No. __-___

IN THE

Supreme Court of the United States

NALERTON CHARLES, a.k.a. Lite,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the time has come for this Court to exercise supervision over the ever-expanding prosecutorial practice of requiring defendants to give up their right to appeal, as the price of a negotiated plea, while the government retains its own access to judicial review; and whether this practice is violative of defendants' due process rights, against public policy, contrary to congressional intent, and inconsistently applied.

PARTIES BELOW

The only parties in the court below were petitioner, Nalerton Charles, and the United States of America, as represented by the United States Attorney for the Eastern District of New York.

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No. 24-

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Nalerton Charles respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The summary opinion of the Court of Appeals for the Second Circuit, dismissing Mr. Charles' appeal, is reproduced in the Appendix at A1-8.

JURISDICTION

On April 10, 2024. the Court of Appeals dismissed petitioner's appeal, ruling that the waiver of his right to appeal included in his plea agreement was binding. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the United States Constitution provides in relevant part: "No person shall be ... deprived of life, liberty, or property, without due process of law[.]"

18 United States Code Section 3742 provides in relevant part:

> (a) **Appeal by a Defendant. –** A defendant may file a notice of appeal in the district court for review of an otherwise final sentence . . . .
>
> **(b) Appeal by the Government.** – The Government may file a notice of appeal in the district court for review of an otherwise final sentence . . . .

STATEMENT OF THE CASE

Nalerton Charles petitions for review of the decision of the Second Circuit Court of Appeals dismissing his appeal from his sentence of 210 months in prison, pursuant to a plea agreement that forbade him from appealing any sentence of imprisonment of 210 months or less while putting no restrictions on the government's right to appeal any sentence.

A. The Guilty Plea and Sentence

In the district court, petitioner pled guilty to distribution and possession with intent to distribute fentanyl, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(B). He was sentenced as a Guideline Career Offender to a 210-month term of imprisonment and a four-year term of supervised release.

Petitioner was a 41-year-old man with a ninth-grade education. He was a life-long addict who used the same drugs he distributed. His plea was pursuant to a written agreement with the government that contained no description of the charged crimes, no stipulations, and no admissions of facts.

In the agreement, petitioner agreed not to file an appeal or collaterally attack his conviction or sentence in the event that his sentence was 210 months or less. The agreement included no concomitant restriction on the government's right to appeal.

At the plea proceeding, the court told petitioner that, under the plea agreement, he could not appeal any sentence of 210 months or less. The court then asked him if he understood what it meant to give up his right to appeal, and Mr. Charles answered: "Yes, your Honor" (P.A. 32).[1] The court did not probe any further.

However, the court *did* probe with respect to petitioner's understanding of his waiver of the right to file a §2255 petition, and his lack of understanding soon became evident:

> THE COURT: You also agreed by this plea agreement that you will not file a [§2255] petition....

[1] Citations to "P.A." refer to the appendix petitioner filed in the Second Circuit Court of Appeals. *See* Appendix to petition's Appellate Brief, No. 22-1244-cr, Doc. 47 (Feb. 3, 2023).

> Did your attorney go over that provision and explain it to you –
>
> THE DEFENDANT: Yes.
>
> * * *
>
> THE COURT: What do you understand that to mean?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: What do you understand those numbers to mean? What do you understand that you are giving up by agreeing not to petition pursuant to 28 U.S.C. 2255?
>
> DEFENSE COUNSEL: Your Honor, if I might just have a moment with Mr. Charles to clarify with him? (P.A. 32).

When Mr. Charles returned after conferring with his attorney, he appeared to conflate his right to appeal to a higher court with his right to collaterally attack his conviction in the district court:

> THE DEFENDANT: Yes, Your Honor. I understand that looking at my conviction, giving up my appeal.
>
> THE COURT: I am sorry?
>
> THE DEFENDANT: I'm in Federal Court, looking at my conviction, giving up appeal (P.A. 32).

The district court did nothing to disabuse petitioner of his mistaken impression that giving up his right to file a § 2255 motion was equivalent to "giving up my appeal." To the contrary, the court reinforced it, describing his waiver as involving only his right to seek review in the district court:

> THE COURT: What you are agreeing to essentially, Mr. Charles, is that you will not petition this Court to allege that there was something wrong legally or factually and gone through any of the proceedings that had occurred in this case from the time you were arrested to the time you were sentenced. You, in effect, are agreeing that the proceedings in this case were all proper and according to law and you are agreeing not to challenge the validity of the proceedings in this case (P.A. 33)(*emphasis added*).

