

NO. _____

IN THE SUPREME COURT
OF THE UNITED STATES

2017-2018 TERM

NORRIS WILLIAMS

Petitioner, vs.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

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QUESTIONS PRESENTED

I.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED WILLIAM'S CONVICTION AS TO COUNT 4 WHERE THE GOVERNMENT FAILED TO ESTABLISH WILLIAMS' GUILT BEYOND A REASONABLE DOUBT THUS DENYING WILLIAMS' FIFTH AND SIXTH AMENDMENT RIGHTS UNDER THE CONSTITUTION.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED THE DISTRICT COURT'S DENIAL OF WILLIAMS' RULE 29 MOTION.

III.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED WILLIAMS' SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

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The Petitioner, NORRIS WILLIAMS (hereinafter “WILLIAMS”), by and through his undersigned counsel, respectfully prays that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Eleventh Circuit entered in the proceedings on December 19, 2017.

OPINION OF THE COURT BELOW

The Court of Appeals for the Eleventh Circuit entered a non-published opinion affirming the District Court's Order of Detention, *United States of America v. Norris Williams*, on December 19, 2017. *Appendix 1*.

JURISDICTION

The judgment of the Eleventh Circuit Court of Appeals affirming the Judgment of the United States District Court was entered on December 19, 2017. The Eleventh Circuit Court of Appeals entered its Order Denying WILLIAMS' Petition for Rehearing and Petition for Rehearing *En Banc* on February 28, 2018. *Appendix 2*. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. §1254 and Rule 10.1, Rules of the Supreme Court. This Petition for Writ of Certiorari is filed pursuant to Rule 13.1, Rules of the Supreme Court.

CONSTITUTIONAL PROVISIONS

UNITED STATES CONSTITUTION, AMENDMENT V

The Fifth Amendment to the Constitution provides, in relevant part that: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person ... be deprived of life, liberty, or property, without

due process of law....”

UNITED STATES CONSTITUTION, AMENDMENT VI

The Sixth Amendment to the Constitution provides in relevant part that: “In all criminal prosecutions, the accused shall enjoy the right ... to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defence.”

STATEMENT OF THE CASE

On October 28, 2015, the Federal Grand Jury in the Middle District of Florida issued a four Count Indictment charging NORRIS WILLIAMS (“WILLIAMS”) with possession with intent to distribute, and did distribute a detectable amount of heroin, in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §841(b)(1)(c) (Counts 1, 2 and 3); and possession with intent to distribute a kilogram or more of heroin in violation of 21 U.S.C. § 841(a)(1) and 21 U.S.C. §841(b)(1)(a)(i) (Count 4). (DE:12)

The matter went to trial on April 6, 2016 and lasted three days. (DE:89,90,91). On April 8, the jury returned its verdict finding WILLIAMS guilty of Counts 1,2,3 and 4. (DE:80;91:50-53).

On October 25, 2016, the District Court sentenced WILLIAMS on all Counts of conviction charged in the indictment for a total term of 240 months as to Counts 1, 2 and 3 and 360 months for Count 4, to be served concurrently to each

other, followed by 3 years supervised release for Counts 1, 2 and 3 and 5 years for Count 4, all to be served concurrently. In addition, the District Court waived fines, but required the payment of a \$400.00 assessment. (DE:114:39-43; 108). Appellant timely filed his Notice of Appeal and is confined. (DE:110)

1. Statement of the Facts.

The government's first witness was Samuel Gonzalez, who is a narcotics Sergeant for Lee County Sheriff's Office and does undercover work purchasing and selling narcotics. (DE:89:157). Sergeant Gonzalez testified that a confidential informant introduced him to WILLIAMS as someone who would be able to sell Gonzalez with heroin. (DE:89:161) Gonzalez testified that he purchased a quarter ounce or seven grams of heroin from WILLIAMS for the price of \$700.00 or \$100.00 per gram. (DE:89:162)

On cross examination, Gonzalez testified that WILLIAMS never sold him a kilogram of cocaine and that the amount he was sold could fit in the palm of his hand. (DE:89:192-193). Gonzalez testified that there are 1,000 grams in a kilogram of heroin and 36 ounces in a kilogram. (DE:89:194-195). Gonzalez also testified that the buyer determines the amount of heroin to be purchased not the seller. (DE:89:196). Gonzalez also testified that he did not know the quality of the heroin he purchased from WILLIAMS and that he did not know if a presumptive test of the heroin was performed. (DE:89:196-197). Gonzalez confirmed that WILLIAMS

never attempted to front him with a kilogram of heroin or even ½ a kilogram of heroin (DE:89:200). The government called other witnesses who testified about the heroin, the testing of the heroin and other matters. (DE:89)

The government then called Victor Chica, who is a narcotics detective with the Cape Coral Police Department. (DE:90:6) Chica testified that WILLIAMS did not have the money to purchase the heroin and they would have to wait until he had it. (DE:90:33-34). Chica also testified that WILLIAMS stated he could not “handle a whole one right now because it’s not season” and that it meant that he could not handle purchasing a kilogram of heroin right then. (DE:90:36).

The government then introduced the audio of Detective Chica and WILLIAMS’ conversation on September 16, 2015, where WILLIAMS states “I can’t take the whole one right now. I can’t afford that, to be honest, I can’t take the whole one . . . I can’t – I’ll do the half a one . . .” (DE:90:51) The government continued the audio where WILLIAMS advised Chica that he can only purchase a half and Chica responds that “I made a call and my boss said he’s fine with the half. All right?” (DE:90:54).

