affirmed Mr. Limbrick's conviction and sentence in an unpublished, per curiam decision. *See United States v. Limbrick*, No.22-40329 (5th Cir. 2023).

REASONS WHY CERTIORARI SHOULD BE GRANTED

I. THE FIFTH CIRCUIT ERRED BY FINDING THAT THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN FAILING TO ALLOW MR. LIMBRICK TO WITHDRAW HIS PLEA OF GUILTY.

Mr. Limbrick acknowledges that a defendant has no absolute right to withdraw a guilty plea; the district court may, however, permit a defendant to withdraw a guilty plea before sentencing upon showing a fair and just reason. *United States v. Still*, 102 F.3d 118, 123-24 (5th Cir. 1996), *cert. denied* 522 U.S. 806 (1997); FED. R. CRIM. P. 32 (e). FED. R. CRIM. P. 11(d)(2)(B). "The burden of establishing a fair and just reason for withdrawing a guilty plea remains at all times on the defendant." *Id*., at 124.

In reviewing the denial of a motion to withdraw a guilty plea, an appellate Court considers several factors: whether (1) the defendant asserted his innocence, (2) withdrawal would prejudice the government, (3) the defendant delayed in filing the withdrawal motion, (4) withdrawal would inconvenience the court, (5) close assistance of counsel was available to the defendant, (6) the plea was knowing and voluntary, and (7) withdrawal would waste judicial resources. *United States v. Carr*, 740 F.2d 339, 343-44 (5th Cir. 1984). Because the Court must consider the totality of the circumstances in applying these factors, *id.* at 344, "[n]o single factor or combination of factors mandates a particular result." *United States v. Badger*, 925 F.2d 101, 104 (5th Cir. 1991). The court need not make a finding as to each of the *Carr* factors as it makes its determination is based on the totality of the circumstances. *United States v. Powell*, 354 F.3d 362, 370-71 (5 Cir. 2003). A defendant's assertion of conclusory allegations does not warrant

withdrawal of a guilty plea at least where such allegations are clearly refuted by the record. *United States v. Bounds,* 943 F.2d 541, 543 (5th Cir. 1991).

An examination of the *Carr* factors in this case supports Mr. Limbrick's claim that district court abused its discretion in failing to allow the withdrawal of the guilty plea. In reviewing the denial of a motion to withdraw a guilty plea, the court considers whether (1) The Defendant asserted his innocence; (2) withdrawal would prejudice the government; (3) the Defendant delayed in filing the withdrawal motion (4) withdrawal would inconvenience the court (5) close assistance of counsel was available to Defendant, (6) the plea was knowing and voluntary, and (7) withdrawal would waste judicial resources. *See Carr* 740 F.2d at 343-344 (5th Cir. 1984). The court must consider the totality of the circumstances in applying these factors. *Id* at 344.

Assertion of Innocence

Mr. Limbrick did not dispute his guilt. The District Court found, and the Fifth Circuit agreed, that this factor weighed in favor of denying his motion.

Prejudice to the Government, ***Inconvenience to the Court*** , and ***Judicial Resources***

The District Court considered these three factors together. The District Court addressed these three factors in its order:

> The second *Carr* factor considers whether the Government would be prejudiced if Limbrick's motion were granted. This factor is closely intertwined with factor four—whether the court would be substantially inconvenienced—and factor seven—whether the withdrawal would waste judicial resources. Therefore, these factors will be analyzed together. *See United States v. Rodriguez*, No. 3:08-CR-267-D, 2010 WL 286730, at *4 (N.D. Tex. Jan. 22, 2010), *aff'd*, 411 F. App'x 713 (5th Cir. 2011). The United States asserts that it would be prejudiced if Limbrick is permitted to withdraw his guilty plea. Specifically, the Government avers that it would have to reallocate significant resources to prepare for trial at this juncture. Furthermore, the United States maintains that allowing

