

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

DAVID TRAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. If a guilty plea was not entered into knowingly and voluntarily, may it be withdrawn under without inquiry into other factors?

RELATED PROCEEDINGS

The following proceedings are directly related to this case:

- *United States v. David Tran*, No. 2:17-CR-00217-1, United States District Court for the Eastern District of Louisiana. Judgment entered September 29, 2021.
- *United States v. David Tran*, No. 23-30487, United States Court of Appeals for the Fifth Circuit. Judgment entered June 21, 2024.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Tran respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case.

OPINION DELIVERED IN THE COURT BELOW

The final judgment and decree rendered by the United States Court of Appeals for the Fifth Circuit denying Petitioner's appeal from his conviction and sentence in the United States District Court for the Eastern District of Louisiana is attached as Appendix A.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THE COURT IS INVOKED

The United States Court of Appeals for the Fifth Circuit entered judgment on June 21, 2024. This Court has jurisdiction under 28 U.S.C. § 1254 to review this Petition.

RELEVANT GUIDELINES PROVISIONS

The Fifth Amendment to the United States Constitution provides, in relevant part:
No person shall * * * be compelled in any criminal case to be a witness against himself * * *.
U.S. Const. amend. V.

The Sixth Amendment to the United States Constitution provides, in relevant part:
In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury * * * and to be confronted with the witnesses against him * * *.
U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Introduction

Mr. Tran's singular focus on a potential suppression motion was clear throughout his pretrial proceedings. Yet when advising Mr. Tran on whether to accept a plea, his attorney of record—who was soon suspended from the practice of law for repeated instances of deficient representation—failed to advise Mr. Tran that, by taking the proposed unconditional guilty plea, Mr. Tran would waive any present

or subsequent suppression challenge. Another attorney, retained to examine potential appellate issues, told Mr. Tran that a guilty plea would not affect his ability to pursue a “postconviction writ” alleging that the government illegally obtained the evidence against him. Mr. Tran’s ability to understand this minimal, unclarified, and confusing advice was further limited by his cognitive and mental health impairments. Once Mr. Tran was appointed a new attorney, who explained the effect his guilty plea had on any Fourth Amendment challenge, Mr. Tran moved to withdraw his plea.

Mr. Tan’s plea was *not* a voluntary and intelligent choice among the alternative courses of action available to him. Yet the district denied Mr. Tran’s motion, and its decision was affirmed by the Fifth Circuit Court of Appeals.

B. The Underlying Charges

This is a drug possession and distribution case. On March 16, 2018, the United States filed a Superseding Indictment charging co-defendants David Tran (78) and David Tran (86)¹ with conspiracy to distribute 1,000 or more marijuana plants (Count 1); possession with intent to distribute 400 grams or more of fentanyl (Count 2); possession with intent to distribute 500 grams or more of methamphetamine (Count 3); and manufacture of 100 or more marijuana plants (Count 4).

C. The initial district court proceedings

1) Mr. Tran is represented by a series of counsel

Mr. Tran was first represented by Gary Schwabe of the Federal Public Defender’s Office. On August 14, 2018, Mr. Tran moved for removal of Gary Schwabe as his counsel and for appointment of new counsel. Mr. Tran subsequently hired Stephen H. Shapiro, who became counsel of record on September 26, 2018.

On March 8, 2019, pursuant to a motion from Mr. Shapiro, the district court found there was reasonable cause to order a psychiatric examination and ordered that a competency hearing be held. At

¹ The defendants are distinguished by their birth year. David Tran (78), the Appellant in this case, is referred to hereinafter as Mr. Tran.

the competency hearing, held on July 31, 2019, Dr. Benjamin Lowenberg testified that Mr. Tran had previously been diagnosed with and received treatment for major depressive disorder with psychotic features, which included “hearing voices and seeing things.” Mr. Tran was deemed competent based on Dr. Lowenberg’s opinion that, despite these mental health impairments, Mr. Tran had a rational and factual understanding of the legal proceedings against him and was able to consult with his attorney with a reasonable degree of rational understanding.

