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No.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2020

CHRISTOPHER WILLIAMS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

_____

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

_____

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

Rebecca L. Kurz
Assistant Federal Public Defender
1000 Walnut, Suite 600
Kansas City, Missouri 64106
(816) 471-8282
Attorney for Petitioner

QUESTIONS PRESENTED

I. Are sequential drug transactions over a short time frame "committed on occasions different from one another" for purposes of the Armed Career Criminal Act where the same undercover law enforcement officer repeatedly bought personal use amounts of a controlled substance from a suspect?

II. In the absence of an appeal waiver as part of a plea agreement, does a prosecutor's increased sentencing recommendation and a district court's imposition of a longer sentence following a defendant's attempt to preserve objections to a presentence investigation report amount to prosecutorial or judicial vindictiveness, or are the more onerous recommendation and sentence legitimate responses to the defendant's purported failure to accept responsibility for his offense?

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Petitioner, Christopher Williams, respectfully requests this Court to issue a writ of certiorari to review the opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on September 30, 2020, affirming the district court's judgment.

OPINION BELOW

The Eighth Circuit's opinion affirming the judgment of the district court is reported at 976 F.3d 781 (8th Cir. 2020), and is included in Appendix A. A copy of the order denying Mr. Williams' petition for rehearing *en banc* is included in Appendix B.

JURISDICTION

The decision of the Court of Appeals affirming the district court's judgment and sentence was entered on September 30, 2020. After being granted an extension of time, Petitioner filed a timely petition for rehearing on October 20, 2020. The Court of Appeals denied rehearing on

November 17, 2020. Normally, in accordance with Supreme Court Rule 13.3, a petition for writ of certiorari must be filed within ninety days of the date on which the Court of Appeals entered its final order affirming the district court sentence. Pursuant to this Court's Order dated March 19, 2020, however, due to the COVID-19 pandemic, the deadline to file any petition for writ of certiorari due after the date of the order was extended to 150 days from the date of the order denying a timely petition for rehearing. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1) and Sup. Ct. R. 13.3.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

The Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), provides:

> In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under 922(g).

The Fifth Amendment to the United States Constitution states, in pertinent part: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

STATEMENT OF THE CASE

A. Original Jurisdiction

Jurisdiction in the United States District Court for the Western District of Missouri was pursuant to 18 U.S.C. § 3231, because Williams was charged and convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g)(1) and 924 (a)(2).

Williams appealed the sentence to the United States Court of Appeals for the Eighth Circuit. Jurisdiction in that court was established by 28 U.S.C. § 1291.

B. Facts and Proceedings Below

Williams was arrested pursuant to a warrant and, during a search incident to that arrest, was found to possess controlled substances (DCD 30, Presentence Investigation Report [PSR] at p. 3, ¶¶ 3-4). During a consensual search of his home, officers found a firearm. *Id*. at ¶ 5. Williams was indicted on one count of unlawful possession of a firearm having previously been convicted of a felony, in violation of 18 U.S.C. § 922(g)(1) (DCD 1, Indictment at 1). On November 20, 2018, Williams pled guilty to the offense (DCD 48, Plea Tr. at 15).

The United States Probation Office prepared a PSR that recommended an offense level of 33, pursuant to U.S.S.G. § 4B1.4(b)(3)(B) (DCD 30, PSR at ¶ 19).[1] According to the PSR, Williams had at least three prior convictions for serious drug offenses committed on different occasions and, therefore, qualified for sentencing under the ACCA (DCD 30, PSR at ¶ 19). In the Circuit Court of Jackson County, Missouri, case number 16CR96000142, Williams was convicted in 1999 of distribution of a controlled substance (DCD 30, PSR at ¶ 26). In the Circuit Court of Jackson County, Missouri, case number 16CR00007020-01, Williams was convicted in 2002 of three counts of sale of a controlled substance (DCD 30, PSR at ¶ 28). Regarding the latter case, the PSR stated that Williams sold personal use amounts of cocaine to the same undercover detective on three separate dates during a single week:

> Court records indicate that on July 25, 2000, the defendant sold approximately .7 gram of a substance containing cocaine to a detective and a CI for $40 of pre-recorded buy money. On July 27, 2000, the same detective purchased an additional .4 gram of a substance containing cocaine from the defendant for $40 of pre-recorded buy money. On August 1, 2000, the detective made contact with the defendant, who was standing next to Donnell Adams. During this contact, the detective purchased

[1] The Chapter Four Enhancement overrode the adjusted base offense level calculated pursuant to U.S.S.G. § 2K2.1, which included a four-level enhancement pursuant to § 2K2.1(b)(6)(B), for possessing a firearm in connection with another felony offense.

> approximately .4 gram of a substance containing cocaine from the defendant for $40 of pre-recorded buy money.

