No. _____

In The

Supreme Court of the United States

TEREK HARPER, a/k/a Reek,

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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QUESTIONS PRESENTED

I. Whether A Federal Criminal Plea Agreement is Void and Unenforceable When it Lacks Consideration.

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ORDER BELOW

The order appealed from is the Judgment located at the CM/ECF Docket of the Fourth Circuit in United States v. Harper, Case No. 19-4260, Docket Entry No. 47, entered on September 30, 2020. A copy of the judgment and per curiam unpublished opinion of the Fourth Circuit is attached.

JURISDICTIONAL STATEMENT

This petition for writ of certiorari is from a final judgment by the Fourth Circuit Court of Appeals on September 30, 2020 dismissing a direct appeal of a sentence imposed against Petitioner Terek Harper in the United States District Court in the Eastern District of North Carolina for a criminal violation of 21 U.S.C. §§ 841(a) and 846. Accordingly, the Court has jurisdiction over this petition for writ of certiorari herein pursuant to 28 U.S.C. § 1254 and 28 U.S.C. § 2101.

CONSTITUTIONAL PROVISIONS INVOLVED

"No person shall be . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend V.

STATEMENT OF THE CASE

A. Procedural History

On May 8, 2018, a federal grand jury for the Eastern District of North Carolina returned a four count indictment against Mr. Harper and three co-defendants. [J.A. at 10-16.][1]

[1] References to the record are made to the Joint Appendix as filed in the United States Circuit Court for the Fourth Circuit in United States v. Harper, Fourth Cir. No. 19-4260.

On September 7, 2018, Mr. Harper pled guilty to a two count Information. [J.A. at 17-46.] Count One of the Information charged Mr. Harper with conspiracy to distribute and possess with the intent to distribute one hundred (100) grams or more of heroin in the Eastern District of North Carolina, in violation of 21 U.S.C. §§ 841(a) and 841(b)(1)(B). Count Two charged Mr. Harper with possession with the intent to distribute a quantity of heroin in the Eastern District of North Carolina on or about April 5, 2018, in violation of 21 U.S.C. § 841(a)(1). [J.A. at 17-46.] Mr. Harper pled guilty pursuant to a written plea agreement. [J.A. at 140-47.]

On November 30, 2018, the initial draft of the PSR was filed. [J.A. at 148-165.] Both Mr. Harper and the Government filed objections. [J.A. at 166-71.] On December 28, 2018, the Final Presentence Report was filed. [J.A. at 172-92.] On January 30, 2019, a Revised Presentence Investigation Report was filed. [J.A. at 193-214.]

On April 1, 2019, the trial court conducted Mr. Harper's sentencing hearing. [J.A. at 48-129.] Also on that date, a written judgment was filed, sentencing Mr. Harper to 87 months of imprisonment on both counts of the Information, to be served concurrently with each other, with a total of five years of supervised release. [J.A. at 130-36.]

On April 13, 2019, trial counsel for Mr. Harper timely filed a notice of appeal. [J.A. at 137-39.] On March 30, 2020, the undersigned on behalf of Mr. Harper filed an Opening Brief and Joint Appendix. 4th Cir. No. 19-4260, Docket Nos. 30-33. On April 15, 2020, the Government moved to dismiss Defendants' appeal on the basis of an appellate waiver clause in Appellant's Plea Agreement. 4th Cir. No. 19-4260, Docket No. 37. On September 30, 2020, the Fourth Circuit granted this motion and dismissed Defendants' appeal. This petition follows.

B. Facts

In this case, Mr. Harper entered into a written Plea Agreement in which he waived indictment and pled guilty to Counts One and Two of the Criminal Information filed concurrently. [J.A. at 140.] Plaintiff's Plea Agreement was filed on September 7, 2018 and is included in the sealed volume of the Joint Appendix. [J.A. at 140-48.] The Criminal Information is included in Volume One of the Joint Appendix. [J.A. at 17-19.] The two counts of the Criminal Information are the same substantive counts against Mr. Harper in the Indictment. [J.A. at 10-16.]

The Plea Agreement contains the following appeal waiver which tracks the standard language in the Eastern District of North Carolina. In it, Mr. Harper agreed:

> c. To waive knowingly and expressly all rights, conferred by 18 U.S.C. § 3742, to appeal the conviction and whatever sentence is imposed on any ground, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that is established at sentencing, and further to waive all rights to contest the conviction or sentence in any postconviction proceeding, including one pursuant to 28 U.S.C. § 2255, excepting an appeal or motion based upon grounds of ineffective assistance of counsel or prosecutorial misconduct not known to the Defendant at the time of the Defendant's guilty plea. The foregoing appeal waiver does not constitute or trigger a waiver by the United States of any of its rights to appeal provided by law.

