Appendix A

UNITED STATES OF AMERICA, Plaintiff-Appellee, versus STEVEN JUSTIN VILLALONA, Defendant-Appellant.
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
506 Fed. Appx. 902; 2013 U.S. App. LEXIS 2459
No. 12-12880 Non-Argument Calendar
February 5, 2013, Decided

Notice:

PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2013 U.S. App. LEXIS 1}
Appeal from the United States District Court for the Middle District of Florida. D.C. Docket No. 6:11-cr-00375-GKS-DAB-2.United States v. Villalona, 2012 U.S. Dist. LEXIS 11346 (M.D. Fla., Jan. 30, 2012)

Disposition:
AFFIRMED.

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Peggy Morris Ronca, LaKesia R. Mosley, U.S. Attorney's Office, ORLANDO, FL; Robert E. O'Neill, U.S. Attorney's Office, TAMPA, FL.
For STEVEN JUSTIN VILLALONA, Defendant - Appellant: Tim Bower Rodriguez, Dane K. Chase, Bower Rodriguez, PA, TAMPA, FL.

Judges: Before DUBINA, Chief Judge, MARTIN and FAY, Circuit Judges.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant appealed the U.S. District Court for the Middle District of Florida's denial of his request at sentencing, without an evidentiary hearing, to withdraw his guilty plea under Fed. R. Crim. P. 11(d)(2) to drug and firearm charges.Defendant had close assistance of counsel prior to and during his plea hearing, and the record showed his guilty plea was knowing and voluntary, and while he formed an intent to withdraw his plea while he retained the absolute right to do so, he failed to act promptly, thus denying a request to withdraw the plea at the plea hearing was not error.

OVERVIEW: The district court did not abuse its discretion by denying defendant's request at sentencing to withdraw his guilty plea because defendant failed to establish a "fair and just reason" for the withdrawal of his plea. Defendant had the close assistance of counsel prior to, and during, his plea hearing, and the exhaustive hearing conducted by the magistrate judge established that his guilty plea was knowing and voluntary. Although the record indicated that defendant had formed the intention to withdraw his plea while he retained the absolute right to do so under Rule 11(d)(1) before the plea was accepted, he failed to act promptly on that intention. Further, because the magistrate conducted an exhaustive Rule 11 hearing that thoroughly probed the knowing and voluntary nature of defendant's guilty plea, the district court did not plainly err, let alone abuse its discretion, by declining to hold an

evidentiary hearing on the request for withdrawal.

OUTCOME: The district court was affirmed.

LexisNexis Headnotes

Criminal Law & Procedure > Guilty Pleas > Appeals
Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Guilty Pleas

An appellate court reviews the district court's denial of a motion to withdraw a guilty plea for an abuse of discretion. In reviewing a district court's denial of such a motion, the appellate court will reverse only if the district court's ultimate conclusion is arbitrary or unreasonable. The appellate court must, however, be able to determine the basis upon which the district court denied a motion to withdraw a guilty plea in order to determine whether its exercise of discretion was reasonable. Generally, the appellate court reviews for abuse of discretion a district court's decision whether to hold an evidentiary hearing.

Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Definitions
Criminal Law & Procedure > Appeals > Standards of Review > Plain Error > Judicial Discretion

An appellate court reviews claims made for the first time on appeal only for plain error. For such claims, the appellate court may not correct an error the defendant failed to raise in the district court unless there is: (1) error, (2) that is plain, and (3) that affects substantial rights. Even then, the appellate court will exercise its discretion to rectify the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings.

Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals
Governments > Courts > Rule Application & Interpretation

A defendant has an absolute right to withdraw a guilty plea before the district court accepts it. Fed. R. Crim. P. 11(d)(1). After the district court has accepted a defendant's guilty plea, and before sentencing, the defendant may withdraw a guilty plea if (1) the district court rejects the plea agreement, or (2) the defendant can show a fair and just reason for requesting the withdrawal. Fed. R. Crim. P. 11(d)(2)(A)-(B). This permissive withdrawal rule is to be liberally construed, but, pursuant to it, there is no absolute right to withdraw a guilty plea.

Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals

In determining whether a defendant has met his burden to show a "fair and just reason" to withdraw a plea, a district court may consider the totality of the circumstances surrounding the plea, including whether: (1) close assistance of counsel was available, (2) the plea was knowing and voluntary, (3) judicial resources would be conserved, and (4) the government would be prejudiced if the defendant were allowed to withdraw his plea. If a defendant does not satisfy the first two prongs of this analysis, the court need not give particular attention to the others.

Criminal Law & Procedure > Guilty Pleas > Changes & Withdrawals
Criminal Law & Procedure > Appeals > Standards of Review > Abuse of Discretion > Guilty Pleas
Evidence > Inferences & Presumptions > Creation of Presumptions
Evidence > Procedural Considerations > Burdens of Proof > Allocation

The good faith, credibility, and weight of a defendant's assertions in support of a motion to withdraw a guilty plea are issues for the trial court to decide. There is a strong presumption that statements made by a defendant during the plea colloquy are true. Consequently, a defendant bears a heavy burden to show that his statements under oath were false. Where the colloquy at the plea hearing sufficiently probed the knowingness and voluntariness of the guilty plea, a district court does not abuse its discretion by declining to hold an evidentiary hearing on the motion to withdraw.

Criminal Law & Procedure > Guilty Pleas > Sufficiency of Allocution
Criminal Law & Procedure > Guilty Pleas > Knowing & Intelligent Requirement
Criminal Law & Procedure > Guilty Pleas > Voluntariness

At the plea hearing, the district court satisfies its obligation to inquire into the knowing and voluntary nature of a guilty plea by addressing three "core" concerns: (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. Under Fed. R. Crim. P. 11, the district court must inform the defendant of his rights relevant to his guilty plea and determine that he understands them. Rule 11 gives the district court specific obligations that effectuate a knowing and voluntary plea, including the obligation to inform the defendant of his right to plead not guilty, his right to counsel, his right to jury trial, his rights at trial, his waiver of those rights as a result of a plea, the nature of the charges, the minimum and maximum penalties he faces as a result of a plea, and any limitation on appealing his conviction or sentence that might be contained in his plea agreement. Fed. R. Crim. P. 11(b)(1)(B)-(N).

Opinion

{506 Fed. Appx. 903} PER CURIAM:

Appellant Steven Villalona appeals the district court's denial of his request at sentencing to withdraw his guilty plea to one count of conspiracy to possess with intent to distribute more than five kilograms of cocaine, in violation of 21 U.S.C. §§ 841(a)(1), (b)(1)(A)(ii)(II), and 846, and one count of aiding and abetting the possession of a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. §§ 924(c)(1)(A) and 2. On appeal, Villalona argues that the district court erred by denying his request to withdraw his guilty plea without holding an evidentiary hearing. He argues that the record undermines his statements at the plea hearing that he was satisfied with **{2013 U.S. App. LEXIS 2}**his counsel's services; rather, he contends that the record suggests that he was deprived of the close assistance of counsel, pointing to his counsel's failure (1) to move to withdraw his guilty plea prior to the district court's acceptance of it, when he would have had an absolute right to withdraw, and (2) to communicate with him prior to sentencing. He argues that the record is insufficiently developed to determine if his communication with his counsel became strained prior to entry of the plea and what impact that strain might have had on the entry of his guilty plea. However, despite the state of the record, he asserts that it is sufficient to demonstrate that he potentially was entitled to withdraw his plea. He asks that the case be remanded for the district court to hold an evidentiary hearing.

We review the district court's denial of a motion to withdraw a guilty plea for an abuse of discretion. *United States v. Brehm*, 442 F.3d 1291, 1298 (11th Cir. 2006). In reviewing a district court's denial of such a motion, we will reverse only if the district court's ultimate conclusion is arbitrary or