(DCD 30, PSR at ¶ 28).

Defense counsel objected to the PSR's conclusion that Williams was an armed career criminal and to a four-level enhancement, which was applied because Williams possessed the firearm in connection with another felony offense (DCD 30, PSR Addendum at p. 19). With respect to Williams' purported ACCA status, defense counsel wrote:

> The defendant challenges that the three sales were committed on different occasions. It was an ongoing business of dealing drugs and was resolved all at the same time because of that fact. He would argue that because they were resolved the same day they constitute one continuous occasion and therefore he would only have two controlled substance convictions that count. He challenges the fact that he is being categorized as an armed career criminal.

(DCD 30, PSR Addendum at p. 19).

After entering a guilty plea, Williams filed a *pro se* motion asking that he be allowed to represent himself at sentencing (DCD 33, Mot. Proceed *Pro Se* at 1). Williams wanted to represent himself because he mistakenly thought that counsel had failed to properly object to the sentencing enhancements by not filing the objections with the court (DCD 33, Mot. Proceed *Pro Se* at 2). He reiterated counsel's objections in a *pro se* memorandum challenging the four-level enhancement for possessing the firearm in connection with another felony offense (DCD 42, *Pro Se* Memorandum at 5).[2] He also argued that his base offense level was not 33, because his prior drug-related convictions were not violent felonies or serious drug offenses (DCD 42, *Pro Se* Memorandum at 7-8). The court denied the motion to proceed *pro se* without a hearing and

[2] The motion to proceed *pro se* at sentencing referred to the memorandum of law, however the memorandum was not actually filed until the day of sentencing, June 4, 2019 (DCD 33, Motion Proceed *Pro Se* at 1; DCD 42, *Pro Se* Memorandum).

without issuing a written order (DCD 34, text only docket entry).

Before the sentencing hearing, the government filed a sentencing memorandum in which it recommended a sentence of 180 months' imprisonment:

> a 180-month sentence accounts for the seriousness of the offense and the defendant's history and characteristics, and also promotes respect for the law, provides for just punishment, and deters future misconduct. In other words, such a sentence will adequately address the factors set forth in 18 U.S.C. § 3553(a).

(DCD 35, Gov't. Sent. Memo. at 1, 7-8).

On June 4, 2019, Williams appeared for sentencing (DCD 49, Sent. Tr. at 1). At the outset of the hearing, defense counsel informed the court that Williams wanted to renew his motion to proceed *pro se* (DCD 49, Sent. Tr. at 3). The court denied the motion (DCD 49, Sent. Tr. at 3-4). Defense counsel argued the objections she had raised regarding to the sentencing enhancement for possessing the firearm in connection with another felony offense and Williams' ACCA status (DCD 49, Sent. Tr. at 4-5, 7-8). The court overruled both objections ((DCD 49, Sent. Tr. at 7, 9).

The government recommended a 15-year sentence, noting it was the "lowest sentence available" and was "a long sentence for this offense" (DCD 49, Sent. Tr. at 10-11). The prosecutor said that Williams' criminal history justified a 15-year sentence but expressed no opinion that Williams' prior convictions called for a sentence higher than the mandatory minimum sentence (DCD 49, Sent. Tr. at 11). The court afforded Williams an opportunity to speak, and Williams renewed his request to represent himself, arguing that counsel refused to raise his PSR objections regarding application of "the career offender sentencing guideline" and "the four-level enhancement" (DCD 49, Sent. Tr. at 12-13).

The government proposed that the court have a hearing to determine whether Williams

could represent himself and hear his allegations about defense counsel (DCD 49, Sent. Tr. at 14). Counsel for the government said, "I think the record should reflect the defendant appears to clearly be making a record for appeal, which he may certainly be entitled to do, but at this point the Government would like to call timeout, reconsider its sentencing recommendation, and let the record be as fulsome as possible" (DCD 49, Sent. Tr. at 14).

The court told Williams that the government had recommended the lowest end of the guideline range, which the court viewed as a generous offer (DCD 49, Sent. Tr. at 14). The court said, "[t]he government's saying, listen, if Mr. Williams wants to play some games here, maybe we should go ahead and exhaust this and chase these rabbits, and their recommendation may be different" (DCD 49, Sent. Tr. at 14-15). The court observed that counsel had raised Williams' objections in a lawyerly fashion as opposed to "this jailhouse lawyer, whoever's helping him" (DCD 49, Sent. Tr. at 15).

Defense counsel asked the court to proceed with the sentencing hearing, noting that 15 years was a long time for a 45-year-old man such as Williams and that Williams was driven not by reason, but by fear and the money he paid to get the "legal expertise" of the jailhouse lawyer (DCD 49, Sent. Tr. at 14-15). In response to counsel's comment that 15 years was a long time, the court said, "Life's a little different" (DCD 49, Sent. Tr. at 16). Counsel agreed that a life sentence would "be a whole lot longer," but asked the court to be reasonable (DCD 49, Sent. Tr. at 16).

