No. _____

IN THE

Supreme Court of the United States

MICHAEL HUNTER COOK,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for 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

Whether, consistent with due process, an appellate court may enforce an appellate waiver unsupported by consideration.

LIST OF ALL DIRECTLY RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit, *United States* v. *Cook*, No. 19-4660 (order entered Mar. 12, 2020; rehearing en banc petition denied Apr. 14, 2020)

United States District Court for the Eastern District of North Carolina, *United States* v. *Cook*, No. 7:17-CR-107-D-1 (judgment entered Sept. 11, 2019)

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Petitioner Michael Cook respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Fourth Circuit's order is unreported, but is available at Pet. App. 1a. That court's opinion denying rehearing and rehearing en banc is also unreported. Pet. App. 10a. The District Court's judgment is available at Pet. App. 2a.

JURISDICTION

The District Court entered final judgment on September 11, 2019. Pet. App. 2a-9a. The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on March 12, 2020. Pet. App. 1a. A timely petition for rehearing and rehearing en banc was denied on April 14, 2020. Pet. App. 10a. This Court entered an order on March 19, 2020, extending the deadline to file any petition for a

writ of certiorari due on or after that date to 150 days from the date of the lower court judgment. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the U.S. Constitution provides:

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

INTRODUCTION

Michael Cook was sentenced to more than eighteen *years* of imprisonment for viewing child pornography over the course of three months in 2017. He challenged that sentence as procedurally and substantively unreasonable, but the Fourth Circuit panel dismissed his appeal in a short per curiam order asserting that Mr. Cook "knowingly and voluntarily waived his right to appeal, and the issues he seeks to raise on appeal fall squarely within the compass of his waiver of appellate rights." A timely petition for rehearing and rehearing en banc was summarily denied. But Mr. Cook received no consideration for waiving his appellate rights: The three-level reduction in offense level for acceptance of responsibility would have been available to him whether or not he entered into a written plea agreement with the Government and waived his appellate rights, and the dismissal of additional counts was a nullity in light of their consideration as relevant conduct in determining Mr. Cook's sentence.

The Fourth Circuit's decision creates a conflict among the federal courts of appeals on a critical question of due process. The Second Circuit has concluded that

appellate waivers unsupported by consideration are invalid in light of "special due process concerns for fairness and the adequacy of procedural safeguards." *United States* v. *Lutchman*, 910 F.3d 33, 37 (2d Cir. 2018); *United States* v. *Goodman*, 165 F.3d 169, 174 (2d Cir. 1999).

The Court's review is needed to resolve this circuit split.

STATEMENT

In August 2017, Michael Cook was indicted on nine counts of receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2)(A), and one count of possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), covering conduct over a three-month span from February to May 2017. Pet. App. 98a-101a. He pleaded guilty to one of the receipt counts pursuant to a written plea agreement, and the remaining charges were dismissed. Pet. App. 68a-97a.

At arraignment, the Assistant United States Attorney stated that, if the case had gone to trial, the Government would have endeavored to prove that Homeland Security agents monitoring a peer-to-peer network traced downloads of child pornography to Mr. Cook's home and executed a search warrant there. Pet. App. 94a. Mr. Cook and his fiancée were at home. *Id.* The agents found a desktop computer in the living room with child pornography files. Mr. Cook admitted downloading the pornography and explained that his fiancée had no knowledge of it. The hard drive contained twenty-eight images and 332 videos of child pornography. Pet. App. 95a.

Following entry of the guilty plea, the United States Probation Office filed a presentence report, which was later amended. CAJA145-CAJA181. Applying U.S.S.G. § 2G2.2, the Office started with a base offense level of twenty-two. It added two levels because the material involved a prepubescent minor or a minor who had not attained the age of twelve years. It added four levels because the material included either depictions of violence or exploitation of an infant or toddler. It added two more levels because the offense involved a computer, and five more levels because the offense involved 600 or more images. *Id.* Subtracting three levels for acceptance of responsibility, the Office used a total offense level of thirty-two and a criminal history category of VI to reach an advisory guideline range of 210 to 240 months. CAJA178-CAJA179.

