Case No. _____

In The

Supreme Court of the United States

DERRICK KENNEDY CRUMPTON,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

It is common practice in a federal criminal prosecution for a defendant and the government to enter into a Plea Agreement or a Proffer Agreement in which the defendant agrees to cooperate with the government in exchange for the government considering to make a substantial-assistance motion for a reduction in the defendant's sentence pursuant to U.S.S.G. § 5K1.1.

The question presented is:

What is the scope of judicial review when the defendant and the government have entered in a Plea Agreement and/or a Proffer Agreement in which the government agrees to consider making a substantial-assistance motion on the defendant's behalf but thereafter refuses to make the substantial-assistance motion on the defendant's behalf?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of the Petition is as follows:

Derrick Kennedy Crumpton, Petitioner

United States of America, Respondent

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Derrick Kennedy Crumpton, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on May 18, 2020, a copy of which is attached at Appendix A to this Petition. Mr. Crumpton timely filed a Petition for Rehearing en Banc, which was denied on July 7, 2020. A copy of the order denying the Petition for Rehearing en Banc is attached hereto at Appendix B.

JURISDICTION

The opinion of the Court of Appeals was entered on May 18, 2020. The order denying the Petition for Rehearing en Banc was denied on July 7, 2020. This petition is filed within ninety (90) days after the entry of the order denying the Petition for Rehearing en Banc. *See* SUP. CT. R. 13.3. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

STATUTES AND GUIDELINES INVOLVED

This Petition concerns U.S.S.G. § 5K.1, which provides:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> **(a)** The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> **(1)** the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> **(2)** the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> **(3)** the nature and extent of the defendant's assistance;
>
> **(4)** any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> **(5)** the timeliness of the defendant's assistance.

STATEMENT

There is a split amongst the Circuit Courts of Appeals regarding the scope of judicial review when the government refuses to make a substantial assistance motion on a defendant's behalf. All of the Circuits agree that courts can review the government's refusal to make the substantial-assistance motion to determine if the government's refusal was based on an unconstitutional motive such as race.

The Fifth, Sixth, and Eleventh Circuits have the most limited form of review among the circuits. These circuits limit judicial review of the government's refusal to make the substantial-assistance motion solely to whether the government refusal was based on an unconstitutional motive such as race.

The other Circuits have allow for a more expansive judicial review, but the scope of that review is inconsistent in those Circuits. The First Circuit and the D.C. Circuit allow courts to review whether the refusal was based on an unconstitutional motive and whether the government's refusal was made in bad faith, but only if the plea agreement specifically states that the government will consider making a substantial assistance motion on the defendant's behalf. The Second and Third Circuits have no such requirement and allow for bad faith review even if the plea agreement does not specifically mention that the government will consider making a substantial assistance motion on the defendant's behalf.

The Ninth and Tenth Circuits have expanded the scope even further and allow for judicial review to determine (1) whether the refusal was based on an unconstitutional motive, (2) whether the refusal was rationally related to a legitimate government end, or (3) whether the refusal was made arbitrarily or in bad-faith.

STATEMENT OF THE CASE

I. Factual and Procedural Background

A. Proffers and Agreements

Mr. Crumpton, a high-ranking member of the Gangster Disciple organization, was indicted on April 22, 2016 in the United States District Court for the Western District of Tennessee. *See* Indictment (R.4), Page ID#40. Count 1 of the Indictment alleged a Conspiracy to Participate in Racketeering Activity in violation of 18 US.C. § 1962(d), and Count 2 alleged a conspiracy to possess with the intent to distribute cocaine and marijuana in violation of 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(A). *Id.*

Shortly after the indictment came down, Mr. Crumpton began to cooperate with the government. Mr. Crumpton participated in seven (7) proffers with the government and, on the day of his arrest, a custodial interrogation without the assistance of counsel. At the beginning of his second meeting with the government, May 25, 2016, Mr. Crumpton and the government executed a Proffer Agreement,

which contained a provision that the government would consider making a substantial-assistance motion pursuant to U.S.S.G. § 5K.1 for a reduction in Mr. Crumpton's sentence if Mr. Crumpton rendered substantial assistance to the government. Whether substantial assistance was rendered was left to the sole discretion of the government. (R. 712, Government's Sealed Response to Defendant's Sentencing Memorandum at EXHIBIT A).