The court confirmed that the government was withdrawing its sentencing recommendation:

> THE COURT: No, I think – I'll be honest with you. I think maybe we should continue this. And you're going to withdraw your recommendation at this time, is that right, Mr. Raskin?

> MR. RASKIN: That's correct.
>
> THE COURT: So there you go, Mr. Williams. We're going to play your game with you. They've just withdrawn their recommendation. I've made all the rulings about the law, so we're not going to revisit those rulings, but we will set this for a hearing about you proceeding *pro se*.

(DCD 49, Sent. Tr. at 16).

The court then questioned Williams to determine whether he was making a voluntary and intelligent decision to represent himself (DCD 49, Sent. Tr. at 16-22). At the end of the colloquy, Williams said that he did *not* want to represent himself, indicating that since he made his objections on the record, he could raise them in an appeal (DCD 49, Sent. Tr. at 22). Defense counsel explained to the court that there was an inmate in the facility where Williams was confined who told defendants that if their objections were not "on file" they could not be raised on appeal (DCD 49, Sent. Tr. at 22-23). Counsel said that Williams was only concerned about his ability to appeal (DCD 49, Sent. Tr. at 22).

Based on Williams' comments about an appeal, the government increased its sentencing recommendation from 15 to 16 years imprisonment:

> The government is going to rethink and make a new recommendation based on the defendant's comments regarding his appeal and his confidence in the success of that appeal. The government feels that that reflects on the genuineness of his acceptance of responsibility in this case, and based on that, we're going to recommend a higher sentence than we recommended before, 16 years instead of 15 years, which would, I guess, be 192 months.

(DCD 49, Sent. Tr. at 24).[3]

Defense counsel asked the court to impose a sentence of 180 months, saying that "the 20

[3] Williams still received a three-level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b) (DCD 30, PSR at ¶¶ 20-21).

minutes that it took him to come to the realization that his appeal would be preserved" should not "cost him another year in prison" (DCD 49, Sent. Tr. at 26). Williams informed the court that he was merely trying to preserve his right to appeal:

> I never attempted to misconstrue the Court in any type of way or anything like that. I was just merely trying to state the fact that I figured that my Rule 32 had to be presented a certain way. And I actually found out that it got presented whether I said it that way or not, and I never intended to harm the Court in any type of way whatsoever, nor tried to manipulate it.

(DCD 49, Sent. Tr. at 27).

The court reviewed the statutory factors it had considered, emphasizing that Williams had eight prior felony convictions and a lifetime of using and selling drugs (DCD 49, Sent. Tr. at 27). The court said it did not understand why Williams listened to the "jailbirds" and "misguided people in CCA," rather than his lawyer (DCD 49, Sent. Tr. at 27-28). The court sentenced Williams to 190 months' imprisonment and five years of supervised release (DCD 49, Sent. Tr. at 28). The court recommended that Williams be admitted to a drug treatment program in the Bureau of Prisons saying, "I think it will work if you'll listen to the people teaching the course, not to the jailbirds who are giving you advice about it" (DCD 49, Sent. Tr. at 29).

Williams filed a timely notice of appeal on June 19, 2019 (DCD 46, NOA at 1). Williams argued that the prosecutor and the district court violated his Fifth Amendment right to due process of law when the prosecuting attorney vindictively increased his sentencing recommendation and the court imposed a sentence of 190 months' imprisonment based on Williams' efforts to proceed *pro se* and preserve his PSR objections for appeal. The Court of Appeals reviewed for plain error, finding that Williams had not claimed in the district court that the government's sentencing recommendation and the district court's sentence were vindictive, denying him due process. *United States v. Williams*, 976 F.3d 781, 784 (8th Cir. 2020).

The Court of Appeals acknowledged that the government had increased its recommended sentence after Williams made his objections but noted that "the government also said his acts reflected on his acceptance of responsibility. *Id.* The court referred to note 3 of the commentary to U.S.S.G. § 3E1.1, which says that evidence of acceptance of responsibility may be outweighed by conduct of the defendant that is inconsistent with acceptance of responsibility. *Id*. The court concluded, "Revising a sentencing recommendation for a legitimate reason during a sentencing hearing is not prosecutorial vindictiveness." *Id*., citing *United States v. Campbell*, 410 F.3d 456, 462 (8th Cir. 2005) (finding no prosecutorial vindictiveness if the prosecutor's decision is based on some objective reason other than to punish the defendant for exercising his legal rights).