[J.A. at 140-41.]

The Plea Agreement recites that it is the full and complete record of the Plea Agreement. [J.A. at 140.] In addition to agreeing to plead guilty to the Information and the above cited appeal waiver language, Mr. Harper agreed to make restitution

to any victim, [J.A. at 140], and to waive all rights to request or receive from the United States any records pertaining to the investigation or prosecution of the matter except as provided in the Federal Rules of Criminal Procedure, [J.A. at 141]. He further agreed to assist the United States in the recovery and forfeiture of assets facilitating or acquired through unlawful activities, [J.A. at 141], to pay a special assessment of $200.00, [J.A. at 141-42], to complete and submit a financial statement under oath, [J.A. at 142], and to waive any rights under the Fifth and Sixth Amendment to have the existence and applicability of any prior convictions charged in the Criminal Information. [J.A. at 142.]

The Government agreed to dismiss Count One and Four of the Indictment (7:18-CR-94-2-D) against Mr. Harper, [J.A. at 145], which was substantially similar to the Counts that Mr. Harper pled guilty to in the Information. The Government also reserved the right to make a sentence recommendation and the right to present any evidence at sentencing, [J.A. at 145], that it would not further prosecute Mr. Harper for conduct constituting the basis of the Criminal Information, [J.A. at 145-46], that it would not share any information provided by Mr. Harper pursuant to the agreement with other prosecuting entities, [J.A. at 146], and that it would not use information provided by Mr. Harper to prosecute him further, except for crimes of violence. [J.A. at 146.]

The parties also agreed to the mutual position at sentencing that Mr. Harper had accepted responsibility and would be entitled to the full reduction for

acceptance of responsibility under the advisory Sentencing Guidelines. [J.A. at 146-47.]

The plea agreement did not call for Mr. Harper to cooperate with authorities or the government to provide the trial court with a full report of his cooperation. [J.A. at 14-48.] Mr. Harper was not debriefed in this case. [See J.A. at 48-129.]

In the offense conduct section of the draft Pre-Sentence Report, the Probation Officer stated:

> Investigation confirmed that **TEREK HARPER** was involved in a conspiracy that distributed cocaine and heroin from at least April 2015 until April 15, 2018. Based on the investigation, **HARPER** is accountable for 2.41 grams of marijuana, 17,600 grams of cocaine, and 4282.212 grams of heroin, which has a converted drug weight of 7,802.21 kilograms. Based on the defendant directing Zena Picott to rent vehicles and hotel rooms and directing CD3 to sell heroin, a 3-level role increase is warranted.

[J.A. at 155.] The draft Pre-Sentence Report calculated Mr. Harper's converted attributable drug weight as at least 3,000 kilograms but less than 10,000 kilograms of marijuana, resulting in a base offense level of 32 pursuant to U.S.S.G. §§ 2D1.1(a)(5) and 2D1.1(c)(4). [J.A. at 162.]

The draft Pre-Sentence Report then applied a three level leadership enhancement under U.S.S.G. § 3B1.1(b) for being a manager or supervisor in criminal activity involving five or more participants. [J.A. at 162.] This resulted in an adjusted offense level of 35. After a three level reduction for acceptance of responsibility, Mr. Harper's total offense level was calculated at 32. [J.A. at 162.]

Based upon a total offense level of 32 and a criminal history category of III, the draft Pre-Sentence Report calculated Mr. Harper's sentencing guideline range at 151 to 188 months. [J.A. at 163.]

Both Mr. Harper's trial counsel and the Government submitted written objections to the draft Pre-Sentence Report. [J.A. at 166-71.]

Mr. Harper objected to the drug weight calculation, to the calculation of his criminal history category as III, and to the application of the leadership enhancement under U.S.S.G. § 3B1.1(b). [J.A. at 166-68.] The Government, in turn contended that multiple additional enhancements should be imposed. [J.A. at 170-71.] These included two levels for familial relations under U.S.S.G. § 2D1.1(b)(16)(A), two levels for maintaining a premise for the purpose of manufacturing or distributing a controlled substance under U.S.S.G. § 2D1.1(b)(12), two levels for criminal livelihood under U.S.S.G. § 2D1.1(b)(16)(E), and two levels for obstruction of justice under U.S.S.G. § 3C1.1. [J.A. at 170-71.] In addition, the government contended that Mr. Harper's leadership role enhancement under U.S.S.G. § 3B1.1 should have been 4 and not 3 levels. [J.A. at 170.]

