No. _____

In The
Supreme Court of the United States

MICHAEL HARRISON LOWMAN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

SHOULD AN APPEAL WAIVER THAT DID NOT EXPRESSLY WAIVE A DUE PROCESS CHALLENGE BE ENFORCED WHERE THE SENTENCING COURT BASED ITS SENTENCE ON UNRELIABLE FACTS IN VIOLATION OF THE DEFENDANT'S DUE PROCESS RIGHTS?

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The order of the Fourth Circuit dismissing the appeal is unpublished. The order is reprinted as Appendix A1 to this Petition. (Appendix A1, infra).

STATEMENT OF SUPREME COURT JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. §1254(1) to review the decision rendered by the United States Court of Appeals for the Fourth Circuit on November 6, 2019.

PROVISIONS OF LAW INVOLVED

Rule 11 of the Federal Rules of Criminal Procedure provides:
(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

> (1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands the following:
>
> ....
>
> (N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

The Due Process Clause of the Fifth Amendment to the United States Constitution provides:

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

STATEMENT OF THE CASE

1. Michael Harrison Lowman, Jr. was indicted by a federal grand jury in the Western District of North Carolina in a three-count indictment filed on October 17, 2017. JA 11.[1]

Count One charged Lowman with Coercing a Minor to engage in sexually explicit conduct, in violation of 18 U.S.C. §2251(a); Count Two charged Lowman with Receiving Child Pornography which had travelled in interstate commerce, in violation of 18 U.S.C. §2252(A)(a)(2)(A); and Count Three charged Lowman with Possessing Child Pornography 18 U.S.C. §2252(A)(a)(5)(B). JA 11-14.

2. Lowman signed a plea agreement, which was filed on February 21, 2018, JA 90, and pled guilty to Count One during a Rule 11 plea hearing on March 2, 2018. JA 18. The plea agreement contained a waiver section, purporting to bar appeals except for (1) Ineffective assistance of counsel, or (2) Prosecutorial misconduct. The waiver did not expressly preclude due process challenges to the sentence. JA 94-95. A factual basis in support of the plea was also executed by Lowman, indicating

[1] "JA" refers to the Joint Appendix on file with Court of Appeals for the Fourth Circuit.

that Lowman made contact with a single 15-year-old male victim. JA 15.

The government drafted a Statement of Relevant Conduct ("SRC") on April 30, 2018, which was incorporated into the final Presentence Report. JA 114-17. The SRC alleged, among other things, "Lowman conducted chats…with at least 53 different minor male victims."

In a subsequent presentence filing, the Government alleged, "Defendant is responsible for the production of child pornography involving at least 53 different victims." JA 96. Lowman, through counsel, objected to the government's contentions regarding the number of alleged victims.

3. The parties appeared for sentencing in front of the District Court on January 3, 2019. The District Court discussed Lowman's issue with the number of victims being proffered at 53, saying:

> "Let's move on to this other point that you've raised, though, Mr. White, and that is pertaining to the number of victims. Because you first referred to the fact that there were six identified victims but that there are a total of 53 victims at least according to what is set out in the presentence agreement or presentence report. 'Identified victims' and 'actual victims' are two different things. So why does the discrepancy between those two numbers have any bearing on the question of sentencing?" JA 40.

Counsel for Lowman then went on to argue that it had bearing because it would determine the appropriate sentence. The government offered no

further evidence at sentencing to support the allegation that 53 victims existed.

The Court imposed a sentence of 300 months in prison. JA 64. In announcing its reasons the Court stated, "Here there are several aggravating factors. One is the number of victims." JA 70.

4. Lowman filed an appeal with the Court of Appeals for the Fourth Circuit. However, upon motion of the government, and specifically citing the appeal wavier as grounds, the Fourth Circuit dismissed the appeal, finding that "the issue Lowman seeks to appeal falls squarely within the compass of his waiver of appellate rights." Pet. App. A1.

