

NO. _____

In The
Supreme Court of the United States

RONALD LESLIE PIERCE, JR.,

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

Raymond C. Tarlton
Counsel of Record
TARLTON POLK, PLLC
209 Fayetteville Street, Suite 105
Raleigh, North Carolina 27601
(919) 948-6464
rtarlton@tarltonpolk.com

Counsel for Petitioner

Dated: September 21, 2020

QUESTION PRESENTED

Whether concurrent sentence harmless error doctrine is not applicable to multiple convictions and sentences with criminal monetary penalties on each since this Court's precedents have established that convictions and sentences with independent monetary penalties are never truly identical sentences?

PARTIES TO THE PROCEEDING

Ronald Pierce, Jr., petitioner on review, was the defendant-appellant below.

The United States of America, respondent on review, was the appellee below.

RELATED PROCEEDINGS

United States Court of Appeals for the Fourth Circuit:

United States v. Pierce, No. 19-4601 (4th Cir. April 22, 2020)

United States District Court for the Eastern District of North Carolina:

United States v. Pierce, No. 7:15-cr-18-BO-1 (E.D.N.C. Aug. 3, 2019)

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	ii
RELATED PROCEEDINGS.....	ii
TABLE OF AUTHORITIES	
OPINION BELOW.....	1
JURISDICTION.....	1
FEDERAL PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
REASON FOR GRANTING THE PETITION	8
THIS COURT SHOULD GRANT THE PETITION TO BRING THE FOURTH CIRCUIT INTO COMPLIANCE WITH THIS COURT'S PRECEDENTS AND SUMMARILY REVERSE AND REMAND TO THE FOURTH CIRCUIT	8
CONCLUSION.....	13
APPENDIX:	
Unpublished Opinion of The United States Court of Appeals For the Fourth Circuit entered April 22, 2020.....	1a
Judgment of The United States Court of Appeals For the Fourth Circuit entered April 22, 2020.....	7a
Judgment in a Criminal Case of The United States District Court for The Eastern District of North Carolina entered March 8, 2016	8a

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Benton v. Maryland</i> , 395 U.S. 784 (1969)	9
<i>Gall v. United States</i> , 552 U.S. 38 (2007)	6, 11, 12
<i>Grady v. North Carolina</i> , 135 S. Ct. 1368 (2015)	8
<i>Greenlaw v. United States</i> , 554 U.S. 237 (2008)	12
<i>Martinez v. Illinois</i> , 134 S. Ct. 2070 (2014)	8
<i>Maryland v. Kulbicki</i> , 136 S. Ct. 2 (2015)	8
<i>Ray v. United States</i> , 481 U.S. 736 (1987)	8, 9, 10
<i>Rita v. United States</i> , 551 U.S. 338 (2007)	6, 11, 12
<i>Rutledge v. United States</i> , 517 U.S. 292 (1996)	10, 13
<i>Spencer v. Kemna</i> , 523 U.S. 1 (1998)	9
<i>United States v. Charles</i> , 932 F.3d 153 (4th Cir. 2019)	9
<i>United States v. Provance</i> , 944 F.3d 213 (4th Cir. 2019)	6
<i>United States v. Smith</i> , 601 F.2d 972 (8th Cir. 1979)	9

CONSTITUTIONAL PROVISION

U.S. CONST. amend. IV	8
-----------------------------	---

STATUTES

18 U.S.C. § 2252(a)(2)	2, 3
------------------------------	------

18 U.S.C. § 2252(a)(4)(B)	2, 3, 7
---------------------------------	---------

18 U.S.C. § 2252(b)(2)	7, 12
------------------------------	-------

18 U.S.C. § 3013.....	4, 10
-----------------------	-------

18 U.S.C. § 3013(a)(2)	2, 8
------------------------------	------

18 U.S.C. § 3013(b)	8
---------------------------	---

28 U.S.C. § 1291.....	2
-----------------------	---

28 U.S.C. § 1254(1)	2
---------------------------	---

28 U.S.C. § 2255.....	2, 5
-----------------------	------

RULE

Sup. Ct. R. 12.7	2
------------------------	---

GUIDELINE

U.S.S.G. § 5H1.11	3
-------------------------	---

IN THE
Supreme Court of the United States

No. _____

RONALD LESLIE PIERCE, 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 A WRIT OF CERTIORARI

Ronald Leslie Pierce, Jr. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINION BELOW

The Fourth Circuit's opinion is unpublished but available at 812 F. App'x 111, 2020 U.S. App. LEXIS 12937** (4th Cir. April 22, 2020). Pet. App. 1a-6a.