Regarding Williams' claim of judicial vindictiveness, the court said a presumption of vindictiveness only applies when a judge has a personal stake in prior proceedings and imposes, without explanation, a higher sentence after a retrial. *Id*. at 785. "The Supreme Court makes clear that the presumption was not designed to prevent a higher sentence 'for some valid reason associated with the need for flexibility and discretion in the sentencing process,' but was 'premised on the apparent need to guard against vindictiveness in the resentencing process.'" *Id*., citing *Chaffin v. Stynchcombe*, 412 U.S. 17, 25 (1973). With respect to actual vindictiveness, the court said that it had never held an initial sentence to be vindictive. *Id*. at 786. The court cited *United States v. Anderson*, 440 F.3d 1013, 1016 (8th Cir. 2006), referring again to the idea that the motive to be vindictive arises when a judge with a personal stake in a prior proceeding is asked to do over what he or she believes was done correctly in the prior proceeding. *Id*. The court concluded that Williams could not meet the plain error standard, because he could not show that his substantial rights were affected. *Id*.

ARGUMENT

I. Williams' ACCA sentence may not be lawful depending on this Court's decision in *Wooden v. United States,* No. 20-5279.

Undercover law enforcement officers sometimes purchase multiple user amounts of a controlled substance from a suspect during a short time period. The practice has been referred to as "sentencing entrapment" because multiple successive buys increase the amount of drugs sold, which drives the defendant's sentence higher. *See e.g.*, *United States v. Barth*, 990 F.2d 422, 424 (8th Cir. 1993); *United States v. Connell*, 960 F.2d 191, 194 (1st Cir. 1992) (rejecting the term "sentencing entrapment" and characterizing the practice as "sentencing factor manipulation"). This practice can have a tremendous impact on a defendant's sentence when used in conjunction with the ACCA, which provides for a mandatory minimum sentence of fifteen years if a defendant has three previous convictions for a violent felony or serious drug offense, or both, "committed on occasions different from one another." 18 U.S.C. § 924(e)(1).

On February 22, 2021, after the Eighth Circuit issued its opinion affirming Williams' sentence and denied rehearing *en banc*, this Court granted certiorari in *Wooden v. United States*, No. 20-5279. In *Wooden* the question presented is whether offenses that were committed as part of a single criminal spree, but sequentially in time, were "committed on occasions different from one another" for purposes of a sentencing enhancement under the ACCA. Presumably, this Court will consider various factors, such as "temporal distinctness," that lower courts should consider in determining whether crimes were committed on different occasions. See, *Wooden v. United States*, No. 20-5279 (January 6, 2021) (Reply Brief of the Petitioner at p. 2).

Wooden had ten burglary convictions that arose out of a single occurrence when he sequentially broke into ten storage units at a storage facility in one evening. *United States v.*

Wooden, 945 F.3d 498, 505 (6th Cir. 2019). The district court treated each burglary as an ACCA predicate concluding that they were "committed on occasions different from one another" and sentenced him to fifteen years imprisonment. *Id*. at 501. The Sixth Circuit affirmed. *Id*. at 506.

Here, Williams was convicted in a single case of three counts of sale of a controlled substance, and each count was treated as a separate serious drug offense under the ACCA (DCD 30, PSR at p. 5, ¶¶ 19, 28). The three sales occurred on separate dates—July 25, 2000, July 27, 2000, and August 1, 2000—but involved the same undercover detective and small, user amounts of cocaine. *Id*. at ¶ 28. The individual counts were charged in a single charging document and were adjudicated on the same date. *Id*. Depending on the scope of the *Wooden* decision, *Wooden* could potentially reduce Williams' sentence from 190 months imprisonment, to 120 months or less, if his convictions were not "committed on occasions different from one another."

As noted in the petitioner's reply brief in *Wooden*, the circuits are divided on how to apply the "different occasion" provision. *Wooden*, No. 20-5279, (Reply at p. 6-9). Some circuits "apply the enhancement whenever crimes are committed *at different times*" while other circuits "do not treat temporal separateness as sufficient, but instead apply the enhancement only when crimes are committed under different circumstances or pursuant to different opportunities." *Id*. at 6-7; comparing *United States v. Carter*, 969 F.3d 1239, 1243 (11th Cir. 2020); *United States v. Schoolcraft*, 879 F.2d 64, 73 (3d Cir. 1989); *United States v. Fuller*, 453 F.3d 274, 278 (5th Cir. 2006; *United States v. Morris*, 821 F.3d 877, 880 (7th Cir. 2016); *United States v. Abbott*, 794 F.3d 896, 898 (8th Cir. 2015); *United States v. Johnson*, 130 F.3d 1420, 1431 (10th Cir. 1997); *United States v. Thomas*, 572 F.3d 945, 951 (D.C. Cir. 2009); with *United States v. Bordeaux*, 886 F.3d 189, 196 (2d Cir. 2018); *United States v. Stearns*, 387 F.3d 104, 108 (1st Cir. 2004); *United States v. Tucker*, 603 F.3d 260, 263 (4th Cir. 2010); *United States v. McElyea*, 158 F.3d

1016, 1021 (9th Cir. 1998).

