No. ___

In the Supreme Court of the United States

ALVIN JAKELYN WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals summary rejection of an ineffective assistance of counsel claim on direct appeal by placing the burden on the defendant and conclusively-apparent-from-the-record standard of proof comports with due process?

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Alvin Jakelyn Williams respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The order of the court of appeals (App., *infra*, A1) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 15, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(a).

CONSTITUTIONAL, STATUTORY PROVISIONS INVOLVED

The pertinent constitutional, statutory provisions and rules – U.S. Const., Amendments V & VI – are set forth in the appendix. App., *infra*, A2.

STATEMENT

Mr. Williams was charged by Mr. Brogdon of the Gaston County, North Carolina, Police Department and FBI Organized Crime and Drug Enforcement Task Force with conspiracy to distribute and to possess with intent to distribute 280 grams of cocaine base since 2013 in Gaston County. (J.A. 12-13). At the detention hearing, Mr. Williams consented to detention. (J.A. 17). Mr. Williams subsequently waived his right to a speedy trial and to an indictment by a grand jury. (J.A. 18-19).

Mr. Williams entered a guilty plea to a bill of information to two counts of possession with intent to distribute cocaine base in Gaston County on December 23, 2013, and January 8, 2014, respectively. (J.A. 20). The government filed a notice of enhanced statutory punishment under 21 U.S.C. § 851, for a 2012 marijuana conviction, (J.A. 49), and the plea agreement contained a stipulation of this enhancement and the increase of the statutory maximum of 30 years imprisonment. (J.A. 23). The government agreed to withdraw this enhancement if Mr. Williams is a career offender under the

sentencing guidelines. Id. The parties stipulated that the quantity was between 28 and 112 grams of cocaine base. Id.

The presentence investigation report classified Mr. Williams as a career offender due to a 1997 felonious assault conviction and 2012 marijuana dealing conviction. (J.A. 218). Mr. Williams was 15 when he committed the felonious assault, was incarcerated for about two months before sentencing in 1999 and did another two months after sentencing before beginning probation. (J.A. 219). About eight months later, probation was revoked, and he served two years. (J.A. 220). He served one year of post release supervision before release was revoked and he served the eight months remaining on his sentence. Id.

The 22 criminal history points assigned to prior convictions were mostly for licensing law violations, specifically, driving while license revoke and no operators license. (J.A. 219-229). North Carolina, reflecting on the cost to its people of onerous licensing laws, effective December 1, 2013, reduced the penalty for driving while license revoked from a Class 1 misdemeanor to a Class 3 misdemeanor for which no points under the federal sentencing scheme would have applied. S.L. 2013-360 Section 18B.14.(f) (amending G.S. 20-28(a)). Alas, bureaucracies usually are not

this introspective, but there is no restriction on the federal trial court putting into proper perspective these licensing law violations under Section 3553(a).

Only five points relate to traditional crimes, specifically, three points for the 1997 felonious assault and two points for the 2007 misdemeanor possession of stolen goods. (J.A. 219-229). He had served about eight months on his 2012 marijuana dealing conviction before post release supervision began. He was on post release supervision about four months before a government asset, confidential informant approached him and bought first 8 grams, then 20 grams of cocaine base. (J.A. 217, 227). Two criminal history points were added for this. (J.A. 229). There was no allegations or arrests after this arranged violation of the drug laws during the eight months that lapsed before Mr. Williams' arrest on these charges. At least the government did not arrange for Mr. Williams to assault people.

Mr. Williams asked for a new attorney because he was not advised that he was a career offender under the guidelines. (J.A. 54-58). Mr. Williams and his attorney discussed this matter and Mr. Williams withdrew his request for new counsel. (J.A. 65).

At his sentencing, Mr. Williams asked for new counsel because of communication problems concerning the scheduling of and preparation for the sentencing hearing. (J.A. 72-76). Counsel admitted spending a lot of time

on a trial that was supposed to begin that week but was settled on the eve of trial. (J.A. 77). Counsel denied any shortcomings in communications, was ready for sentencing and had not left a stone unturned. (J.A. 76-78). The trial court denied the motion. (J.A. 79-80).