JURISDICTION

The District Court entered on the docket the final judgment on March 8, 2016. Pet. App. 8a-14a. The district court entered an amended judgment on June 16, 2016. Mr. Pierce sought post-conviction relief and filed a motion to vacate his sentences and

convictions under 28 U.S.C. § 2255 on June 21, 2017. (CAJA 12).¹ On August 3, 2019, the district court granted, in part, Mr. Pierce’s motion for post-conviction relief, and re-entered the judgment as of that day so that Mr. Pierce could pursue a direct appeal. (CAJA 255). The Fourth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and entered judgment on April 22, 2020. Pet. App. 7a. On March 19, 2020, this Court extended deadline to file petitions for a writ of certiorari by 150 days from the date of the lower court judgment due to the ongoing public health concerns relating to COVID-19. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

The relevant statutory provisions are codified at 18 U.S.C. § 2252(a)(2), 18 U.S.C. § 2252(a)(4)(B), and 18 U.S.C. § 3013(a)(2).

STATEMENT OF THE CASE

This case arose out of an investigation into computer peer-to-peer file sharing networks that ultimately led law enforcement to search Mr. Pierce’s home and business in North Carolina, including seizing computers. (CAJA 275-76). Images involving depictions of the sexual exploitation of minors downloaded from file-sharing networks were found on the computer in Mr. Pierce’s business. (*Id.*)

On March 3, 2015, Mr. Pierce was charged in an indictment in the Eastern District of North Carolina with ten counts of receiving pornography with depictions involving the sexual exploitation of minors in violation of 18 U.S.C. § 2252(a)(2), and

¹ Citations are to the record on appeal—the joint appendix—in the Fourth Circuit. The citations are provided for the Court’s convenience in the event this Court deems it necessary to review the record to resolve this petition. *See* Sup. Ct. R. 12.7.

with one count of possession of pornography with depictions involving the sexual exploitation of minors in violation of 18 U.S.C. § 2252(a)(4)(B). (CAJA 18-21).

On November 2, 2015, Mr. Pierce pleaded guilty, without a plea agreement to Count 11 of the indictment, the charge of possession in violation of 18 U.S.C. § 2252(a)(4)(B). (CAJA 190). However, at that arraignment, he pled not guilty to the rest of the indictment that alleged ten counts (Counts 1 through 10) of receipt in violation of 18 U.S.C. § 2252(a)(2), each of which carries a mandatory minimum sentence of five years in prison.

About 7 days later, on November 9, 2015, the day that his jury trial was set to begin, Mr. Pierce pled guilty to Count 1, receipt, under a written plea agreement that applied only to Count 1. (CAJA 204). Afterwards, a pre-sentence report (PSR) was prepared. (CAJA 281). Mr. Pierce had zero criminal history points, and the offense level calculated for the advisory sentencing guidelines was 32, thus his advisory guideline range was 121 months to 151 months in prison. (CAJA 282). However, the U.S. Probation Office informed the district court that it may wish to consider a downward departure or downward variance from the advisory sentencing guideline range under U.S.S.G. § 5H1.11 based on Mr. Pierce's military service.

At the sentencing hearing on March 8, 2016, Mr. Pierce's district court counsel argued for a downward variance from the advisory sentencing guideline range. (CAJA 56, 219). Mr. Pierce had an exemplary military service spanning many years, including in combat zones, and that sacrifice led to permanent injuries that he suffered. (CAJA 220-21, 278-79). His district court counsel also emphasized the

sacrifices that Mr. Pierce had recently made to care for his wife as she battled cancer. (CAJA 222). His district court counsel advanced other arguments in support of Mr. Pierce's otherwise good character, including his strong work ethic going back to high school and building a small business as well as other evidence of strong community support based on letters submitted to the district court. (CAJA 226-27).

Despite those arguments, when it announced the sentence, the district court (the late Honorable James C. Fox) summarized the mitigation arguments as:

Defendant's parents were divorced when he was young. His years were absent of any type of abuse. The Defendant is married—in his prior military service—established a history of anxiety.

(CAJA 234).

The district court sentenced Mr. Pierce to a term of imprisonment of 151 months in prison (the top-end of the advisory sentencing guideline range) on both Count 1 (the receipt charge governed by a written plea agreement) and Count 11 (the possession charge pled to without a plea agreement), and ran those imprisonment terms for each count concurrently. Pet. App. 9a. The district court imposed criminal monetary penalties. Pet. App. 13a. The special assessments, as part of those penalties, totaled \$200, or \$100 for Count 1 and \$100 for Count 11, which was reflected in the plea agreement governing the plea to Count 1 (receipt) and called for a \$100 special assessment for each count under 18 U.S.C. § 3013. *Id.*; *see also* (CAJA 239, 266). The written plea agreement expressly noted that part of the penalty for the plea to Count 1 (receipt) was a special assessment of \$100. (CAJA 268).

The district court also imposed a term of supervised release to run at the conclusion of the prison sentence for a period of 10 years for each count to run concurrently. Pet. App. 10a.