These proffers and the custodial interrogation were held on the following dates: (1) May 4, 2016, (2) May 25, 2016, (3) January 12, 2017, (4) April 27, 2017, (5) May 30, 2017, (6) August 17, 2017, (7) October 5, 2017, and (8) June 7, 2018. These proffers and the interrogation were memorialized in writing by the FBI on Form FD-302, all of which are attached to Crumpton's Sealed Sentencing Memorandum, R. 709, at EXHIBIT F. Thus, over a period of approximately two years, Mr. Crumpton met with the government on eight separate occasions. Mathematically speaking, that's the equivalent of meeting with the government once every three months.

After participating in half of these meetings with the government, Mr. Crumpton and the government entered into a Rule 11(c)(1)(C) Plea Agreement on May 30, 2017. *See* Plea Agreement (R. 395), Page ID# 1467-72. Pursuant to the terms of the Rule 11(c)(1)(C) Plea Agreement, Mr. Crumpton entered a guilty plea to both counts of the Indictment. *See* Plea Agreement (R.395); Minute Entry (R.393). The

Plea Agreement did not indicate whether the government would entertain a substantial-assistance motion or not, which is normal practice in the Western District of Tennessee in order to protect cooperating defendants from the prying eyes of wrongdoers mentioned during proffer sessions so that the Plea Agreement can still be filed in the record without it being sealed. A sealed plea agreement is generally seen by co-defendants as proof that the defendant with the sealed plea agreement is cooperating with the federal government. Therefore, in the Western District of Tennessee, the practice has developed where only the proffer agreement mentions that the government will consider making a substantial assistance motion on the defendant's behalf since the proffer agreement is generally confidential and not made a part of the record.

B. Sentencing Proceeding

Just prior to Mr. Crumpton's sentencing hearing, a new prosecutor from outside of the Western District of Tennessee arrived in Memphis to handle this case. The new prosecutor, never having met Mr. Crumpton nor participated in any of the seven proffers over the preceding two years, wished to have a proffer session with Mr. Crumpton in order to review his anticipated trial testimony against his codefendants. During this proffer, which occurred on June 7, 2018, the out-of-town prosecutor determined that Mr. Crumpton had been untruthful and had not rendered substantial assistance. On June 24, 2018, the government indicated that it would not make a

substantial-assistance motion to reduce Mr. Crumpton's sentence because it had determined that Mr. Crumpton had not been truthful and had not rendered substantial assistance to the government. (R.709, Defendant's Sentencing Memorandum at EXHIBIT A).

On July 5, 2018, the district court conducted a hearing, during which the government defended its decision not to make a substantial-assistance motion on Mr. Crumpton's behalf. Every time the district court pressed the prosecutors on this issue and asked the prosecutor to explain specifically where Mr. Crumpton had purportedly lied, the prosecutor provided virtually no detail about the alleged lies. The district court noted that the government's decision was "difficult to comprehend" absent "something very significant," given the timeline and surrounding facts. (R.935 at 33).

Mr. Crumpton disputed that he had been untruthful and argued that he had provided substantial assistance to the government. The government sought information from Mr. Crumpton via proffer eight times over the course of two years, returning after each proffer for more information. Out of concerns for his safety as a result of the information he was providing as part of his cooperation, the government arranged for Mr. Crumpton be housed in a secure location. As support for his position that the government's refusal to make the 5K1 motion was improper, Mr. Crumpton attached to his Sentencing Memorandum the FBI 302s in which the

FBI agents explained in detail all of the information that Mr. Crumpton had provided to them during the various proffers in which he had participated. *See* D.E. #709, Ex. F, pages 1 – 30. This information is very detailed until you get to the portion in which the government claims that Mr. Crumpton was untruthful. That section in its entirety provides as follows:

> [Agent's Note: At this time in the proffer, prosecutors began to go over the predicate acts in the plea agreement with CD.] CD did not do some of the acts listed in the plea agreement.]