The court accepted petitioner's guilty plea after finding that he understood his rights "in connection with this plea" and that there was a factual basis for the plea (P.A. 36).

At sentencing, after imposing a 17½-year term of imprisonment, the court advised petitioner:

> you have a right to appeal this sentence. Although you waived your right to appeal if the sentence was not in excess of 210 months. You could appeal your sentence in any event" (A90-91).

B. Proceedings in the Court of Appeals

On appeal, petitioner argued, inter alia, that the appeal waiver was unenforceable, since petitioner was clearly confused as to what it entailed, and the district court's explanation only increased that confusion.[2] Petitioner also argued that the appellate court should not enforce the waiver, since the government (which authored the agreement) was not subject to a similar bar. He contended that a practice which permits one party to seek judicial redress for its claims while denying such redress to an opposing party should be barred as unconscionable and against public policy.

The Second Circuit Court of Appeals dismissed petitioner's appeal, rejecting his claim that the district court's explanation of the waiver provision was misleading. The Court rejected, without reaching its substance, the argument that unilateral appeal waivers contravene public policy, holding that one-sided appeal waivers were enforceable because of. "settled" Second Circuit precedent (Appendix A at 3).

[2] Petitioner raised additional substantive points on appeal: that the district court erred in relying on his New York state narcotics conviction to adjudicate him a career offender, since the state conviction did not qualify as a predicate controlled substance offense under U.S.S.G. §4B1.1; and that his sentence was procedurally and substantively unreasonable.

REASONS FOR GRANTING THE WRIT

The issue of the validity of appeal waivers probably affects more criminal defendants than any other single issue. By insulating the vast majority of federal convictions and sentences from appellate review, appeal waivers have had an incalculable impact on the evolution of criminal jurisprudence. See, e.g., United States v. Booker, 543 U.S. 220, 264 (2005) (noting that Congress strongly favors the "retention of sentencing appeals" to "iron out sentencing difference"); Gregory M. Dyer & Brendan Judge, *Criminal Defendants Waiver of the Right to Appeal — An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 662-663 (1990)(arguing that the waiver of other rights are not analogous to an appeal waiver, since right of appeal is not primarily for the defendant's protection, but equally serves functions of developing the common law and maintaining judicial integrity). In light of the importance of this issue to the administration of criminal justice, it is critical that lower courts have the benefit of this Court's guidance regarding the constitutionality of appeal waivers and, if constitutional, under what circumstances and in what form they are permissible or impermissible.

More than nine out of ten criminal cases are disposed of by some form of plea arrangement. Brady v. United States, 397 U.S. 742, 752 n.10 (1970).[3] In modern reality, plea-bargaining "*is* the criminal justice system." Missouri v. Frye, 566 U.S. 134, 144 (2012)(*emphasis in original*)(*citations omitted*). The migration of the criminal justice system away from the adversarial model and toward an administrative model which relies on

[3] Since *Brady,* this trend has only increased. By 2015, 97.1 percent of all federal offenders pleaded guilty. *Overview of Federal Criminal Cases Fiscal Year 2015*, UNITED STATES SENTENCING COMM'N 4 (June 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf.

prosecutors for quality control serves the interest of efficiency but carries, in turn, "tremendous risks" of unfairness and inaccuracy, involving, inter alia, "abbreviated investigations, sentencing disparities, and incorrect but uncorrected presentence report calculations." Simmons v. Kapture, 516 F.3d 450, 457 (6th Cir. 2008)(Martin, J., dissenting), *citing* Nancy J. King, *Judicial Oversight of Negotiated Sentences in a World of Bargained Punishment*, 58 STAN. L. REV. 293 (2005).

Judicial review acts as the primary check against these risks. The appellate system exists "to correct errors; to develop legal principals; and to tie geographically dispersed lower courts into a unified, authoritative legal system." Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985). Moreover, as Senior District Court Judge Jack B. Weinstein explained,

> Plea agreements typically contain boilerplate terms which are not negotiated. Because of the prevalence of plea agreements and the absence of arm's-length negotiation of the terms by parties of equal power, courts must review such agreements closely to ensure that defendants' rights are not crushed by government's power.