The trial court had a colloquy with Mr. Williams to ascertain that he received and reviewed the presentence investigation report with his counsel. (J.A. 80). Mr. Williams said he looked at and somewhat understood the report. Id. Counsel proceeded to withdraw the objection to the application of 4A1.2(k)(2)(B) rather than (C) in determining the limitation period for inclusion of prior convictions. (J.A. 81). Instead, counsel argued that under *Johnson* the prior felonious assault conviction is not a crime of violence under the residual clause and therefore does not trigger the career offender guidelines. (J.A. 82). The trial court overruled the objection by looking to the state indictment and finding that it did not allege culpable negligence and therefore the conviction qualifies as a crime of violence. (J.A. 90). The trial court continued the sentencing to hold the case in abeyance for some guidance on this issue of how to classify the prior conviction. (J.A. 92).

Two months later, Mr. Williams asked for new counsel because counsel had not made objections to the pre-sentence investigation report as he specified in the motion in great detail, paragraph by paragraph of the

report. (J.A. 95-97). About a week later, Mr. Williams made a pro se motion to withdraw his plea because of the ineffective assistance of counsel. (J.A. 99). These motions were denied without prejudice pursuant to Local Rule 47.1(H) concerning pro se motions filed by represented party.

The government moved to continue due to the scheduling conflict of the prosecutor, even though there are dozens of fellow prosecutors more than capable of stepping in on short notice. (J.A. 101). This was unopposed by defense counsel. Id. The trial court granted the motion. (J.A. 103).

About three months later, it was the defense counsel's turn to seek a continuance of the sentencing, but it was for the legitimate and compelling purpose of holding the case in abeyance pending the outcome of the appeal in *United States v. Thompson,* 16-4685. (J.A. 104-105). Notwithstanding this valid reason, and the prior gratuitous continuance for the convenience of the government, the trial court denied the motion. (J.A. 108). Mr. Williams pro se asked for a new detention hearing. (J.A. 109). At calendar call the trial court reconsidered the motion to continue and granted the motion. (J.A. 6).

Mr. Williams moved pro se to dismiss the case because of ineffective assistance of counsel in adequately advising Mr. Williams on his rights to a preliminary hearing on the complaint, his rights under the Speedy Trial Act and constitutional right to a speedy trial, his right to a bill of indictment by

the grand jury and to object to a 851 information filed at the same time as his effectively uncounseled guilty plea, and his right to object to and defend against the offense conduct and other information in the pre-sentence investigation report. (J.A. 113-114).

Mr. Williams moved for new counsel. (J.A. 119-120). Counsel had met with Mr. Williams to discuss the issues raised in his pro se motion and they were unable to resolve those issues to the satisfaction of Mr. Williams. Id. At a hearing on the matter, the trial court vouched for the defense counsel. (J.A. 126). Defense counsel incorrectly informed the trial court that there was no warning from Mr. Williams of any complaints. (J.A. 126). Defense counsel also stated that after the motion for new counsel was filed at the direction of Mr. Williams, he called and asked defense counsel to remain in the case. (J.A. 127). Defense counsel contradicted her prior claim of surprise, when she said that there was an earlier status of counsel hearing. Id. Mr. Williams informed the trial court that he wanted defense counsel to remain in his case assisting him with it. (J.A. 128). Mr. Williams stated that he has been in the local jail for three years and did not want to prolong this situation by pursuing the issues raised. (J.A. 130-131). The trial court denied the pro se request for a new counsel, (J.A. 135), and denied without prejudice the pro se motion to dismiss the case. (J.A. 138).

About six months later, Mr. Williams moved for new counsel. (J.A. 139). Defense counsel stated that the relationship is tenuous and unstable, communications impossible. (J.A. 140). At the hearing, Mr. Williams was informed at the suggestion of defense counsel that getting a new attorney would delay sentencing. (J.A. 147). Mr. Williams questioned the accuracy of that since his family had retained Chiege Okwara to assist him at sentencing. (J.A. 147-148). The trial court advised Mr. Williams that Ms. Okwara needed to file an appearance. (J.A. 148).

When the trial court reconvened for sentencing, Mr. Williams stated that he wanted new counsel because it was not in counsel's best interest to assist him. (J.A. 164). The trial court vouched for defense counsel and said that she had worked on Mr. Williams' behalf as late as last night. (J.A. 165). Mr. Williams summarized in precise terms all the problems previously stated with defense counsel. Id. The trial court stated that it had already found a factual basis for the plea and that it was voluntarily and knowingly entered. Id. The trial court said that the case is "teed up" and ready for disposition. (J.A. 167). So, the trial court took a swing at it.