The district court initially delayed imposing restitution as a criminal monetary penalty in the case until a final determination of the losses attributed to the victims' depicted in the images underlying the counts of conviction could be made. Pet. App. 14a. Pursuant to a post-sentencing motion filed by the Government, and joined in by Mr. Pierce's district court counsel, on June 9, 2016, the district issued an order granting the motion to include restitution (but without specifying in that order how much restitution applied to each count of conviction) and entered a new judgment imposing \$4,500 in restitution as an additional criminal monetary penalty on top of the total amount of \$200 that had been imposed as a special assessment. (CAJA 247-53).

Mr. Pierce did not initially pursue a direct appeal through his district court counsel, however, he filed for post-conviction relief under 28 U.S.C. § 2255, in part on a claim of ineffective assistance of counsel for failing to consult about or otherwise pursue a direct appeal. The district court granted Mr. Pierce relief on his claim that his district court counsel was ineffective for failing to consult about or otherwise file a notice of appeal after the final judgments were entered and, as a remedy, the district court re-entered the final judgment so that Mr. Pierce could pursue a direct appeal on August 3, 2019. (CAJA 255).

Mr. Pierce did so and sought to challenge his convictions and sentences in the Fourth Circuit Court of Appeals on grounds that his guilty pleas were not knowing and voluntary, his sentences for each conviction were procedurally unreasonable, and his sentence on Count 11 (possession) was unlawful because it exceeded the statutory maximum punishment of 10 years in prison. The Fourth Circuit disagreed that the pleas were not knowing and voluntary by finding that the district court must have remembered the evidence presented at a pre-trial hearing despite not receiving a factual basis for the pleas during each arraignment hearing. The Fourth Circuit also disagreed on his other challenges to his convictions and sentences, affirming the conviction and sentence on Count 11 (possession) and dismissing the appeal as to Count 1 (receipt) because of the written plea agreement containing, in its view, a valid appeal waiver solely as to Count 1, in an unpublished, per curiam decision. Pet. App. 2a.

Citing this Court’s precedents in *Gall v. United States*, 552 U.S. 38, 51 (2007) and *Rita v. United States*, 551 U.S. 338, 356 (2007), as well as its own precedent in *United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019), the Fourth Circuit determined that the district court committed procedural error; “[t]here is no indication that the district court considered counsel’s request for a below-Guidelines sentence of 60 month’s imprisonment.” Pet. App. 4a. However, as to the 151 month sentence (and \$100 criminal monetary penalty in the form of a special assessment)

imposed on Count 1, the Fourth Circuit determined that the appeal waiver in the plea agreement prevented it from granting relief and declined to review Mr. Pierce's challenge to the procedural reasonableness of the sentence. Pet. App. 5a.

As to the 151 months in prison (and \$100 special assessment) imposed on Count 11, which was not subject to an appeal waiver (or a written plea agreement), the Fourth Circuit declined to vacate the sentence on Count 11 and remand for a resentencing because, in its view, Mr. Pierce "received identical concurrent sentences." *Id.* The Fourth Circuit characterized its ruling as an application of the concurrent sentence doctrine as a species of harmless-error review. Pet. App. 6a.

The Fourth Circuit also determined that the unlawful sentence of 151 months that Mr. Pierce received for Count 11 (possession) was plain error, because the statutory maximum sentence for that count of conviction was only 10 years in prison (120 months imprisonment) under 18 U.S.C. §§ 2252(a)(4)(B) and (b)(2). *Id.* As to Count 11, the district court erroneously treated Mr. Pierce as being convicted for aggravated offense of possession of depictions involving the sexual exploitation of minors that only applies when the additional element of the depictions involved a prepubescent minor or a minor who had not attained the age of 12 is charged, but Count 11 did not charge Mr. Pierce with committing that aggravated possession offense. However, in the Fourth Circuit's view, that error, including erroneously treating Mr. Pierce as convicted of aggravated possession in Count 11, did not affect substantial rights, again under the concurrent-sentence doctrine, because the

unlawful sentence does not affect the total length of imprisonment given its decision to not disturb the sentence and conviction for Count 1 (receipt). *Id.*

This petition for certiorari followed.

REASON FOR GRANTING THE PETITION

THIS COURT SHOULD GRANT THE PETITION TO BRING THE FOURTH CIRCUIT INTO COMPLIANCE WITH THIS COURT'S PRECEDENTS AND SUMMARILY REVERSE AND REMAND TO THE FOURTH CIRCUIT

In light of the Fourth Circuit's failure to comply with this Court's precedents that federal sentences are never truly concurrent for purposes of the concurrent sentence doctrine when multiple criminal monetary penalties, including special assessments of \$100 for each count of conviction and collected in the same manner as a fine under 18 U.S.C. §§ 3013(a)(2) and (b), are effectively imposed for each sentence. *See, e.g., Ray v. United States*, 481 U.S. 736, 737 (1987) (per curiam). The Court should summarily reverse and remand to the Fourth Circuit. *See Maryland v. Kulbicki*, 136 S. Ct. 2, 3 (2015) (per curiam) (summarily reversing where the court applied governing Supreme Court case "in name only"); *Grady v. North Carolina*, 135 S. Ct. 1368, 1370 (2015) (per curiam) (summarily reversing a judgment inconsistent with the Court's Fourth Amendment precedents); *Martinez v. Illinois*, 134 S. Ct. 2070, 2077 (2014) (per curiam) (summarily reversing a holding that "r[an] directly counter to [this Court's] precedents").

