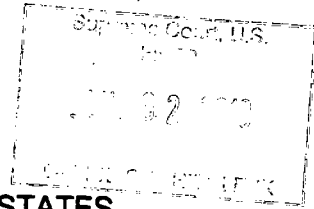


19-6746

No. \_\_\_\_\_

ORIGINAL



\_\_\_\_\_  
IN THE

SUPREME COURT OF THE UNITED STATES  
\_\_\_\_\_

Michael Mitchell — PETITIONER  
(Your Name)

vs.

United States of America — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

Fourth Circuit Court of Appeals

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

PETITION FOR WRIT OF CERTIORARI

Michael Mitchell, Pro Se

(Your Name)

Butner LSCI  
P.O. Box 999

(Address)

Butner, North Carolina 27509

(City, State, Zip Code)

N/A

(Phone Number)

## QUESTION(S) PRESENTED

1. Does a waiver of direct appeal rights and collateral rights excepting claims premised on ineffective assistance of counsel violate a defendant's "due process" rights to a fair hearing when said waiver immunizes the sentencing court from appellate review of a sentence that is clearly unreasonable, unfair and in violation of the prohibition against unwarranted sentencing disparities?
2. Does an unjustified disparity between sentences imposed on co-defendants violate a defendants rights to equal protection and due process?

## LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

## TABLE OF CONTENTS

OPINIONS BELOW.....	5
JURISDICTION.....	6
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED .....	7
STATEMENT OF THE CASE .....	8
REASONS FOR GRANTING THE WRIT .....	13
CONCLUSION.....	16

## INDEX TO APPENDICES

APPENDIX A	Appellate decision dismissing 2255.....18 2019 U.S. App. Lexis 10566 (4th Cir. 2019)
APPENDIX B	District Court decision denying 2255.....19 2018 U.S. District Lexis 174117 (E.D.N.C. 2018)
APPENDIX C	Appellate decision dismissing direct appeal.....20 Fourth Circuit Court of Appeals Appeal No. 16-4864, 07/18/2017
APPENDIX D	
APPENDIX E	
APPENDIX F	

## TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
Hill v. United States.....	14
368 U.S. 424, 825 S. Ct. 468, 7. Ed. 2d 417 (1962)	
Hughes v. United States.....	14
Case No. 17-155 (June 4, 2018)	
(Sotomayor concurring)	
United States v. Addonizio.....	14
442 U.S. 178, 60 L. Ed. 2d 805, 995 S. Ct. 2255 (1975)	

## STATUTES AND RULES

18 U.S.C. 3553(a)(6) .....	7
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## OTHER

U.S.S.G. 2D 1.1 (c).....	8
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IN THE  
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

**OPINIONS BELOW**

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

☒ reported at 2019 U.S. App. Lexis 10566; or,  
☐ has been designated for publication but is not yet reported; or,  
☒ is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

☒ reported at 2018 U.S. Dist. Lexis 174117 (E.D.N.C. 2018); or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

The opinion of the \_\_\_\_\_ court appears at Appendix \_\_\_\_\_ to the petition and is

☐ reported at \_\_\_\_\_; or,  
☐ has been designated for publication but is not yet reported; or,  
☐ is unpublished.

## JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was April 10, 2019

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was \_\_\_\_\_.  
A copy of that decision appears at Appendix \_\_\_\_\_.

☐ A timely petition for rehearing was thereafter denied on the following date: \_\_\_\_\_, and a copy of the order denying rehearing appears at Appendix \_\_\_\_\_.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including \_\_\_\_\_ (date) on \_\_\_\_\_ (date) in Application No. \_\_\_\_ A \_\_\_\_.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Amendment V

No person shall be...deprived of life, liberty, or property, without due process of law.

### 18 U.S.C. 3553(a)(6)

The need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct.



### Statement of the Case

On January 12, 2016, a grand jury, in a single indictment, charged Michael Anthony Mitchell, Heather Ann Holmes, and Marc Alan Kearney with conspiring to manufacture and distribute 50 grams or more of methamphetamine. Mitchell was named only in the conspiracy count; Kearney was named in six other counts in the nine-count indictment, and Holmes was named in two other counts.