The government rested and WILLIAMS’ counsel renewed all of WILLIAMS’ previously entered objections and moved for a Rule 29(a) motion as to Counts 1, 2, 3 and 4. (DE:90:174). Said Motion was denied. The District Court ruled that “there is sufficient evidence for any rational juror to conclude that Mr. Williams is guilty

as to each element of the criminal charges against him beyond a reasonable doubt.”
(DE:90:174-175).

The Defense called WILLIAMS to testify. (DE:90:180). WILLIAMS testified that he was approached by two confidential informants who introduced him to Detective Chica. (DE:90:182). He testified that he was put into contact with Detective Chica to purchase heroin. He also testified that he had never seen a kilo of heroin, never sold a kilo and had never purchased a kilo because he could not afford it. (DE:90:182) He further testified he is a street dude and that he sells small quantities of heroin. (DE:90:186). WILLIAMS confirmed that Chica agreed to sell him a half of kilo of heroin but changed the price for \$37,500.00 to \$40,000.00. WILLIAMS also confirmed he never bought any drugs from Agent Chica. (DE:90:187). On cross examination, WILLIAMS confirmed he wanted a half and did not want the kilo because then he would be working for Chica and did not want to do that. (DE:90:203). He confirmed that he begged Chica to sell him ½ of a brick and that he never did buy any drugs from Chica. He also confirmed that Chica did offer to sell him a half of brick. (DE:90:207). WILLIAMS testified that Chica was trying to force him to buy more than he could afford. (DE:90:216). He confirmed that all he wanted to buy was a half of kilo and that if he would have sold him the ½ of kilo, he would have bought it. (DE:90:222). He confirmed he never sold drugs to

Chica. (DE:90:227). He confirmed that the day he was arrested, he had no drugs in his possession just money. (DE:90:230)

The Defense rested and counsel moved for a judgment of acquittal pursuant to Rule 29(a). Said motion was again denied. (DE:90:231). On April 8, 2016, the jury returned its verdict finding WILLIAMS guilty of Counts 1, 2, 3, and 4. (DE:91:50-53;80).

2. **Facts Pertaining to WILLIAMS' Sentence and Sentencing Hearing.**

The probation officer who prepared WILLIAMS' PSI set his base offense level at 30 pursuant to U.S.S.G. §2D1.1(a)(5). Probation found that the instant offense involved the distribution of 73 grams of heroin, and the intended distribution of 1,000 grams of heroin. Additionally, the offense also involved the quantities of cocaine, cocaine base, and LSD found at the defendant's residence. Therefore, according to U.S.S.G. §2D1.1(c)(5), if the offense involved at least 1,000 kilograms of marihuana, but less than 3,000 kilograms of heroin, the base offense level is 30.

In addition, the Probation Officer found that WILLIAMS was a career offender as defined in U.S.S.G. § 4B1.1. Probation found that WILLIAMS had at least two prior felony convictions of either a crime of violence or a controlled substance offense listed below. Since the statutory maximum penalty is 20 years, the Probation Officer enhanced his total offense level to 32 pursuant to U.S.S.G.

§4B1.1(b)(3). WILLIAMS did not receive any decrease for acceptance of responsibility and therefore his total offense level was found to be 32. (DE:84).

WILLIAMS' total criminal history score was seven. According to the sentencing table in U.S.S.G. Chapter 5, Part A, a criminal history score of seven establishes a criminal history category of IV. Because WILLIAMS was found to be a career offender, his criminal history category was increased to VI pursuant to U.S.S.G. §4B1.1(b).

WILLIAMS filed his written objections, amended objections and Sentencing Memorandum of Law. (DE:85,86,101). WILLIAMS' objected to the facts as alleged in the Presentence Investigation Report, the loss amount he was found to be responsible for and the Chapter Four Enhancement. WILLIAMS argued that the Chapter Four Enhancement was in error because said enhancement was based upon his felony convictions for controlled substance offenses that occurred in 1999 and 2000 and therefore said sentences for said convictions were imposed over fifteen (15) years prior to the commencement of this offense. As such, WILLIAMS' sentence should not have been enhanced pursuant to U.S.S.G. §4A1.2(e).

In his Sentencing Memorandum, WILLIAMS sought both a departure and a variance in his sentence. (DE:86). WILLIAMS sought a downward departure pursuant to U.S.S.G §5K2.13, and U.S.S.G. §5H1.3, due to WILLIAMS' mental

disabilities causing him to become addicted to drugs. WILLIAMS also sought a downward departure of his criminal history category due to the prior convictions being more than 15 years ago. (DE:86). He also sought a downward departure based upon the Chapter 4 enhancement and the fact that one of the convictions was being counted for two separate convictions, which supported the Chapter 4 enhancement. (DE:86) WILLIAMS also sought a variance due to him being enlisted in the military, the awards he won while in the military, that most of his prior convictions were almost six and seven years ago, that most if not all of his convictions were drug related and the fact that he is not a threat to the community. (DE:86).

WILLIAMS' sentencing hearing was held on October 25, 2016. (DE:114). At the hearing, WILLIAMS' counsel argued his objections to the PSI regarding the amounts of drugs WILLIAMS was found to be responsible for and the Chapter Four Enhancement. WILLIAMS' counsel also raised additional *ore tenus* objections at the hearing in order to preserve said arguments on appeal.