The concurrent sentence doctrine has been summarize as authorizing an appellate court to use its discretion to:

Decline to review the validity of a defendant's conviction where (a) the defendant has received concurrent sentences on plural counts of an indictment, (b) a conviction on one or more of those counts is unchallenged or found to be valid, and (c) a ruling in the defendant's favor on the conviction at issue would not reduce the time he or she is required to serve under the sentence for the valid conviction(s). A reviewing court will not, however, apply the concurrent sentence rule in cases where its application would be *substantially prejudicial to a defendant or expose him to a substantial risk of adverse collateral consequences* that might flow from an invalid but unreversed conviction.

United States v. Smith, 601 F.2d 972, 973 (8th Cir. 1979); *see also United States v. Charles*, 932 F.3d 153, 159-61 (4th Cir. 2019) (recognizing that the concurrent sentence doctrine rests on the same reasoning as harmless-error review). This Court has indicated a general willingness to "presume" that an unlawful conviction "has continuing collateral consequences." *Spencer v. Kemna*, 523 U.S. 1, 8 (1998). That presumption should apply in the instant case.

The origins of the concurrent sentence doctrine are obscure. *Benton v. Maryland*, 395 U.S. 784, 789 (1969). One indisputable aspect of the doctrine is that it is not a jurisdictional rule; rather, it is a matter of judicial discretion. *Id.* at 790. This Court stated in *Benton* that the doctrine's only "continuing validity" is as a "rule of judicial convenience." *Id.* at 791.

In *Ray*, this Court, in a per curiam decision, reasoned that the lower appellate court erred by applying the concurrent sentence doctrine to avoid reaching a challenge to one of the convictions and sentences when that the defendant received concurrent 7-year prison terms for his convictions for one count of conspiracy to possession cocaine with intent to distribute and two counts of possession of cocaine with intent to distribute. 481 U.S at 736. This Court reasoned that the defendant was

not in fact serving concurrent sentences considering the criminal monetary penalties imposed for each count of conviction, specifically the special assessments (then \$50) for each count of conviction under 18 U.S.C. § 3013. *Id.* at 737.

Almost a decade later, this Court, in a unanimous decision, *see Rutledge v. United States*, 517 U.S. 292, 301 (1996), and citing to *Ray*, reiterated that the imposition of multiple criminal monetary penalties, such as special assessments due to multiple counts of convictions, means that the sentences below were not fully concurrent sentences, which precludes application of the concurrent sentence doctrine of harmless error. *Id.* This Court remanded even though the lower appellate court in that case never had the issue of the impact of criminal monetary penalties on the application of the concurrent sentence doctrine litigated before it. *Id.* *Rutledge* also recognized the myriad of ways an erroneous conviction and sentence can impact someone going beyond the issue of the prison term and even criminal monetary penalties:

The separate conviction, apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statutes for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction.

Id. at 302 (cleaned up).

The Fourth Circuit's decision was manifest error. It applied the concurrent sentence doctrine to decline to remand the case for re-sentencing notwithstanding the appellate court's determination that the district court committed procedural error by

failing to consider important mitigation arguments for a lower sentence as required by this Court's precedents in *Gall v. United States*, 552 U.S. 38, 51 (2007) and *Rita v. United States*, 551 U.S. 338, 356 (2007), and notwithstanding its determination that the sentence for Count 11 (possession) was unlawful because it exceeded the statutory maximum punishment of 10 years imprisonment. In its flawed view, the 151 month prison sentences for Count 11 (possession) and for Count 1 (receipt) were effectively identical, and the sentence on Count 1 (receipt) could not be challenged due to the appeal waiver that covered that sentence (but not the sentence on Count 11). That manifest error was also compounded by the Fourth Circuit erroneously treating a sentence and conviction covered by an appeal waiver as having the effect of restoring validity to an otherwise invalid sentence. Here, Count 1 (receipt) was treated as the valid conviction and sentence for purposes of the concurrent sentence harmless error doctrine notwithstanding the appellate court determining that the district court committed serious procedural error in contravention of this Court's important sentencing precedents.

Another aspect of the Fourth Circuit's erroneous application of the concurrent sentencing doctrine to deny a remand of the case for a re-sentencing is the imposition of \$4,500.00 of restitution in this case. The judgment imposing it does not clarify how much of that figure is attributable to Count 1 (receipt) versus Count 2 (possession). It is another criminal monetary penalty that establishes that the sentences here are not truly identical under the parameters set for that concept by this Court.