According to Mitchell's Presentence Investigation Report, the three co-defendants were involved in the conspiracy from 2012 through 2016 in the area of Goldsboro, North Carolina. Mitchell and Holmes were romantically involved and lived together during the conspiracy (and they had twin children together soon after their arrest in this case). Mitchell and Holmes would procure the ingredients for making methamphetamine, and Kearney would manufacture the end product.

Mitchell pleaded guilty on September 26, 2016, pursuant to a written plea agreement. Because much hinged on the weight of drugs attributable to Mitchell at sentencing, Mitchell and the government stipulated the amount of drugs that could be proven and that should be used at sentencing: "[T]he relevant readily provable drug weight applicable to this defendant is at least 3,000 kilograms but less than 10,000 kilograms of marijuana (equivalence), resulting in a base offense level of 32 pursuant to U.S.S.G. 2D1.1(c). "The plea agreement acknowledged that the stipulation was not "binding on the [district court] in its application of the advisory Guidelines range..."

The United States Probation Office sent its draft PSR on November 18, 2016. The draft PSR alleged that Mitchell was responsible for 27.6 kilograms of pseudoephedrine and 246.96 grams of crystal methamphetamine, for a total of 281,043.25 kilograms of marijuana equivalence, yielding a base offense level of

38.

Mitchell objected, noting that under the "fail-safe" method of establishing drug weight in methamphetamine conspiracies-using the purchase logs of the defendants-Mitchell would be responsible for 2,040 kilograms of marijuana. Mitchell acknowledged, however, that the Government had statements from other individuals who had knowledge of the conspiracy suggesting a higher amount, although the statements varied wildly in terms of the amount and in terms of reliability.

As a result, Mitchell noted, he and the Government had "agreed that the preponderance of the evidence would support that the offense involved no more than 10,000 kilograms of marijuana and a base offense level of 32. From the defendant's perspective, his agreement established that his drug accountability is under 5 times that established by the most reliable method of calculation." Mitchell noted that the Government concurred with this objection, and he asked that [i]n the event the probation office declines to make these modifications, the defendant requests that the probation office provide the court with the full text of this objection."

The Probation Office issued the final PSR on December 7, 2016. It rejected the stipulation and the joint objection, finding that Mitchell was responsible for 276,449.925 kilograms of marijuana equivalent yielding a base level of 38. With Mitchell's criminal history category of III, the PSR's imprisonment range was 292 to 365 months.

The addendum to the PSR noted that both Mitchell and the Government objected to the findings as to drug weight. It noted that, if the stipulation and objection were sustained, the imprisonment range would be 151 to 188 months. For whatever reason, it did not include the full text of the joint objection, as drafted by Mitchell.

In his sentencing memorandum, Mitchell noted the stipulation and joint objection as to the drug weight and asked that the district court sentence using that stipulation and joint objection.

At the sentencing hearing, after reciting the standard preliminary matters, Senior United States District Judge James C. Fox stated the following: "The Court has reviewed his Presentence Report. The Court finds the basis for the findings contained in the Presentence Report credible and reliable, and therefore, the Court adopts those findings." The district court then asked, "The Defendant and the Government have the same objection?," to which counsel for Mitchell responded. "Yes, sir, Your Honor. There's a joint objection as to drug weight that is found in the Presentence Report." The district court replied: "The objection is overruled. The Court finds the basis for the finding contained in the Presentence Report credible and reliable, and, therefore adopts those findings." There was no other discussion by the district court of the drug weight, and the court set the corresponding total offense level at 38.

