

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OF AMERICA

MICHAEL ALLEN LONG
Petitioner-Defendant

v.

UNITED STATES OF AMERICA
Respondent

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit.
Fifth Circuit Case No. 21-60703

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Fifth Circuit erred by finding that Mr. Long's appeal should be dismissed based on the waiver of appeal provision in his Plea Agreement.

PARTIES TO THE PROCEEDING

All parties to this proceeding are named in the caption of the case.

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I. OPINIONS BELOW

On July 28, 2020, the Grand Jury for the Southern District of Mississippi returned a seven-count Indictment against Mr. Long. However, on the motion of the prosecution, the court dismissed Counts 1 through 5. Counts 6 and 7 charged production of child pornography in violation of 18 U.S.C. § 2251(a).

Mr. Long accepted full responsibility for the two remaining counts by pleading guilty on May 4, 2021. The plea was under a Plea Agreement entered by Mr. Long and the prosecution. The Plea Agreement contained a waiver of appeal provision that is further analyzed below.

The sentencing hearing followed on August 20, 2021. The court ordered a 720-month (60-year) statutory maximum prison term. It also ordered Mr. Long to be on supervised release for the remainder of his life after the prison term. The court entered a Judgment reflecting this sentence on August 26, 2021. The Judgment is attached hereto as Appendix 1.

Mr. Long appealed the district court's sentencing decision to the United States Court of Appeals for the Fifth Circuit on September 8, 2021. He argued that the sentence was substantively unreasonable. After that, the prosecution filed a Motion to Dismiss Appeal, based on the waiver of appeal provision in the Plea Agreement. Without ever considering the merits of Mr. Long's substantive unreasonableness argument, the Fifth Circuit rendered an Opinion granting the

Motion to Dismiss. It entered the Opinion on April 4, 2022, and it entered a Judgment on the same day. The Fifth Circuit's Opinion and Judgment are attached hereto as composite Appendix 2.

II. JURISDICTIONAL STATEMENT

The United States Court of Appeals for the Fifth Circuit filed both its Order and its Judgment in this case on April 4, 2022. This Petition for Writ of Certiorari is filed within 90 days after entry of the Fifth Circuit's Judgment, as required by Rule 13.1 of the Supreme Court Rules. This Court has jurisdiction over the case under the provisions of 28 U.S.C. § 1254(1).

III. CONSTITUTIONAL PROVISIONS INVOLVED

No constitutional provisions are directly implicated in this case. However, the issue indirectly implicates Mr. Long's Fifth Amendment right to due process. The Due Process Clause states: "No person shall ... be deprived of life, liberty, or property, without due process of law"

IV. STATEMENT OF THE CASE

A. Basis for federal jurisdiction in the court of first instance.

This case arises out of a criminal conviction entered against Mr. Long for production of child pornography in violation of 18 U.S.C. § 2251(a). The court of first instance, which was the United States District Court for the Southern District of Mississippi, had jurisdiction over the case under 18 U.S.C. § 3231 because the criminal charges levied against Mr. Long arose from the laws of the United States of America.

B. Statement of material facts.

Facts relevant to the issue in this Petition pertain solely to the waiver of appeal issue. Mr. Long pled guilty to two counts of production of child pornography. The plea was subject to a Plea Agreement that contained a waiver of appeal provision, which states: “Defendant ... hereby expressly waives ... the right to appeal the conviction and sentence imposed in this case, or the manner in which the sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever[.]”

The parties also entered a Plea Supplement. It established obligations on the prosecution. As relevant to this case, the Plea Supplement required the prosecutor to “recommend that the Court impose a sentence within the lower 50% of the

applicable range under the United States Sentencing Guidelines ... as computed by the Court[.]”

The sentence range under the Sentencing Guidelines was 360 months to 720 months in prison. The court ordered a sentence at the tip-top of the range – 720 months (60 years) in prison. As set forth below, the prosecutor failed to abide by its obligation to properly recommend a sentence within the lower fifty percent of the Guidelines range.