Mr. Tran and Mr. Shapiro came into conflict, and on October 29, 2019, the Magistrate Judge held a hearing on a Motion to Withdraw Counsel and Motion to Appoint Counsel. In arguing in favor of his own withdrawal, Mr. Shapiro stated that “[Mr. Tran’s] thoughts are extremely disorganized and they frequently do not make any sense whatsoever.” Mr. Shapiro also noted disagreements with Mr. Tran related to Mr. Tran’s insistence on pursuing a motion to suppress wiretap evidence.

The Magistrate Judge found “a complete breakdown in communication and that there are irreconcilable differences or conflicts between counsel and the client.” The Magistrate Judge stated that she would grant the motion and would substitute counsel, but that it would be Mr. Tran’s “last bite at the apple,” and “there will be no more motions to substitute counsel entertained by this Court.” On November 1, 2019, the Magistrate Judge appointed Robert C. Jenkins to represent Mr. Tran.

On February 3, 2020, Mr. Tran wrote a letter to the district court, which was received on February 6, seeking a continuance. In his letter, Mr. Tran stated that his new attorney, Mr. Jenkins, had only met with him once, and for less than 10 minutes, and that they were not prepared for trial. Mr. Tran also indicated that he had difficulty translating between English and Vietnamese. On February 10, 2020, the district court denied Mr. Tran’s continuance request, and trial commenced on that day.

2) Mr. Tran pleads guilty

After selecting a jury, Mr. Tran changed his plea to guilty. Mr. Tran and Mr. Jenkins signed a factual basis outlining the circumstances of Mr. Tran’s offenses. The district court then conducted a colloquy with Mr. Tran. At the beginning of the colloquy, the prosecutor stated that “there’s no plea

agreement,” and that Mr. Tran “would be pleading straight up.” After Mr. Tran was placed under oath, the district court discussed with Mr. Tran his rights. The district court confirmed that Mr. Tran had the opportunity to discuss his case with Mr. Jenkins, that he was satisfied with Mr. Jenkins’ advice, and that Mr. Jenkins was satisfied that Mr. Tran’s plea was knowing and voluntary. The district court then discussed the evidence against Mr. Tran and the factual basis.

The district court’s colloquy did not include any discussion of a suppression motion, the district court did not ask Mr. Tran if he understood that he was waiving his ability to file a suppression challenge in the future or on appeal, and the district court did not discuss or explain to Mr. Tran the difference between a conditional or unconditional guilty plea.

3) Mr. Tran seeks to remove Mr. Jenkins, and Mr. Jenkins is shortly thereafter suspended from practice by the Louisiana Supreme Court

On September 21, 2020, the court received into the record a letter filed by Mr. Tran objecting to Mr. Jenkins’ continued representation. Mr. Tran wrote in the letter that Mr. Jenkins had been non-responsive and had not provided any counsel to him during the pre-sentencing period. Mr. Tran also stated that Mr. Jenkins had “committed grievous error prior to Defendants’ recent ‘plea,’ and counsel’s deficient performance will be collaterally actioned placing counsel in a conflict of interest position.” Mr. Tran sought replacement counsel, but that motion was denied by the Magistrate Judge.

On November 27, 2020, Mr. Tran again moved for Mr. Jenkins’ dismissal. On December 3, 2020, the court docketed another letter that Mr. Tran sent expressing his displeasure with Mr. Jenkins’ representation. On January 7, 2021, Mr. Jenkins himself moved to withdraw. Mr. Jenkins’ motion was granted, and the court appointed Annalisa Miron as Mr. Tran’s new counsel for sentencing. Three months later, Mr. Jenkins was suspended from practice by the Louisiana Supreme Court because he “neglected legal matters, failed to communicate with clients, failed to refund unearned fees, and failed to properly terminate the representation of clients.” *See In re: Robert C. Jenkins, Jr.*, No. 2021-B-0293 (La. April 7, 2021).