Id. at 31. There's absolutely no detail about which acts the agents contended Mr. Crumpton did not do. Moreover, every time the district court pressed the prosecutors on this issue and asked the prosecutors to explain specifically where Defendant had purportedly lied, the prosecutors provided virtually no detail about the purported lies. Yet Mr. Crumpton, through counsel, both orally and in writing, *see* D.E. #709, Ex. D, at pgs. 1 – 5, noted the areas in which the government and the Mr. Crumpton purportedly disagreed and showed that the alleged disagreements are so miniscule that the fact that the government used these minute differences as its basis to refuse to make the substantial-assistance motion STRONGLY implicates an unconstitutional or bad faith motive for the refusal to make the substantial-assistance motion.

The district court reconvened on March 21, 2019. Ultimately, the district court denied Mr. Crumpton's request to review government's refusal to make a

substantial-assistance motion on grounds that the "the record is devoid of any unconstitutional motive. Doesn't seem to be based on race or anything like that. Assuming what the government says is true, then if they were to proceed, they would be relying on untruthful testimony or information from the government." (R. 996 at Page ID# 6159). Mr. Crumpton was sentenced to 324 months in the Bureau of Prisons as to each of the two counts, with the sentences to run concurrently. (R.904: Judgment).

At Mr. Crumpton's March 21, 2019 sentencing hearing, the district court determined that the government had total discretion whether to make the substantial-assistance motion, with few limits. (R. 996 at 8). The district court, citing *Wade*, conceded that some limitations did exist; namely, "a consideration is whether or not that decision [to make the 5K motion] is rationally related to a legitimate government interest, unconstitutional motives such as race, things of that nature." *Id.*

The district court never specifically addressed whether it had the authority to review the government's refusal to make the substantial-assistance motion for bad faith, but the Sixth Circuit explicitly stated it does not. *See* Appendix A, May 18, 2020 Opinion of the Sixth Circuit, at pgs. 2, 7-8 ("We have previously held in published opinions that judges cannot second-guess the government's refusal to file a §5K1 motion despite bad faith allegations; only an unconstitutional motive will do.").

REASONS FOR GRANTING THE PETITION

I. This Petition should be granted so that the Court may resolve the Circuit Court split regarding the appropriate level of judicial review when the government refuses to make a substantial-assistance motion on a defendant's behalf

All twelve Circuits have addressed the appropriate scope of judicial review for when the government refuses to make a substantial-assistance motion on behalf of a cooperating defendant behalf. Unfortunately, the Circuits disagree about the appropriate level of judicial review. This Circuit disagreement is based on how the lower courts interpret this Court's ruling in *Wade v. United States,* 504 U.S. 181 (1992).

A. The Minority Approach

The Fifth, Sixth, and Eleventh[1] Circuits are the most restrictive in the scope of judicial review they permit. These Circuits have interpreted this Court's decision of *Wade v. United States*, 504 U.S. 181 (1992) to limit judicial review of a prosecutor's refusal to make a substantial-assistance motion solely to unconstitutional motive such as race or religion. *See United States v. Urbani*, 967 F.2d 106 (5th Cir. 1992); *United States v. Moore*, 225 F.3d 637 (6th Cir. 2000);

[1] At least one very recent unpublished case out of the Eleventh Circuit, however, appears to endorse judicial review of failure to move for substantial assistance for not only unconstitutional motive, but also decisions that are not rationally related to a legitimate government objective. *See United States v. Bagui-Solis*, 771 Fed. Appx. 960, 963 (11th Cir. May 8, 2019). Interestingly, the *Bagui-Solis* panel also engaged in analysis of the merits of the defendant's allegations of bad faith by the government in failing to move for downward departure. *Id.* at 963-64.