V. ARGUMENT

A. Review on certiorari should be granted in this case.

Rule 10 of the Supreme Court Rules states, “[r]eview on writ of certiorari is not a matter of right, but of judicial discretion.” For the following reason, the Court should exercise its discretion and grant certiorari in Mr. Long’s case.

This case involves a quid pro quo scenario created when the prosecution and a defendant enter into a plea agreement. In return for pleading guilty, the prosecution must abide by its obligations under the agreement. The prosecution’s obligation to fulfill its promises under a plea agreement is an issue that affects literally thousands of criminal defendants each year. Accordingly, this Court should grant certiorari to provide clarity on the issue.

B. The Fifth Circuit erred by finding that Mr. Long’s appeal should be dismissed based on the waiver of appeal provision in his Plea Agreement.

1. Applicable law.

The Fifth Circuit recognizes the sanctity of the plea process, including the plea agreement itself. In *United States v. Saling*, the Court held “if a guilty plea is entered as part of a plea agreement, the government must strictly adhere to the terms and conditions of its promises.” 205 F.3d 764, 767 (5th Cir. 2000) (emphasis added; citation omitted); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971) (holding “when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or

consideration, such promise must be fulfilled.”). When a defendant enters a plea agreement, he or she has “every right to expect that in exchange for his guilty plea the government would strongly recommend the agreed to sentence.” *United States v. Grandinetti*, 564 F.2d 723, 726 (5th Cir. 1977) (emphasis added). “This is so regardless of whether the failure of the government to strongly advocate the agreement had any effect on the sentencing judge.” *Id.*

“[A] plea agreement is construed strictly against the Government as the drafter.” *United States v. Roberts*, 624 F.3d 241, 245 (5th Cir. 2010) (citations omitted). “[W]here the government has breached or elected to void a plea agreement, the defendant is necessarily released from an appeal waiver provision contained therein.” *United States v. Gonzalez*, 309 F.3d 882, 886 (5th Cir. 2002) (citation omitted).

“[I]n determining whether a breach has occurred, we must consider ‘whether the government’s conduct is consistent with the defendant’s reasonable understanding of the agreement.’” *Saling*, 205 F.3d at 766 (emphasis added; citation omitted). “Although the Government has a duty to provide the sentencing court with relevant factual information and to correct misstatements, it may not hide behind this duty to advocate a position that contradicts its promises in a plea agreement.” *United States v. Munoz*, 408 F.3d 222, 227 (5th Cir. 2005) (emphasis added).

2. Application of the law to the facts of Mr. Long's case.

The facts and holdings in *United States v. Williams*, 821 F.3d 656 (5th Cir. 2016) support a conclusion that the Fifth Circuit plainly erred by dismissing the appeal based on the waiver of appeal provision in Mr. Long's case. Williams pled guilty to intent to distribute cocaine base. *Williams*, 821 F.3d at 657. The plea was under a plea agreement that required the prosecution to "recommend Williams be sentenced at the bottom of the applicable Guidelines range." *Id.* The prosecutor did not make the required recommendation to the court at sentencing. *Id.*

Just like Mr. Long's case, the Fifth Circuit had to decide Williams' argument on a plain error standard because the issue was not brought up in district court. *Williams*, 821 F.3d at 657. As stated above, the plain error factors that this Court must analyze are:

- 1) there is an error that was not intentionally abandoned;
- 2) whether the error is clear and obvious;
- 3) whether the error affects Mr. Long's substantial rights; and
- 4) whether the error affects the fairness, integrity or public reputation of judicial proceedings. *Id.* at 657.

The *Williams* court found that "[t]he first two factors are clearly met." 821 F.3d at 658. The first two factors are clearly met in Mr. Long's case as well. That

is, the prosecution clearly erred by failing to unequivocally recommend a sentence within the lower fifty percent of the Guidelines range.