> Limbrick to withdraw his plea would inconvenience the court, present scheduling problems, impact other cases and defendants, and be a clear waste of judicial resources, an assessment with which the court concurs. Limbrick, despite having the burden to show the court that a withdrawal is justified, did not address any of these issues in his motion. *See United States v. Washington*, 480 F.3d 309, 316 (5th Cir. 2007) (noting in its denial of withdrawal motion that defendant failed to cite any *Carr* factors in his filing), *cert. denied*, 559 U.S. 1114 (2010). The court finds that allowing Limbrick to withdraw his plea would result in prejudice to the Government. Limbrick pleaded guilty on Thursday, March 18, 2021, just days before his trial was set to begin on Monday, March 22, 2021. Limbrick filed an unsuccessful motion for continuance on March 12, 2021, suggesting that he still intended to proceed to trial. In the interim, the Government was actively preparing for trial, but abandoned its preparations when Limbrick agreed to plead guilty. If Limbrick is allowed to withdraw his plea, the Government will have to duplicate its efforts to prepare for trial once again. Moreover, granting Limbrick's motion would inconvenience the court and waste judicial resources. The court spent time reviewing and researching the pending charges, the applicable jury instructions, the Government's witness list, and appropriate voir dire questions, and otherwise preparing for trial. The court's time and effort in scheduling, reviewing the file, and receiving Limbrick's plea would be for naught if withdrawal is permitted. Furthermore, rescheduling this case will disrupt the court's existing docket and expend additional judicial resources for a trial, time that would otherwise be available to protect "the rights of other accused persons awaiting trial, whose cases may lose . . . their position on the calendar." *Carr*, 740 F.2d at 346. Therefore, considering that the Government and the court would be inconvenienced by a withdrawal of Limbrick's guilty plea and that allowing withdrawal would be a waste of judicial resources, *Carr* factors two, four, and seven weigh in favor of denial. ROA.109-111.

The district court erroneously found that these factors weighed against Mr. Limbrick. Regarding the second factor, no prejudice to the government was demonstrated The government did not demonstrate that any witnesses or evidence would be unavailable. *Compare McKnight*, 570 F.3d at 649 (although the government claimed a witness would be "difficult to locate", this Court found no prejudice to the government).

Fourth, Mr. Limbrick showed that withdrawal would not inconvenience the Court. Although the Beaumont Division is busy, there is no indication that it could not accommodate Mr. Limbrick's desire for trial.

Finally, Mr. Limbrick showed that the withdrawal would not waste judicial resources. There is no indication that, had the case gone to trial, it would have been lengthy or difficult to accommodate on the Court's docket.

There was an insufficient basis for this finding, and the prejudice factor should have weighed in favor of withdrawal. The court abused its discretion in finding prejudice to the government. There is insufficient evidence that allowing Mr. Limbrick to withdraw his guilty plea would prejudice the government. Further, a court should not base any of its decisions on questions of inconvenience or the amount of time it takes to decide constitutional issues and matters that relate to one's guilt or innocence.

Delay in Filing the Motion

Third, Mr. Limbrick showed he did not delay in filing the withdrawal motion. On March 18, 2021, Mr. Limbrick appeared before United States District Judge Marcia Crone and entered a plea of guilty to Count One of the Indictment pursuant to a plea agreement. On August 19, 2021, Limbrick filed the motion requesting to withdraw his guilty plea. This amounts to a delay of approximately five months.

The Court made the following finding in its written order:

> The third *Carr* factor, *i.e.*, whether Limbrick delayed in filing his motion to withdraw, weighs against granting his motion. Limbrick has been dilatory in raising the issue of withdrawing his guilty plea. Limbrick pleaded guilty on March 18, 2021, but he did not file the instant motion until August 19, 2021, five months after his Change of Plea Hearing. *See Carr*, 740 F.2d at 345 (characterizing withdrawal motion as untimely when it was filed twenty-two days after defendant's guilty plea); *see also Strother*, 977 F.3d at 444 ("[T]hree months between the entering of a guilty plea and the filing of a motion to withdraw constitutes a significant delay that weighs against granting withdrawal."); *United States v. Dunfee*, 821 F.3d 120, 131 (1st Cir. 2016) (finding that a two-month delay in filing motion to withdraw after