United States v. Nealy, 232 F.3d 825, 831 (11th Cir. 2000); *United States v. Forney,* 9 F.3d 1492 (11th Cir. 1993). These Circuits refuse to allow courts to review if the prosecutor's decision not to make the substantial-assistance motion was based on anything other than an unconstitutional motive

B. The Majority Approach

The remaining Circuits, however, have expanded judicial review of the government's refusal to make the motion to more that just whether the refusal was based on an unconstitutional motive. Yet there is still significant disagreement about the appropriate scope of review within those Circuits. Like the minority approach, all of the Circuits that follow the majority approach permit review for unconstitutional motive.

1. Bad Faith Review

Some of the Circuits within the majority also allow for judicial review to of whether the refusal to make the substantial-assistance motion was made in bad-faith. These Circuits justify this bad-faith expansion by recognizing that a plea agreement is merely a contract and, like all contracts, includes an implied obligation of good faith and fair dealing.

In fact, the majority of federal courts in this country are permitted to hold the government to good-faith dealing when it obtains cooperation or assistance from a criminal defendant, provided that the defendant has executed a plea agreement, and

makes a threshold showing of bad faith in the government's decision making. Unfortunately, defendants like Mr. Crumpton who agree to cooperate with the government in jurisdictions that limit judicial review to an unconstitutional motive only do not have that protection and the government is not required to deal with defendants in those Circuits in good faith.

Even though the majority of the Circuits allow for bad-faith review of the government's refusal to make the motion, the Circuits disagree on when bad-faith review is permitted. The First Circuit and D.C. Circuit permit courts to engage in a bad faith of the refusal to make the motion only if the plea agreement specifically provides that the government will consider making a substantial-assistance motion on the defendant's behalf. *See United States v. Sandoval*, 204 F.3d 283, 286 (1st Cir. 2000); *United States v. Proctor*, 931 F. Supp. 897 (D.C. Cir. 1996). This approach, rooted in contract principles, requires the government to execute in good faith its contingent obligation to consider the motion. A plea agreement, like all contracts, includes an implied obligation of good faith and fair dealing. *Proctor*, 931 F. Supp. at 902. As such, the arbitrary or bad-faith actions of the government may be addressed or corrected by the district court, but the specific content of the plea agreement will control whether the court will do so.

Other Circuits that permit bad-faith review, however, do not require that the plea agreement contain a specific provision that the government will consider

making a substantial assistance motion on the defendant's behalf. For example, the Second and Third Circuit permit bad faith review even if the plea agreement does not specifically provide that the government will consider making a substantial-assistance motion on the defendant's behalf. *See United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992); *United States v. Isaac*, 141 F.3d 477 (3rd Cir. 1998).

2. Rationally Related to a Legitimate Government End Review

The Fourth Circuit has held that courts can review for an unconstitutional motive and whether the decision not to make the substantial-assistance motion was rationally related to a legitimate government end. *See United States v. Lerose*, 219 F.3d 335, 342-43 (4th Cir. 2000). The Fourth Circuit has not decided whether it will allow bad faith review of the government's refusal to make a substantial assistance motion, but several district courts within the Fourth Circuit have applied bad faith. *See, e.g.*, *Grant v. United States*, 2006 U.S. Dist. LEXIS 79611 (D.S.C., October 31, 2006) ("The decision to make a downward departure motion is within the sole discretion of the government and is not reviewable unless the government bases its decision upon bad faith or an unconstitutional factor, such as gender or religion.").