When conducting a re-sentencing, the district court must consider this Court's precedents in *Gall*, 552 U.S. at 51, and *Rita*, 551 U.S. at 356. The invocation of the concurrent sentence doctrine by the Fourth Circuit Court of Appeals effectively deprives Mr. Pierce of the right to have his sentencing package unbundled and his sentence considered anew by the district court. *See Greenlaw v. United States*, 554 U.S. 237, 253-54 (2008) (noting in a successful attack on a sentence in a multi-count indictment the remedy often is to unbundle the sentencing package and allow the district court to sentence anew on each count of conviction provided that the aggregate sentence does not exceed the original sentence).

Furthermore, if the concurrent sentencing doctrine is invoked to deny Mr. Pierce relief on his sentence for Count 11 (possession), he would still be serving a sentence of 151 months on that count, even though such a sentence should be subject to a maximum statutory term of 120 months (10 years). Furthermore, leaving Count 11 intact also allows not just an erroneous sentence to stand but also an erroneous conviction; Count 11 in the indictment only charged Mr. Pierce with possession of images involving the sexual exploitation of minors (individuals under 18 years old), triggering a statutory maximum sentence of 10 years in prison under 18 U.S.C. § 2252(b)(2) and *not* the aggravated offense of possession of images involving the sexual exploitation of individuals who were prepubescent or had not yet attained the age of 12 years old, which triggers an increased statutory maximum punishment of up to 20 years in prison under § 2252(b)(2). Aggravated offenses carry aggravated societal stigma, which is an adverse collateral consequence of Mr. Pierce's erroneous

conviction and sentence for Count 11. *See Rutledge*, 517 U.S. at 302. This constitutes either significant prejudice or an adverse collateral consequence to Mr. Pierce, because there is no other scenario where he would be able to challenge this unlawful sentence and conviction .

CONCLUSION

For the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

/S/ RAYMOND C. TARLTON
RAYMOND C. TARLTON
Counsel of Record
Tarlton Polk PLLC
209 Fayetteville Street, Suite 105
Raleigh, NC 27601
(919) 948-6464
rtarlton@tarltonpolk.com

Counsel for Petitioner

APPENDIX

TABLE OF CONTENTS

	<u>Appendix Page</u>
Unpublished Opinion of The United States Court of Appeals For the Fourth Circuit entered April 22, 2020	1a
Judgment of The United States Court of Appeals For the Fourth Circuit entered April 22, 2020	7a
Judgment in a Criminal Case of The United States District Court for The Eastern District of North Carolina entered March 8, 2016	8a

UNPUBLISHED**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

No. 19-4601

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

RONALD LESLIE PIERCE, JR.,

Defendant - Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at
Wilmington. James C. Fox, Senior District Judge. (7:15-cr-00018-BO-1)

Submitted: March 25, 2020

Decided: April 22, 2020

Before AGEE, KEENAN, and RUSHING, Circuit Judges.

Affirmed in part and dismissed in part by unpublished per curiam opinion.

Raymond C. Tarlton, TARLTON POLK PLLC, Raleigh, North Carolina, for Appellant.
Robert J. Higdon, Jr., United States Attorney, Jennifer P. May-Parker, Assistant United
States Attorney, Kristine L. Fritz, Assistant United States Attorney, OFFICE OF THE
UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Ronald Leslie Pierce, Jr., pled guilty in separate proceedings to receipt of child pornography, in violation of 18 U.S.C. § 2252(a)(2), (b)(1) (2018) (Count 1), and possession of child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), (b)(2) (2018) (Count 11). He received concurrent sentences of 151 months' imprisonment and 10 years' supervised release. Pierce argues that his guilty pleas were unknowing and involuntary because they lacked an independent factual basis. He also argues that the district court failed to address his argument for a variant sentence. Lastly, he argues that his sentence for Count 11 exceeded the statutory maximum. We affirm in part and dismiss in part.

“Before entering judgment on a guilty plea, the [district] court must determine that there is a factual basis for the plea.” Fed. R. Crim. P. 11(b)(3). The requirement that the court find a factual basis “ensures that the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime.”

United States v. DeFusco, 949 F.2d 114, 120 (4th Cir. 1991). “The requirement . . . is designed to protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.” *United States v. Mastrapa*, 509 F.3d 652, 660 (4th Cir. 2007) (internal quotation marks omitted). “The district court possesses wide discretion in finding a factual basis, and it need only be subjectively satisfied that there is a sufficient factual basis for a conclusion that the defendant committed all of the elements of the offense.” *United States v. Stitz*, 877 F.3d 533, 536 (4th Cir. 2017) (internal quotation marks omitted). The “court is not required to replicate the trial that the parties sought to avoid, or

to rely only on the Rule 11 plea colloquy. Rather, the district court may conclude that a factual basis exists from anything that appears on the record.” *United States v. Ketchum*, 550 F.3d 363, 366-67 (4th Cir. 2008) (citations and internal quotation marks omitted).