> pleading guilty weighs against permitting withdrawal); *United States v. Walton*, 537 F. App'x 430, 435 (5th Cir.), *cert. denied*, 571 U.S. 1083 (2013)affirming court's denial of defendant's motion to withdraw guilty plea where the motion was filed five months after the plea was entered); *United States v. Saucedo-Castanon*, 511 F. App'x 308, 311 (5th Cir. 2013) (affirming district court's denial of defendant's motion to withdraw his guilty plea where he filed the withdrawal motion "nearly three months after pleading guilty—a considerable delay"); *United States v. Shanklin*, 193 F. App'x 384, 386 (5th Cir. 2006), *cert. denied*, 549 U.S. 1143 (2007) (affirming denial of motion to withdraw guilty plea where defendant admitted under oath that he was guilty and that his plea was knowing and voluntary and did not move until the day of the sentencing hearing—four months after the plea—to request withdrawal); *United States v. Graham*, 466 F.3d 1234, 1238 (10th Cir. 2006)(finding that defendant was not entitled to withdraw his guilty plea when, among the other *Carr* factors, defendant filed his motion to withdraw about two months after plea). Limbrick asserts no reason for his delayed filing; rather, it appears he simply has come to regret his decision to plead guilty. The court finds that Limbrick has unjustifiably delayed—without any explanation—seeking to
> withdraw his plea, which was entered approximately five months prior to filing a motion to withdraw it. As *Carr* recognizes, "[w]ithdrawal is permitted for pleas unknowingly made; 'the purpose is not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.'" *Washington*, 480 F.3d at 317 (quoting *Carr*, 740 F.2d at 345); *United States v. Hoskins*, 910 F.2d 309, 311 (5th Cir. 1990)("A mere change of mind is insufficient to permit the withdrawal of a guilty plea before sentencing."). Accordingly, the court finds this factor weighs in favor of denial.ROA. 111-112.

The District Court's finding that Mr. Limbrick was "dilatory" in filing his motion is not supported. Mr. Limbrick contends that this finding is not supported and constitutes an abuse of discretion.

Close Assistance of Counsel

The District Court is required to consider is whether close assistance of counsel was available at the time Mr. Limbrick entered his plea. Mr. Limbrick raised numerous issues with his attorney's representation. First, Mr. Limbrick stated that his attorney failed to review discovery with him, did not explain the factual basis of his guilty plea, did not advise him what the government had to prove or the elements of the offense, and did not

explain all of the rights he was waiving by pleading guilty. Mr. Limbrick did not understand the sentence he was to receive. Mr. Limbrick complained about a lack of communication with his attorney. ROA.166-167.

The District Court addressed the issue in its written order, writing:

> Limbrick largely bases his motion for withdrawal on the ground that he received "insufficient counsel" because Owens was absent when the Government met with him at the correctional facility. He fails to mention, however, but does not refute, that Owens was present on the telephone and he was given the opportunity to confer privately with Owens before signing the plea agreement. "Determining whether close assistance of counsel was available under *Carr* 'requires a fact-intensive inquiry.'" *Strother*, 977 F.3d at 445 (quoting *McKnight*, 570 F.3d at 646); *see Urias-Marrufo*, 744 F.3d at 365. Moreover, the question of whether Limbrick received effective assistance of counsel is distinct from whether he received close assistance of counsel under [*Carr*]." *Strother*, 977 F.3d at 445; *United States v. Marquez*, 707 F. App'x 804, 806 (5th Cir. 2017). Notably, Limbrick stated under oath that he discussed the facts of his case, the charges pending against him, and any possible defenses he had with counsel; he was satisfied that counsel had considered those factors; he was fully satisfied with his counsel's representation and advice; and his plea was not the result of force or threats by anyone. "Reviewing courts give great weight to the defendant's statements at the plea colloquy." *United States v. Cothran*, 302 F.3d 279, 283-84 (5th Cir. 2002). Neither Limbrick nor Owens expressed any concerns about the jailhouse meeting at the Change of Plea Hearing, and the court was unaware of the situation. In addition, Owens appeared in person at the Change of Plea Hearing, giving Limbrick the opportunity to ask questions and discuss the plea agreement with him. Therefore, the court finds that Limbrick had the benefit of close assistance of counsel throughout the negotiation and entry of his plea. ROA. 112-113.

Mr. Limbrick, throughout the pendency of the case, has made it apparent that he was not satisfied with the representation provided by his first retained counsel, Mr. Owens. Therefore, the District Court's finding regarding close assistance of counsel is not sufficiently supported by the record.