WILLIAMS' counsel argued for a departure and variance based on several factors to wit: that he in reality accepted responsibility by testifying at trial, the action was in reality a "sting operation" where WILLIAMS had no intent to purchase a kilo of heroin but only a half a kilo, but was "coerced" into purchasing more, the fact that neither counsel nor the AUSA believed that WILLIAMS was a career offender, the fact that he has had no prior incidents for the past 15 or 16 years, the

fact that he is older and therefore the risk of recidivism is significantly less and the fact that WILLIAMS was in the military and was a veteran. Based upon the above factors counsel argued that WILLIAMS should receive a sentence of approximately 120 months or 10 years. (DE:114:28-29).

The District Court, after hearing argument of counsel and WILLIAMS' address to the District Court, the District Court denied his request for a variance and sentenced WILLIAMS on all Counts of conviction charged in the indictment for a total term of 240 months as to Counts 1, 2 and 3, 360 months as to Count 4, all to be served concurrently, followed by 3 years supervised release for Counts 1, 2 and 3 and 5 years for Count 4, all to be served concurrently. In addition, the District Court waived any fines and ordered a \$400.00 assessment be paid. (DE:114:37-42; 108).

Appellant timely filed his Notice of Appeal and is confined. (DE:110).

A. WILLIAMS' Conviction As To Count 4 Should not have been Affirmed by the Eleventh Circuit Where the Evidence the Government Introduced Was Insufficient to Support the Conviction; the Effect Being that the Conviction As to Count 4 Was in Violation of WILLIAMS' Due Process Rights.

Challenges to the sufficiency of the evidence in a criminal case are reviewed *de novo*. *United States v. Evans*, 473 F.3d 1115, 1118 (11th Cir. 2006). When making a *de novo* review of the sufficiency of the evidence, the reviewing Court

examines the evidence in a light most favorable to the prosecution with all reasonable inferences and credibility determinations being in the government's favor. *United States v. Hamaker*, 455 F.3d 1316, 1332 (11th Cir. 2006). The reviewing Court must ask whether any reasonable fact finder could conclude that the evidence demonstrates the guilt of the defendant beyond a reasonable doubt. *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006). In order for WILLIAMS' conviction as to Count 4 to be upheld, there had to be sufficient evidence to prove all of the elements of the crime charged. *United States v. Ndiaye*, 434 F.3d 1270, 1294 (11th Cir. 2006). WILLIAMS argues that the evidence did not support a finding that WILLIAMS had possession with intent to distribute a kilogram or more of heroin. The evidence clearly does not support this conviction. In fact, the evidence supported a finding that in reality, WILLIAMS was involved and arrested as a result of a "sting operation" where WILLIAMS had no intent to purchase a kilo of heroin but only a half a kilo, but was "coerced" into purchasing more. Because there was insufficient evidence to prove that WILLIAMS had possession with intent to distribute a kilogram or more of heroin, the Eleventh Circuit should have reversed his conviction. The affirming of WILLIAMS' conviction by the Eleventh Circuit allowed WILLIAMS to be convicted in violation of his due process rights. Accordingly, WILLIAMS' Petition for Writ of Certiorari must be granted.

B. The Denial of WILLIAMS’ Rule 29 Motion by the District Court Should not have been Affirmed by the Eleventh Circuit.

The Fifth and Sixth Amendments guarantee that “criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, “[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged”. *United States v. Gaudin*, 115 S.Ct at 2314.

It is quite clear that in reviewing the evidence and testimony presented by the government that the elements required to support WILLIAMS’ conviction, were not proven beyond a reasonable doubt. Therefore, WILLIAMS’ motion for judgment of acquittal should have been granted. *United States v. Garcia*, 405 F.3d 1260 (11th Cir. 2005). Accordingly, the failure of the Eleventh Circuit to reverse the denial of WILLIAMS’ motion for judgment of acquittal justifies the granting of WILLIAMS’ Petition for Writ of Certiorari.

C. WILLIAMS' Sentence Should not have been Affirmed by the Eleventh Circuit.

The denial of WILLIAMS' request for a downward departure and variance by the District Court should not have been affirmed by the Eleventh Circuit due to WILLIAMS' diminished capacity and his military record. Furthermore, the District Court erred in denying WILLIAMS' objection to the amount of drugs he was responsible for and the Chapter Four Enhancement.

In conclusion, WILLIAMS' sentence was unreasonable in light of the sentencing factors listed in 18 U.S.C. §3553(a)-(f) and the totality of the circumstances. Moreover, the sentence was not minimally sufficient, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a). Therefore, the District Court did in fact err in sentencing WILLIAMS as it did, and because of this, the Eleventh Circuit should not have affirmed WILLIAMS' sentence. Based on the above, WILLIAMS' Petition for Writ of Certiorari must be granted.

REASONS FOR GRANTING THE PETITION

I.

**CERTIORARI REVIEW SHOULD BE GRANTED WHERE
THE ELEVENTH CIRCUIT AFFIRMED WILLIAM'S**

**CONVICTION AS TO COUNT 4 WHERE THE GOVERNMENT
FAILED TO ESTABLISH WILLIAMS' GUILT BEYOND A
REASONABLE DOUBT THUS DENYING WILLIAMS' FIFTH
AND SIXTH AMENDMENT RIGHTS UNDER THE
CONSTITUTION.**

The law requires that a criminal act be performed voluntarily and intentionally and not because of mistake or accident. *United States v. Woodruff*, 296 F.3d 1041 (11th Cir. 2002). The government bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995). No element may be removed from the jury's consideration. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984).

Intent is an element of all the charges against WILLIAMS, therefore, for WILLIAMS' conviction as to Count 4, to be upheld, there had to be a showing by the government that WILLIAMS had the specific intent to commit the crimes as charged. *United States v. De La Mata*, 266 F.3d 1275 (11th Cir. 2001); *see also*, *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984).