REASONS FOR GRANTING THE WRIT

I. The Supreme Court Should Review This Case To Resolve Disparate Treatment Of Appeal Waivers Between The Circuits.

Appeal waivers have consistently been the subject of appellate and Supreme Court jurisprudence, from the emergence of the *Menna-Blackledge*[2] doctrine down to this Court's recent decisions in *Class v. United States* 583 U.S. ____, 138 S. Ct. 798 (February 21, 2018) and *Garza v. Idaho* 586 U.S. _____, 139 S. Ct. 738 (Feb. 27, 2019). These

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[2] The doctrine establishes that a plea of guilty to a charge does not waive a claim that—judged on its face— the charge is one that the government cannot constitutionally prosecute. It is derived from *Blackledge v. Perry,* 417 U.S. 21(1974) and *Menna v. New York,* 423 U.S. 61 (1975).

recent decisions have clarified the scope of appeal waivers and brought uniformity among the circuits with respect to *some* issues, (challenges to the constitutionality of a statute in *Class*, and ineffective assistance of counsel challenges in *Garza)* but not all. This case presents the Court with an opportunity to bring clarity and resolve differences among the circuits when it comes to challenging the constitutionality of a sentence when a generic appeal waiver exists.

The United States Supreme Court has long recognized that a criminal defendant has a due process right to be sentenced on *accurate* facts and information. See, e.g., *United States v. Tucker*, 404 U.S. 443, 447 (1972), *William v. New York*, 337 U.S. 241 (1949), *Townsend v. Burke*, 334 U.S. 736 (1948).

Here, Michael Lowman contends that his sentence was based on the inaccurate and unproven allegation that there were 53 victims in his case. This unproven allegation was inaccurate and in violation of his due process rights, but it nevertheless earned him a harsh sentence. He was not allowed to appeal that harsh sentence in the Fourth Circuit, because of the appeal waiver.

Had Lowman appealed in another circuit court, however, the outcome may have been different. Depending on the circuit, a constitutional attack on the sentence rendered by the district court, after a plea of guilty containing an appeal waiver, may or may not be heard on the merits. For example, the Ninth Circuit has held, in *United States v. Torres*, 828 F.3d 1113 (9th Cir. 2016), that appellate

waivers are unenforceable when the defendant was given an illegal or unconstitutional sentence. By contrast, the Fifth Circuit has held that appellate waivers will be strictly enforced when a sentence is challenged, with only two exceptions: first, ineffective assistance of counsel, *United States v. White*, 307 F.3d 336, 339 (5th Cir. 2002), and second, a sentence exceeding the statutory maximum. *United States v. Leal*, 933 F.3d 426, 431 (5th Cir.), *cert. denied*, 140 S. Ct. 628 (2019).

The above-cited cases only illustrate differences between two circuits. Others exist. For example, the Second Circuit has held that although an appeal waiver is generally enforceable, if the defendant claims the sentencing was unconstitutional, the waiver will be strictly construed in order to permit a review of the constitutional claim. See *United States v. Johnson*, 347 F.3d 412 (2d Cir. 2003). Meanwhile, the Eighth Circuit, in adopting a "miscarriage of justice" standard[3] will not enforce a plea waiver when there

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[3] "The miscarriage of justice" exception to appeal waivers further demonstrates the need for this Court to review this case, as some circuits have adopted the exception, and some have not. *See e.g., United States v. Teeter,* 257 F.3d 14, 26 (1st Cir. 2001) (applying miscarriage of justice exception to appeal waivers); *United States v. Hahn,* 359 F.3d 1315, 1327 (10th Cir. 2004) (adopting the exception and applying *United States v. Olano,* 507 U.S. 725 (1993), substantial rights" analysis); *United Statses v. Khattak,* 273 F.3d 557, 563 (3rd Cir. 2001) ("Waivers of appeals, if entered into knowingly and voluntarily, are valid, unless they work a miscarriage of justice."); *but see United States v. Ford*, 688 F. App'x 309, (5th Cir. 2017) (per curiam), (Fifth Circuit holding that "we have not adopted such an exception…").

has been an "illegal" sentence. *But*, "illegal" does *not* include any sentence that violates due process, so long as that sentence is within the statutory range. See, *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003).