Mr. Limbrick's Plea was not Knowing or Voluntary

Mr. Limbrick's plea was not knowing and voluntary.The District Court made the following finding regarding this factor:

"To enter a knowing and voluntary guilty plea, a defendant must have full knowledge of what the plea connoted and of its consequences." *Lord*, 915 F.3d at 1016 (citing *Boykin v. Alabama*, 395 U.S. 238, 244 (1969)); *see Strother*, 977 F.3d at 445. Indeed, a defendant must have notice of "the nature of the charges against [him], [he] must understand the consequences of [his] plea, and must understand the nature of the constitutional protections [he] is waiving." *Urias-Marrufo*, 744 F.3d at 366. "A guilty plea is invalid if the defendant does not understand the nature of the constitutional protection that he is waiving or if he has such an incomplete understanding of the charges against him that his plea cannot stand as an admission of guilt." *Lord*, 915 F.3d at 1016 (quoting *James v. Cain*, 56 F.3d 662, 666 (5th Cir. 1995)). "For a guilty plea to be voluntary, it must 'not be the product of actual or threatened physical harm, or . . . mental coercion overbearing the will of the defendant or of state-induced emotions so intense that the defendant was rendered unable to weigh rationally his options with the help of counsel.'" *Urias-Marrufo*, 744 F.3d at 366 (quoting *Matthew v. Johnson*, 201 F.3d 353, 365 (5th Cir. 2000)). Limbrick now contends that he did not know the details of the plea agreement because Owens did not discuss them with him and that he was coerced into entering the plea agreement because Owens was not present when he signed it. During the Change of Plea Hearing, however, Limbrick repeatedly asserted that his plea was knowing and voluntary. Specifically, Limbrick told the court the following while under oath: (1) he understood the charges against him; (2) his plea was voluntary; (3) his plea was not the result of force, threats, or promises by anyone; (4) he participated in discussions with his attorney and the Government regarding his plea; (5) he accepted the terms of the plea agreement; and (6) he was entering his plea knowingly, freely, voluntarily, and with the advice of counsel. He also admitted his guilt in his own words and acknowledged that his conduct was wrong. Limbrick's statements in open court "carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74 (1977); *Strother*, 977 F.3d at 444; *United States v. Palacios*, 928 F.3d 450, 456 (5th Cir. 2019) ("[A] defendant ordinarily will not be heard to refute [his] testimony given at a plea hearing while under oath."); *Cothran*, 302 F.3d at 283-84. Additionally, the court provided a litany of admonishments and explanations to Limbrick throughout the hearing, including the elements of the charge, the consequences of his plea, the offense's maximum punishment, and his right to appeal. *See Palacios*, 928 F.3d 450, 456 (5th Cir. 2019) (finding that the "record plainly demonstrate[d] that the plea was both knowing and voluntary"); *United States v. McFarland*, 839 F.2d 1239, 1242 (7th Cir.), *cert.denied*, 486 U.S. 1014 (1988) ("To deter abuses in the withdrawal of guilty pleas . . . and to protect the integrity of the judicial process, we have held that rational conduct requires that voluntary responses made by a defendant under oath [when entering a guilty plea] . . . be binding."); *United States v. Duran-Espinoza*, No. 5:10-CR-1294-3, 2010 WL 5014341, at *3 (S.D. Tex. Dec. 1, 2010) (finding that defendant's plea was knowing and voluntary based on his responses during the Rule 11 colloquy). During the Change of Plea Hearing, as noted above, the court advised Limbrick that if he desired to change his plea of guilty to a plea of not guilty at any time during the proceedings, the court would permit him to do so. Throughout the

> hearing, however, Limbrick expressed no reluctance or doubts about pleading guilty, did not suggest that he wished to withdraw his plea, gave no indication that he had any reservations or questions about the plea agreement, and voiced no concerns about his attorney's representation. Therefore, the court finds that Limbrick entered his plea of guilty knowingly and voluntarily, and this factor, too, weighs against withdrawal. ROA. 113-115.

A guilty plea is valid only if it is knowing and intelligent. *Bousley v. United States*, 523 U.S. 614, 618 (1998). Due process requires that a guilty plea be entered knowingly and voluntarily, with knowledge of the consequences of the plea. *McCarthy v. United States*, 394 U.S. 459 (1969). To be valid, a guilty plea must be voluntary, knowing, and intelligent. *United States v. Washington*, 480 F.3d 309, 315 (5th Cir. 2007). A plea is voluntary if it represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. *Id*. When determining whether a plea is voluntary, the court considers all relevant circumstances and examines whether the conditions for a valid plea have been met. *Id*. The conditions for a valid plea require, among other things, that the defendant have notice of the charges against him, understand the constitutional protections waived, and have access to the advice of competent counsel. *Id*.