unreasonable. *United States v. Freixas*, 332 F.3d 1314, 1318 (11th Cir. 2003). We must, **{2013 U.S. App. LEXIS 3}**however, be able to determine the basis upon which the district court denied a motion to withdraw a guilty plea in order to determine whether its exercise of discretion was reasonable. *United States v. Pressley*, 602 F.2d 709, 711 (5th Cir. 1979). Generally, we review for abuse of discretion a district court's decision whether to hold an evidentiary hearing. *United States v. Arbolaez*, 450 F.3d 1283, 1293 **{506 Fed. Appx. 904}** (11th Cir. 2006); *see also United States v. Stitzer*, 785 F.2d 1506, 1514 (11th Cir. 1986) (reviewing a district court's decision not to grant an evidentiary hearing on a defendant's motion to withdraw his guilty plea for an abuse of discretion). We review claims made for the first time on appeal, however, only for plain error. *United States v. Peters*, 403 F.3d 1263, 1270 (11th Cir. 2005). For such claims, we "may not correct an error the defendant failed to raise in the district court unless there is: '(1) error, (2) that is plain, and (3) that affects substantial rights.'" *Id.* at 1271 (quoting *United States v. Cotton*, 535 U.S. 625, 631, 122 S. Ct. 1781, 1785, 152 L. Ed. 2d 860 (2002)). "Even then, we will exercise our discretion to rectify the error only if it 'seriously affects the fairness, **{2013 U.S. App. LEXIS 4}**integrity, or public reputation of judicial proceedings.'" *Id.* (quoting *Cotton*, 535 U.S. at 631, 122 S. Ct. at 1785).

A defendant has an absolute right to withdraw a guilty plea before the district court accepts it. Fed.R.Crim.P. 11(d)(1). After the district court has accepted a defendant's guilty plea, and before sentencing, the defendant may withdraw a guilty plea if (1) the district court rejects the plea agreement, or (2) "the defendant can show a fair and just reason for requesting the withdrawal." Fed.R.Crim.P. 11(d)(2)(A)-(B). This permissive withdrawal rule is to be liberally construed, but, pursuant to it, there is no absolute right to withdraw a guilty plea. *United States v. Buckles*, 843 F.2d 469, 471 (11th Cir. 1988).

In determining whether a defendant has met his burden to show a "fair and just reason" to withdraw a plea, a district court may consider the totality of the circumstances surrounding the plea, including whether: (1) close assistance of counsel was available, (2) the plea was knowing and voluntary, (3) judicial resources would be conserved, and (4) the government would be prejudiced if the defendant were allowed to withdraw his plea. *Id.* at 471-72. If a defendant **{2013 U.S. App. LEXIS 5}**does not satisfy the first two prongs of the *Buckles* analysis, this Court need not "give particular attention" to the others. *United States v. Gonzalez-Mercado*, 808 F.2d 796, 801 (11th Cir. 1987).

"The good faith, credibility and weight of a defendant's assertions in support of a motion to withdraw a guilty plea are issues for the trial court to decide." *Brehm*, 442 F.3d at 1298 (internal quotation marks and alteration omitted). There is a strong presumption that statements made by a defendant during the plea colloquy are true. *United States v. Medlock*, 12 F.3d 185, 187 (11th Cir. 1994). Consequently, a defendant bears a heavy burden to show that his statements under oath were false. *United States v. Rogers*, 848 F.2d 166, 168 (11th Cir. 1988). Where the colloquy at the plea hearing sufficiently probed the knowingness and voluntariness of the guilty plea, a district court does not abuse its discretion by declining to hold an evidentiary hearing on the motion to withdraw. *See Stitzer*, 785 F.2d at 1514.

At the plea hearing, the district court satisfies its obligation to inquire into the knowing and voluntary nature of a guilty plea by addressing three "core" concerns: "(1) the guilty plea **{2013 U.S. App. LEXIS 6}**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. Hernandez-Fraire*, 208 F.3d 945, 949 (11th Cir. 2000) (internal quotation marks omitted). Under Federal Rule of Criminal Procedure 11, the district court must "inform the defendant of his rights relevant to his guilty plea and determine that he understands them." *Brehm*, **{506 Fed. Appx. 905}** 442 F.3d at 1298. Rule 11 gives the district court specific obligations that effectuate a knowing and

voluntary plea, including the obligation to inform the defendant of his right to plead not guilty, his right to counsel, his right to jury trial, his rights at trial, his waiver of those rights as a result of a plea, the nature of the charges, the minimum and maximum penalties he faces as a result of a plea, and any limitation on appealing his conviction or sentence that might be contained in his plea agreement. Fed.R.Crim.P. 11(b)(1)(B)-(N).