The Eighth Circuit allows for review for whether the refusal was rationally related to a legitimate government end. It also allows for bad faith review, but takes a slightly different approach to get there. The Eighth Circuit holds that when the

government makes a decision in bad faith, that decision is itself not rationally related to a legitimate government end. *See United States v. McClure*, 338 F.3d 847, 850 (8th Cir. 2003) (the district court may review the government's decision not to file a substantial assistance motion only if the defendant makes a substantial threshold showing that the decision was based on unconstitutional motive, or was not rationally related to a legitimate government objective such as being based on bad faith). Therefore, in the Eight Circuit, bad faith review becomes part of the analsyis of whether the government's refusal to make the substantial assistance motion was rationally related to a legititmate government end.

3. The Most Expansive Judicial Review

Finally, the Ninth and the Tenth Circuits permit the most expansive judicial review and allow courts to review (1) whether the refusal was based on an unconstitutional motive, (2) whether the refusal was rationally related to a legitimate government end, or (3) whether the refusal was made arbitrarily or in bad-faith. *United States v. Mikaelian,* 168 F.3d 380, 1384 (9th Cir. 1999) (acknowledging that the courts generally lack authority to review the government's failure to make the motion, but such a decision may be reviewed for unconstitutional motive, arbitrariness, or bad faith); *United States v. Duncan*, 242 F.3d 940, 947 (10th Cir. 2001) (same).

The Seventh Circuit also appears to follow this approach because it permits review of the government's refusal to make a 5K.1 motion for unconstitutional motive or actions not rationally related to a legitimate government end. *United States v. Egan*, 966 F.2d 328, 332 (7th Cir. 1992). And, on at least one occassion, the Seventh Circuit has permitted judicial review of the government's good or bad faith dealing and worded support for an implied duty of good faith and fair dealing in every contract, including contracts with the government and a criminal defendant as parties. *See United States v. Wilson*, 390 F.3d 1003, 1011-12 (7th Cir. 2004). The Seventh Circuit has even warned the government against advancing pretextual reasons for refusing to make a substantial-assistance motion and finds the use of pretextual reasons to indicate bad faith. *Id.* at 1012.

C. Even within the Sixth and Eleventh Circuits, Judges Have Questioned the Restrictive Reading of Wade

The Fifth, Sixth, and Eleventh Circuits hold that *Wade* limits the scope of judicial review of the government's refusal to make a substantial-assistance motion solely to a review of whether the decision was based on an unconstitutional motive such as race or religion. At least one Sixth Circuit panel, however, has expressly questioned the Sixth Circuit's reading of *Wade*. Additionally, Senior Judge Clark of the Eleventh Circuit issued a compelling dissent in the seminal case limiting judicial review to unconstitutional motive only. As such, the minority approach is questioned even within the minority jurisdictions.

In *United States v. Moore*, 225 F.3d 637 (6th Cir. 2000), the Sixth Circuit started developing a line of cases that stand for the proposition that *Wade v. United States,* 504 U.S. 181 (1992) held that where the government has reserved its discretion to move for a departure under U.S.S.G. § 5K1, a district court may only review the government's refusal to make the motion to determine whether the refusal is based on an unconstitutional motive. *Id.* at 1073; *see, e.g., United States v. Gates*, 461 F.3d 703, 710-11 (6th Cir. 2006). At least one panel of the Sixth Circuit has noted, however, "that this Court's interpretation of *Wade* is erroneous, or at the very least overly restrictive" and requested that [the Sixth Circuit] consider *en banc* review of this issue to correct that legal error." *United States v. Hawkins*, 274 F.3d 420, 426 – 434 (6th Cir. 2001). Although the *Hawkins* panel believed that the Sixth Circuit's interpretation of *Wade* was erroneous, or overly restrictive, it acknowledged that it had to follow that legal error because "one panel of the Sixth Circuit cannot overrule the decision of another panel" and, therefore, followed a precedent that it clearly believed was an erroneous interpretation of *Wade*. *Id.* at 428.