Under Rule 11, the district court must address three core principles before accepting a guilty plea: "(1) the guilty plea must be free from coercion; (2) the defendant must understand the nature of the charges; and (3) the defendant must know and understand the consequences of his guilty plea."*United States v. Jones*, 143 F.3d 1417, 1418-1419 (11th Cir.1998). Rule 11 also requires the court to inform the defendant of "any maximum possible penalty, including imprisonment, fine, and term of supervised release." Fed.R.Crim.P. 11(b)(1)(H).

For a plea to be knowing and voluntary, "the defendant must be advised of and understand the consequences of the [guilty] plea.' *United States v. Gaitan*, 954 F.2d 1005, 1011 (5th Cir. 1992). "Out of just consideration for persons accused of crime,

courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences." *Machibroda v. United States*, 368 U.S. 487, 493 (1962).

The fact that Mr. Limbrick entered a guilty plea and said it was voluntary at the plea hearing does not bar his later assertion that the plea was involuntary. *United States v. Diaz*, 733 F.2d 371, 373 (5th Cir. 1984). Mr. Limbrick explained at sentencing that his plea was not made knowingly and voluntarily:

> **THE COURT**: All right. Does the Defendant wish to make a statement?
>
> **THE DEFENDANT:** Yes, ma'am. Your Honor, at the time I was kind of intimidated due to the fact that I hadn't really had any time with my attorney and he told me like just go along with whatever is going on. I'm really thinking at the time that he was really -- had my best interest, but I mean I really felt otherwise because I really didn't -- I didn't sign the plea until afterwards. I didn't sign the plea until we was downstairs because I felt like some of the stuff that you were saying to me like it wasn't true. So I didn't sign the plea agreement. Like plea agreement came to me back in the holding cell which I was kind of forced to sign because I even explained to my lawyer I didn't feel right signing it due to the fact of like a lot of the things that he had me agreeing to was not right. ROA.172.

The District Court did not conduct a hearing on Mr. Limbrick's motion to withdraw his plea. Mr. Limbrick was not afforded a full opportunity to explain that his plea was involuntary.

Other Considerations

While not a listed *Carr* factor, a defendant must also establish a fair and just reason for withdrawing his guilty plea. In addition to the *Carr* factors that weigh in Mr. Limbrick's favor, Mr. Limbrick had questions about not being able to visit with his attorney due to COVID restrictions. Mr. Limbrick was sentenced to 144 months in prison, the longest sentence of any of the co-defendants in the Indictment. The following shows the sentencing results of all the co-defendants in this case:

Defendant	**Sentence**
Mr. Limbrick	144 months imprisonment, 3 years supervised release
Rhonda Monschelle Felder	46 months imprisonment; 3 years supervised release
Deandre Romerus Limbrick	Dismissed
Terrence Neil Bronson	72 months imprisonment; 5 years supervised release
Ashley Nicole Murray	55 months imprisonment; 3 years supervised release
Don Raynard Larkin	78 months imprisonment; 5 years supervised release
Cedrick Demond Hunt	60 months imprisonment; 4 years supervised release
Dominick Devonte Limbrick	3 years probation
Crystal Michelle Carruth	21 months imprisonment, 3 years supervised release.
Alisha Nicole Cleveland	12 months imprisonment; 1 year supervised release
Corey Devon McQueen	8 months imprisonment, 3 years supervised release
Jahcov Johnson	80 months, 3 years supervised release
James Parker	51 months imprisonment; 3 years supervised release

Ernest Houston	30 months imprisonment; 5 years supervised release
Curtis Brumley	80 months confinement; 5 years supervised release
Russell Limbrick	48 months imprisonment; 1 year supervised release

Therefore, not only has Mr. Limbrick met the burdens under *Carr* but he also showed a fair and just reason for withdrawing his guilty plea, simple equity and fairness.

Mr. Limbrick has shown that he is entitled to relief under the totality of the *Carr* factors. In evaluating a motion to withdraw, no single *Carr* factor is determinative; instead, the court makes its decision based on the totality of the circumstances. *See United States v. Badger*, 925 F.2d 101, 104 (5th Cir.1991). "The rationale for allowing a defendant to withdraw a guilty plea is to permit him to undo a plea that was unknowingly made at the time it was entered. " *Carr,* 740 F.2d at 345.

The weight of evidence supports Mr. Limbrick's claim that his plea was made unknowingly. The Fifth Circuit erred by upholding the decision of the District Court to deny Mr. Limbrick the opportunity with withdraw his guilty plea. Mr. Limbrick requests that this Court grant certiorari, vacate the Fifth Circuit's decision, and remand for proceedings consistent with this Court's opinion.