United States v. Chua, 349 F.Supp.3d 214, 218 (E.D.N.Y. 2018)(*citations omitted*).

Federal prosecutors have increasingly demanded that defendants waive their right to seek review of their convictions and sentences as part of negotiated plea agreements.[4]

[4] Scholarly commentary decrying this trend has grown along with the increasing use of appeal waivers. *See, e.g.,* Carrie Leonetti, *More Than a Pound of Flesh: The Troubling trend of Unconscionable Waiver Clauses in Plea Agreements,* OHIO ST. J. ON DISP. RESOL. 38 (2023); David A. Lord, *Breaking the Faustian bargain: Using ethical norms to level the playing field in criminal plea bargaining*, 35 GEO. J. LEGAL ETHICS 73 (2022); Inga Ivsan, *To Plea or Not To Plea: How Plea Bargains Criminalize The Right To Trial And Undermine Our Adversarial System Of Justice*; 39 N.C. CENTRAL L.REV. 134 (2017); Marc. L. Miller & Ronald F. Wright, *The Black Box*, 94 IOWA L. REV. 125 (2008); Stephen Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004); Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1581, 1611 & nn.93-95 (2005)("What replaces jury trials as the check on the executive branch is not judicial scrutiny of evidence, but defendants' consent."); Andrew D. Leipold, *How the Pretrial Process Contributes to Wrongful Convictions*, 42 AM. CRIM.

Research indicates that nearly two-thirds of the cases settled by plea agreement include waivers of defendants' right to review. Susan R. Klein, Aleza S. Remis, Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L.REV. 73, 74-75, 87 (2015). However, although appeal waivers are ubiquitous, they are not applied uniformly throughout the country; a defendant's right to judicial review depends not only on the largesse of the local prosecutor but also on where a case is being adjudicated:

> In the Ninth Circuit, ninety percent of plea agreements contain an appeal waiver clause. They are found in seventy-six percent of agreements in the Second Circuit. On the other hand, appeal waivers are used in only nine percent of plea agreements in the First Circuit....

Andrew Dean, *Challenging Criminal Appeals*, 61 BUFFALO L. REV. 1191, 1197 (2013), *citing* Nancy J. King, Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 232 (*Figure 7*)(2005).

Courts of appeals have upheld this practice, often concluding that the appellate waiver provides additional bargaining power for the defendant. *See*, *e.*g., United States v. Burden, 860 F.3d 45, 52 (2d Cir. 2017); United States v. Teeter, 257 F.3d 14, 22 (1st Cir. 2001)("Allowing a criminal defendant to agree to a waiver of appeal gives her an additional bargaining chip in negotiations with the prosecution"). However, this basis for upholding one-sided appeal waivers has been roundly criticized as divorced from reality:

> While, in theory, an appeal waiver is an extra bargaining chip for the defendant to use in plea negotiations, in practice, given the near-mandatory requirement of appeal waivers as conditions of plea bargains, defendants receive no benefit in exchange for appeal waivers and are often rendered victims

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L. REV. 1123 (2005); Jenia Iontcheva Turner, *Judicial Participation in Plea Negotiations: A Comparative View*, 54 AM. J. COMP. L. 199, 213-214 (2006); Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79 (2005).

> of 'situational coercion' by these automatic, non-bargained-for waivers.

New York City Bar Association, *Report On Legislation by The Criminal Justice Operations Committee And The Mass Incarceration Task Force* (April 2023), *available* at https://www.nycbar.org/reports/removing-impediments-to-appellate-review-of-excessive-sentences/. *See also* Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. LQ 127, 193 (1995)("an appeal waiver is rarely a discrete item of trade to be bartered for specified concessions; rather, it is the price of admission to plea bargaining"); People *v.* Batista, 167 A.D.3d 69, 81 (2d Dep't 2018) (Scheinkman, P.J., *concurring*)("the inclusion of an appeal waiver or limitation has seemingly become part and parcel of plea bargaining and the giving of an appeal waiver a standard part of the bargain struck").

Most courts that have upheld the validity of appeal waivers have done so simply on the ground that the defendant knowingly and voluntarily entered into such waiver, with little reasoning given to support the holdings. See, e.g., United States v. Yemitan, 70 F.3d 746, 747 (2d Cir. 1995)(holding that once a sentence is imposed that conforms to the parameters of a plea agreement, court will uphold the appeal waiver of a defendant who entered into his plea agreement knowingly and voluntarily); United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992)(knowing and voluntary waiver of right to appeal foreclosed review of sentence conforming to plea agreement); United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991).