If temporal distinctness alone overrides all other potential considerations in determining the "different occasions" question, Williams was properly sentenced under the ACCA because his drug transactions were committed on different dates. But if a "different occasions" analysis properly includes other considerations, as argued in *Wooden*, Williams' ACCA sentence is questionable. This Court should grant certiorari to consider whether the government's conduct is a relevant factor to consider in "different occasions" analysis.

Drug trafficking offenses present unique considerations for ACCA application. A defendant who makes three drug sales to the same undercover officer during a short time frame hardly seems to be the "career criminal" that ACCA is designed to punish more harshly. If temporal distinctness alone is the overriding factor, an undercover officer who targets a suspect can make three buys separated by an hour or so in a single day, and thereby make a "career" offender subject to a mandatory minimum sentence of 15 years. Taking an approach similar to that in the Guidelines Manual and considering additional factors—whether the buys were separated by an intervening arrest, whether the offenses were charged in the same charging instrument, and whether the sentences were imposed on the same day—would focus ACCA on the career criminals it was designed to reach. See, U.S.S.G. § 4A1.2(a)(2) (using these factors to determine whether multiple prior sentences should be treated as a single sentence for purposes of computing criminal history).

Considering the issues surrounding the use of multiple drug transactions as ACCA predicates at the same time this Court decides *Wooden* promotes judicial efficiency and will provide needed guidance to the lower courts in resolving the circuit split identified by the petitioner in that case. It would also promote evenhanded justice for those defendants with

similar issues whose direct appeals are not yet final.

In *Griffith v. Kentucky*, this Court said, the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. 314, 322 (1987). Once this Court has decided a new rule in a specific case, "the integrity of judicial review" requires that the new rule apply to all similar cases pending on direct review." *Id*. The Court obviously cannot hear all pending cases and apply the new rule, but the Court fulfills its "judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." *Id*. at 323. Selective application of a new rule would violate the "principle of treating similarly situated defendants the same." *Id*. The Court held, therefore, "that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id*. at 328.

When *Griffith* referred to cases not yet "final," it was referring to a case "in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Id*. at 321, n. 6. Thus, Williams' case is not yet final and will not be final unless and until this Court denies his petition. If this Court grants Williams' petition for certiorari or holds his petition until deciding *Wooden*, he will receive the benefit of any new rule, and the principles of constitutional adjudication espoused in *Griffith* will be served.

II. Prosecutorial and Judicial Vindictiveness

In the United States District Court for the Western District of Missouri, objections to PSRs are not filed with the court. The objections are submitted to the United States Probation Officer who includes and responds to the objections in an addendum to the PSR. Williams, an indigent

criminal defendant with no training in the law, did not understand this process. He mistakenly thought that his attorney had not filed objections to the PSR, so he attempted to make a record of his objections and preserve them for appeal.

Before Williams embarked on this endeavor, the prosecuting attorney had recommended a sentence of 180 months imprisonment, the minimum possible sentence if Williams was sentenced under the ACCA. As a result of Williams' mistake, the prosecuting attorney increased his recommendation to 192 months, insisting that Williams' intent to appeal from his sentence meant that he had not truly accepted responsibility for the offense. The district court, believing that Williams was playing games with the court and "chasing rabbits" sentenced him to 190 months' imprisonment. Williams contends that his right to due process of law was violated because he was punished more harshly for doing that which the law plainly allows him to do—object to sentencing enhancements and, should those objections be denied, appeal to a higher court.

A. The prosecuting attorney's increased sentencing recommendation was retaliation for Williams' objections to sentencing enhancements and his intent to appeal if his objections were denied.

This Court should exercise its discretion to review the Eighth Circuit's decision because it "has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Supreme Court Rule 10(a). The Eighth Circuit's decision permits prosecuting attorneys to increase their sentencing recommendations merely because a defendant objects to the application of sentencing enhancements and intends to appeal from unfavorable rulings on those objections. Here, the prosecutor increased his sentencing recommendation "based on [Williams'] comments

regarding his appeal and his confidence in the success of that appeal" because they reflected "on the genuineness of his acceptance of responsibility" (DCD 49, Sent. Tr. at 24).