The defense acknowledges that the prosecutor initially made a recommendation within the lower fifty percent of the Guidelines range. But then she went on to “just make these brief remarks about this defendant.” The prosecutor’s “brief remarks” implied that Mr. Long was untruthful about stating that he suffered from depression and that “the victim in this case deserves just punishment for what has happened to her.” She then described that Mr. Long told the victim that he would kill himself or he would leave the family if the victim told anyone. The prosecutor alleged that the victim suffered because the incident caused conflict in the family. She stated that Mr. Long groomed the victim to meet his sexual desires.

Also, the prosecutor alleged that Mr. Long inexplicably did not seek treatment for his condition. In addition to improperly failing to advocate for a sentence in the lower fifty percent of the Guidelines range, this statement was untrue. Mr. Long explained that he did not continue sex offender treatment because he lacked the money to pay for it. Therefore, in addition to failing to advocate for a lower fifty percent sentence, the prosecutor affirmatively misstated facts that painted a negative picture of Mr. Long.

After making these disparaging comments about Mr. Long, the prosecutor recommended a sentence “within the guidelines,” not within the lower fifty percent of the Sentencing Guidelines range as she was required to do under the Plea Agreement. As if this breach of the Plea Agreement was not enough, she then went on to state, “[t]he public needs to be protected. And a sentence from this Court will deter other individuals from committing similar conduct. And, again, we believe a sentence within the sentencing Guidelines is appropriate.” The complete content of the prosecutor’s comment follows:

Your Honor, the government **stands by its recommendation in the plea supplement of the lower 50 percent of the sentencing guidelines. I would just make these brief remarks concerning this defendant.**

In some of the discovery and in the defendant's interview, he indicated that he was depressed. Usually, in these type of cases, you see some allegations or concerns from the defendant that he’s been abused or that he was using alcohol or drugs. We have none of that in this case. From his witnesses, from all indications, he had a loving family. They were going to church and socializing with individuals, but this was a secret that he had with his daughter. No one knew about it. And the victim in this case deserves just punishment for what has happened to her.

The things this defendant said to that child was: He was going to kill himself. And if she told anyone, he would leave the family. And that is what has happened, in a sense. And there’s some indication from the victim’s interview, when she went to a child advocacy interview, that this defendant had a fight with the mother at the house, and the other children in that house started throwing things at her. So this child has got a burden on her from what has happened to her. She didn’t ask for it. She was 8 years old.

So this defendant started molding her, grooming her, for what his sexual desires were. And we would just ask that **a sentence within the guidelines** is appropriate in this case.

This defendant claimed to have been depressed. He didn’t seek any counseling. He had some counseling sessions set up. He stopped going to

those. And if he needed any kind of treatment, he just stopped. He didn't go forward.

The public needs to be protected. And a sentence from this Court will deter other individuals from committing similar conduct. And, again, we believe **a sentence within the sentencing guidelines** is appropriate.

In summary, the prosecutor initially recommended a sentence within the lower fifty percent of the Guidelines range, but then she went on to make several disparaging statements about Mr. Long. After that, the prosecutor twice recommended a sentence within the Sentencing Guidelines range, not within the lower fifty percent of the Guidelines range as required by the Plea Agreement.

As stated above, when a defendant enters a plea agreement, he or she has “every right to expect that in exchange for his guilty plea the government would strongly recommend the agreed to sentence.” *Grandinetti*, 564 at 726 (emphasis added). “[I]n determining whether a breach has occurred, we must consider ‘whether the government’s conduct is consistent with the defendant’s reasonable understanding of the agreement.’” *Saling*, 205 F.3d at 766 (emphasis added; citation omitted). “Although the Government has a duty to provide the sentencing court with relevant factual information and to correct misstatements, it may not hide behind this duty to advocate a position that contradicts its promises in a plea agreement.” *Munoz*, 408 F.3d at 227 (emphasis added).

Clearly, the prosecutor’s comments in this case are anything but a “strong recommendation” for a sentence in the lower fifty percent of the Guidelines range.