By focusing on the defendant's volition and knowledge, these courts fail to address the issue of whether

> [c]ompelling individuals to waive their appeal rights, especially as part of an across-the-board prosecutorial policy, infringes on fundamental guarantees of due process and impermissibly interferes with the functions of the judiciary. It

> is time for the lower courts to reevaluate, or the U.S. Supreme Court to address, the legality of appeal rights waivers and the circumstances, if any, in which they may be adopted by the parties to a plea agreement and be enforced by a court.

Quin M. Sorenson, *Appeal Rights Waivers: Constitutionally Dubious Bargain*, THE FEDERAL LAWYER 32 (Oct./Nov. 2018). [5]

This Court has yet to address the role appellate waivers play in the criminal justice system, nor has it indicated by analogy whether it would endorse them, limit their use, or outlaw them. However, this Court has recognized that in analogous contexts, a waiver of the right to judicial review may violate public policy. In Newton v. Rumery, 480 U.S. 386 (1987), for example, a case involving a defendant's agreement to forego filing a civil rights claim in exchange for a prosecutor's dismissal of criminal charges, this Court explicitly referred to the public policy implications of enforcing waivers of statutory rights to judicial access: "[A] promise is unenforceable if the interest in its enforcement is outweighed in

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[5] While most federal courts have avoided this foundational question, some state courts have directly addressed it. For example, the Minnesota Court of Appeals held:

> Minnesota law gives a criminal defendant an unconditional right to appeal from any sentence imposed or stayed. In addition, under the Minnesota Sentencing Guidelines, it is the role of the court to determine the appropriate sentence. Vindication of the Guidelines' stated goals of establishing 'rational and consistent sentencing standards,' of reducing sentencing disparity, and providing uniformity in sentencing requires appellate review of trial court sentencing determinations. The unconditional nature of the statutory right and the importance of judicial determination of sentences under the Minnesota sentencing scheme precludes us from holding that a defendant in Minnesota may waive the right to appeal from a sentence.

Ballweber v. State, 457 N.W.2d 215, 217-218 (Minn. Ct. App. 1990).. *See also* State v. Maurstad, 706 N.W. 2d 545 (Minn. Ct. App. 2005); State v. Sainz, 107 N.J. 283, 294 (N.J. 1987)("a defendant may appeal a criminal sentence even if she had agreed to waive the right of appeal as part of a plea agreement"); State v. Ward, 211 Ariz. 158 (Ariz. Ct. App. 2005); State v. Ethington, 121 Ariz. 572, 573 (Ariz.1979)(*en banc*)("public policy forbids a prosecutor from insulating himself from review by bargaining a defendant's appeal rights"); People v. Harrison, 386 Mich. 269, 191 N.W.2d 371 (1971).

the circumstances by a public policy harmed by enforcement of the agreement." *Id*. at 392. While rejecting a *per se* rule invalidating release-dismissal agreements, this Court recognized that such waivers of a defendant's right to pursue legal remedies "may threaten important public interests." *Id*. at 395.[6]

Unlike the majority of circuit courts that have upheld appellate waivers solely on a "knowing and voluntary" basis, the Court in *Newton* questioned whether that factor alone was sufficient, at least in the § 1983 context:

> We note that two Courts of Appeals have applied a voluntariness standard to determine the enforceability of agreements entered into after trial in which the defendants released possible § 1983 claims in return for sentencing considerations. We have no occasion in this case to determine whether an inquiry into voluntariness alone is sufficient to determine the enforceability of release-dismissal agreements.

Id. at 419 n.10 (*citations omitted*)(*emphasis in original*).