4) Mr. Tran’s motion to withdraw his guilty plea is denied, and the district court sentences him to 140 months in prison

On July 21, 2021, Mr. Tran filed, through his new attorney, Ms. Miron, a motion to withdraw his guilty plea. In the accompanying memorandum, Mr. Tran asserted that he did not know or did not understand that pleading guilty foreclosed the possibility of further challenges to the wiretap evidence.

The district court denied Mr. Tran’s motion on September 10, 2021. The district court entered its Judgment and sentenced Mr. Tran to 140 months in prison on September 29, 2021.

5) Mr. Tran appeals the denial of his motion to withdraw his guilty plea, and the Fifth Circuit Court of Appeals finds the district court abused its discretion in denying an evidentiary hearing

On February 4, 2022, Mr. Tran filed an appellate brief in the Fifth Circuit Court of Appeals asserting that the district court abused its discretion when it denied his motion to withdraw his guilty plea. This Court vacated and remanded for an evidentiary hearing, reasoning that Mr. Tran “asserted that he would not have pleaded guilty if he had known he would not be able to appeal any suppression issues”; that “Mr. Tran “repeatedly attempted to address the suppression issues” including “attempt[ing] to raise it with counsel [and] with the court”; and a “plea colloquy is not sufficient to remedy a deficiency by counsel.” *United States v. Tran*, No. 21-30608, 2022 U.S. App. LEXIS 35320, at *8, 16 (5th Cir. Dec. 21, 2022).

D. The district court proceedings after remand

1) Mr. Tran is appointed new counsel

After Mr. Tran’s case was remanded, he was initially represented by Joseph Raspanti. Mr. Raspanti and Mr. Tran both filed motions requesting that Mr. Raspanti be permitted to withdraw. At a hearing on the motions, Mr. Raspanti said that he did not think it was in Mr. Tran’s “best interest” for Mr. Raspanti to be his attorney. Mr. Raspanti stated that he and Mr. Tran had “a basic interpersonal conflict” and that Mr. Raspanti did not think that he was “effectively communicating with” Mr. Tran. On May 11, 2023, the court granted Mr. Raspanti’s motion to withdraw.

On May 16, 2023, the court appointed Anna L. Friedberg to represent Mr. Tran. Shortly thereafter, in a motion to continue the evidentiary hearing, Ms. Friedberg stated it was her “belief and understanding after meeting with Mr. Tran today that he may have some mental health issues and low intellectual functioning.”

2) An evidentiary hearing is held on Mr. Tran’s motion to withdraw his guilty plea

On June 28, 2023, an evidentiary hearing was held on Mr. Tran’s motion to withdraw his guilty plea. Baldemar Zuniga testified that he was retained to represent Mr. Tran to “examine some appellate issues and to sit with the attorney that was assigned to case at trial for the purposes of just being there for appellate reasons.” Mr. Zuniga stated that Mr. Tran was “very focused” on evidence that Mr. Tran believed was unlawfully obtained by the government. Mr. Zuniga related that he and Mr. Tran continued to discuss Mr. Tran’s desire to pursue a suppression motion and Mr. Tran’s belief that there was governmental wrongdoing in the moments before Mr. Tran’s plea. Mr. Zuniga explained:

I discussed with him the suppression issue. Now, the issue that he had expressed as far as wanting to pursue had to do with some wrongdoing on behalf of the government agents and some potential -- I don't know how to explain it -- some malfeasance, I guess, on the part of the investigators and the agents for the government.

I did tell him that with the information I had reviewed that I had not seen that yet in the documentation I had received, but that certainly I did not believe that was something that would be waived for purposes of a postconviction writ, if that was applicable, because that was something that had not really been developed yet or investigated. In fact, when he pled open to the Court, if I remember correctly, he did not waive his right to appeal.

Mr. Zuniga also testified: “we had the conversation about if anything were to arise after the fact or there was anything new that would support his theory that the agents did something illegal to obtain evidence, that we would be able to pursue that.”