II. 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).

.

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 fairand-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 a 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 Mr. Limbrick's request to withdraw his plea. *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); *see* also 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. Mr. Limbrick's case is a good vehicle for addressing the issue.

Mr. Limbrick's case illustrates well how the checklist approach obscures the fair-andjust reason inquiry. The courts did not actually engage with those facts. The District Court tracked the *Carr* factors, and the Fifth Circuit affirmed under *Carr*. The court of appeals' opinion demonstrates how the checklist factors displace fair-and-justice analysis. The Fifth Circuit affirmed the District Court's decision without meaningful analysis of Mr. Limbrick's arguments.

At each step, the *Carr* checklist, not the circumstances of Mr. Limbrick's case, were what the courts examined and dwelled upon. This reliance 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 order. Mr. Limbrick'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.

The circumstances surrounding Mr. Limbrick's plea affected the fairness and justice of the plea he entered and the merits of his request to withdraw it. The *Carr* checklist asked only whether Mr. Limbrick had counsel with him leading up to the plea, and so the district court focused on the fact that Mr. Limbrick had counsel with him during the plea proceedings, rather than on what counsel failed to do and failed to tell Mr. Limbrick leading up to the entry of the plea and in the time immediately following the plea. The district court had been instructed 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 preformulated 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 Mr. Limbrick 's case presents a good vehicle for resolving the question**.**

CONCLUSION

This Petition for Writ of Certiorari should be granted and the decision of the Fifth Circuit should be vacated, and the case should be remanded for proceedings consistent with this Court's opinion.

Respectfully submitted,

/s/ Amy R. Blalock
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RELIEF REQUESTED

FOR THESE REASONS, the Petitioner moves this Court to grant a Writ of Certiorari in order to review the Judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 28th day of March, 2022, I served one (1) copy of the foregoing Petition for Writ of Certiorari on the following individuals by mail (certified mail return receipt requested) by depositing same, enclosed in post paid, properly addressed wrapper, in a Post Office or official depository, under the care and custody of the United States Postal Service, or by other recognized means pursuant to the Rules of the Supreme Court of The United States of America, Rule 29:

Solicitor General
U.S. Department of Justice
Washington, D.C. 20530

Bradley Elliot Visosky, Assistant U.S. Attorney
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Jonathan Limbrick
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FEDERAL CORRECTIONAL INSTITUTION
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EL RENO, OK 73036

/s/ Amy R. Blalock
AMY R. BLALOCK

No. _____

In the Supreme Court of the United States

OCTOBER TERM, 2022

JONATHAN LIMBRICK,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

APPENDIX

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals for the Fifth Circuit

No. 22-40329
Summary Calendar

United States Court of Appeals
Fifth Circuit
FILED
June 6, 2023
Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

JONATHAN LIMBRICK,

Defendant—Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 1:20-CR-79-1

Before BARKSDALE, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:[*]

Jonathan Limbrick pleaded guilty pursuant to a written plea agreement to conspiracy to distribute and possess with intent to distribute a mixture or substance containing a detectable amount of methamphetamine, in violation of 21 U.S.C. §§ 841(b)(1)(C), 846. Approximately five months later, he moved to withdraw his guilty plea. The motion was denied.

[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

Limbrick was sentenced, *inter alia*, to the agreed-upon term of 144-months' imprisonment.

Limbrick challenges the denial of his motion to withdraw his guilty plea. We review for abuse of discretion. *E.g.*, *United States v. Lord*, 915 F.3d 1009, 1013 (5th Cir. 2019). "A district court abuses its discretion if it bases its decision on an error of law or a clearly erroneous assessment of the evidence." *Id.* at 1013–14 (citation omitted).

A district court may grant a motion to withdraw a guilty plea upon a showing of "a fair and just reason for requesting the withdrawal". FED. R. CRIM. P. 11(d)(2)(B); *see United States v. Strother*, 977 F.3d 438, 443 (5th Cir. 2020). "The burden of establishing a fair and just reason for withdrawing a guilty plea remains at all times with the defendant." *Lord*, 915 F.3d at 1014 (citation omitted). To meet his burden, defendant must show, based on the totality of the circumstances, that the below-discussed factors provided in *United States v. Carr*, 740 F.2d 339, 343–44 (5th Cir. 1984), support withdrawal. *Lord*, 915 F.3d at 1014. Although the court "is not required to make explicit findings as to each of the *Carr* factors", it did so in a comprehensive order. *Id.*

Limbrick concedes he did not assert his innocence in his motion; therefore, the court correctly determined the first factor weighed against withdrawal.

