

22-5417
No. _____

ORIGINAL

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES
OCTOBER OF 2022

CHARLES E. WILLIAMS PETITIONER

(Your Name)

VS.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

CHARLES E. WILLIAMS

(Your Name)

Federal Correctional Institution Gilmer
P.O. box 6000, Glenville, WV. 26351

(Address)

Glenville, West Virginia, 26351

(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

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

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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM OF 2022

CHARLES E. WILLIAMS

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

Petitioner, Charles E. Williams, respectfully request 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 January, 03, 2022, denying an application for certificate of appealability.

JUDGMENT BELOW

The Eighth Circuits judgment denying an application for a certificate of appealability, and dismissing the appeal, while affirming the judgment of the district court is reported at No. 21-3458 (8th Cir. 2022), and is included in Appendix A. A copy of the order denying Mr. Williams petition for rehearing by panel is included in Appendix B.

JURISDICTION

The decision of the Court of Appeals denying application for certificate of appealability and dismissing appeal was entered on January, 03, 2022. After being granted an extension of time, Petitioner filed a timely petition for rehearing on March, 21, 2022. The Court of Appeals denied rehearing on April, 11, 2022. 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.. The Petitioner submitts this timely petition for writ of certiorari pursuant to the governing Supreme Court rule 13.3, and invokes the jurisdiction of this honorable court pursuant to Title 28 U.S.C. § 1254 (1), and the above mentioned rule 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

On August, 7, 2015, police officers responded to the report of an injury automobile accident involving a single vehicle. (PSR, 4). In the course of interacting with the officers, Williams opened the trunk of his car where he retrieved a red blanket and threw it to the ground. (PSR. 5). The officers recovered the firearm, which was a Norinco Mak-90, semi automatic rifle. (PSR. 7). Officers also recovered a small baggy from Williams pants pocket which contained 1.13 grams of cocaine. (PSR. 8 and 11). On March,20, 2018, Williams entered a plea of guilty to a single count indictment charging him with being a

felon in possession of a firearm. (DCD. 77). The plea agreement contained an appellate waiver that expressly excluded the issue of whether Williams qualified for the ACCA sentencing enhancement. (DCD. 76, 15 (b)).

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). 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. In the circuit court of Jackson County, Missouri, case no. cr96-02584, Williams was convicted in 1996 of three counts of sale of a controlled substance. (PSR. 36). The psr stated that Williams sold personal use amounts of cocaine to the same undercover detective on three separate dates.

Court records indicate that on May, 23, 1996, the defendant sold approximately .2 grams of a substance containing cocaine to the detective for \$ 20.00 of pre-recorded buy money. On June, 6, 1996, the same detective purchased an additional 1.5 grams of substance containing cocaine from the defendant for \$ 100.00 of pre-recorded buy money. On June, 18, 1996, the detective made contact with the defendant and purchased approximately .5 grams of a substance containing cocaine from the defendant for \$ 50.00 of pre-recorded buy money.

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 a firearm in connection with another felony offense. (PSR, first addendum, pg.2).

On February, 5, 2019, Williams appeared for sentencing, during the sentencing hearing. The district court addressed the final objection in the third addendum to the psr, which is the ACCA application. Defense counsel stated: Mr. Williams is

preserving this issue for appeal. There are cases directly on point in the Eighth Circuit at this point in time. We are merely preserving that issue for appeal. In overruling the objections the court notes that Mr. Williams has preserved his ability to contest that at the appellate level. (sentencing transcripts pg. 10 - 11). The court also noted the three score for sale of a controlled substance conviction in 1996 reflected on page 9. The government recommended a guideline sentence, noting it was the lowest sentence available. "The guideline range as calculated by the court is 180 to 210 months." (sent. trans. pg.18). But expressed no opinion that Williams prior convictions called for a sentence higher than the mandatory minimum and five years of supervised release. (sent. trans. at 23).