The *Hawkins* panel also pointed out that the Sixth Circuit panel in *United States v. Moore*, 225 F.3d 637 (6th Cir. 2000), which is the case that definitively rejected "bad faith" review and specifically limited judicial review to unconstitutional motives only, had relied on dicta from the earlier case of *United*

States v. Benjamin, 138 F.3d 1069 (6th Cir. 1998) to reach that erroneous holding. Moreover, virtually all of the cases that the panel in Mr. Crumpton's case relied on in determining that it could only review for unconstitutional motives and that a claim based on bad faith was not reviewable cited the erroneously decided *Moore* for the proposition that review of the refusal to make a substantial-assistance motion was limited to a review of unconstitutional motive only. *See United States v. Villareal*, 491 F.3d 605, 608 (6th Cir. 2007) (citing *Moore*, 225 F.3d at 641); *United States v. Gates*, 461 F.3d 703, 711 (citing *Moore*, 225 F.3d at 641); *Hawkins*, 274 F.3d at 427-28.

The *Hawkins* panel explained that *Wade* was factually distinct from the line of cases in which a defendant and the government entered into a plea agreement because *Wade* did not involve a plea agreement. *Hawkins*, 274 F.3d at 430. *Hawkins* explained that a plea agreement is a contract; therefore, a defendant may infer that an obligation of good faith exists in his dealings with the government. *Id.* at 431.

The *Hawkins* panel advocated for *en banc* review in the Sixth Circuit. The panel provided a five-page analysis of why that panel believed *en banc* review of the same issues raised in this appeal warranted *en banc* review. *See United States v. Hawkins*, 274 F.3d 420, 428 – 433 (6th Cir. 2001) (per curiam). Unfortunately, even though the Defendant in *Hawkins* submitted a Petition for *en banc* rehearing, it was never heard because the parties to *Hawkins* filed a joint motion to vacate the defendant's

sentence and remand for resentencing, which was granted, causing the defendant to withdraw his petition. *See United States of America v. Antwand Deshion Hawkins*, 6th Cir. No. 00-1337, D.E. # 63, 67, and 72.

In *United States v. Forney*, 9 F.3d 1492, 1498 (11th Cir. 1993), the Eleventh Circuit ruled on a case in which defendant Forney pled guilty pursuant to a plea agreement that provided for the possibility of a substantial-assistance motion. The plea agreement provided that the prosecutor would have sole discretion in choosing to make the motion, and that if Forney cooperated, that the government would consider filing a 5K motion. *Id.* The government made no motion. *Id*. at 1497-98. The defendant alleged breach of the plea agreement and bad faith on behalf of the government. *Id.* at 1500-01. The Eleventh Circuit opined that judicial review is appropriate only when the defendant alleges a "constitutionally impermissible motive." *Forney*, 9 F.3d at 1500, n.2.

Even the *Forney* panel majority acknowledged that it was "troubled by the government's failure to comport with a term of the plea agreement that it agreed to perform," and noted the government's "enhanced negotiating position in plea bargaining and plea agreements." *Id.* at 1503. Senior Judge Clark, dissenting, complained that the majority's approach, regardless of the extent of the defendant's cooperation, would obligate the government to do "absolutely nothing." *See id.* at 1504. Senior Judge Clark wrote that the result in the case was "inconsistent with

Supreme Court precedents governing plea agreements, with principles of contract law, and with fundamental fairness. The government promised to *consider* filing a 5K1.1 motion; it must be required to act in good faith in fulfilling this promise." *Id.* Judge Clark would have remanded the case for analysis consistent with that employed by the Second Circuit in *United States v. Knights*, 968 F.2d 1483 (2d Cir. 1992).

II. This Petition Should be Granted Because The Minority Approach Disregards Supreme Court Precedent by not Following this Court's Holding in *Santobello v. New York*.

This Court long ago opined in *Santobello v. New York*, 404 U.S. 257 (1971) that plea bargaining is an essential component of the criminal justice system. *Id.* at 260. In *Santobello,* this Court held that fairness is presupposed in an agreement between an accused and a prosecutor. *Id.* at 261.