Because Pierce did not attempt to withdraw his guilty pleas, review is for plain error. *United States v. Lockhart*, 947 F.3d 187, 191 (4th Cir. 2020) (en banc). “To succeed under plain error review, a defendant must show that: (1) an error occurred; (2) the error was plain; and (3) the error affected his substantial rights.” *Id.* If Pierce satisfies these three prongs, we will only correct the error if it “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Id.* (internal quotation marks omitted). Upon our review of the record, we conclude that the court became aware of the factual basis for the two charges after receiving testimony from law enforcement during a pretrial hearing. This testimony amply established an independent factual basis for the convictions. Accordingly, there was no plain error.

Pierce argued for a sentence below the advisory Sentencing Guidelines range. He now argues that his sentence is procedurally unreasonable because the district court did not adequately explain the sentence or consider his reasons for a variant sentence. The Government asserts that this argument is unreviewable because Pierce waived his right to appeal any sentence within the Guidelines range.

In determining procedural reasonableness of a sentence, we look for “significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] § 3553(a) [(2018)] factors, selecting a sentence based on clearly erroneous facts, or failing to

adequately explain the chosen sentence.” *Gall v. United States*, 552 U.S. 38, 51 (2007). “When rendering a sentence, the district court must make an individualized assessment based on the facts presented and must state in open court the particular reasons supporting its chosen sentence.” *United States v. Provance*, 944 F.3d 213, 218 (4th Cir. 2019) (internal quotation marks omitted). “The sentencing judge should set forth enough to satisfy the appellate court that he has considered the parties’ arguments and has a reasoned basis for exercising his own legal decisionmaking authority.” *Rita v. United States*, 551 U.S. 338, 356 (2007). This standard requires the court to “address or consider all non-frivolous reasons presented for imposing a different sentence and explain why he has rejected those arguments.” *United States v. Ross*, 912 F.3d 740, 744 (4th Cir.), *cert. denied*, 140 S. Ct. 206 (2019). “[F]ailing to adequately explain the chosen sentence [is a] procedural error[.]” *Provance*, 944 F.3d at 218.

There is no indication that the district court considered counsel’s request for a below-Guidelines sentence of 60 months’ imprisonment. Pierce, however, waived his right to appeal a within-Guidelines sentence for Count 1. We review *de novo* the issue of whether a defendant validly waived his right to appeal. *United States v. McCoy*, 895 F.3d 358, 362 (4th Cir.), *cert. denied*, 139 S. Ct. 494 (2018). When the Government seeks to enforce an appeal waiver and does not breach its obligations under the plea agreement, we will enforce the waiver if the record establishes that (1) the defendant knowingly and intelligently waived his right to appeal and (2) the issues raised on appeal fall within the waiver’s scope. *United States v. Blick*, 408 F.3d 162, 168-69 (4th Cir. 2005). In determining the validity of the appeal waiver, we consider “the totality of the circumstances, including the experience and

conduct of the defendant, his educational background, and his knowledge of the plea agreement and its terms.” *McCoy*, 895 F.3d at 362 (internal quotation marks omitted). Generally, if the district court fully questions a defendant regarding the waiver provision during the plea “colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid.” *Id.* (internal quotation marks omitted).

“In determining whether an appellate waiver provision bars consideration of the issues raised in a particular appeal, we interpret the terms of the parties’ plea agreement in accordance with traditional principles of contract law.” *United States v. Yooho Weon*, 722 F.3d 583, 588 (4th Cir. 2013). Accordingly, we “hold the government to a greater degree of responsibility for any ambiguities than the defendant, or even than the drafter of a provision of a commercial contract,” and “will enforce an appellate waiver provision against a defendant only if that provision is clearly and unambiguously applicable to the issues raised by the defendant on appeal.” *Id.* (citation and internal quotation marks omitted).

We conclude that Pierce’s appeal waiver is valid and enforceable as to Count 1. Accordingly, we will not review Pierce’s challenge to the procedural reasonableness of Count 1’s sentence. But Pierce entered his guilty plea to Count 11 prior to waiving his right to appeal in court. The subsequent plea agreement appears to apply only to Count 1, and we will not extend the waiver to the sentence Pierce received for Count 11. Nevertheless, even if the district court procedurally erred by failing to fully explain the chosen sentence, we will not vacate Count 11’s sentence and remand for resentencing because Pierce received identical concurrent sentences.

“[T]he concurrent sentence doctrine . . . still has continuing force as a species of harmless-error review where a defendant seeks to challenge the legality of a *sentence* that was imposed for a valid conviction, but where the challenged sentence runs concurrently with a valid sentence of an equal or greater duration.” *United States v. Charles*, 932 F.3d 153, 160 (4th Cir. 2019). Because Pierce’s challenge to the procedural reasonableness of Count 11’s sentence would have no effect on Pierce’s total term of imprisonment or supervised release, we conclude that any error was harmless.