To prove that WILLIAMS distributed a controlled substance in violation of 21 U.S.C. § 841(a)(1), "the prosecution is obliged to prove 'that (1) . . . [WILLIAMS] knowingly or intentionally distributed the controlled substance alleged in the indictment, and (2) at the time of such distribution . . . [WILLIAMS]

knew that the substance distributed was a controlled substance under the law.’ ”
United States v. Alerre, 430 F.3d 681, 689 (4th Cir.2005) (alteration in original)
(quoting *United States v. Tran Trong Cuong*, 18 F.3d 1132, 1137 (4th Cir.1994)).

As to Count 4, the government had to prove that WILLIAMS had possession with intent to distribute a kilogram or more of heroin. The evidence clearly does not support this conviction.

First, the evidence clearly shows that WILLIAMS was not predisposed to purchasing less than a kilogram of heroin from Chica. Second, it is quite clear from the testimony of the government’s witnesses and WILLIAMS, that his intent was always to purchase only a half of kilo of heroin.

WILLIAMS’ true intent can be seen from the testimony of Detective Chica. Chica testified that “[w]e agreed upon the price, \$75,000.00 for a kilogram of heroin and I was to be - - I was going to call him a few weeks later when he was ready with the money to carry out the transaction.” (DE:90:16). Chica further testified that WILLIAMS did not have the money to purchase the heroin and they would have to wait until he had it. (DE:90:33-34). Chica also testified that WILLIAMS stated he could not “handle a whole one right now because it’s not season” and that it meant that he could not handle purchasing a kilogram of heroin right then. (DE:90:36).

The fact that WILLIAMS only intended to purchase ½ of a kilo is evidenced in the audio of Detective Chica and WILLIAMS’ conversation on September 16,

2015, where WILLIAMS states “I can’t take the whole one right now. I can’t afford that, to be honest, I can’t take the whole one . . . I can’t – I’ll do the half a one . . . ” (DE:90:51)

The government’s audio where WILLIAMS advises Chica that he can only purchase a half and Chica responds that “I made a call and my boss said he’s fine with the half. All right?” clearly supports the evidence that WILLIAMS only wanted the ½ kilo and that Chica was in agreement. (DE:90:54).

Chica continued to testify that they were charging WILLIAMS \$40,000.00 for the half although \$40,000.00 is not half of \$75,000.00 because “we were just a kilogram wholesalers, not half a kilogram. I stated to him from the very beginning that we would not sell anything less than a kilogram of heroin. So, you know, the \$40,000.00 would be a higher price just because of the hassle.” (DE:90:57)

Throughout his testimony, WILLIAMS testified that he was a smalltime dealer and that he never intended to buy a kilo of heroin. His testimony is supported by the testimony of Sergeant Gonzalez. Gonzalez testified that he purchased a quarter ounce or seven grams of heroin from WILLIAMS for the price of \$700.00 or \$100.00 per gram. (DE:89:162). Gonzalez also testified that his next purchase from WILLIAMS was to be for a quarter ounce but instead he was given ten and half grams (DE:89:174). On cross examination, Gonzalez testified that WILLIAMS never sold him a kilogram of drugs and that the amount he was sold could fit in the

palm of his hand. (DE:89:192-193). Gonzalez testified that there are 1,000 grams in a kilogram of heroin and 36 ounces in a kilogram. (DE:89:194-195). Gonzalez also testified that the buyer determines the amount of heroin to be purchased not the seller. (DE:89:196). Gonzalez confirmed that WILLIAMS never attempted to front him with a kilogram of heroin or even ½ of a kilogram of heroin (DE:89:200). Gonzalez' testimony about the two buys he had with WILLIAMS supports WILLIAMS' testimony that he deals in small amounts.

In addition, the issue of WILLIAMS' knowledge and intent was not proven by the government as can be seen by the testimony of Agent Mark Strang, who is a special agent with the U.S. Drug Enforcement Administrator and was the one who had custody of the heroin used in the various buys with WILLIAMS. (DE:89:204, 206-208, 210-212, 214-219). On cross examination, Agent Strang testified that the alleged brick of heroin used in the flash meeting with WILLIAMS was not weighed prior to it being used. (DE:89:228-232). Therefore, there was no true evidence as to how much heroin WILLIAMS was purchasing. Since it was not weighed prior to the flash, then how could the government prove that WILLIAMS was purchasing a kilo? The government could not prove this and therefore the conviction as to Count 4 should not have been affirmed by the Eleventh Circuit.

Based upon the above testimony of the government's witnesses, WILLIAMS' testimony was credible and reliable. WILLIAMS admitted to being a drug dealer

and that he dealt small amounts. (DE:90:191-193). He admitted he could have walked away but didn't and he admitted that he met Chica and had the money to pay for a half of kilo. (DE:90:200-201). He confirmed he wanted a half and did not want the kilo because then he would be working for Chica and did not want to do that. (DE:90:203). WILLIAMS confirmed that he begged Chica to sell him ½ a brick and that he never did buy any drugs from Chica. He also confirmed that Chica did offer to sell him a half of brick. (DE:90:207). WILLIAMS testified that Chica was trying to force him to buy more than he could afford. (DE:90:216). He confirmed that all he wanted to buy was a half of kilo and that if he would have sold him the ½ of kilo, he would have bought it. (DE:90:222).