By not allowing for bad faith review, the minority approach does not impose a duty of good faith and fair dealing in agreements that the government reaches with a defendant. Every contract imposes upon each party a duty of good faith and fair dealing in its performance, and courts should be allowed to require the government to comply with these duties just like every other party to a contract. The government should not be excused from acting in good faith and fair dealing with cooperating

defendants in part of the United States while it is required to adhere to those duties in others. Only the courts can protect cooperating defendants and ensure that they are being treated fairly, in good faith and not left to the mercy of an unscrupulous prosecutor, but in those jurisdictions that limit judicial review to an unconstitutional motive only, even the courts are not there to protect these defendants.

The minority jurisdictions all rely on *Wade* to limit judicial review to an unconstitutional motive only and finding that there is no imposed duty of good faith, but these Circuits fail to recognize that factual distinction that the defendant in *Wade* had not enter entered into a plea agreement with the government. *See Wade v. United States*, 504 U.S. 181 (1992); *United States v. Wade*, 936 F.2d 169, 170 (4th Cir. 1991). As such, there was no agreement as to a sentence recommendation or any expectations as to the outcome of any efforts to cooperate. With no agreement between the accused and the prosecutor, the *Wade* defendant was not entitled to the same contractual protections of an imposed duty of good faith and fair dealing that Mr. Crumpton should receive in this case.

Mr. Crumpton has entered into two separate agreements with the government – his June 25, 2016 Proffer Agreement, and his May 30, 2017 Plea Agreement. Both of these agreements are in writing and are contractual in nature, and both of these agreements, like all contracts, have imposed duties of good faith and fair dealing in their performance. Therefore, judicial review of the government's refusal to make

the substantial assistance motion on Mr. Crumpton's behalf should not be limited to unconstitutional motives only, but rather should also include judicial review of whether the government violated its duties of good faith and fair dealing when it refused to make the substantial-assistance motion on Mr. Crumpton's behalf.

III. This Petition should be granted in order for this Court to Establish an Appropriate Procedure For District Courts To Follow When Reviewing Whether The Government Has Engaged In Bad-Faith Dealing.

The majority jurisdictions that require the government to adhere to good-faith standards when deciding whether to file a substantial-assistance motion are faced with a procedural task. They must determine what constitutes a threshold showing of possible suspect motive, and what sort of conduct may indicate bad faith on behalf of the government. They must identify parameters of conduct outside which the government's conduct falls short of good faith dealing.

Granting this Writ will permit this Court an ideal opportunity to guide the district courts in establishing such policy.

IV. The Case is an Excellent Vehicle for Correcting the Minority Approach, which Conflicts with this Court's Holding in *Wade*

By limiting judicial review of a prosecutor's refusal to make a substantial-assistance motion to constitutional motive only, the minority approach conflicts with

this court's decision of *Wade v. United States*, 504 U.S. 181 (1992). Although in *Wade* this Court specifically held only that "federal district courts have authority to review a prosecutor's refusal to file a substantial-assistance motion and to grant a remedy if they find that the refusal was based on an unconstitutional motive," this Court stated that the defendant would be entitled to relief if the prosecutor's refusal to make the motion was not rationally related to any legitimate government end. *Id.* at 185-86. ("As the Government concedes, Wade would be entitled to relief if the prosecutor's refusal to move was not rationally related to any legitimate Government end . . . ." (citations omitted)). By acknowledging that a defendant would be entitled to relief if the prosecutor's refusal was not rationally related to any legitimate government end, this Court was instructing the lower courts that judicial review also encompasses a review for whether the prosecutor's refusal was rationally related to any legitimate government end. Therefore, by limiting judicial review of the prosecutor's refusal to unconstitutional motive only and refusing to allow for review of whether it was rationally related to any legitimate government end, the minority approach conflicts with this Court's decision in *Wade*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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Dated: October 5, 2020