Lastly, Pierce correctly argues that his 151-month sentence for Count 11 exceeds the 10-year statutory maximum sentence. *See* 18 U.S.C. § 2252(a)(4)(B), (b)(2). Review of this issue is for plain error because Pierce did not raise the issue below. We conclude that there was error in the sentence and the error is plain. However, because Pierce received a valid and identical term of imprisonment for Count 1, the error does not affect Pierce’s substantial rights because it will not affect his length of imprisonment. *See United States v. Ellis*, 326 F.3d 593 (4th Cir. 2003) (on plain error review, declining to vacate erroneous sentence because error did not affect Ellis’ length of imprisonment).

Accordingly, we affirm the sentences in part, and dismiss Pierce’s challenge to the procedural reasonableness of Count 1 due to Pierce’s waiver of his right to appeal a within-Guidelines sentence. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

*AFFIRMED IN PART,
DISMISSED IN PART*

FILED: April 22, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4601
(7:15-cr-00018-BO-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

RONALD LESLIE PIERCE, JR.

Defendant - Appellant

JUDGMENT

In accordance with the decision of this court, the judgment of the district court is affirmed in part. The appeal is dismissed in part.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

UNITED STATES DISTRICT COURT

Eastern

District of

North Carolina

UNITED STATES OF AMERICA
V.

RONALD LESLIE PIERCE, JR.

JUDGMENT IN A CRIMINAL CASE

Case Number: 7:15-CR-18-1F

USM Number: 59198-056

Walter Hoyt Paramore, III

Defendant's Attorney

THE DEFENDANT:

pleaded guilty to count(s) 1 and 11 (Indictment)

pleaded nolo contendere to count(s) _____ which was accepted by the court.

was found guilty on count(s) _____ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 2252(a)(2), 18 U.S.C. § 2252(b) (1)	Receipt of Child Pornography	1/19/2012	1
18 U.S.C. § 2252(a)(4)(B), 18 U.S.C. § 2252 (b)(2)	Possession of Child Pornography	1/19/2012	11

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

The defendant has been found not guilty on count(s) _____

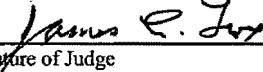
Count(s) 2,3,4,5,6,7,8,9, & 10 of Indict is are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

Sentencing Location:
Wilmington, North Carolina

3/8/2016

Date of Imposition of Judgment


Signature of Judge

JAMES C. FOX, SENIOR US DISTRICT JUDGE

Name and Title of Judge

3/8/2016

Date

DEFENDANT: RONALD LESLIE PIERCE, JR.
CASE NUMBER: 7:15-CR-18-1F

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:

COUNTS 1 AND 11 - 151 MONTHS ON EACH COUNT TO BE SERVED CONCURRENTLY

The court makes the following recommendations to the Bureau of Prisons:

The court recommends FCI Butner.

The defendant is remanded to the custody of the United States Marshal.

The defendant shall surrender to the United States Marshal for this district:

at _____ a.m. p.m. on _____

as notified by the United States Marshal.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

before p.m. on _____

as notified by the United States Marshal. Or

as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

a _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: RONALD LESLIE PIERCE, JR.

CASE NUMBER: 7:15-CR-18-1F

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

COUNTS 1 AND 11 - 10 YEARS ON EACH COUNT, ALL SUCH TERMS TO RUN CONCURRENTLY

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- The defendant shall not possess a firearm, destructive device, or any other dangerous weapon. (Check, if applicable.)
- The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)
- The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)
- The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district or other specified geographic area without the permission of the court or probation officer.
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five (5) days of each month.
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4. The defendant shall support the defendant's dependents and meet other family responsibilities.
5. The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
6. The defendant shall notify the probation officer at least ten (10) days prior to any change of residence or employment.
7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance, or any paraphernalia related to any controlled substance, except as prescribed by a physician.
8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered, or other places specified by the court.
9. The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
10. The defendant shall permit a probation officer to visit the defendant at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer.
12. The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: RONALD LESLIE PIERCE, JR.
CASE NUMBER: 7:15-CR-18-1F

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall provide the probation office with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation office.

The defendant shall submit to a psycho-sexual evaluation by a qualified mental health professional who is experienced in evaluating sexual offenders and who is approved by the U.S. Probation Officer.

The defendant shall participate in a program of mental health treatment, as directed by the probation office.

The defendant shall participate in a sex offender treatment program as directed by the U.S. Probation Officer, and the defendant shall comply with and abide by all the rules, requirements, and conditions of the treatment program until discharged. The defendant shall take medication as prescribed by the treatment provider.