After the district court heard evidence about Mitchell's assistance and granted the Government's motion for a downward departure for substantial assistance, Mitchell's counsel argued as follows:

I know the Court's ruling on the objection. Ms. Wells [an Assistant United States Attorney] initially had the case, and we discussed it. We even had a stipulation in there, we discussed the reliability and the consistency of some of those statements that were in there, as to how we came to that stipulation in the indictment, and looked at the various evidence that was available at the time he entered his plea. That's how we got to the stipulation that was in the plea agreement, and why we offered the objection to the Presentence Report findings. With the 5K, the Government's recommendation is a sentence of a 120 months, that was calculated in the stipulation. We'd ask the Court to impose a sentence of 120 months. We think that is sufficient in this case.

For its part, the Government argued as follows:

Your Honor, just for the Government, I just want to note on the record that I will also be here today advocating on behalf of that stipulation that Ms. Wells had offered about the Level 32. I understand the Court has made a ruling, but I just would--would note that, that was our position coming in again today, that we had agreed to an offense Level 32 as being appropriate in the case. That, based on that level, giving a guideline range of 151 to 188, our recommendation from there, for a modest 5K was, as the defense has stated, a total term of 120 months.

So, that would be our starting point of what we were asking for in the case. If the Court is going with that higher Guideline, then, I would just ask you to impose a comparable reduction from there. I think if the Court were at the 292-365, then, I would recommend that you come down to at least the comparable 20 percent from there. But, that was our starting point coming in here today, was asking for the 151 to 188 and, then, a total of 120, and I would advocate for that. But, if the Court is not so inclined, then, I would just ask that you give him a comparable reduction from the guideline range. Thank you.

Without any more explanation, the Court imposed a sentence of 219 months.

Mitchell filed his Notice of Appeal fourteen days later.

About five weeks later, in January of 2017, the same district court sentenced Holmes. Holmes also pleaded guilty, and Mitchell has reason to believe that her written agreement contained a stipulation as to drug weight that was identical or substantially identical to the stipulation in Mitchell's plea agreement. Mitchell has reason to believe that the drug weight attributable to Holmes in her draft PSR was identical or substantially identical to that in Mitchell's draft PSR, and that Holmes and the Government entered into a joint objection to the draft PSR that was identical or substantially identical to that in Mitchell's case.<sup>1</sup> Mitchell has

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1. Looking at Mitchell's PSR, it is clear that the drug weight attributed to him was also attributable to Holmes. That is, there is no clear distinction in that PSR between Mitchell's conduct and Holmes's conduct that would result in the drug weight being different for the two defendants.

reason to believe that the Probation Office rejected the stipulation and objection in Holmes's case, just like it did in Mitchell's case.

In sentencing Holmes, however, the district court summarily adopted the stipulation and joint objection as to drug weight, without explanation: "I'll honor the stipulations contained in the plea agreement and sustain the drug weight objections." The defendant and the Government then agreed that the guidelines range was 121 to 151 months' imprisonment. After that, the district court heard Holmes's motion for a 5K downward departure for substantial assistance, after which the Government recommended a 20% decrease in the sentence, to the "recommended" 97 months. The District Court then sentenced Holmes to 90 months imprisonment—seven months less than the Government recommended after the district court had accepted the stipulation as to the drug weight. (E.D.N.C. No. 5:16-cr-0007-BO, D.E. 100.)

In short, the same district judge who rejected the stipulation and joint objection in Mitchell's case upheld an identical stipulation and joint objection in a co-defendant's case, which involved the same conduct, without explaining why the same set of facts could yield two diametrically opposed findings of fact.

The third co-defendant, Kearney, was sentenced on April 12, 2017. Unlike Mitchell and Holmes, Kearney apparently had sentencing enhancements for manufacturing methamphetamine and for possessing firearms. Kearney's guidelines range in his PSR was 324–405 months, which was significantly higher than Mitchell's guideline range—even Mitchell's range after the joint stipulation as to drug weight was ignored—but apparently the district court sustained an objection to the PSR at Kearney's sentencing hearing and set the guidelines range at 292–365 months. The Government requested a sentence for Kearney of 259 months after a downward variance but the district court sentenced him to only 120 months.