The trial court denied Mr. Williams new counsel. (J.A. 167). The trial court reversed his earlier decision about the prior conviction and concluded that it was not a crime of violence and that Mr. Williams was not a career

offender. (J.A. 184-185). The trial court determined that the guideline level is 21, criminal history category VI, and sentencing range between 77- and 96-months imprisonment. (J.A. 185). Defense counsel had no objection to *this calculation. Id.*

Mr. Williams reiterated his problems with defense counsel and argued his motion to dismiss the case. (J.A. 189-193). The trial court summarily denied the motion. (J.A. 194). The government condemned Mr. Williams for his words and objected to the credit for acceptance of responsibility. (J.A. 194). The government asked for a significant upward variance in Mr. Williams' sentence, specifically, a sentence of 168 months, which is the midpoint for a career offender guideline range. (J.A. 195). Of course, he is not a career offender. Defense counsel asked for a sentence of 77, at the low end of the guideline range. (J.A. 197). This was inconsistent with the prior motion for a sentence below the guideline range.

The trial court granted the government's motion for an upward variance and sentenced Mr. Williams to 120 months imprisonment. (J.A. 200-201). The trial court said that Mr. Williams is not a career offender under the guidelines, but he is a career offender in terms of his conduct over three decades. (J.A. 201). This does not fit with the well-recognized influence of time and age on recidivism. The government demanded a six-

year term of supervised release stating that there is an 851-information filed in effect that requires a minimum of six years. (J.A. 203-204).

Mr. Williams filed a notice of appeal about one month after the sentencing hearing and about one month before judgment was entered. (J.A. 207-214).

On February 15, 2019, the Court of Appeals declined to address the issue of ineffective assistance of counsel, stating, "because ineffective assistance is not conclusively established by the record before us." Opinion, A-4.

REASONS FOR GRANTING THE PETITION

The rules applied to ineffective assistance claims on direct appeal are inconsistent with due process and fundamental liberty interests.

In this case, the court of appeals did not need to look beyond the trial court record because the particularized Sixth Amendment claim was completely within the record and was preserved before the trial court and was appropriately before the court of appeals on direct appeal. *United States v. Smith*, 640 F.3d 580 (4th Cir. 2011).

Early in the proceeding following a guilty plea (where the blank confession is taken and a few months later the defendant finds out what he pled to), Mr. Williams asked for a new attorney because he was not advised

that he was a career offender under the guidelines. (J.A. 54-58). At his sentencing, Mr. Williams asked for new counsel because of communication problems concerning the scheduling of and preparation for the sentencing hearing. (J.A. 72-76). Counsel admitted spending a lot of time on a trial that was supposed to begin that week but was settled on the eve of trial. (J.A. 77). At the original sentencing, when asked if he had seen the pre-sentence investigation report and reviewed it with his attorney, Mr. Williams said he looked at and somewhat understood the report. (J.A. 80).

Two months later, Mr. Williams asked for new counsel because counsel had not made objections to the pre-sentence investigation report as he specified in the motion in detail, paragraph by paragraph of the report. (J.A. 95-97). About a week later, Mr. Williams made a pro se motion to withdraw his plea because of the ineffective assistance of counsel. (J.A. 99). Mr. Williams moved pro se to dismiss the case because of ineffective assistance of counsel in adequately advising Mr. Williams on his rights to a preliminary hearing on the complaint, his rights under the Speedy Trial Act and constitutional right to a speedy trial, his right to a bill of indictment by the grand jury and to object to a 851 information filed at the same time as his effectively uncounseled guilty plea, and his right to object to and defend

against the offense conduct and other information in the pre-sentence investigation report. (J.A. 113-114).

Mr. Williams moved for new counsel. (J.A. 119-120). Counsel had met with Mr. Williams to discuss the issues raised in his pro se motion and they were unable to resolve those issues to the satisfaction of Mr. Williams. Id. At a hearing on the matter, the trial court vouched for the defense counsel. (J.A. 126).

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When the trial court reconvened for sentencing, Mr. Williams stated that he wanted new counsel because it was not in counsel's best interest to assist him. (J.A. 164). Mr. Williams summarized in precise terms all the problems previously stated with defense counsel. Id. Mr. Williams reiterated his problems with defense counsel and argued his motion to dismiss the case. (J.A. 189-193).

This Court will consider a claim of ineffective assistance of counsel on a direct appeal from a criminal conviction "only if it conclusively appears from the record" that the appellant's counsel "did not provide effective assistance." *See United States v. Martinez*, 136 F.3d 972, 979 (4th Cir.