We conclude from the record here that the district court did not abuse its discretion by denying Villalona's request at sentencing to withdraw his guilty plea because Villalona failed to establish **{2013 U.S. App. LEXIS 7}**a "fair and just reason" for the withdrawal of his plea. Villalona had the close assistance of counsel prior to, and during, his plea hearing, and the exhaustive hearing conducted by the magistrate judge established that his guilty plea was knowing and voluntary. Although the record does indicate that Villalona had formed the intention to withdraw his plea while he retained the absolute right to do so, he failed to act promptly on that intention. Further, because the magistrate judge conducted an exhaustive Rule 11 hearing that thoroughly probed the knowing and voluntary nature of Villalona's guilty plea, we conclude that the district court did not plainly err, let alone abuse its discretion, by declining to hold an evidentiary hearing on his request for withdrawal.

Based on the aforementioned reasons, we affirm the district court's order denying Villalona's request to withdraw his guilty plea.

AFFIRMED.

Appendix B

STEVEN JUSTIN VILLALONA, Petitioner, v. UNITED STATES OF AMERICA, Respondent.
UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, ORLANDO DIVISION
2018 U.S. Dist. LEXIS 143978
Case No: 6:14-cv-162-Orl-40TBS,6:11-cr-375-Orl-40TBS
August 24, 2018, Decided
August 24, 2018, Filed

Editorial Information: Subsequent History

Appeal dismissed by, As moot, Motion denied by, As moot Villalona v. United States, 2018 U.S. App. LEXIS 25513 (11th Cir. Fla., Sept. 7, 2018)Motion denied by Villalona v. United States, 2019 U.S. Dist. LEXIS 234487, 2019 WL 11031717 (M.D. Fla., Feb. 12, 2019)Certificate of appealability denied, Motion denied by, As moot Villalona v. United States, 2019 U.S. App. LEXIS 6032 (11th Cir. Fla., Feb. 27, 2019)Motion denied by, Certificate of appealability denied Villalona v. United States, 2020 U.S. Dist. LEXIS 212943, 2020 WL 6600361 (M.D. Fla., Feb. 6, 2020)Motion granted by, Appeal dismissed by, Motion denied by, As moot United States v. Villalona, 2021 U.S. App. LEXIS 5015 (11th Cir., Feb. 19, 2021)

Editorial Information: Prior History

Villalona v. United States, 714 Fed. Appx. 994, 2018 U.S. App. LEXIS 6375, 2018 WL 1256529 (11th Cir. Fla., Mar. 12, 2018)

Counsel **{2018 U.S. Dist. LEXIS 1}**Steven Justin Villalona, Petitioner, Pro se, Sanford, FL.

For Steven Justin Villalona, Petitioner: Larry B. Henderson, LEAD ATTORNEY, Federal Public Defender's Office, Orlando, FL; Tim Bower-Rodriguez, LEAD ATTORNEY, Tim Bower Rodriguez, PA, Tampa, FL.

For United States of America, Respondent: Kara Marie Wick, LEAD ATTORNEY, US Attorney's Office - FLM*, Orlando, FL.

Judges: PAUL G. BYRON, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: PAUL G. BYRON

Opinion

ORDER

This cause is before the Court following an evidentiary hearing held on August 15, 2018. Petitioner, Steven Justin Villalona, initiated this case by filing a Motion to Vacate, Set Aside, or Correct Sentence ("Motion to Vacate," Doc. 1). Villalona alleged that his counsel, Mauricio Hued, was ineffective for failing to file a motion to withdraw his plea prior to the Court's acceptance of his plea. The Court denied the Motion to Vacate and dismissed the case. (Doc. 10). Villalona appealed, and the Eleventh Circuit Court of Appeals entered an Opinion/Order (Doc. 19), vacating the order of

dismissal and remanding the case "for the district court to hold an evidentiary hearing to determine whether the failure of counsel to file a motion to withdraw Villalona's plea amounted**{2018 U.S. Dist. LEXIS 2}** to ineffective assistance." (Doc. 19 at 2).

I. Procedural Background

A Grand Jury charged Villalona and two other individuals in a three-count indictment with the commission of various crimes. (Criminal Case No. 6:11-cr-375-Orl-40KRS, Doc. 20).1 Villalona was charged in counts one (conspiracy to possess with intent to distribute 5 kilograms or more of cocaine) and three (possession of a firearm in furtherance of a drug trafficking offense). Villalona entered into a Plea Agreement (Criminal Case Doc. 38) dated January 4, 2012, in which he agreed to enter a guilty plea to counts one and three. Villalona acknowledged in the Plea Agreement that "[i]t was part of the conspiracy that Villalona, along with his co-conspirators, would take possession, with an intent to distribute, a total of 10 kilograms of cocaine from an undercover law enforcement officer . . . ." (*Id.* at 18).