In the Revised Pre-Sentence Report, Mr. Harper's guideline range was calculated with the addition of the enhancements for maintaining a premise under U.S.S.G. § 2D1.1(b)(12) and committing the offense as part of a pattern of criminal conduct engaged in as a livelihood under U.S.S.G. § 2D1.1(b)(16)(E). [J.A. at 207.] This resulted in a calculated advisory guideline range of 235 to 293 months. [J.A. at 208.]

Trial counsel for Mr. Harper preserved his objections and submitted a sentencing memorandum discussing them. [J.A. at 215-25.]

At the sentencing hearing, the trial court heard evidence from the case agent concerning the multiple objections by the government and the defense. [J.A. at 58-92.] After that, the trial court heard argument from both government and defense counsel. [J.A. at 92-121.]

At the conclusion of the evidence and argument, the trial court discussed its findings on the objections as follows:

> THE COURT: All right. In connection with these objections, we'll go through them one at a time. The first objection is an objection to the drug weight in paragraph 72 ultimately, is where in the PSR. The probation officer scored it a 32. The defense contends it should be a 24. And the defense contends that Harper should be accountable for 283.17 grams of heroin and 2.41 grams of marijuana, resulting in a base offense level of 24.
>
> The Court sustained the objection to the defense of the drug weight. I did find the agent credible, but also the credibility turns on Mr. Lige and whether it's -- that his statements get things over the requisite burden of proof. And I have considered the arguments associated with the fact that he is Mr. Harper's brother and that's certainly – everything else being equal -- lends more credibility than someone who's implicating a rival. On the other hand, I don't think the evidence is sufficient for me to find by a preponderance of the evidence that the drug weight ought to be a 32 as reflected in the calculations in paragraph 72. So paragraph 72 becomes a 24.
>
> The next objection is an objection to the second -- to the two criminal history points assigned for being under a criminal justice sentence. The defense contends that Mr. Harper ought to be a criminal history category II. Harper was under a criminal justice sentence until April 29th, 2016.
>
> Based on the evidence presented, I'm not convinced that Harper got back into drug dealing or that the Government has shown that Harper got back into drug dealing while he was still under the probationary

sentence. Certainly, Mr. Harper is no stranger to being a drug dealer, to say the least, but I don't think that that is properly scored. So I'll sustain that objection and he'll be a criminal history category II.

Next, Harper objects to a three-level enhancement for being a manager or supervisor. He contends that there's not sufficient evidence that there were five or more participants in the offense; claims that Zena Picott was not a participant in the offense. Under 3B1.1(b), there's a three-level enhancement if the defendant was a manager or supervisor, but not an organizer or leader and the criminal activity involved five or more participants or was otherwise extensive. There's a two-level enhancement if the defendant was an organizer, leader, manager or supervisor in any criminal activity other than described in A or B; increase by two levels.

Here, the Government I think has met its burden of proof. I do think based on the evidence presented that although Picott was not convicted, I think by a preponderance of the evidence she was a participant in this offense, notwithstanding her claims that she was just taking a vacation in Wilmington, had no idea what was going on. I think that's ludicrous. I think she knew exactly what was going on and knew what her role was.

There, obviously, were I think much more than five, but certainly with Lige, Sims, Simpkins, Harper and Picott – I think there were others that were referenced in the PSR. A participant is a person who's criminally responsible for the commission of the offense but need not have been convicted as stated in 3B1.1 note 2 and as discussed in U.S. v. Kimmell, 644 Fed.App'x 239, 233, (4th Cir. 2016). I do think that Harper certainly supervised Picott in connection with the activity associated with this conspiracy. So I overrule that objection to paragraph 76. The Government I think withdrew its claim that it should be a four-level enhancement, so I don't need to address that.

MR. SEVERO: That's correct, Your Honor.

THE COURT: Okay.