1998). The appellate court did not need to look beyond the trial court record in this direct appeal because the particularized Sixth Amendment claim were completely within the record and preserved before the trial court. *United States v. Smith*, 640 F.3d 580 (4th Cir. 2011).

What we are seeing here is mission creep. Courts of appeal started out rejecting ineffective assistance of counsel claims on the grounds that the issue was not raised in the trial court. *United States v. Straughter*, 950 F.2d 1223 fn. 3 (6th Cir. 1991).

> Several circuits follow this approach. See United States v. McDonald, 935 F.2d 1212, 1220 (11th Cir. 1991); United States v. DeFusco, 930 F.2d 413, 415 (5th Cir. 1991), cert. denied, 116 L. Ed. 2d 194,, 112 S. Ct. 239 (1991); United States v. Gonzales, 929 F.2d 213, 215 (6th Cir. 1991); United States v. Young, 927 F.2d 1060, 1061 (8th Cir. 1991), petition for cert. filed, (Aug. 7, 1991); United States v. Sanchez, 917 F.2d 607, 612-13 (1st Cir.), cert. denied, 113 L. Ed. 2d 722, 111 S. Ct. 1625 (1990); United States v. Matos, 905 F.2d 30, 32 (2d Cir. 1990); United States v. Gambino, 788 F.2d 938, 950 (3rd Cir.), cert. denied, 479 U.S. 825, 93 L. Ed. 2d 49, 107 S. Ct. 98 (1986).

The Fourth Circuit added its own *United States v. DeFusco*, 949 F.2d 114 (4th Cir. 1991), to this line of cases.

The courts of appeal have gone from a "not raised" in the trial court standard to a "on the record" standard. This mission creep suggests that the courts of appeal have lost sight of the liberty interests at stake and that this area needs the regime of a burden placed on the government and a standard

of proof applied to the government that allows for the fair determination of ineffective assistance claims on direct appeal. The burden should be on the government to show the absence of evidence in the record and the standard of proof should be the preponderance standard. When the issue was raised in the trial court, there should be a presumption that the record is adequate to address the issue, especially since it is the defendant who would suffer the preclusive effect of raising this issue on direct appeal.

Mr. Williams first asked for new counsel 13 months after entering a guilty plea and shortly after finding out what he had pled to. (J.A. 36, 54-56). This request was repeated three months later in March 2016, (J.A. 72-76), again two months after that in May 2016, (J.A. 95-97), again 16 months later in September and October 2017, (J.A. 113-116, 119-120, 122-136), and again five months after that in March 2018. (J.A. 139-143, 145-148, 162-205). He thought he was pleading to between 46 and 57 months for two small transactions, he thought were less than 28 grams, but the plea agreement and factual basis said was at least 28 grams. (J.A. 23, 28, 115).

No one bothered to have a colloquy with Mr. Williams, not the magistrate judge or the district court judge, about this anomaly to see if there was any basis in fact for Mr. Williams to think his sentence would be based on a quantity of cocaine base less than 28 grams or his expectations as to the

guideline range. On January 20, 2016, and October 17, 2017, Magistrate Judge Kessler had the opportunity to do so, but did not. On March 16, 2018, Magistrate Judge Cayer had the opportunity to do so, but did not. On March 2, 2016, and March 21, 2018, District Court Judge Conrad had the opportunity to do so but did not.

As pointed out by this Court in *Smith*, the Sixth Amendment right to successor appointed counsel arises because the initial appointment has ceased to constitute effective assistance of counsel. The requests for new counsel began in December 2015 and continued for the next two and one-half years. There was no actual assistance for the accused's defense and thus a deprivation of the Sixth Amendment right to the effective assistance of counsel. *United State v. Cronic*, 466 U.S. 648, 654 (1984).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

/s Aaron E. Michel

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February 2019

UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 18-4503

UNITED STATES OF AMERICA,
Plaintiff - Appellee,
v.
ALVIN JAKELYN WILLIAMS,
Defendant - Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert J. Conrad, Jr., District Judge. (3:14-cr-00217-RJC-DCK-1)

Submitted: January 31, 2019 Decided: February 15, 2019

Before MOTZ, KEENAN, and FLOYD, Circuit Judges.

Dismissed in part and affirmed in part by unpublished per curiam opinion.