On January 10, 2012, Magistrate Judge David A. Baker held a change of plea hearing, and, on the same date, filed a Report and Recommendation Concerning Plea of Guilty (Criminal Case Doc. 50, 2012 U.S. Dist. LEXIS 200266), recommending that the Plea Agreement and the guilty plea be accepted and that Villalona be adjudged guilty and have sentence imposed accordingly.**{2018 U.S. Dist. LEXIS 3}**

On January 19, 2012, Villalona and Hued met with law enforcement agents for a proffer. The proffer was ninety minutes long and was "well received." (Government's Exhibit Number 6). The agents were "very pleased" by Villalona's proffer. (Criminal Case Doc. 95 at 5).

On January 23, 2012, Hued went to the Seminole County Jail to meet with Villalona for an interview with a probation officer regarding his Presentence Investigation Report ("PSR"). However, according to the PSR, the "Probation Office attempted to interview the defendant. Villalona advised the Probation Office that he intended to seek new counsel and to withdraw his plea. Defense Counsel advised the Probation Office that the defendant would not be interviewed." (PSR at 12).

On January 31, 2012, the Court accepted the Report and Recommendation and entered an Acceptance of Plea of Guilty and Adjudication of Guilt (Criminal Case Doc. 60, 2012 U.S. Dist. LEXIS 11338). At the sentencing hearing, Villalona himself expressed to the Court that "on January 23rd, 2012, during the meeting with the probation officer I stated to my attorney that my intentions were to withdraw my plea and retain new counsel." (Criminal Case Doc. 96 at 2). The Court then asked Villalona: "And if**{2018 U.S. Dist. LEXIS 4}** you were charged with two kilos would you then want to withdraw your plea?" (*Id.* at 3). Villalona responded, "No, sir." (*Id.*). The Court found that Villalona was "responsible for conspiracy to possess with intent to distribute two kilos of cocaine." (*Id.* at 4). The Court indicated that it would sentence Villalona to the minimum mandatory sentence of ten years as to Count One and to the minimum mandatory sentence of five years (consecutive) as to Count Three. (*Id.* at 5).

On May 18, 2012, the Court entered a Judgment in a Criminal Case (Criminal Case Doc. 82) in which Villalona was adjudicated guilty of the crimes and sentenced to imprisonment for a total term of 180 months, to be followed by supervised release for a term of five years. On direct appeal, the Eleventh Circuit Court of Appeals made the following determination regarding Villalona's guilty plea:

> We conclude from the record here that the district court did not abuse its discretion by denying Villalona's request at sentencing to withdraw his guilty plea because Villalona failed to establish a "fair and just reason" for the withdrawal of his plea. Villalona had the close assistance of counsel prior to, and during, his plea hearing, and the exhaustive**{2018 U.S. Dist. LEXIS 5}** hearing

conducted by the magistrate judge established that his guilty plea was knowing and voluntary. Although the record does indicate that Villalona had formed the intention to withdraw his plea while he retained the absolute right to do so, he failed to act promptly on that intention. Further, because the magistrate judge conducted an exhaustive Rule 11 hearing that thoroughly probed the knowing and voluntary nature of Villalona's guilty plea, we conclude that the district court did not plainly err, let alone abuse its discretion, by declining to hold an evidentiary hearing on his request for withdrawal.(Criminal Case Doc. 105, 506 Fed. Appx. 902 at 905).

II. Legal Standard (Ineffective Assistance of Counsel)

To prevail on a claim of ineffective assistance of counsel, a defendant must establish two things: (1) "counsel's performance was deficient," meaning it "fell below an objective standard of reasonableness," and (2) "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687-88, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). To satisfy the deficient-performance prong, the defendant must show that counsel made errors so serious that he was not functioning as the counsel guaranteed by the Sixth Amendment. *Id.* at 687. The defendant must rebut the strong presumption that his counsel's conduct**{2018 U.S. Dist. LEXIS 6}** fell within the range of reasonable professional assistance. *Id.* at 689.