The next one is Harper objects to a two-level enhancement for maintaining a premise for purposes of manufacturing or distributing a controlled substance. Harper rented two hotel rooms in Wilmington, North Carolina and investigators discovered 68.4 grams of heroin, 2.41 grams of marijuana and $9,077 in the room. Harper claims there is no evidence that he was selling heroin out of the hotel rooms. A two-level

enhancement applies under Section 2D1.1(b)(12) if the defendant maintained a premises for purposes of manufacturing or distributing a controlled substance. A premises can be a, quote, "building, room or enclosure." See Comment 17. *See also* United States v. Christian, 544 Fed.App's 188, 190 and 191. Moreover, "Manufacturing or distributing a controlled substance need not be the sole purpose for which the premises was maintained, but must be one of defendant's primary or principal uses for the premises rather that one of the defendant's incidental or collateral use of the premises." See comment 17 to 2D1.1. *See also* U.S. v. Messer, 655 Fed.App'x 956, 958-59 (4th Cir. 2016), U.S. v. Saxby, 754 Fed.App'x 161, (4th Circuit 2018). The Court should consider whether the defendant held a possessory interest in the premises that is/was owned or rented and the extent to which he controlled access or activities. The Court also should consider how often it was used.

Renting a hotel room for purposes of selling heroin satisfies the requirement of 2D1.1(b)(12) as discussed in U.S. v. Nimerfroh, 716 F.App'x 311, 215. I do think the evidence is sufficient and I do find by a preponderance of the evidence that that enhancement is properly applied.

With respect to the Government's objection that Harper should receive a two-level enhancement for use of fear, impulse, friendship, I don't think the Government has met its burden of proof on that. I think Picott knew exactly what was going on; she was a participant in this conspiracy.

Harper objects to a two-level enhancement under 2D1.1(b)(16)(e) for committing the offense as part of a criminal livelihood. Under the guidelines and as discussed in cases such as U.S. v. Gordon, 852 F.3d 126, 133, (1st Cir. 2017), I don't think the Government has met its burden of proof in connection with the amount of money you have to make for this to apply. So I sustain that objection. So that means paragraph 74 becomes zero.

And I have considered the Government's argument associated with Mr. Harper's conduct and [disdain] apparently for dealing with his issues in State Court, but I don't think it rises to the level of warranting an obstruction enhancement in this Federal proceeding or how that behavior impeded this case. And certainly, there's no evidence that -- he hasn't -- he's failed to appear at any proceedings here. So I will give him acceptance.

[J.A. at 107-12.]

As a result of these findings, the trial court calculated Mr. Harper's advisory guideline range as 70 to 87 months. [J.A. at 112.] After this calculation, the government asked the trial court to consider an upward variance to 100 months. [J.A. at 119.] The trial court did not vary upward, but sentenced Mr. Harper to the top of the guideline range at 87 months. [J.A. at 126.]

Defendant appealed to the Fourth Circuit and filed an Opening Brief and Joint Appendix. As noted above, on September 30, 2020, the Fourth Circuit granted the Government's motion and dismissed Defendants' appeal.

REASONS CERTIORARI SHOULD BE GRANTED

I. The Court Should Grant Certiorari to Clarify That A Federal Criminal Plea Agreement is Void and Unenforceable When it Lacks Consideration.

"A plea agreement is essentially a contract between an accused and the government." Puckett v. United States, 556 U.S. 129, 137 (2009)). As a result, the interpretation of a plea agreement "is rooted in contract law, and . . . each party should receive the benefit of its bargain." United States v. Dawson, 587 F.3d 640, 645 (4th Cir. 2009) (internal quotation marks omitted)). "Because a defendant's fundamental and constitutional rights are implicated when he is induced to plead guilty by reason of a plea agreement, our analysis of the plea agreement or breach thereof is conducted with greater scrutiny than in a commercial contract." United States v. McQueen, 108 F.3d 64, 66 (4th Cir. 1996). As a result, the government is held to "a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements."

United States v. Wood, 378 F.3d 342, 348 (4th Cir. 2004) (internal quotation marks omitted). "A defendant entering into a plea agreement with the government undertakes to waive certain fundamental constitutional rights; because of that waiver, the government is required to meet the most meticulous standards of both promise and performance." United States v. Gonczy, 357 F.3d 50, 53 (1st Cir. 2004)).

> Although the analogy may not hold in all respects, plea bargains are essentially contracts. See Mabry v. Johnson, 467 U.S. 504, 508, 104 S.Ct. 2543, 81 L.Ed.2d 437 (1984). When the consideration for a contract fails—that is, when one of the exchanged promises is not kept—we do not say that the voluntary bilateral consent to the contract never existed, so that it is automatically and utterly void; we say that the contract was broken. See 23 R. Lord, Williston on Contracts § 63.1 (4th ed.2002) (hereinafter Williston). The party injured by the breach will generally be entitled to some remedy, which might include the right to rescind the contract entirely, see 26 *id.,* § 68.1 (4th ed. 2003); but that is not the same thing as saying the contract was never validly concluded.