In addition, WILLIAMS testified that "I never touched no drugs. All he did was took my money, that's it, I never seen no drugs, no nothing, he didn't have any drugs there. He lured me into a situation where all I know is somebody pulled a gun on me and took my money, I never seen no drugs." (DE:90:223). He confirmed he never sold drugs to Chica. (DE:90:227). He confirmed that the day he was arrested, he had no drugs in his possession just money. (DE:90:230). In reviewing the testimony, it is quite clear that there was no specific testimony that WILLIAMS purchased a kilo of heroin or that he ever intended to purchase a kilo or heroin.

The government bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct.

2310 (1995). No element may be removed from the jury's consideration. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984). Furthermore, the law requires that a criminal act be performed voluntarily and intentionally and not because of mistake or accident. None of the testimony or evidence proved beyond a reasonable doubt WILLIAMS' criminal intent – an element that must be proven; but was not. Everything was circumstantial at best. Therefore, WILLIAMS' conviction should not have been affirmed by the Eleventh Circuit and therefore WILLIAMS' Petition for Writ of Certiorari must be granted.

II.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED THE DISTRICT COURT'S DENIAL OF WILLIAMS' RULE 29 MOTION.

Pursuant to Fed.R.Crim.P. 29(c)(2), “[i]f the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal”, if there is insufficient evidence to convict. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

In deciding a Rule 29 motion for judgment of acquittal, a District Court must determine whether viewing all the evidence in a light most favorable to the government and drawing all reasonable inferences and credibility choices in favor of the jury's verdict, a reasonable trier of fact could find that the evidence established guilt beyond a reasonable doubt. The District Court's decision on sufficiency of the

evidence in determining a motion for judgment of acquittal is entitled to no deference by the Appellate Court which reviews the denial of a motion for acquittal *de novo*. *United States v. Ellington*, 348 F.3d 984 (11th Cir. 2003). Accordingly, a defendant's motion for judgment of acquittal must be granted if the evidence was insufficient to support the conviction. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

In considering a motion for judgment of acquittal, a District Court should apply the same standard used in reviewing the sufficiency of the evidence to sustain a conviction. *United States v. Ward*, 197 F.3d 1076 (11th Cir. 1999). The District Court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *United States v. Ward*, 197 F.3d at 1079. It is not necessary for the evidence to exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. *United States v. Ward*, 197 F.3d at 1079. WILLIAMS argues that his motion for judgment of acquittal should have been granted because the evidence was insufficient to support his conviction beyond a reasonable doubt. *United States v. Yates*, 438 F.3d 1307 (11th Cir. 2006).

The Fifth and Sixth Amendments guarantee that “criminal convictions [will] rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt”. *United States v.*

Gaudin, 515 U.S. 506, 115 S.Ct. 2310, 2313 (1995). Therefore, “[t]he Constitution gives a criminal defendant the right to demand that a jury find him guilty of all the elements of the crime with which he is charged”. *United States v. Gaudin*, 115 S.Ct. at 2314. The government rested and WILLIAMS’ counsel renewed all of WILLIAMS previously entered objections and moved for a Rule 29(a) motion as to Counts 1, 2, 3 and 4. (DE:90:174). Said Motion was denied. The District Court found that “there is sufficient evidence for any rational juror to conclude that Mr. Williams is guilty as to each element of the criminal charges against him beyond a reasonable doubt. (DE:90:174-175). The Defense rested and counsel again moved for a judgment of acquittal pursuant to Rule 29(a). Said motion was also denied. (DE:90:231).

WILLIAMS’ Rule 29 motion should have been granted as to the issue regarding the amount of heroin that WILLIAMS intended to purchase due to the fact that the government failed to prove beyond a reasonable doubt that WILLIAMS in fact intended to purchase a kilo of heroin. The evidence did not prove beyond a reasonable doubt this element of the charges against WILLIAMS. In fact, the testimony of both WILLIAMS and the government’s key witnesses clearly supported the fact that WILLIAMS’ intent was to purchase ½ kilo and never a kilo as he was a smalltime dealer and did not have the money to purchase a kilo.

The government bears the burden of proving beyond a reasonable doubt all the elements of the crime charged. *United States v. Gaudin*, 515 U.S. 506, 115 S.Ct. 2310 (1995). No element may be removed from the jury's consideration. *United States v. Goetz*, 746 F.2d 705 (11th Cir. 1984). At trial, the evidence presented by the government was not sufficient to establish the offense charged in the indictment against WILLAMS. The amount of drugs he intended to sell was not proven beyond a reasonable doubt. Accordingly, the District Court should have granted a judgment of acquittal under Rule 29. *United States v. Salman*, 378 F.3d 1266 (11th Cir. 2004); *Kyles v. Whitley*, 514 U.S. 419, 115 S.Ct. 1555 (1995). However, the District Court denied WILLIAMS' Rule 29 Motion and the Eleventh Circuit affirmed said denial. Therefore, in the interest of justice, WILLIAMS' Petition for Writ of Certiorari must be granted.

III.

CERTIORARI REVIEW SHOULD BE GRANTED WHERE THE ELEVENTH CIRCUIT AFFIRMED WILLIAMS' SENTENCE WHERE THE DISTRICT COURT COMMITTED SENTENCING ERRORS.

During his trial and at sentencing WILLIAMS' position was that he never intended to purchase a kilo of heroin because he was a smalltime dealer and because

he did not have the money to purchase a kilo of heroin. Said facts were supported by the government's own witnesses' testimony.