And in Griffin v. Illinois, 351 U.S. 12 (1956), this Court recognized the important role that the appellate process plays in the criminal justice system and extended due process protections to a criminal defendant's statutory right to appeal his conviction. While this Court has not required that "avenues of appellate review" be established, it held it to be "fundamental that, once established, these avenues must be kept free of unreasoned

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[6] Four justices — Justices Stevens, Brennan, Marshall, and Blackmun — would have gone further and ruled that "the federal policies reflected in the enactment and enforcement of § 1983 mandate a strong presumption against the enforceability of such agreements. *Id.* at 418 (*Stevens, J.,* dissenting). Justice Stevens explained:

> The very existence of [§ 1983] identifies the important federal interest in providing a remedy for the violation of constitutional rights and in having the merits of such claims resolved openly by an impartial adjudicator rather than *sub silentio* by a prosecutor whose primary objective in entering release-dismissal agreements is definitely not to ensure that meritorious § 1982 claims prevail. The interest in vindication of constitutional violations unquestionably outweighs the interest in avoiding the expense and inconvenience of defending unmeritorious claims. *Id.* at 418-419.

distinctions that can only impede open and equal access to the courts." Blackledge v. Perry, 417 U.S. 21, 25 (1974), *quoting* Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

Even if this Court determines that appeal waivers are permissible in the guilty plea context, however, the lower courts need the benefit of this Court's immediate guidance regarding the type of appeal waivers that will pass muster, and the circumstances in which they can be used, particularly since many U.S. Attorney's offices now "require their inclusion in every plea agreement offered, and many more follow this approach as a matter of practice if not policy." *Sorenson*, *supra.* Such guidance is necessary so that waivers are not permitted to defeat the underlying purposes of the statutory right to appeal.

Perhaps the issue most urgently needing this Court's attention is the use of unilateral appeal waivers, where a defendant but **not** the government is required to waive the right to appeal and/or seek collateral review on almost any basis. The increasing use of one-sided waivers has caused significant concern in the legal community.[7] In fact, the American Bar Association has explicitly instructed its prosecutorial members *not* to employ one-sided appeal waivers:

> A prosecutor should not condition a disposition agreement on a waiver of the right to appeal the terms of a sentence which exceeds an agreed-upon or reasonably anticipated sentence. **Any waiver of appeal of sentence should be comparably binding on the defendant and the prosecution** (*emphasis added*).

[7] Only the Fourth Circuit has even attempted to "even the playing field somewhat," United States v. Blick, 408 F.3d 162, 168 n.5 (4th Cir. 2005), by holding that "when a defendant waives the right to appeal in a plea agreement, such a provision against appeals must also be enforced against the government." United States *v.* Guevara, 941 F.2d 1299, 1299 (4th Cir. 1991), *cert. denied,* 503 U.S. 977 (1992). *See also* United States v. Zuk, 874 F.3d 398 (4th Cir. 2017).

ABA STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-5.8 (4th ed. 2017).[8] As one commentator described the practice,

> [a] prosecutor who seeks a one-way appeal-of-sentence waiver is effectively saying: "I do not care whether or not the trial judge errs in imposing sentence, so long as the error only harms the defendant."

D. Randall Johnson, *Giving Trial Judges the Final Word: Waiver of the Right to Appeal Sentences Under the Sentencing Reform Act*, 71 NEB. L. REV. 694, 723 (1992).

Johnson points out that Congress, when establishing the government's right to appeal sentences, explicitly disapproved procedures which permit only one side to appeal sentences:

> [I]t is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines. If the defendant alone can appeal, there will be no effective opportunity for the reviewing courts to correct an injustice arising from a sentence that is patently too lenient

S. REP. No. 225, 98th Cong., 2d Sess., at 65 (1983), reprinted in 1984 U.S.C.C.A.N. 3182. Similarly, if the government alone can appeal, there is no effective opportunity for reviewing courts to correct an injustice arising from a sentence that is patently too harsh:

> The criminal justice system is not improved by insulating from review either simple miscalculations or novel questions of law.... Only appellate courts have the vantage necessary to assess whether sentences are being imposed in a uniform manner within a circuit or across the country; however, the habitual acceptance and enforcement of unilateral waivers of appellate rights precludes such analysis, and is likely to lead to a wide range of sentences, despite similarities in offense levels and criminal histories. This "systemic distortion" is further intensified by the "asymmetry" in appellate rights,

[8] This Court has previously relied on the ABA's Standards for Criminal Justice to determine "what is reasonable" in the guilty plea context: "We have long recognized that prevailing norms of practice as reflected in American Bar Association standards and the like are guides to determining what is reasonable." Padilla v. Kentucky, 559 U.S. 356, 366 (2010)(*citations omitted*).

> which allows the Government to seek harsher sentences on review, and results in jurisprudence necessarily "skewed" toward restricting the ways in which district courts may show leniency.