Williams filed a timely notice of appeal on February, 6, 2019. Appellate counsel filed a brief under Anders v. California, 386 U.S. 738, 87 s.ct. 1396 (1967), arguing that the district court erred in classifying Williams as an armed career criminal based on, inter alia, his prior Missouri convictions under Mo. Rev. Stat. 195.211 for drug offenses. Williams filed a pro se supplemental brief challenging the use of his prior conviction under Mo. Rev. Stat. 195.211, that were three incidents of sale of a controlled substance, to the same undercover officer. There was no intervening arrest, and they were consolidate for sentencing. As reflected in the psr (pg.9 at 36), those sales received only three criminal history points, one case number, one conviction. That it was an ongoing investigation, a " continuing course of conduct ". That the " committed on occasions different from one another " clause within the arned career criminal statute violated Williams right to due process under the Fifth Amendment when the court looked into the facts of the prior convictions to determine they were committed on different occasions. Then seperating a consolidated sentence for armed career criminal

purposes. That he doesn't have the predicate convictions to support the enhancement. The court of appeals affirmed the District Court ruling concluding it did not err in classifying Williams as an armed career criminal, as his prior Missouri drug convictions qualify as serious drug offenses for ACCA purposes.

Williams filed a timely motion to vacate, set aside, or correct sentence on December, 14, 2020, listing four grounds for relief. In his third ground for relief he asserts that appointed counsel was ineffective during the sentencing stage for not forth an argument that his prior sales conviction was one conviction based on an on going investigation by local police. And the convictions were consolidated for sentencing. Therefore that conviction doesn't trigger the ACCA enhancement. (motion vacate pg. 7).

The order denying movants motion to vacate sentence, 28 U.S.C. § 2255 and declining to issue a certificate of appealability was filed on October, 13, 2021. Respondent argues as to movants third claim: "First, Williams asserts that defense counsel should have argued that his three drug convictions under Mo. Rev. Stat. 195.211 only counted as one predicate offense. That argument is legally erroneous. The Eighth Circuit has repeatedly held that convictions for separate drugs transactions on separate days are multiple ACCA predicate offenses, even if the transactions were sales to the same victim or informant.

Having reviewed movants reply, the court agrees with the respondent that movant's criticism of counsel regarding the ACCA sentence are legally frivolous. Therefore relief is denied on movants third ground. (Doc. 24, pg.2). Williams filed a timely appeal and motion for Issuance of Certificate of Appealability, December, 10, 2021. Reasserting that he was erroneously sentenced to 180 months under the provisions of 18 U.S.C. § 924 (e), ACCA, because he doesn't have the predicate convictions to support the enhancement, violating Fifth and Sixth Amendment rights.

That defense counsel was ineffective for not presenting the argument that his conviction happened on one occasion. And the proper documents were never presented to support the enhancement. Wooden v. United States, was pending in the Supreme Court while Williams petition for certificate of appealability was pending in the Eighth Circuit Court of Appeals. On January, 03, 2022, the court of appeals issued its judgment stating:

" This appeal comes before the court on appellants application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed. "

Williams filed a motion for extension of time to file petition for rehearing, which was granted by the Eighth Circuit Court of Appeals. Williams files petition for rehearing by panel on March, 21, 2022. The petition for rehearing by the panel order was issued on April, 11, 2022, denying rehearing.

After the initial appeal was filed and denied the Movant filed a motion to vacate, set aside, or to correct sentence pursuant to 28 U.S.C. § 2255. As well as a petition for certificate of appealability in accordance with 28 U.S.C. § 2253.

ARGUMENT

I. Williams ACCA sentence may not be lawful in light of this court's decision in Wooden v. United States, No.20-5279, and Williams v. United States v. No.20-7798.

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 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 March, 7, 2022, after the Eighth Circuit Court of Appeals issued its judgment denying an application for a certificate of appealability, and while Williams motion for rehearing by panel was pending. This court ruled 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. Wooden, had ten burglary convictions that arose out of a single occurrence when he sequentially broke into the 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. This court held Wooden's ten burglary offenses arising from a single criminal episode did not occur on different " occasions " and thus count as only one prior conviction for purposes of ACCA. Stating, that an ordinary person using language in its normal way would describe Wooden's entries into the storage units as happening on a single occasion, rather than on ten " occasions different from one another ". § 924 (e)(1). Clarifying, the inquiry into whether offenses were committed on different occasions involves a " straight forward and intuitive " but " multi-factored " test that requires the district court to consider whether the offense were " committed close in time, in an uninterrupted course of conduct ".