Puckett v. United States, 556 U.S. 129, 137 (2009).

Unlike in Puckett, Mr. Harper does not allege that the Government breached the plea agreement after it was entered. Instead, Mr. Harper contends that his plea agreement contract "was never validly concluded." Id. Mr. Harper's contract was never validly formed because it lacks the necessary consideration.

One of the fundamental principles of contract formation is the necessity of consideration as an essential element of any contract. This Court has previously upheld the principle that a contract without consideration is void. See, e.g., Mexican Light Co. v. Tex. Mex. R. Co. 331 U.S. 731, 734 (1947).

> It is a settled rule of law, with certain well defined exceptions, that a consideration is an essential element of a simple contract and hence a promise is binding only if consideration is given for it. See 12 Am. Jur., Contracts, § 72; Williston on Contracts, Rev. Ed., § 18; Festerman v.

> Parker, 32 N.C. 474; Peoples Building and Loan Association v. Swaim, 198 N.C. 14, 150 S.E. 668; Craig v. Price, 210 N.C. 739, 188 S.E. 321; Stonestreet v. Southern Oil Co., 226 N.C. 261, 37 S.E.2d 676; Jordan v. Maynard, 231 N.C. 101, 56 S.E.2d 26. Thus, it is set out in the Restatement of Contracts, § 19, that a sufficient consideration is one of the legal requirements for the formation of an informal contract, except as otherwise stated in §§ 85-90 and 535. Consideration for a promise is defined in § 75 as an act or a forbearance, or the creation, modification or destruction of a legal relation, or a return promise, bargained for and given in exchange for the promise. Hence, it is said in § 75, Comment B, that in effect consideration is the price bargained for and paid for a promise.

Byerly v. Duke Power Company, 217 F.2d 803, 806 (4th Cir. 1954). In Byerley, the Fourth Circuit upheld summary judgment in favor of the defendants because the contract in question lacked sufficient consideration. Id.

In this case, Mr. Harper did not receive any tangible consideration for entering into his plea agreement, and it is therefore unenforceable as a contract. Under the circumstances of Mr. Harper's case, the plea agreement gives no discernible benefit to Mr. Harper that he would not otherwise have obtained by pleading guilty. Mr. Harper contends that he was not advised about the possibility of pleading guilty without a plea agreement. In that event, his entrance into this written plea agreement was not made knowingly and voluntarily. But whether he so advised or not, on the face of the record below Mr. Harper's written plea agreement was without consideration. It is therefore a legal nullity, and unenforceable.

> Under Paragraph No. 4 of the plea agreement, the Government recites that:
>
> a. Pursuant to Fed. R. Crim. P. 11(c) (1) (A), at sentencing [it] will dismiss Count One and Four of the Indictment (7:18-CR-94-2-D) as to this Defendant only.
>
> b. That it reserves the right to make a sentence recommendation.

> c. That it reserves the right at sentencing to present any evidence and information pursuant to 18 U.S.C. § 3661, to offer argument or rebuttal, to recommend imposition of restitution, and to respond to any motions or objections filed by the Defendant.
>
> d. That, pursuant to Fed. R. Crim. P. 11(c) (1) (A), the USA-EDNC will not further prosecute the Defendant for conduct constituting the basis for the Criminal Information, however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities.
>
> e. That the USA-EDNC agrees not to share any information provided by the Defendant pursuant to this Agreement with other state or federal prosecuting entities except upon their agreement to be bound by the terms of this Agreement.
>
> h. That, provided that the defendant complies with this agreement, the USA-EDNC agrees not to directly use information provided by the defendant pursuant to this plea agreement to prosecute the defendant for additional criminal offenses, except for crimes of violence, but the USA-EDNC may make derivative use of such information against the defendant and pursue any investigative leads suggested by such information.

[J.A. at 145-46.][2]

In paragraph 4(a) above, the Government agrees to dismiss the two counts in the Indictment which are the exact same counts in the Information. [J.A. at 145.] The dismissal of these two counts in exchange for pleading guilty to them is not consideration. There is no benefit to Mr. Harper for exchanging the same counts in an Indictment to their equivalents in an Information.