United States v. Mutschler, 152 F.Supp.2d 1332, 1340 (W.D. Wash. 2016). *See also* United States v. Raynor, 989 F.Supp. 43, 49 (D.D.C. 1997)("The condition sought to be imposed by the government is inherently unfair; it is a one-sided contract of adhesion inconsistent with what Congress intended"); United States v. Perez, 46 F.Supp.2d 59, 69 (D. Mass. 1999)("if the government has appeal rights that the defendant does not have, then a disproportionate number of cases brought on appeal will be brought by the government. This would lead to skewed case law, and it would be contrary to the symmetry Congress intended to create")(*citations omitted*).

Additionally, while one-sided appeal waivers have been used and accepted in plea agreements, this practice is quite an anomaly under both federal and state law. In the civil law context, courts do not countenance provisions that significantly interfere with only one party's ability to obtain redress for his or her claims. *See, e.g.,* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 637, n.19 (1985)("condemning" as "against public policy" clauses which operate "as a prospective waive of a party's right to pursue statutory remedies for antitrust violations"); Nagrampa v. MailCoups, Inc., 469 F.3d 1257, 1286-1287 (9th Cir. 2006)(contract unconscionable where it gave one party "access to a judicial forum...while it provided [the other party] with only the arbitral forum to resolve her claims"); Iberia Credit Bureau, Inc. v. Cingular Wireless LLC, 379 F.3d 159 (5th Cir. 2004)(same); Zuver v. Airtouch Communications Inc., 153 Wash. 2d 293, 318 (Wash. 2004)(clause was unconscionable because it "blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse"); Shroyer

v. New Cingular Wireless Services, 498 F.3d 976 (9th Cir. 2007)("[s]ubstantively unconscionable terms may take various forms, but may generally be described as unfairly one-sided"); Durham v. Ciba-Geiby Corp., 315 N.W.2d 696, 700 (S.D. 1982)("One-sided agreements whereby one party is left without a remedy for another party's breach are oppressive and should be declared unconscionable"); Beynon v. Garden Grave Med. Grp., 161 Cal. Rptr. 146, 149 (Cal. App. 4th 1980)(invalidating a clause in a health care plan that permitted care providers a unilateral right, following arbitration, to require re-arbitration of the same issues before a panel of doctors because the clause was invalid both on adhesion principles and as a matter of public policy).[9]

This Court has never decided the propriety of these one-sided appeal waivers; in the absence of the Court's guidance, they have become boiler-plate terms injected into many, if not most, guilty plea agreements. Since there is no apparent basis for accepting a one-sided practice in criminal cases that would not be condoned in commercial cases, this Court should either forbid the practice or provide a rationale for it.

In short, this issue is of great importance, not only to petitioner, but to numerous criminal defendants and to the proper functioning of the criminal justice system. Accordingly, it is worthy of consideration by this Court.

[9] By contrast, courts have upheld provisions that apply to both parties. *See, e.g.,* Desiderio v. NASD, 191 F.3d 198, 207 (2d Cir. 1999)(contract which "binds *both* parties to mandatory arbitration" is not a contract of adhesion because it does not favor either party); Pingel v. General Elec. Co., 2014 WL 7334588 (D.N.J. 2015)(the "fact that [a] provision equally binds both parties weighs heavily against" a finding of unconscionability); Nichols v. Washington Mut. Bank, 2007 WL 4198252 (E.D.N.Y. 2007).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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CERTIFICATE OF MEMBERSHIP IN BAR

I, MARSHA R. TAUBENHAUS, hereby certify that I am a member of the Bar of this Court.

MARSHA R. TAUBENHAUS, ESQ.

APPENDIX A

22-1244
United States v. Charles

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING TO A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of April, two thousand twenty-four.

PRESENT:

DENNIS JACOBS,
PIERRE N. LEVAL,
RICHARD J. SULLIVAN,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. No. 22-1244

NALERTON CHARLES, a.k.a. Lite,

Defendant-Appellant.

For Defendant-Appellant: Marsha R. Taubenhaus, Law Offices of Marsha R. Taubenhaus, New York, NY.

For Appellee: Nicholas J. Moscow, Miriam L. Glaser Dauermann, James R. Simmons, Assistant United States Attorneys, *for* Breon Peace, United States Attorney for the Eastern District of New York, Brooklyn, NY.