Mr. Cook filed a sentencing memorandum and four character letters. He sought a sentence below the advisory guideline range calculated by the Probation Office, arguing that the two-level reduction from U.S.S.G. § 2G2.2(b)(1) should apply to reduce the range to 168 to 210 months because Mr. Cook did not knowingly distribute images of child pornography. CAJA59.

He also argued that a sentence of 210 months would be greater than necessary under 18 U.S.C. § 3553(a), in light of his significant work history and the fact that he did not seek to traffic, trade, or chat about this material and did not seek out children on the internet. CAJA60-CAJA61. He explained that any sentence within the statutory range would be the longest sentence he has served in his life, by far, and that the conduct in this case calls for a sentence lower than 210 months to

avoid sentencing disparities, noting that in 2018, the average child pornography offender received a sentence of 105 months. CAJA61. Finally, he argued that the court should reject the advice of the Guidelines because child pornography guidelines are based on congressional dictates rather than data and experience and thus "do not reflect the Commission's exercise of its characteristic institutional role." CAJA62 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 109 (2007)). He explained that all of the enhancements applied to Mr. Cook were "all but inherent" in the offense itself, and should not be used to increase the sentence. CAJA63.

Mr. Cook's fiancée described him as "a rock and positive influence on her" for six years and explained that his addiction led to the conduct in this case, describing him as "very sick and not at all in his right mind" when this conduct took place. CAJA184. Mr. Cook's father described his son's diligence with work and managing and saving his money, noting that he "always worked multiple jobs at a time so that he could be financially independent." CAJA185. Mr. Cook's close friend of ten years described him as a "really good person and loving father," describing this conduct as uncharacteristic of the "type of person he is." CAJA186.

At sentencing, Special Agent Charles Kitchen from the Department of Homeland Security, testified that Mr. Cook had two peer-to-peer network programs on his computer at the time it was seized, the Tor browser and Ares. Pet. App. 18a. No child pornography was found on the Tor browser. Pet. App. 22a.

Mr. Cook's counsel argued that no evidence was presented that Mr. Cook knew how Ares worked, that he was "not a sophisticated computer user," that "this was

his first computer," and he "does not have a lot of technological skills," evidenced by his use of his own email address to log into Ares. Pet. App. 23a. Mr. Cook himself explained that he did not understand how peer-to-peer software worked and was unaware that it made images from his computer available to others for downloading. Pet. App. 48a. The Government presented no evidence to the contrary and its witnesses at sentencing acknowledged the software allowed sharing by default. Pet. App. 23a. Nonetheless, the District Court denied the two-level offense level reduction for conduct limited to receipt, rather than distribution, of child pornography.

The District Court ultimately sentenced Mr. Cook to 222 months in prison—18.5 years—for his conduct, even though he did not traffic in or trade the images, made no effort to discuss them with anyone, and otherwise worked through his entire adult life and enjoyed significant family support. Pet. App. 2a-9a.

Mr. Cook appealed his sentence, arguing that it was both procedurally and substantively unreasonable. He explained that his sentence was procedurally unreasonable because the District Court declined to apply the two-level reduction applicable to receipt of child pornography where the person did not intend to distribute it. And he explained that it was substantively unreasonable because the District Court imposed a sentence near the statutory maximum for a person who viewed this material over only three months and did not make any effort to trade or traffic in it, never sought to discuss it with anyone else, and otherwise had significant work history and family support.

The Government moved to dismiss Mr. Cook's appeal as encompassed within the scope of his appellate waiver. But Mr. Cook responded in opposition, explaining that he received no consideration for entering into a written plea agreement with the Government and the appellate waiver, unsupported by consideration, was thus unenforceable. The panel dismissed the appeal, stating in a short order that "Cook knowingly and voluntarily waived his right to appeal" and "the issues Cook seeks to raise on appeal fall squarely within the compass of his waiver of appellate rights." Pet. App. 1a. Mr. Cook's timely petition for rehearing and rehearing on banc was summarily denied. Pet. App. 10a.