Detective Chica testified that "[w]e agreed upon the price, \$75,000.00 for a kilogram of heroin and I was to be - - I was going to call him a few weeks later when he was ready with the money to carry out the transaction." (DE:90:16). Chica further testified that WILLIAMS did not have the money to purchase the heroin and they would have to wait until he had it. (DE:90:33-34). Chica also testified that WILLIAMS stated he could not "handle a whole one right now because it's not season" and that it meant that he could not handle purchasing a kilogram of heroin right then. (DE:90:36).

The fact that WILLIAMS only intended to purchase $\frac{1}{2}$ of a kilo was further evidenced in the audio of Detective Chica and WILLIAMS' conversation on September 16, 2015, where WILLIAMS states "I can't take the whole one right now. I can't afford that, to be honest, I can't take the whole one . . . I can't - I'll do the half a one" (DE:90:51)

The government's audio where WILLIAMS advises Chica that he can only purchase a half and Chica responds that "I made a call and my boss said he's fine with the half. All right?" clearly supports the evidence that WILLIAMS only wanted the $\frac{1}{2}$ kilo and that Chica was in agreement. (DE:90:54).

The fact that WILLIAMS was a smalltime dealer and therefore he did not have the intent or the means to purchase a kilo of heroin is supported by the testimony of Sergeant Gonzalez. Gonzalez testified that he purchased a quarter ounce or seven grams of heroin from WILLIAMS for the price of \$700.00 or \$100.00 per gram. (DE:89:162). Gonzalez also testified that his next purchase from WILLIAMS was to be for a quarter ounce but instead he was given ten and half grams (DE:89:174). On cross examination, Gonzalez testified that WILLIAMS never sold him a kilogram of drugs and that the amount he was sold could fit in the palm of his hand. (DE:89:192-193). Gonzalez testified that there are 1,000 grams in a kilogram of heroin and 36 ounces in a kilogram. (DE:89:194-195) Gonzalez confirmed that WILLIAMS never attempted to front him with a kilogram of heroin or even ½ a kilogram of heroin. (DE:89:200). Gonzalez' testimony about the two buys he had with WILLIAMS supports WILLIAMS' testimony that he deals in small amounts.

Note 5, in the commentary to U.S.S.G. §2D1.1, provides that “[i]n an offense involving an agreement to sell a controlled substance, the agreed-upon quantity of the controlled substance shall be used to determine the offense level . . . If, however, the defendant establishes that the defendant . . . was not reasonably capable of providing or purchasing the agreed-upon quantity of the controlled substance, the court shall exclude from the offense level determination the amount of controlled

substance that the defendant establishes that the defendant did not intend to provide or purchase or was not reasonable capable of providing or purchasing.” In the case at hand, WILLIAMS, specifically advised Chica that he “did not have enough money to acquire a whole kilogram of heroin, but advised that he could purchase one half kilogram”. ” (DE:90:51). In fact, WILLIAMS confirmed that he begged Chica to sell him ½ of a brick and that he never did buy any drugs from Chica. He also confirmed that Chica did offer to sell him a half of brick. (DE:90:207). WILLIAMS testified that Chica was trying to force him to buy more than he could afford. (DE:90:216). He confirmed that all he wanted to buy was a half of kilo and that if he would have sold him the ½ of kilo, he would have bought it. (DE:90:222). Based upon the facts of this case, WILLIAMS should have been found accountable for one-half kilogram not a whole kilogram.

WILLIAMS’ objected to the District Court finding him to be career offender and enhancing his total offense level pursuant to U.S.S.G. §4B1.1 based upon his felony convictions for controlled substance offenses that occurred in 1999 and 2000. The District Court denied said objection in error and the Eleventh Circuit erred in affirming WILLIAMS’ sentence.

WILLIAMS argues that the granting of the career offender enhancement violated WILLIAMS’ Sixth Amendment right to a jury trial on his federal sentencing enhancements. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004).

WILLIAMS' claim that said enhancement was in error, is also based upon his Fifth Amendment right to a grand jury indictment (*e.g.* Indictment Clause – right to be charged by the grand jury – and Due Process Clause). *United States v. Colton*, 535 U.S. 625, 122 S.Ct. 1781 (2002); *Blakely, supra*. This is a categorical challenge to the enhancement under the federal sentencing guidelines.

In addition, WILLIAMS does not qualify as a career offender. Under U.S.S.G. §4B1.1, “[a] defendant is a career offender if (1) the defendant was at least eighteen years old at the time the defendant committed the instant offense of conviction; and (2) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.”

The District Court erred in enhancing WILLIAMS' sentence due to the fact that one of the felony convictions against WILLIAMS was for violating *Fla.Stat.* §893.13. *Fla.Stat.* §893.13 does not have the “mens rea” that is required for the crime to match the generic definitions of the federal definition of “mens rea”, which is “knowing and intent” to do a crime. *Fla.Stat.* §893.13 requires a violation of a “prohibited act”; in other words, the State does not have to prove a person knew they were violating the statute. As such using WILLIAMS' violation of *Fla.Stat.* §893.13 to qualify him as a career offender, failed to consider the holdings of *Donawa v. U.S.*

Attorney General, 735 F.3d 1275 (11th Cir. 2013) and *Descamps v. United States*, __ U.S. ___, 133 S.Ct. 2276 (2013). Under said case law, WILLIAMS' violation of *Fla.Stat.* §893.13 is not an offense that has a single, indivisible set of elements and therefore the District Court was incorrect in qualifying him as a career offender. Accordingly, the determination by the District Court that WILLIAMS qualified as a career offender did not "comport" with the holdings of *Donawa* and *Descamps* and therefore, WILLIAMS' sentence should not have been affirmed by the Eleventh Circuit.