Although Williams' comments reflected an intent to appeal his sentence, he said nothing about challenging the validity of his guilty plea. Nor did he make any comments implying that he was not guilty or not responsible for his conduct. Nothing he said reflected negatively on his acceptance of responsibility and no reasonable person would have interpreted his comments in that way. By sanctioning the prosecutor's rationale as a "legitimate reason" for an increased sentencing recommendation, the Court of Appeals endorsed increasing Williams' punishment for doing what the law plainly allows him to do—exercising his right to appeal his sentence. *Williams*, 976 F.3d at 784. While the Court of Appeals said by citation to *Campbell* that prosecutorial vindictiveness does not occur "if the prosecutor's decision is based on some objective reason other than to punish the defendant for exercising his legal rights," the Eighth Circuit panel opinion never identified an objective reason other than increased punishment for exercising his right to make objections and appeal. *Id*.

Federal criminal defendants have a statutory right to appeal their sentences. 18 U.S.C. § 3742(a); 28 U.S.C. § 1291; *Abney v. United States*, 431 U.S. 651, 656 (1977). The statutory right to appeal can be waived, and often is, as part of a plea agreement. But Williams did not waive his right to appeal. In the absence of an appeal waiver, Williams had a right to appeal his sentence and to make any objections needed to preserve his claims. This Court has long recognized that a person cannot be punished for doing what the law plainly allows him to do. *United States v. Goodwin*, 457 U.S. 368, 372 (1982), citing *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978).

In *North Carolina v. Pearce*, the Court examined whether a defendant could be punished

more harshly on retrial for having asserted his right to appeal and obtained a reversal of his original conviction. 395 U.S. 711, 723-25 (1969). The Court held that due process of law required that vindictiveness play no part in the sentence a defendant receives after a new trial. *Id*. at 725. The Court further held that because the fear of vindictiveness might unconstitutionally deter a defendant from asserting his right to appeal or collaterally attack his conviction, "due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." *Id*.

The same is true when a prosecutor, rather than a sentencing judge, poses a realistic likelihood of vindictiveness. *Blackledge v. Perry*, 417 U.S. 21, 27-28 (1974). Prosecutors have "a considerable stake" in discouraging appeals which "clearly require increased expenditures of prosecutorial resources before the defendant's conviction becomes final." *Id*. at 27. A prosecutor need not act in bad faith or maliciously for the Due Process Clause to be violated. *Id*. at 28. In *Blackledge*, the Court said a defendant is entitled to pursue his statutory right to appeal "without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration." *Id*. The same reasoning applies here. Williams was entitled to object to the application of the sentencing enhancements sought by the government without fear that the prosecutor would retaliate by seeking a longer sentence.

B. The district court's actions require a presumption that the court vindictively sentenced Williams to 190 months' imprisonment, rather than imposing the 180-month term initially recommended by the government.

The district court did not explicitly state that it was imposing an additional ten months' imprisonment because Williams had asked to represent himself and made his own sentencing

objections to preserve them for appeal. But the district court expressed annoyance with Williams and its comments indicate actual vindictive motive, or, at a minimum, a reasonable likelihood of a vindictive motive. The court indicated twice its belief that Williams was playing games and chasing rabbits (DCD 49, Sent. Tr. at 14-16).

By the time the court imposed its sentence, it was clear that Williams had received bad advice from another inmate who led Williams to believe that he had to file what he referred to as his Rule 32 motion and that is why Williams wanted to represent himself (DCD 49, Sent. Tr. at 22, 26). Williams told the court that he intended no harm, but believed "that my Rule 32 had to be presented a certain way" and then learned "that it got presented whether I said it that way or not" (DCD 49, Sent. Tr. at 27).

The objections Williams was attempting to preserve were not frivolous and the court admitted as much. The court, speaking to defense counsel, said, "he's not listening to you Ms. Holloman-Hughes, because he's arguing that you didn't make certain arguments that you already made, which I thought were good arguments, and you did them in a legal way versus this jailhouse lawyer, whoever's helping him" (DCD 49, Sent. Tr. at 15). After Williams tried to articulate his arguments, the court said, "She just argued that. Were you listening to anything she just said, Mr. Williams?" (DCD 49, Sent. Tr. at 20). Thus, Williams' objections were not frivolous in the judge's mind, but merely duplicative of defense counsel's and thus unnecessary.

In *Pearce*, this Court said to assure the absence of a retaliatory motivation on the part of a sentencing judge, "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." 395 U.S. at 726. The Court continued:

> Those reasons must be based on objective information concerning identifiable conduct on the part of the defendant occurring after the

> time of the original sentencing proceeding. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id.