This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION IS WRONG AND CREATES A CONFLICT WITH THE SECOND CIRCUIT ON THE ENFORCEABILITY OF APPELLATE WAIVERS IN THE ABSENCE OF CONSIDERATION

The Fourth Circuit's decision conflicts with the Second Circuit's decision in *United States v. Lutchman*, 910 F.3d 33 (2d Cir. 2018). Although "a defendant's right to appeal his sentence may be waived in a plea agreement," those waivers are not "enforceable on a basis that is limited and unexamined." *United States* v. *Ready*, 82 F.3d 551, 555 (2d Cir. 1996), *superseded on other grounds as stated in United States* v. *Cook*, 722 F.3d 477, 481 (2d Cir. 2013).

"It is well-established that the interpretation of plea agreements is rooted in contract law, and that 'each party should receive the benefit of its bargain.' " *United States* v. *Peglera*, 33 F.3d 412, 413 (4th Cir. 1994) (quoting *United States* v.

Ringling, 988 F.2d 504, 506 (4th Cir. 1993)). In fact, plea agreements are given even "greater scrutiny than we would apply to a commercial contract" "[b]ecause a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement." *United States* v. *Warner*, 820 F.3d 678, 683 (4th Cir. 2016) (internal quotation marks and citations omitted).

The Fourth Circuit's decision to enforce the appellate waiver in Mr. Cook's case contravenes those principles and creates a conflict with the Second Circuit's decision in *Lutchman*, 910 F.3d 33 (2d Cir. 2018), on the scope of due process protections in the context of appellate waivers.

In Lutchman's written plea agreement, he pleaded guilty to a violation of 18 U.S.C. § 2339B(a)(1), waived his right to indictment, and waived his right to appeal any sentence lesser than or equal to the statutory maximum 240-month sentence. *Id.* at 37. The Government "would achieve 'a conviction without the expense and effort of proving the charges at trial beyond a reasonable doubt' and save the time and expense of an appeal." *Id.* (quoting *United States* v. *Rosa*, 123 F.3d 94, 97, 101 n.7 (2d Cir. 1997)).

Meanwhile, Lutchman "received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement." *Id.* The three-level reduction he received for pleading guilty "was available to Lutchman even in the absence of an agreement to waive his right to appeal." *Id.*

In Mr. Cook's case, as in Mr. Lutchman's, the three-level reduction for acceptance of responsibility would have been available to him whether or not he

entered into a written plea agreement with the Government. In fact, the Sentencing Guidelines commentary instructs that "[t]he government should not withhold [a Section 3E1.1(b) motion] based on . . . whether the defendant agrees to waive his or her right to appeal." U.S.S.G. § 3E1.1 cmt. 6.

Unlike in *Lutchman*, there were counts dismissed as a result of Mr. Cook's plea agreement. But the effect of that dismissal was a nullity, in light of the relevant conduct rules. *See* U.S.S.G. § 1B1.3 (explaining that advisory guideline range must be calculated based on "all acts and omissions committed . . . by the defendant . . . that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense" and "all acts and omissions . . . part of the same course of conduct or common scheme or plan as the offense of conviction"). Here, Mr. Cook was sentenced on the basis of all the conduct charged in the indictment. CAJA166-CAJA168 (setting forth "offense conduct" that describes all of the conduct encompassed in the original indictment). What is more, the District Court sentenced Mr. Cook below the statutory maximum sentence of twenty years, demonstrating that the reduction n statutory maximum sentence resulting from the dismissal of additional counts was illusory, too. In other words, Mr. Cook received nothing of value in exchange for his purported waiver of his appellate rights.