Mr. Jenkins testified as well, stating that he was aware that Mr. Tran has concerns about a potential suppression motion, but that when he talked with Mr. Tran on the day of trial about changing his plea he did not discuss the suppression issue with Mr. Tran.

Mr. Tran also testified. Mr. Tran stated that he was not told that if he plead guilty it would foreclose his ability to challenge the governmental wiretap, and that his understanding from meeting with Mr. Zuniga before entering his guilty plea was that if he plead guilty, he would still be able to “challenge the suppression afterwards.” Mr. Tran testified that Mr. Jenkins did not rebut this understanding. Instead, on the date of the plea, Mr. Jenkins did not discuss the suppression issue with Mr. Tran at all. Mr. Tran stated that this understanding was why he accepted the guilty plea. When Mr. Tran later realized, after a new attorney was appointed, that he could not bring a suppression challenge on appeal, he filed a motion to withdraw his plea.

Mr. Tran further testified that he began attending special education classes when he was in fourth grade and that he continued them in high school. As was discussed at Mr. Tran’s competency hearing, he stated that could he hear voices and see shadows, and was treated for these hallucinations in the past.

3) Mr. Tran’s motion to withdraw his guilty plea is again denied by the district court

On July 13, 2023, the district court issued an *Order and Reasons* denying Mr. Tran’s motion to withdraw his guilty plea. The district court stated that the *Carr* factors weigh against granting Mr. Tran’s motion because (1) Mr. Tran “does not assert his innocence,” (2) “granting [Mr. Tran’s] motion would substantially prejudice the Government’s case, inconvenience the Court, and waste judicial resources”; (3) Mr. Tran “filed his Motion a year and half after his plea and one week prior to his sentencing,” though “it is true” that Mr. Tran “spent much of the elapsed time trying to raise his suppression issue with counsel and the Court”; (4) “the evidentiary hearing revealed that [Mr. Tran] received more than adequate assistance of counsel” because “the suppression issue were investigated by at least three of [his] prior attorneys,” he had the assistance of two attorneys when he made the decision to enter a guilty plea, and he stated in his plea colloquy that he had an opportunity to discuss possible defenses with his attorney and was satisfied with his services; and (5) “the evidentiary hearing revealed that [Mr. Tran’s] plea was knowingly and voluntarily entered” because the district court did not find credible Mr. Tran’s assertion that “his trial counsel incorrectly advised him that he could raise suppression issues after he pleaded

guilty” and during the plea colloquy the court had “thoroughly explored whether the plea was being entered knowingly and voluntarily and found that it was.”

E. The Fifth Circuit Court of Appeals denies Mr. Tran’s appeal

On December 14, 2023, Mr. Tran timely filed an appeal with the United States Court of Appeals for the Fifth Circuit. Mr. Tran argued that, given his counsels’ acts of omission and misleading advice, his plea was not knowing and voluntary and at the time he entered his plea he did not have the close assistance of competent counsel. Mr. Tran also argued that his counsels’ deficient performance rendered his plea involuntary under *Strickland v. Washington* and *Hill v. Lockhart*. Mr. Tran’s appeal was denied on June 21, 2024. The Court of Appeals stated that “the district court did not abuse its discretion in denying Tran’s motion” and “[a]s for Tran’s ineffective assistance of counsel claims, the record is not sufficiently developed to permit us to consider the merits of Tran’s allegations.” *See Appendix A at 2.*

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT THE WRIT TO MAKE CLEAR THAT IF A GUILTY PLEA IS NEITHER KNOWING NOR VOLUNTARY, THEN IT CAN BE WITHDRAWN, WITHOUT INQUIRY INTO ADDITIONAL FACTORS

To enter a knowing and voluntary guilty plea, the defendant must have a “full understanding of what the plea connotes and of its consequence.” *Boykin v. Alabama*, 395 U.S. 238, 244, 89 S. Ct. 1709, 23 L. Ed. 2d 274 (1969). “The longstanding test for determining the validity of a guilty plea is whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill v. Lockhart*, 474 U.S. 52, 56 (1985) (citations omitted).