While, on at least one occasion, the Fourth Circuit has held "a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations", *United States u. Attar,* 38 F.3d 727, 732 (4th Cir. 1994), a constitutional challenge to a sentence is somehow yet *foreclosed* so long as "the issue appealed is within the scope of the waiver." *United States v. Copeland*, 707 F.3d 522, 528 (4th Cir.), *cert. denied*, 134 S. Ct. 126 (2013).

The Eleventh Circuit is no clearer on the issue. There, any appeal waiver is valid if the government shows either that: (1) the district court specifically questioned the defendant about the waiver; or (2) the record makes clear that the defendant otherwise understood the full significance of the waiver. *United States v. Johnson*, 541 F.3d 1064, 1066 (11th Cir. 2008).

Application of this rule has led to the conclusion that an appeal waiver "includes more than just difficult or debatable legal issues; it includes 'waiver of the right to appeal blatant error.'" *Id*. at 1068. At the same time, however, the Eleventh Circuit has held that "a defendant who has executed an effective waiver does not subject himself to being

sentenced entirely at the whim of the district court." *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993). Certainly, it is arguable that a Defendant such as Lowman, who has been sentenced on unreliable facts, in violation of due process, has been damaged at least as much as he would be when sentenced "at the whim of the district court."

All of these different approaches, rules, and standards, underscore the need for this Court to bring uniformity to the circuit courts when it comes to constitutional challenges to sentences in the face of appeal waivers. This Court recently saw the need to resolve important outstanding issues related to appeal waivers in both *Garza* and *Class*. It is now time for the Court to bring the same finality when it comes to questions of constitutional challenges to sentences, despite the existence of a plea waiver.

II. The Question Presented Is Important And Recurs Frequently.

The issue presented here—whether a defendant can bring a due process challenge to his sentence despite an appeal waiver—is important, and occurs frequently in our system. It has been observed as far back as 2005 that over 65% of plea agreements in federal cases across the entire country included an appeal waiver. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 231 fig. 7 (2005). This figure has most likely increased since that time.

While it is obvious that defendants who elect to plead guilty and execute plea waivers forfeit certain constitutional rights, such as the right to a jury trial and the right to confront witnesses, it is also clear that, as this Court recently observed in *Garza* "all jurisdictions appear to treat at least some claims as unwaiveable". *Garza v. Idaho*, 586 U.S.___, ___(2019). The Court specifically addressed how some courts adhere to the "miscarriage of justice" standard, and appeared to specifically leave for another day which and what kind of exceptions *should* exist. "We make no statement today on what particular exceptions may be required." *Id. at* footnote 6.

The time has now come for this Court to make such a statement, and further clarify its jurisprudence relating to appeal waivers. This Court can and should fashion a bright-line rule, as it did in *Garza* and in *Class*, and hold that absent an express waiver of a due process right, a defendant is not precluded from bringing a constitutional challenge to his sentence. This rule would bring all subsequent cases in line with this Court's constitutional mandates regarding due process requirements at sentencing.

It is easy to see the danger and prejudice that lack of such a rule brings. As demonstrated, it happened here to Michael Lowman: The district court handed down a "harsh" sentence based on unproven and unreliable facts. Lowman was told by the Fourth Circuit that, because of the appeal waiver, he had no recourse, despite an obvious and colorable due process challenge.

This Court has understood the urgency of clarifying important and deeply-held constitutional principles as they relate to appeal waivers: Effective Assistance of Counsel as well as the constitutional validity of a statute. This Court should now expressly address the bedrock principle of due process in relation to appellate waivers, and embrace the principle recognized by the Second Circuit that "important constitutional rights require some exceptions to the presumptive enforceability of [an appeal] waiver." *Campusano v. United States* 442 F.3d 770, 774, (2d Cir. 2006) (Sotomayor, J.) This case presents the Court with a perfect vehicle within which to do so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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