In paragraph 4(b) and 4(c) above, the Government reserves its rights to made a sentencing recommendation and fully litigate its position at the sentencing hearing. [J.A. at 145.] By definition, a reservation of rights by one party to a contract cannot constitute consideration to the other party. Further, to the extent one could conceive

[2] The Plea Agreement does not contain a paragraph 4(f) or 4(g).

of a possible exception to the preceding sentence, these particular reservations of rights by the Government brought no benefit to Mr. Harper. Instead, if anything, Mr. Harper was harmed by the Government's extreme sentencing position which it vigorously advocated against him. Thus, these provisions are also not consideration.

In paragraph 4(d), the Government states that the Eastern District of North Carolina will not prosecute the Defendant for conduct constituting the basis for the Criminal Information, however, this obligation is limited solely to the USA-EDNC and does not bind any other state or federal prosecuting entities. [J.A. at 145-46.]

This, however, is not consideration to Mr. Harper, because any additional prosecution of Mr. Harper by the Government for the same offense conduct he had just pled guilty to would constitute impermissible double jeopardy. See Brown v. Ohio, 432 U.S. 161 (1977); Blockburger v. United States, 284 U.S. 299, 304 (1932). Thus, a recitation by the Government that it will not attempt to violate Mr. Harper's constitutional rights cannot constitute consideration in a plea agreement.

Under subparagraphs 4(e) and (h), the Government makes certain representations about information provided by Mr. Harper. [J.A. at 146.] However, Mr. Harper did not ask to be interviewed, was never interviewed under the plea agreement, and the plea agreement, unlike many in the Eastern District of North Carolina, has no provision for Mr. Harper's cooperation with the Government. [J.A. at 140-48.] Thus, these provisions are meaningless boilerplate in Mr. Harper's case carried over from the Government's standard form. They are not consideration to Mr. Harper, because they never were going to be applicable to him.

The Government might contend that paragraph 5 contains some consideration for Mr. Harper, because it constitutes a joint position on the applicability of U.S.S.G. § 3E1.1, which spells out the reduction in a federal criminal defendant's advisory sentencing guideline for acceptance of responsibility. This argument, however, would fail under United States v. Divens, 605 F.3d 343 (4th Cir. 2011).

Under U.S.S.G. § 3E1.1(b), the third point reduction should only be granted by the district court upon motion of the government, and the government "retains discretion to determine whether the defendant's assistance has relieved it of preparing for trial" because "the Government is in the best position" to do so. United States v. Divens, 650 F.3d 343, 345-346 (4th Cir. 2011) (emphasis and internal quotation marks omitted). However, a district court may compel the government to file such a motion if it is withheld on improper grounds, meaning some reason other than the fact that the defendant's failure to timely accept responsibility for his offense required the government to prepare for trial. Id. at 350.

As a result, the Government's position with respect to a third point for acceptance of responsibility is a result of its objective determination as to whether or not it had to prepare for a trail. It is not a factor that depends on or was part of the negotiation between the Government and the defendant. Accordingly, the joint position on acceptance of responsibility is not consideration to Mr. Harper. It is what the Government's objective determination of his behavior and its impact on the Government's preparation mandated in this particular case.

In sum, then, there was no consideration to Mr. Harper for entering the plea agreement below. The plea agreement only benefits the Government. In the case of

the appeal waiver, it benefits the Government at the expense of Mr. Harper. Because the plea agreement gives no consideration to Mr. Harper, it is unenforceable.

Mr. Harper raised this argument as an affirmative defense against the plea agreement being brought to the Circuit Court for enforcement by the Government. An affirmative defense against an attempt to enforce a contract is the normal and appropriate procedural posture for a lack of consideration argument. See Fed. R. Civ. P. 8(b). Thus, it was properly raised at this procedural posture on appeal. Accordingly, the Fourth Circuit should have upheld Mr. Harper's lack of consideration argument on its merits, declined to enforce the plea agreement, and considered his appellate arguments on their merits. This Court should grant certiorari in order to clarify that federal criminal plea agreements that lack any consideration for the Defendant are void and their appeal waivers should therefore not be enforced on appeal.

CONCLUSION

For the above stated reasons, Petitioner respectfully requests that the Court grant his petition for writ of certiorari to the Fourth Circuit Court of Appeals, and grant whatsoever other relief may be just and proper.

Respectfully submitted this the 22nd day of December, 2020.

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