Mr. Tran’s guilty plea was *not* a voluntary and intelligent choice. Instead, it was the result of a mistake and was entered into without an understanding of the alternative courses of action that were available to him. The evidentiary hearing testimony showed that:

- Mr. Tran was “very focused” on suppression issues and continued to discuss his desire to pursue a suppression motion in the moments before his plea;

- Mr. Zuniga told Mr. Tran that even if he plead guilty, he could potentially still pursue a “postconviction writ” pertaining to an allegation that the government illegally obtained the evidence against him; and
- During the conversations about Mr. Tran changing his plea to guilty, neither Mr. Jenkins nor Mr. Zuniga otherwise discussed with Mr. Tran the effects a plea would have on his ability to pursue suppression issues on appeal.²

Despite Mr. Tran’s clear and continued focus on his suppression issues, all he was told by counsel about the affect his plea would have on the potential to pursue such a claim was that his plea would not affect his ability to pursue a “postconviction writ” alleging that the government illegally obtained the evidence against him. This limited, unclarified, and misleading information would be difficult for any layperson to grasp. It was likely even more difficult for Mr. Tran given his cognitive and mental health impairments. It is of little surprise that Mr. Tran’s understanding from meeting with his attorneys was that if he plead guilty, he would still be able to “challenge the suppression afterwards.” Therefore, because of the omissions and easily misunderstood statements by his counsel, Mr. Tran’s decision to enter a plea of guilty was not a “voluntary and intelligent choice among the alternative courses of action open to the defendant.” *Hill*, 474 at 56; *see also Padilla v. Kentucky*, 559 U.S. 356, 368-69 (2010) (“there is no relevant difference between an act of commission and an act of omission in this context”) (citing *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (“The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance.”)).

However, the Fifth Circuit failed to even analyze whether Mr. Tran’s decision was knowing and voluntary. And they did not need to – under its precedent, such an inquiry is only one of *seven* factors that should be assessed when a defendant moves to withdraw a guilty plea. *See United States v. Carr*, 740 F.2d

² Mr. Tran’s allegations against Mr. Jenkins are in line with the suspension order handed down by the Louisiana Supreme Court against Mr. Jenkins a few months later. *In re: Robert C. Jenkins, Jr.*, No. 2021-B-0293 (La. April 7, 2021).

339, 343-344 (5th Cir. 1984).³ Under this inquiry, no single factor, including whether the decision to enter a plea was knowing and voluntary, demands a particular result. *Id.* at 344.

But when a plea is not entered into knowingly and voluntarily, it *cannot* pass constitutional muster. *See D.H. Overmyer Co. v. Frick Co.*, 405 U.S. 174, 185, 31 L. Ed. 2d 124, 92 S. Ct. 775 (1972); *Johnson v. Zerbst*, 304 U.S. 458, 464, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938). Therefore, an unintelligent and uninformed waiver of constitutional rights, standing alone, should be held to be a “fair and just reason for requesting the withdrawal” of a guilty plea. *See* Fed. R. Crim. P. 11.

CONCLUSION

For the foregoing reasons, the Court should grant Mr. Tran’s petition and issue a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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³ Under *Carr*, to determine whether a defendant may withdraw a guilty plea, a court must consider the following factors: (1) whether or not the defendant has asserted his innocence; (2) whether or not the government would suffer prejudice if the withdrawal motion were granted; (3) whether or not the defendant has delayed in filing his withdrawal motion; (4) whether or not the withdrawal would substantially inconvenience the court; (5) whether or not close assistance of counsel was available; (6) whether or not the original plea was knowing and voluntary; and (7) whether or not the withdrawal would waste judicial resources. 740 F.2d at 343-344.

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Appendix A The United States Court of Appeals for the Fifth Circuit, *United States v. David Tran*, No. 23-30487, Opinion, June 21, 2024