See Grandinetti, 564 at 726. Her comments were against Mr. Long’s “reasonable understanding” of the prosecution’s requirement to advocate for a sentence within the lower fifty percent of the Guidelines range. *See Saling*, 205 F.3d at 766. By making numerous disparaging comments about Mr. Long, the prosecutor breached her duty to refrain from “advocat[ing] a position that contradicts its promises in a plea agreement.” *See Munoz*, 408 F.3d at 227. Finally, and most important, the prosecutor explicitly breached the Plea Agreement by twice recommending a sentence within the Guidelines range, and not within the lower fifty percent of the range. Consistent with this Court’s holdings in *Williams*, the facts in Mr. Long’s case indicate that the first two prongs of the plain error test are met in Mr. Long’s case.

The third factor focused on whether the prosecution’s breach of its obligation to “strongly recommend” a sentence within the lower fifty percent of the Guidelines range violated Mr. Long’s substantial rights. The *Williams* Court provided the following analysis on this factor:

There is no indication the district court would have been unmoved by the Government’s recommendation for a lower sentence. In one case, the Government breached the plea agreement by failing both to file a motion for a two-level reduction and to recommend a sentence at the low end of the applicable Guidelines range. *United States v. Bellorin–Torres*, 341 Fed. Appx. 19, 20 (5th Cir. 2009). We held that there was plain error, partially because there was “nothing in the record to indicate that the district court would not have granted [the] motion....” *Id.* While *Bellorin–Torres* is unpublished, its analysis is persuasive. Here, there is “a reasonable

probability that, but for the error, [Williams] would have received a lesser sentence.” *Hebron*, 684 F.3d at 559.^[1]

Williams, 821 F.3d at 658 (bracketed footnote added).

Mr. Long’s case is comparable to *Williams* regarding the third plain error factor. There is nothing in the record indicating that the district court would not have been persuaded by the prosecution’s sentencing recommendation, had she made the required recommendation.² Under the law stated in *Williams* and under the facts of this case, the third plain error factor is met.

As to the fourth factor, the *Williams* Court held “[t]he Government’s failure to fulfill its promise affects the fairness, integrity, and public reputation of judicial proceedings....” 821 F.3d at 658 (citation omitted). This Court should reach the same conclusion on the fourth factor in Mr. Long’s case.

The facts in Mr. Long’s case are comparable to the facts in *Williams*. The *Williams* Court found that all the factors for plain error were met. 821 F.3d at 865. The same conclusion should be reached in Mr. Long’s case. That is, the Court should find that the prosecution breached the Plea Agreement by failing to meet its responsibility to strongly recommend a sentence within the lower fifty percent of

¹ The complete cite for *Hebron* is *United States v. Hebron*, 684 F.3d 554 (5th Cir. 2012).

² The Guidelines range in Mr. Long’s case was 360 months to life in prison. The district court ordered a 360-month sentence per count for each of the two counts. However, the court ordered the sentences to run consecutively for a total of 720 months in prison. Had the prosecution refrained from making disparaging comments about Mr. Long and stuck by the required lower fifty percent recommendation, there is no evidence indicating that the district court would not have ordered a total sentence significantly lower than 720 months in prison.

the Guidelines range. Since the prosecution breached the Plea Agreement, the waiver of appeal provision must be found unenforceable. *See Gonzalez*, 309 F.3d at 886 (citation omitted).

VI. CONCLUSION

Based on the arguments presented above, Mr. Long asks the Court to grant his Petition for Writ of Certiorari.

Submitted June 29, 2022, by:



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CERTIFICATE OF SERVICE

I, Jacinta A. Hall, appointed under the Criminal Justice Act, certify that today, June 29, 2022, pursuant to Rule 29.5 of the Supreme Court Rules, a copy of the Petition for Writ of Certiorari and the Motion to Proceed In Forma Pauperis was served on Counsel for the United States by Federal Express, No. 7772 5806 6255, addressed to:

The Honorable Elizabeth B. Prelogar
Solicitor General of the United States
Room 5614, Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

I further certify that all parties required to be served with this Petition and the Motion have been served.



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Assistant Federal Public Defender