In *Lutchman*, the Second Circuit declined to enforce the appellate waiver to bar Lutchman's appeal "[b]ecause the agreement offered nothing to Lutchman that affected the likelihood he would receive a sentence below the statutory maximum"

and thus was "unsupported by consideration" and incompatible with due process. *Id.* at 38; *see also Goodman*, 165 F.3d at 174 (refusing to enforce appellate waiver because, among other things, defendant "received very little benefit in exchange for her plea of guilty"). It "sever[ed] the waiver from the plea agreement and proceed[ed] to the merits." *Lutchman*, 910 F.3d at 38.

II. THIS ISSUE IS IMPORTANT AND RECURS FREQUENTLY

Appellate waivers in plea agreements are commonplace. In fiscal year 2019, 97.6% of criminal defendants in federal court pleaded guilty rather than proceeding to trial. United States Sentencing Commission, Fiscal Year 2019 Overview of Federal Criminal Cases, at 8 (Apr. 2020), *available at* https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/FY19_Overview_Federal_Criminal_Cases.pdf (last visited Sept. 11, 2020). An empirical study of 971 federal plea agreements in 2003 found that almost two-thirds contained an appellate waiver provision. Nancy J. King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005).

And these commonplace waivers have fallen under significant scrutiny. Some commentators have argued that appellate waivers are "inherently involuntary or coercive because of the unequal balance of power between the government and the defendant in a criminal prosecution." Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 Univ. Mich. J. L. Reform, at 347, 359 (2015). *See* Steven L. Chanenson, *Guidance from Above and Beyond*, 58 Stan. L. Rev. 175, 182 (2005) ("[T]here is

reason to question how much real trading occurs."); Lynn Fant & Ronit Walker, *Reflections on a Hobson's Choice: Appellate Waivers and Sentencing Guidelines*, 11 Fed. Sent'g Rep. 60, 60 (1998) ("[M]any United States Attorney's Offices require defendants to waive the right to appeal as part of a plea agreement."); Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 167 (1995) ("[A]ppeal waivers look . . . more like the price of admission to engage in the plea bargaining process at all."). Some courts have even described appellate waivers as "one-sided contract[s] of adhesion." *United States* v. *Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997); *see also United States* v. *Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997).

The enforceability of these waivers, then, is an issue of nationwide importance. Clarifying the standards to be applied to ensure minimum due process protection would allow both parties to criminal cases to have clear-eyed negotiations and certainty in which rights each party agrees to preserve and forego.

III. THIS IS A CLEAN VEHICLE TO DECIDE THE QUESTION PRESENTED

This argument has been pressed at each appropriate level of review. Mr. Cook pressed his argument that his appellate waiver should not be enforced in response to the Government's motion to dismiss his appeal in the Fourth Circuit. When the court of appeals dismissed his appeal over his objection, Mr. Cook raised the same issue with the en banc court.

What is more, the question is outcome-determinative. If the court of appeals had agreed with Mr. Cook's argument and declined to enforce his appellate waiver, it

would have reached his arguments on the procedural and substantive unreasonableness of his sentence. And if it had reached those arguments, Mr. Cook would likely have succeeded in seeking vacatur and remand of his sentence. After all, the Fourth Circuit has held that, in order to justify denial of the "receipt-only" reduction sought by Mr. Cook, the Government cannot merely rest on a showing that peer-to-peer file-sharing software was used; it must also prove that the defendant knew how that software worked. *See United States* v. *Abbring*, 788 F.3d 565, 567-568 (6th Cir. 2015); *United States* v. *Spriggs*, 666 F.3d 1284, 1287 (11th Cir. 2012); *United States* v. *Layton*, 564 F.3d 330, 335 (4th Cir. 2009). And Mr. Cook provided compelling reasons why the court's sentence was excessive under the Section 3553(a) sentencing factors: The offense spanned fewer than three months and never involved trafficking, trading, or even discussing the material; Mr. Cook never attempted to seek out children or try to talk to children on the internet; and Mr. Cook received a sentence more than two and a half times the national average for similar child pornography offenses in 2018 even though a five year, mandatory minimum sentence would have been the longest he had ever served, by far.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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