### Reasons For Granting The Petition

The waiver of appellate rights and collateral rights, excepting claims premised on ineffective assistance of counsel (IAC), is a common practice in Federal criminal prosecutions resolved by written plea agreements. Numerous judicial decisions have provided rationales for upholding the practice of appellate and collateral waivers. Petitioner's case, however, presents an issue that falls outside previous rulings - - an issue that may affect many defendants. The issue is this:

Appellate and collateral waivers that immunize a district court from review and correction of clearly improper decisions violate defendants' right to a fair hearing, i.e. due process of law.

In brief, here is what happened. Petitioner and his two co-defendants all entered guilty pleas to the same single count of conspiracy to manufacture and distribute methamphetamine. Petitioner was sentenced to 219 months of incarceration. One of his co-defendants received a 90 month sentence; the other co-defendant received a 120 month sentence. There were some differences in the individual circumstances of each of the three co-defendants. The co-defendant with the 90 month sentence had no criminal history. The co-defendant with the 120 month sentence had a more severe criminal history than Petitioner. Petitioner had been named in only one (1) count of the indictment. Petitioner's co-defendants had been named in multiple counts of the indictment. All three (3) co-defendants cooperated with authorities in the investigation of other persons engaged in drug trafficking. There was, too, wildly differential treatment in how the District Court dealt with objections to identical assertions contained in all three co-defendants PSR's. Although all three (3) co-defendants pleaded guilty to

exactly the same conduct and the Government and the defendants jointly stipulated to drug weights and resulting base offense levels, the District Court sustained one co-defendants objections to the drug weight and base offense level contained in the PSR<sup>FN</sup> but overruled Petitioner's self-same objection.

Because Petitioner had waived his appellate rights and his collateral rights, excepting claims promised on IAC, the Fourth Circuit dismissed his attempt at direct appeal without addressing the merits of his substantive claim.<sup>FN</sup> In his collateral [2255] proceedings the District Court confined itself to IAC premised claims none of which addressed the missteps of the Court at sentencing.

In United States v. Addonizio, 442 U.S. 178, 60 L. Ed. 2d 805, 99 S. Ct. 2235 (1975), the Court held that a fundamental defect in sentencing "inherently results in a complete miscarriage of justice." In Hughes v. United States, Case No. 17-155, June 4, 2018 (Sotomayor, concurring) (slip opinion at p. 3), Justice Sotomayor wrote:

The integrity and legitimacy of our criminal justice system depends upon consistency, predictability, and evenhandedness.

In Hill v. United States, 368 U.S. 424, 428, 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962), the Court wrote that:

A fundamental defect... inherently results in a complete miscarriage of justice [when there is] an omission inconsistent with the rudimentary demands of fair procedure.

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**FN.** The PSR recommended greater drug weight and a higher offense level than that contained in the joint stipulation.

**FN.** The "substantive claim[s]" and the "missteps" are one and the same. They are the Court's differing treatment of co-defendants' identical objections to PSR assertions and imposition of significantly disparate sentences on co-defendants who pleaded guilty to exactly the same conduct.

That a "fundamental defect", a "miscarriage of justice" occurred in Petitioner's sentencing seems to be beyond debate. "Consistency, predictability, and evenhandedness" were absent in Petitioner's sentencing proceeding. What happened to Petitioner was "inconsistent with the rudimentary demands of fair procedure."

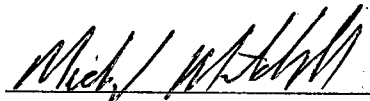
Yet because Petitioner waived his appellate and collateral rights, an apparently impenetrable wall was erected around the errors of the District Court. Petitioner is not a trained attorney. He does not have the acumen to articulate in legalese a proscription sufficient to prohibit recurrences of what has transpired in his proceedings. However, Petitioner has every confidence that the Supreme Court can offer guidance that will remove barriers to appellate review of egregious errors committed by lower courts. Somehow or another an end must be brought to procedure [appellate and collateral waivers] trumping substance [fundamental defects].



## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Mich. / M. Mitchell", written over a horizontal line.

Michael Mitchell, Pro Se

Date: July 2, 2019