In *Hill v. Lockhart*, 474 U.S. 52, 58, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985), the Supreme Court held that "the two part *Strickland v. Washington* test applies to challenges to guilty pleas based on ineffective assistance of counsel." A defendant may satisfy the prejudice prong by showing "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985). A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

II. Analysis

At the evidentiary hearing, Villalona testified on his own behalf, and Hued testified on behalf of the Government. Villalona and Hued recalled different versions of the events surrounding Villalona's desire to withdraw his plea. Their testimony is summarized below.

A. Villalona and Hued's Accounts at the Evidentiary Hearing

Villalona stated that, on January 19, 2012, during the proffer, he did not believe that Mr. Mercedes was going to testify against him and that he "didn't feel right about pleading guilty." (Transcript of Evidentiary Hearing at 62). According to Villalona, he asked Hued before the proffer began if he could withdraw his plea. (*Id.*). Hued responded that**{2018 U.S. Dist. LEXIS 7}** "it's too late" because the Court had already accepted the plea. (*Id.*).

Villalona maintained that, after the proffer (specifically between January 19, 2012, and January 23, 2012), he was informed by another inmate that he could withdraw his plea because it had not been accepted by the Court. (*Id.* at 63). According to Villalona, he was upset at Hued for providing erroneous information about withdrawing his plea. (*Id.*). As a result, Villalona told the probation officer on January 23, 2012, that he wanted to cancel the interview. (*Id.* at 64). On that same day at the Seminole County Jail, Villalona stated that he instructed Hued that he wanted to withdraw his plea and directed Hued to file a motion to withdraw the plea; however, Hued refused and told Villalona that he needed to find private counsel to do so. (*Id.* at 65-66, 70, 76).

Conversely, the upshot of Hued's testimony was that Villalona never directed him, prior to January 31, 2012, to move to withdraw the plea. Hued stated that, at the January 19, 2012, proffer, Villalona never expressed his intention or desire to withdraw his plea, and Villalona did not instruct Hued to

withdraw his plea. (Transcript of Evidentiary Hearing at 12). According to Hued, Villalona told him{**2018 U.S. Dist. LEXIS 8**} on January 23, 2012, at the Seminole County Jail, that he was firing Hued and that he was hiring private counsel to move to withdraw the plea. (*Id.* at 13, 86). During their interaction on January 23, 2012, Villalona referred to Hued as a "clown" and stated that he had "lost all faith" in Hued and that Hued was useless. (*Id.* at 14, 86-88). However, Villalona did not direct Hued to file a motion to withdraw the plea prior to January 31, 2012. (*Id.* at 15, 17). Hued reiterated on several occasions that Villalona never asked him to file a motion to withdraw the plea prior to January 31, 2012. (*Id.* at 18, 83-84). Further, Hued stated that Villalona also never instructed him to find someone else to file a motion to withdraw on his behalf. (*Id.* at 84).

Hued followed up the January 23, 2012, by sending Villalona a letter dated January 27, 2012, stating that on "Monday you told me you were hiring a new lawyer who will be filing a motion to withdraw your plea. As of today I have not seen any new attorney file a notice of appearance on your case." (Government's Exhibit Number 6). The next communication Hued had with Villalona was on March 9, 2012, at the Seminole County Jail. (*Id.* at 16). Hued was informed on that occasion that Villalona was in isolation due to a scabies infection.{**2018 U.S. Dist. LEXIS 9**} (*Id.*).

B. Findings of Fact and Conclusions of Law

"A defendant has an absolute right to withdraw a guilty plea before the district court accepts it. Fed. R. Crim. P. 11(d)(1)." *United States v. Villalona*, 506 F. App'x 902, 904 (11th Cir. 2013). However, after the district court has accepted a defendant's guilty plea, and before sentencing, the defendant may withdraw a guilty plea only if "(1) the district court rejects the plea agreement, or (2) the defendant can show a fair and just reason for requesting the withdrawal." *Id.* (citation omitted) (quotation omitted). In the present case, the issue of whether Hued failed to file a motion to withdraw Villalona's plea is relevant to Villalona's absolute right to withdraw his plea before the Court accepted it.