The court considered the second, fourth, and seventh factors together—whether withdrawal would prejudice the Government, substantially inconvenience the court, or waste judicial resources. *See id.* It determined withdrawal would: cause the Government to have to "duplicate its efforts to prepare for trial once again" (Limbrick did not plead guilty until a few days before trial was to begin); waste the court's resources that had been invested in preparing for trial; and disrupt the court's docket.

Therefore, it concluded each of these factors also weighed against withdrawal. Limbrick's vague assertions in this court that these findings were unsupported are insufficient to show error.

Regarding the third factor—timeliness of the motion—the court determined Limbrick's delay was "unjustifi[ed]" and "without any explanation" because he presented no reason for waiting five months to file his motion. Again, his general assertion that this determination was unsupported is insufficient to show error.

The fifth factor considers whether defendant "received close assistance of counsel", which is an inquiry "distinct from whether [he] received *effective* assistance of counsel". *United States v. Urias-Marrufo*, 744 F.3d 361, 365 (5th Cir. 2014) (emphasis added). Limbrick was initially appointed counsel by the court, but approximately four months later replaced appointed counsel with a retained attorney, who , approximately five weeks later, represented him during his entering of his plea (plea counsel). He subsequently replaced plea counsel with a third attorney, who filed the withdrawal motion.

The court found Limbrick received close assistance of counsel because, although plea counsel was not physically present when Limbrick signed his plea agreement before the plea hearing, he was present via telephone; and Limbrick was given an opportunity to confer privately with plea counsel before signing the agreement. Further, the court noted that, at the plea hearing, Limbrick stated under oath: with plea counsel he discussed (and understood) the facts of the case and charges against him; he was satisfied with plea counsel's representation and advice; and his plea was voluntary. *See Blackledge v. Allison*, 431 U.S. 63, 74 (1977) ("Solemn declarations in open court carry a strong presumption of verity."); *see also United States v. Cothran*, 302 F.3d 279, 283–84 (5th Cir. 2002) ("Reviewing

courts give great weight to the defendant's statements at the plea colloquy."). Additionally, the court observed that neither Limbrick nor plea counsel had mentioned plea counsel's physical absence during the plea-agreement signing at any time prior to the withdrawal motion, and that plea counsel was present for the plea hearing, giving Limbrick an additional opportunity to discuss the plea with him. Although Limbrick contends he was unsatisfied with plea counsel's performance, he does not show that the court clearly erred in finding this factor also favored denying his motion.

Finally, the court found the sixth factor—whether the plea was knowing and voluntary—also favored denying withdrawal. In doing so, it relied on the above-referenced statements by Limbrick at the plea hearing. It added that, at the plea hearing: Limbrick "admitted his guilt in his own words and acknowledged that his conduct was wrong"; the court provided explanations regarding the elements of, and maximum punishments for, his charged crime, and the consequences of pleading guilty; the court advised him he could change his plea at any time during the hearing; and he "gave no indication that he had any reservations or questions about the plea agreement". He once more fails to show clear error. *See United States v. Benavides*, 793 F.2d 612, 617 (5th Cir. 1986) (examining conduct of plea hearing and holding no clear error in court's finding plea knowing and voluntary).

Accordingly, based on the totality of the circumstances, including his sworn statements at the plea hearing regarding his understanding of the plea agreement and his satisfaction with counsel, Limbrick fails to show the court clearly erred in its assessment of the *Carr* factors or otherwise abused its discretion in denying Limbrick's motion to withdraw his guilty plea. *See Strother*, 977 F.3d at 443–47; *Lord*, 915 F.3d at 1013–17.

AFFIRMED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

June 06, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing or Rehearing En Banc

No. 22-40329 USA v. Limbrick
USDC No. 1:20-CR-79-1

Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH CIR. R. 35, 39, and 41 govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5TH CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5TH CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari**. Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

By:_____
Dantrell L. Johnson, Deputy Clerk

Enclosure(s)

Ms. Amy R. Blalock
Ms. Terri Lynn Hagan
Mr. Russell James III
Mr. Bradley Elliot Visosky