At the direction of the U.S. Probation Officer, the defendant shall submit to physiological testing, which may include, but is not limited to, polygraph examinations or other tests to monitor the defendant's compliance with probation or supervised release and treatment conditions.

The defendant's residence and employment shall be approved by the U.S. Probation Officer. Any proposed change in residence or employment must be provided to the U.S. Probation Officer at least ten days prior to the change and pre-approved before the change may take place.

The defendant shall not possess any materials depicting and/or describing "child pornography" and/or "simulated child pornography" as defined in 18 U.S.C. § 2256, nor shall the defendant enter any location where such materials can be accessed, obtained, or viewed.

The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, et seq.), as directed by the U.S. Probation Officer, the Bureau of Prisons, or any state or tribal government sex offender registration agency in a state where the defendant resides, works, is a student, or was convicted of a qualifying crime.

The defendant shall not associate or have verbal, written, telephonic, or electronic communications with any person under the age of eighteen (18), except: (1) in the presence of the parent or legal guardian of said minor; (2) on the condition that the defendant notifies the parent or legal guardian of the defendant's conviction or prior history; and (3) with specific, written approval from the U.S. Probation Officer. This provision does not encompass persons under the age of 18 with whom the defendant must deal in order to obtain ordinary and usual commercial services (e.g., servers, cashiers, ticket vendors, etc.).

The defendant shall not loiter within 1,000 feet of any area where minors frequently congregate (e.g., parks, school property, playgrounds, arcades, amusement parks, day-care centers, swimming pools, community recreation fields, zoos, youth centers, video arcades, carnivals, and circuses) without prior written permission from the U.S. Probation Officer.

The defendant shall not use, purchase, possess, procure, or otherwise obtain any computer or electronic device that can be linked to any computer networks, bulletin boards, internet, internet service providers, or exchange formats involving computers unless approved by the U.S. Probation Officer.

To ensure compliance with supervision, the defendant shall submit to unannounced searches of any computer or computer equipment (including mobile phones) which, in the discretion of the U.S. Probation Officer, may include the use of computer monitoring technology, computer search or analysis software, and copying of all data from the device and external peripherals. Such examination may require the removal of devices from your possession for the purpose of conducting a thorough inspection.

DEFENDANT: RONALD LESLIE PIERCE, JR.
CASE NUMBER: 7:15-CR-18-1F

SPECIAL CONDITIONS OF SUPERVISION

At the direction of the U.S. Probation Officer, the defendant shall consent to the installation of systems or software that will allow the probation officer or designee to monitor computer use on any computer that the defendant owns or is authorized to use. The defendant shall pay the costs of this monitoring.

The defendant shall not use, possess, or control any computer-based counter forensic tools. The defendant shall not use or have installed any programs specifically and solely designed to encrypt data, files, folders, or volumes of any media. The defendant shall, upon request, immediately provide the U.S. Probation Officer with any and all passwords required to access data compressed or encrypted for storage by any software.

The defendant shall submit to a search of person, house, residence, vehicle, papers, computer, other electronic communication or data storage devices or media, and effects at any time, with or without a warrant. The search may be conducted by any law enforcement officer or probation officer with reasonable suspicion concerning a violation of a condition of supervision or unlawful conduct by the person, and by any probation officer in the lawful discharge of the officer's supervision functions.

The defendant shall cooperate in the collection of DNA as directed by the probation officer.

The drug testing condition required by 18 U.S.C. § 3608 is suspended based upon the court's determination that the defendant poses a low risk of future substance abuse.

DEFENDANT: RONALD LESLIE PIERCE, JR.
CASE NUMBER: 7:15-CR-18-1F

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	<u>Assessment</u>	<u>Fine</u>	<u>Restitution</u>
TOTALS	\$ 200.00	\$	\$

The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

<u>Name of Payee</u>	<u>Total Loss*</u>	<u>Restitution Ordered</u>	<u>Priority or Percentage</u>
TOTALS	\$0.00	\$0.00	

Restitution amount ordered pursuant to plea agreement \$ _____

The defendant must pay interest on restitution and a fine of more than \$2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

The court determined that the defendant does not have the ability to pay interest and it is ordered that:

the interest requirement is waived for the fine restitution.

the interest requirement for the fine restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: RONALD LESLIE PIERCE, JR.
CASE NUMBER: 7:15-CR-18-1F

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A Lump sum payment of \$ _____ due immediately, balance due
 not later than _____, or
 in accordance C, D, E, or F below; or

B Payment to begin immediately (may be combined with C, D, or F below); or

C Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of \$ _____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F Special instructions regarding the payment of criminal monetary penalties:

The special assessment imposed shall be due in full immediately. The imposition of restitution should be delayed until final determination of the victim's losses can be made. The delay in the imposition of restitution shall not exceed 90 days after sentencing as set forth in 18 U.S.C. § 3664(d)(5).

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

The defendant shall pay the cost of prosecution.
 The defendant shall pay the following court cost(s):
 The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.