Whether the offenses occurred in physical proximity to one another, and " the character and relationship of the offenses," including how " similar or intertwined the conduct giving rise to the offenses, " was, or whether " they share[d] a common scheme or purpose. Wooden v. United States, 142 S.C.T. 1063, 1070-71 (2022). The court concluded that the district court erred by finding these crimes were committed on different occasions for purposes of the ACCA. Therefore, the court vacated the judgment and remanded the case for resentencing.

In Williams v. United States, No.20-7798, this court vacated and remanded his case back to the Eighth Circuit Court of Appeals in light of the ruling in Wooden. Williams case had to do with sequential drug transactions to the same undercover on three separate dates, but there was no intervening arrest. The individual counts were charged in a single charging document and were adjudicated on the same date. Virtually identical to what happen with Williams in this instant petition.

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, (PSR. pg.6. 36). The three sales occurred on separate dates - May, 23, 1996, June, 6, 1996, and June, 18, 1996 - but involved the same undercover detective and a small, user amounts of cocaine. The individual counts were charged in a single charging document and were adjudicated on the same date. The court's decision in Wooden could potentially reduce Williams sentence from 180 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 pg.6-9).

Some circuits have " applied 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 where 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 (3rd, 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. Abbot*, 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 (2nd 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 were to override 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 the " different occasions " analysis includes other considerations, as ruled in Wooden, therefore Williams ACCA sentence is questionable. This court should grant certiorari to consider whether the governments conduct is relevant, factor to consider in " different occasions " analysis. Drug trafficking offenses present unique consideration 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 designed to punish more harshly. If temporal distinctness alone is the overriding factor, an undercover officer who targets a suspect can make three buys and thereby make a " career offender " subject to a mandatory minimum of fifteen years.

Taking an approach similar to that in the guideline manual and considering additional factors - whether the buys were separated by an intervening arrest, 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 competing criminal history). Considering the issues surrounding the use of multiple drug transactions as ACCA predicates in light of this court's ruling in 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 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 norm 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 similar 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 was not final when the ruling was made by this court in Wooden, and will not be final unless and until this court denies this petition. If this court grants Williams petition for certiorari, the principles of constitutional adjudication espoused in Griffith will be served.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons, Williams respectfully requests that the Court grant his petition for certiorari. In light of this Courts ruling in Wooden, and Williams. 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.

APPENDIX

Appendix A - The Eighth Circuits judgment denying an application for certificate of appealability. Affirming the Judgment of the district court.

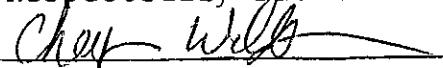
Appendix B - Order denying petition for rehearing by panel.

CERTIFICATE OF SERVICE

I, Charles E. Williams, hereby certify that a true and correct copy of the foregoing petition for writ of certiorari was placed in the hands of the institutional staff for mailing postage prepaid to the interested parties via U.S. mail. Pursuant to the Supreme Court's decision in Houston v. Lack, 487 U.S. 266, 108 S.C.T. 2379, 101 L.ED. 2d 2454, (1988): the instant petition is filed within the time limit as authorized by the Supreme Court under the mail box rule.

Executed this 10th day of July, 2022

Respectfully Submitted

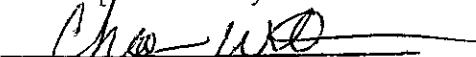


Unnotarized Oath

I Charles E. Williams, do so swear that the statement of facts contained herein are true and exact to the best of my personal knowledge under the penalties of perjury pursuant to Title 28 U.S.C. § 1746.

Executed this 10th day of July, 2022.

Respectfully


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