A presumption of vindictiveness does not apply, however, where "there are enough justifications for a heavier second sentence that it cannot be said to be more likely than not that a judge who imposes one is motivated by vindictiveness." *Alabama v. Smith*, 490 U.S. 794, 802 (1989). In *Smith*, the defendant successfully challenged a guilty plea to burglary and rape for which he had been sentenced to concurrent terms of thirty years imprisonment. *Id*. at 796. After his convictions were vacated, the defendant was tried before the same judge on charges of burglary, rape, and sodomy, a charge that had been dismissed in exchange for his guilty plea. *Id*. The jury found the defendant guilty on all counts and the judge imposed two concurrent terms of life imprisonment on the burglary and sodomy convictions and a consecutive term of 150 years' imprisonment on the rape conviction. *Id*. The judge explained the harsher sentence, saying he learned new information during the trial, including that the victim had been raped multiple times and threatened with a knife. *Id*. Given this new information, there was no reasonable likelihood of actual vindictiveness on the part of the sentencing judge and, therefore, the burden remained on the defendant to prove actual vindictiveness. *Id*. at 799.

Here, the Eighth Circuit concluded that a presumption of judicial vindictiveness "does not apply if the judge has no personal stake in prior proceedings." *Williams*, 976 F.3d at 785. The court said, "the presumption was not designed to prevent a higher sentence 'for some valid reason associated with the need for flexibility and discretion in the sentencing process,' but was 'premised on the apparent need to guard against vindictiveness in the resentencing process." *Id*., citing *Chaffin and Stynchcombe*, 412 U.S. 17, 25 (1973). The court believed the sentence of 190

months' imprisonment, ten months above the prosecutor's initial recommendation of 180 months, was based on the sentencing factors in 18 U.S.C. § 3553(a), noting that the district court judge had referred to Williams' eight prior felony convictions and noted that Williams had unlawfully possessed the firearm for three years. *Id*. at 786. The court also observed that it had never held an initial sentence to be vindictive. *Id*.

The court's approach to claims of judicial vindictiveness is too cramped. Vindictiveness can occur in an initial proceeding as well as on retrial. Williams' 190-month sentence could be based solely on the court's assessment of the § 3553(a) sentencing factors. But it could also be based on the court's belief that Williams, by making objections, was playing games, and chasing rabbits (DCD 49, Sent. Tr. at 14-15). That is why a presumption of vindictiveness should apply. The record could be interpreted two different ways. In one instance, the district court may have sentenced Williams only on permissible sentencing factors. In the other instance, the sentence may have been based in part on the district court's displeasure with Williams' objections. Because vindictiveness can play no role in sentencing, and a defendant cannot be punished for doing what the law plainly allows him to do, the presumption should be applied. Only the district court judge can know whether he would have sentenced Williams to 180 months, in accordance with the prosecutor's recommendation, if Williams had not raised his objections to preserve them for appeal. Defense counsel argued that Williams should not be punished more harshly for his misunderstanding, but the court never disavowed an intent to impose a sentence longer than it would have had Williams not objected.

C. This Court should exercise its supervisory authority and grant certiorari because the appellate court's opinion puts all federal criminal defendants in the Eighth Circuit at risk of vindictive sentencing practices.

This Court should exercise its supervisory authority and grant certiorari. The Eighth Circuit's decision permits prosecutors to threaten defendants with higher sentencing recommendations if they object to sentencing enhancements and intend to appeal if their objections are denied. Granting certiorari in this case does not serve only as a means of error correction for Williams but protects all defendants in federal criminal proceedings. If the mere objection to a sentencing enhancement and an intent to appeal serve as a "legitimate reason" for increasing a prosecutor's sentencing recommendation, then all federal defendants in the Eighth Circuit are at risk of vindictive retaliation.

"This Court is charged with supervisory functions over the proceedings of the federal courts" to ensure "[t]he untainted administration of justice." *Mesarosh v. United States*, 352 U.S. 1, 14 (1956); *Nguyen v. United States*, 539 U.S. 69, 81 (2003) (exercising supervisory power to vacate appellate court judgment where panel included an Article IV territorial-court judge in violation of statute allowing only "district judges" to sit on court of appeals when business so required, because the error involved a statutory provision that "embodie[d] a strong policy concerning the proper administration of judicial business").

D. Williams did not forfeit his claim but even if plain error review is required, that is no reason to deny certiorari or sentencing relief.

The Eighth Circuit treated Williams' claims of prosecutorial and judicial vindictiveness as forfeited saying that Williams failed to raise the issue before the district court. Defense counsel did not object to the government's modification of its sentencing recommendation by explicitly uttering the words "prosecutorial vindictiveness," but counsel did argue that Williams' failure to realize that counsel's objections adequately protected his ability to appeal should not "cost him another year in prison" (DCD 49, Sent. Tr. at 26). Counsel's statement adequately

apprised the court that the defense's position was that Williams' sentence should not be increased for doing what the law allows him to do. Williams did not forfeit his claim.

But even if the claim is forfeited and may be reviewed only for plain error, Williams meets that standard. A defendant must meet three conditions before a court may exercise its discretion to correct an error: 1) there must be an error that was not intentionally relinquished or abandoned; 2) the error must be plain, or obvious; and 3) the error must have affected the defendant's substantial rights, meaning a reasonable probability exists that, but for the error, the outcome of the proceeding would have been different. *United States v. Olano*, 507 U.S. 725, 732-34 (1993).