Aaron E. Michel, Charlotte, North Carolina, for Appellant. Amy Elizabeth Ray, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Asheville, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Alvin Jakelyn Williams pled guilty, pursuant to a written plea agreement, to two counts of possession with intent to distribute cocaine, in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C) (2012). In his plea agreement, Williams waived all rights to contest his conviction and sentence, except for claims of ineffective assistance of counsel and prosecutorial misconduct.

On appeal, Williams claims that (1) the district court erred in denying Williams' requests for new counsel, and (2) the district court erred in granting the Government's request for an upward-variant sentence and denying Williams' request for a downward-variant sentence. Williams does not expressly raise a claim of ineffective assistance of counsel; however, there is a lengthy discussion in his opening brief of the burden for bringing an ineffective assistance of counsel claim on direct appeal. The Government filed a motion to dismiss the appeal, arguing that Williams' claims are barred by the appeal waiver and that Williams' theory of ineffective assistance of counsel should be dismissed "because the record does not conclusively establish that the performance of his attorney was constitutionally deficient." (Mot. to Dismiss at 1).

"A defendant may waive the right to appeal his conviction and sentence so long as the waiver is knowing and voluntary." *United States v. Copeland*, 707 F.3d 522, 528 (4th Cir. 2013) (internal quotation marks omitted). "We review the validity of an appeal waiver de novo, and will enforce the waiver if it is valid and the issue appealed is within the scope of the waiver." *Id.* (internal quotation marks omitted). We conduct our assessment "by reference to the totality of the circumstances" surrounding the waiver. *Id.*

(internal quotation marks omitted). "Generally, if a district court questions a defendant regarding the waiver of appellate rights during the [Fed. R. Crim. P.] 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid." *United States v. Tate*, 845 F.3d 571, 574 n.1 (4th Cir. 2017) (internal quotation marks omitted).

Upon review of the plea agreement and the transcript of the Fed. R. Crim. P. 11 hearing, we conclude that under the totality of the circumstances Williams knowingly and voluntarily waived his right to appeal. We further conclude that Williams' second claim—that the district court erred in granting the Government's request for an upward variance and denying Williams' request for a downward variance—falls squarely within the scope of the appeal waiver.

But Williams' first claim—that the district court erroneously denied his requests for new counsel—falls outside the scope of the waiver. A general appeal waiver does not waive a defendant's right to appeal on the ground that the proceedings were conducted in violation of the Sixth Amendment right to counsel, *United States v. Attar*, 38 F.3d 727, 732-33 (4th Cir. 1994), and the erroneous denial of a motion to appoint substitute counsel is a "constructive denial of counsel," *United States v. Smith*, 640 F.3d 580, 593 (4th Cir. 2011).

Although Williams' claim is not barred by the appeal waiver, we nonetheless conclude that it is meritless. We review the denial of a motion for new counsel for abuse of discretion. *United States v. Horton*, 693 F.3d 463, 466 (4th Cir. 2012). In doing so,

> [we] consider[] three factors to determine whether the initial appointment [of counsel] ceased to constitute Sixth Amendment assistance of counsel: (1) the timeliness of the motion; (2) the adequacy of the court's subsequent inquiry; and (3) whether the attorney/client conflict was so great that it had resulted in a total lack of communication preventing an adequate defense.

Id. at 467 (internal quotation marks omitted). After a review of the record, we conclude that, on each occasion Williams either sought new counsel or complained about the ineffectiveness of his counsel, the court adequately inquired into Williams' concerns and correctly determined that the communication breakdown was not so great as to prevent an adequate defense. *See id.* Therefore, this claim entitles Williams to no relief.

Accordingly, we grant the Government's motion to dismiss in part, dismiss the appeal in part, and affirm the district court's judgment in part. To the extent Williams intended to raise on appeal the issue of ineffective assistance of trial counsel, we decline to address it. Williams should raise this claim, if at all, in a 28 U.S.C. § 2255 (2012) motion because ineffective assistance is not conclusively established by the record before us. *See United States v. Faulls*, 821 F.3d 502, 507-08 (4th Cir. 2016). We deny Williams' motion for leave to file a pro se supplemental brief because counsel has filed a brief on the merits. *See United States v. Penniegraft*, 641 F.3d 566, 569 n.1 (4th Cir. 2011). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED IN PART,
AFFIRMED IN PART

U.S. Const., Amends. V & VI

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.

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 the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.