Furthermore, WILLIAMS argues that he was erroneously sentenced as a career offender due to the fact that neither his instant offense nor his prior offense of violating 21 U.S.C. §841(a) qualifies him as a career offender because the offenses do not categorically state a federal felony offense as defined in U.S.S.G. §4B1.1(a). *Mathis v. United States*, 136 S.Ct. 2243 (2016).

In *Descamps*, the Supreme Court held that to determine whether an offense can be used to enhance a defendant's sentence, District Courts are limited to reviewing the "elements" of the offense. *Descamps v. United States*, __ U.S. ___, 133 S.Ct. 2276 (2013). Based on this, WILLIAMS argues that 21 U.S.C. §841(a) contains no penalty as part of the offense elements and therefore, a violation of said statute cannot be said to be a felony offense. Although 21 U.S.C. §841(a) is titled "Unlawful Acts," this subsection alone does not define a complete offense because

it includes no punishment. *Castillo v. United States*, 530 U.S. 120, 125, 120 S.Ct. 2090, 147 (2000) (noting that the mere fact that a statutory section is entitled “Penalties” does not indicate whether that section creates sentencing factors or entirely new crimes for “[t]he title alone does not tell us which are which”).

It is the government’s burden of proving that a sentencing enhancement under the Career Criminal Act is warranted. *United States v. Harrison*, 558 F.3d 1280 (11th Cir. 2009). WILLIAMS contends that the government failed to meet its burden and therefore the enhancement was not supported by the facts or law. WILLIAMS’ sentence was unwarranted and it was “greater than necessary”. *See, United States v. Livesay*, 525 F.3d 1081 (11th Cir. 2008). Accordingly, WILLIAMS’ sentence should not have been affirmed by the Eleventh Circuit. *See also, United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009). And, because it was, WILLIAMS’ Petition for Writ of Certiorari must be granted.

Furthermore, the fact that the District Court applied the career offender provisions under U.S.S.G. §4B1.1 and the Eleventh Circuit affirmed WILLIAMS’ sentence, said sentence violated the overriding principle and basic mandate of 18 U.S.C. §3553(a); to wit: imposing a sentence “sufficient, but not greater than necessary” to comply with the purposes of sentencing under 18 U.S.C. §3553(a)(2). The career offender provision was overly severe under the unique circumstances of

WILLIAMS' case and clearly did not comport with the 18 U.S.C. §3553(a) mandate and factors. *United States v. Ameline*, 400 F.3d 646 (9th Cir. 2005).

WILLIAMS further argues that pursuant to the dictates of *United States v. Booker*, *supra*, the advisory guidelines did not mandate the application of U.S.S.G. §4B1.1, career offender. This offense level “overrepresented” WILLIAMS actual culpability and an individualized sentence was warranted in order to reduce sentencing disparity. *United States v. Webb*, 139 F.3d 1390, 1395 (11th Cir. 1998).

Therefore, considering the above, WILLIAMS' sentence was not minimally sufficient, but greater than necessary to comply with the purposes of sentencing under 18 U.S.C. §3553(a)(2). Thus, the District Court's application of the career offender guidelines was altogether unwarranted and unjustified and did not result in an appropriate individualized sentence in light of the statutory factors outlined by *Booker*. Because the Eleventh Circuit erred in affirming WILLIAMS' sentence, his Petition for Writ of Certiorari must be granted.

WILLIAMS also argues that the Eleventh Circuit erred in affirming his sentence where the District Court denied his request for a downward departure pursuant to U.S.S.G. §5K2.13. U.S.S.G. §5K2.13 provides that “a downward departure may be warranted if (1) the defendant committed the offense while suffering from a significantly reduced mental capacity; and (2) the significantly reduced mental capacity contributed substantially to the commission of the offense”.

A downward departure is not warranted, however, if “(1) the significantly reduced mental capacity was caused by the voluntary use of drugs or other intoxicants; (2) the facts and circumstances of the defendant’s offense indicate a need to protect the public because the offense involved actual violence or a serious threat of violence; (3) the defendant’s criminal history indicates a need to incarcerate the defendant to protect the public; or (4) the defendant has been convicted of an offense under chapter 71, 109A, 110 or 117 of Title 18, United States Code”. U.S.S.G. §5K2.13. In the case at hand, although WILLIAMS may suffer from drug abuse, WILLIAMS also suffers from diminished capacity which has caused him to become addicted to drugs. Being in the military may also have caused him to become addicted as well. (PSI:67-68, 76, 78-82)(DE:114;86,95, 101).

U.S.S.G. §5H1.3 provides that “[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, . . . are present to an unusual degree and distinguish the case from the typical cases covered by the guidelines”.

In the case at hand, WILLIAMS has a long history of substance abuse. WILLIAMS first used alcohol and marijuana at 14 years of age. In his teens, he experimented with speed, acid, and heroin. While in the Army, he began using speed,

acid, and marijuana regularly, and his drug use continued after his discharge. WILLIAMS was using marijuana daily, and acid and ecstasy regularly.

Because of WILLIAMS' addiction as a child and then his active duty involvement, it is clear that said drug addiction was a means of WILLIAMS' self-medicating himself for the mental illness he suffers from.

Furthermore, it is clear that the facts in the indictment do not indicate a "need to protect the public because the offense involved actual violence". Therefore, there is no "need to incarcerate the defendant to protect the public" and he has not been convicted of an offense under "chapter 71, 109A, 110 or 117, of Title 18, United States Code". *United States v. Cook*, 53 F.3d 1029, 1031 (9th Cir. 1995).