Here, the error was plain, or obvious, because the government stated its vindictive motive on the record. The government made it clear that it increased its recommendation because Williams intended to appeal. Williams has met his burden by proving "through objective evidence that the prosecutor's decision was intended to punish him . . . for the exercise of a legal right." *United States v. Graham*, 323 F.3d at 603, 607 (8th Cir. 2003). The district court's comments sanctioned the prosecutor's increased sentencing recommendation.

The error affected Williams' substantial rights, because there is a reasonable probability that but for the error, Williams would have received a more favorable sentence. See, *United States v. Dominguez-Benitez*, 542 U.S. 74, 81-82 (2004) (to establish that an error affected a substantial right a defendant must show a reasonable probability that, but for the claimed error, the result would have been different). The court's sentence was not based solely on the sentencing factors in 18 U.S.C. § 3553. In pronouncing its sentence, the court chastised Williams for listening to "jailbirds," rather than his lawyer, saying that "it really hurts your case most of the time" (DCD 49, Sent. Tr. at 28).

Furthermore, a prosecutor's recommendation, even a non-binding one, is not without effect on the sentence ultimately imposed. Research has shown that judicially imposed sentences are anchored by prosecutors' sentencing recommendations. Stein, C. and Drouin, *Cognitive Bias in the Courtroom: Combating the Anchoring Effect through Tactical Debiasing,* 52 U.S.F.L. Rev. 393, 400, 420 (2018); Bennett, M., *Confronting Cognitive 'Anchoring Effect' and 'Blind Spot' Biases in Federal Sentencing: A Modest Solution for Reforming a Fundamental Flaw,* 104 J. Crim. L. & Criminology 489, 504-05 (2014). The district court's sentence reflects this anchoring effect. After Williams objected, the government increased its sentencing recommendation from 180 to 192 months, the defense asked for 180 months, and the court settled on a sentence of 190 months, which is closer to the government's revised recommendation (DCD 49, Sent. Tr. at 24, 26, 28). Any amount of additional prison time imposed is "significant" and has "exceptionally severe consequences for the incarcerated individual." *Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1907 (2018).

Finally, this Court should exercise its discretion to correct the error, because the error seriously affects the fairness, integrity or public reputation of judicial proceedings. Williams made a mistake that cost him an additional ten months in prison. He did not understand that the objections made by defense counsel were adequate to preserve his claims regarding the application of the sentencing enhancements for appeal (DCD 49, Sent. Tr. at 22-23). Increasing a defendant's punishment for not understanding the intricacies of issue preservation, undermines the fairness, integrity and public reputation of judicial proceedings. A criminal defendant should not be punished more severely just because he was misinformed by a prisoner holding himself out to be a "jailhouse lawyer."

Our criminal justice system is designed to be adversarial. It is premised on both the

government and the defense zealously advocating their respective positions. A citizen may not be able to recite all of the protections provided by the Bill of Rights, but every American knows and expects that if accused of a crime, he will "have his day in court" to admit or defend against the accusation, object to the government's attempt to deprive him of his liberty, and if an error is made, he may take his case to a higher court. For a prosecutor to withdraw a favorable sentencing recommendation when a defendant objects to a longer deprivation of his liberty with the intent to appeal if need be, the public perception of the justice system as one that is fair and just is undermined. Even if the sentence imposed is deemed reasonable, the perception that the prosecutor vindictively sought a higher sentence because the defendant objected to sentencing enhancements with an intent to appeal undermines the public's confidence in the justice system. *Rosales-Mireles*, 138 S.Ct. at 1910 ("Likewise, regardless of its ultimate reasonableness, a sentence that lacks reliability because of unjust procedures may well undermine public perception of the proceedings").

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Williams respectfully requests that the Court grant his petition for certiorari. In the alternative, he asks that the Court hold his petition for certiorari pending this Court's decision in *Wooden v. United States*, No. 20-5279. If this Court rules in Wooden's favor, Williams prays that this Court grant this petition, vacate the judgment, and remand to the United States Court of Appeals for the Eighth Circuit for further consideration in light of *Wooden*.

Respectfully submitted,

LAINE CARDARELLA
Federal Public Defender
Western District of Missouri

s/Rebecca L. Kurz
Rebecca L. Kurz
Assistant Federal Public Defender
Western District of Missouri
1000 Walnut, Suite 600
Kansas City, Missouri 64106
Becky_Kurz@fd.org
(816) 471-8282

APPENDIX

Appendix A – Judgment of the Eighth Circuit Court of Appeals

Appendix B – Order denying rehearing by the Eighth Circuit Court of Appeals