After a careful weighing of the evidence, this Court finds that Hued's testimony as to the facts is more credible than Villalona's testimony. *See Castle v. Sangamo Weston, Inc.*, 837 F.2d 1550, 1559 (11th Cir. 1988) (Assessing the weight of evidence and credibility of witnesses is reserved for the trier of fact."). As such, the Court finds that, on January 23, 2012, Villalona informed Hued that he intended to file a motion to withdraw the plea through new counsel. Moreover, on that day, **Villalona fired Hued** and never directed **Hued** to file a motion to withdraw the plea.

This scenario is confirmed{**2018 U.S. Dist. LEXIS 10**} by Hued's letter to Villalona dated January 27, 2012, in which Hued stated that, although Villalona told him of his intention to file a motion to withdraw the plea through new counsel, Villalona had not done so. Villalona was well aware that he had the absolute right to withdraw his plea prior to the Court's acceptance of it, but he took no action to do so. **Hued**, who was **fired** by **Villalona** on January 23, 2012, understood that Villalona intended to file a motion to withdraw his plea through new counsel. Villalona never made a clear request to Hued to withdraw his plea. Villalona never directed Hued to do so, and he never did so himself or through new counsel, despite the fact that Villalona was aware of the necessity of doing so prior to the Court's acceptance of the plea.

Under the circumstances, the Court finds that Hued's failure to file a motion to withdraw Villalona's plea did not amount to ineffective assistance. **Hued** did not do so because **Villalona fired** him and told him that new counsel would be doing so. Hued's performance did not fall below an objective standard of reasonableness as Villalona had not communicated a clear desire for Hued to withdraw the plea. Consequently, Hued's{**2018 U.S. Dist. LEXIS 11**} performance was not deficient with regard to this matter.

The Court also finds that Villalona has not shown prejudice. At sentencing, the Court specifically asked Villalona whether he desired to withdraw his plea if the charges only involved two kilograms of cocaine, and Villalona stated, "No, sir." The Court then proceeded to find Villalona responsible for conspiracy to possess with intent to distribute two kilograms of cocaine. "Solemn declarations in open court carry a strong presumption of verity." *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629, 52 L. Ed. 2d 136 (U.S. 1977). Based on Villalona's representation at sentencing, there was not a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial.

In sum, the Court finds that Hued's failure to file a motion to withdraw Villalona's plea did not amount to ineffective assistance.

III. Certificate of Appealability

This Court should grant an application for a certificate of appealability only if the petitioner makes "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional**{2018 U.S. Dist. LEXIS 12}** claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000); *see also Lamarca v. Sec'y, Dep't of Corr.*, 568 F.3d 929, 934 (11th Cir. 2009). However, the petitioner need not show that the appeal will succeed. *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

Villalona fails to demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. Moreover, Villalona cannot show that jurists of reason would find this Court's procedural rulings debatable. Villalona fails to make a substantial showing of the denial of a constitutional right. Thus, the Court will deny Villalona a certificate of appealability.

IV. Conclusion

Accordingly, it is **ORDERED** and **ADJUDGED** as follows:

1. The Motion to Vacate, Set Aside, or Correct Sentence (Doc. 1) is **DENIED**.

2. This case is **DISMISSED with prejudice**.

3. The Clerk of the Court is directed to enter judgment in favor of Respondent and to close this case. A copy of this Order and the judgment shall also be filed in criminal case number 6:11-cr-375-Orl-40TBS.

4. Petitioner is **DENIED** a certificate of appealability in this case.

5. The Clerk of the Court is directed to terminate any related section 2255 motions filed in criminal case number 6:11-cr-375-Orl-40TBS.

DONE and **ORDERED** in Orlando, Florida on August 24, 2018.

/s/ Paul G. Byron

PAUL G. BYRON

UNITED STATES**{2018 U.S. Dist. LEXIS 13}** DISTRICT JUDGE

Footnotes

1

Criminal Case No. 6:11-cr-375-Orl-40KRS will be referred to as "Criminal Case."

Appendix F

In the
United States Court of Appeals
For the Eleventh Circuit

No. 12-12880

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

STEVEN JUSTIN VILLALONA,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:11-cr-00375-GKS-DAB-2

Before WILSON, LAGOA, and DUBINA, Circuit Judges.

BY THE COURT:

Appellant's motion to recall the mandate is DENIED.

Additional material from this filing is available in the Clerk's Office.