Because of the above, it is quite clear that WILLIAMS does in fact suffer from a mental deficiency and diminished capacity and that said mental deficiency and diminished capacity is present to such an unusual degree that WILLIAMS' request for a downward departure should have been granted.

Furthermore, WILLIAMS was entitled to a downward departure due to WILLIAMS' criminal history category being over-represented especially considering that most of his prior convictions are related to his addiction to illegal drugs. U.S.S.G. §4A1.3(b), provides that "[i]f reliable information indicates that the defendant's criminal history category substantially over-represents the

seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure may be warranted".

Accordingly, finding that WILLIAMS' criminal history category is a category VI is clearly an overrepresentation of his criminal past. Because of said overrepresentation, a downward departure should have been granted. *See generally, United States v. Himick*, 338 F.Supp.2d 1310 (S.D. Fla. 2004); *United States v. Simpson*, 228 F.3d 1294 (11th Cir. 2000) Therefore, because there is "reliable information [to] indicate ... that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history or the likelihood that the defendant will commit other crimes, a downward departure [was] . . . warranted". U.S.S.G. §4A1.3(b). As such, the denial of said request should not have been affirmed by the Eleventh Circuit.

The same is true with WILLIAMS' request for a variance. WILLIAMS' request for a variance comported with the sentencing procedures that have evolved since the Supreme Court's decisions in *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738 (2005), and *Gall v. United States*, 552 U.S. 38, 128 S.Ct. 586 (2007). *See, United States v. Livesay*, 525 F.3d 1081, 1089-90 (11th Cir. 2008) (summarizing current sentencing procedures in Eleventh Circuit); *United States v. Pugh*, 515 F.3d 1179, 1188-91 (11th Cir. 2008). As such, his request should have been granted.

The statutory factors set forth in 18 U.S.C. §3553(a) weigh strongly in favor of a sentence substantially below the sentence given. Case law is clear that where circumstances warrant, a District Court can impose sentences that vary downward significantly from the advisory guidelines range and the Appellate Court will affirm such sentences as reasonable. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also, United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010). The District Court failed to grant same and therefore the Eleventh Circuit should not have affirmed WILLIAMS' sentence.

In addition, WILLIAMS is entitled to a variance due to him being enlisted in the military, the awards he won while in the military, that most of his prior convictions were almost six and seven years ago, that most if not all of his convictions were drug related and the fact that he is not a threat to the community. (PSI: 33-40). Therefore, he was entitled to a sentence at the low end of the guideline with a variance and the denial of same by the District Court and the Eleventh Circuit affirming said denial is reason for WILLIAMS' Petition for Writ of Certiorari to be granted. *See generally, United States v. Whitehead*, 532 F.3d 991 (9th Cir. 2008).

It is quite clear that the strict application of the advisory sentencing guidelines produced a sentence greater than necessary for punishment under 18 U.S.C. §3553(a) for WILLIAMS. The statutory factors set forth in 18 U.S.C. §3553(a) weigh strongly in favor of a sentence outside of and below the advisory sentencing

guidelines. Case law is clear that where circumstances warrant, a District Court can impose sentences that varies downward significantly from the advisory guidelines range and the Appellate Court will affirm such sentences as reasonable. *Kimbrough v. United States*, 552 U.S. 85, 128 S.Ct. 558 (2007); *see also*, *United States v. Phaknikone*, 605 F.3d 1099 (11th Cir. 2010). However, that is not what happened in the case at hand. “This standard requires that there be error, that the error be plain, and that the error affect a substantial right.” *United States v. Bennett*, 472 F.3d 825, 831 (11th Cir. 2006). “A substantial right is affected if the appealing party can show that there is a reasonable probability that there would have been a different result had there been no error.” *United States v. Bennett*, 472 F.3d at 831-32.

Because of the above, the sentence imposed by the District Court should have been reversed by the Eleventh Circuit as there was a “definite and firm conviction that the District Court committed a clear error of judgment in weighing the 18 U.S.C. §3553(a) factors”. *United States v. Pugh*, 515 F.3d 1179, 1191 (11th Cir. 2008). WILLIAMS’ sentence was unwarranted and it was “greater than necessary”. *See*, *United States v. Livesay*, 525 F.3d 1081, 1090 (11th Cir. 2008). Accordingly, the Eleventh Circuit should have reversed the sentence and because it did not, WILLIAMS’ Petition for Writ of Certiorari must be granted.

In considering all of WILLIAMS’ arguments, it is clear that WILLIAMS has met his burden of demonstrating that the sentence imposed by the District Court was

substantially unreasonable and that the sentence should have been vacated. *United States v. Thomas*, 446 F.3d 1348 (11th Cir. 2006); *see also*, *United States v. Saac*, 632 F.3d 1203 (11th Cir. 2011). *See also*, *United States v. Bonilla*, 579 F.3d 1233 (11th Cir. 2009). Because WILLIAM'S sentence was affirmed by the Eleventh Circuit, his Petition for Writ of Certiorari must be granted.

CONCLUSION

This Court should explicitly adopt WILLIAMS' position based upon law and equity. The upholding of his conviction and sentence by the Eleventh Circuit seriously affects the fairness, integrity and public reputation of the judicial proceedings. *See generally*, *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005); *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993). For all of these reasons and in the interest of justice, the Petitioner, NORRIS WILLIAMS, prays that this Court will issue a Writ of Certiorari and reconsider the decision below.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 23rd day of March, 2018, to the SOLICITOR GENERAL OF THE UNITED STATES, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

By /s/ David J. Joffe
DAVID J. JOFFE, ESQUIRE