Appeal from a judgment of the United States District Court for the Eastern District of New York (I. Leo Glasser, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the appeal is **DISMISSED**.

Nalerton Charles appeals from a judgment of conviction following his guilty plea to one count of distribution and possession with intent to distribute over 40 grams of a substance containing fentanyl, in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B). Pursuant to the terms of Charles's plea agreement with the government, Charles waived the right to appeal or collaterally attack his conviction and sentence so long as the sentence imposed was no greater than 210 months' imprisonment. The district court sentenced Charles to 210 months' imprisonment. Notwithstanding his appeal waiver, Charles now challenges his sentence on appeal; the government has filed a motion to dismiss the appeal in

light of the waiver. We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal.

Charles asks us to invalidate the appeal waiver in his plea agreement and reach the merits of his challenge to his sentence because he did not knowingly enter the waiver.[1] Specifically, he argues that the district court's explanation of the waiver provision at his change-of-plea hearing misled him into thinking that he was waiving *only* his right to collateral attack and not his right to direct appeal. We are not persuaded.

While "waivers of the right to appeal a sentence are presumptively enforceable," we may deem unenforceable a waiver that "was not made knowingly, voluntarily, and competently." *United States v. Burden*, 860 F.3d 45, 51 (alterations and internal quotation marks omitted). A district court's failure "to comply with the important strictures of Rule 11" of the Federal Rules of Criminal Procedure may render an appeal waiver invalid. *United States v. Lloyd*, 901 F.3d 111, 118 (2d Cir. 2018); *see* Fed. R. Crim. P. 11(b)(1)(N) (requiring court to inform the defendant of, and determine that the defendant understands, "the

[1] Charles also contends that his appeal waiver is unenforceable because unilateral appeal waivers contravene public policy. However, "the enforceability of unilateral appeal waivers in the plea context is well settled." *United States v. Burden*, 860 F.3d 45, 52 (2d Cir. 2017).

terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence").

Charles did not object to the district court's explanation of his written appeal and collateral attack waiver below, so we review his challenge for plain error. *See Lloyd*, 901 F.3d at 119; *United States v. Cook*, 722 F.3d 477, 479 (2d Cir. 2013) ("We hold that plain error is the standard of review for an unpreserved challenge to an appeal waiver."). To show plain error, Charles "must demonstrate that (1) there was error, (2) the error was plain, and (3) the error prejudicially affected his substantial rights; [even] if such error is demonstrated, we will reverse . . . only when (4) the error seriously affected the fairness, integrity[,] or public reputation of judicial proceedings." *Lloyd*, 901 F.3d at 119 (internal quotation marks omitted).

Charles's plea agreement stated, in relevant part: "The defendant agrees not to file an appeal or otherwise challenge, by petition pursuant to 28 U.S.C. § 2255 or any other provision, the conviction or sentence in the event that the [c]ourt imposes a term of imprisonment of 210 months or below. This waiver is binding without regard to the sentencing analysis used by the [c]ourt." App'x at 14. On the final page of the agreement, immediately above Charles's signature,

is the statement: "I have read the entire agreement and discussed it with my attorney. I understand all of its terms and am entering into it knowingly and voluntarily." *Id.* at 18.

During Charles's change-of-plea hearing, after the district court placed Charles under oath, it confirmed that he had "discussed th[e] plea agreement" and "gone over it completely[] with [his] attorney." *Id.* at 29. The district court then explained to Charles that, by pleading guilty pursuant to the plea agreement, he was agreeing not to appeal his sentence if the sentence imposed was no greater than 210 months. The district court specifically asked Charles if he understood that point, and he replied that he did. The district court followed up by asking "[d]o you understand what it means to give up your right to appeal?" *Id.* at 31. Again, Charles confirmed that he understood.

Next, the district court explained that Charles was "also" agreeing not to file a petition under section 2255. *Id.* at 32. The district court asked Charles whether his attorney had reviewed that provision with him and had explained to him "what it is you will [be] giving up by agreeing not to petition pursuant to 28 U.S.C. [§] 2255." *Id.* Charles replied "[y]es" before the court had finished its question, and then said "[y]es" again at the end of the question. *Id.* When the court then

asked Charles what he "underst[ood] that to mean," Charles repeated "yes" a third time, apparently not realizing that the court was asking a new question. *Id.* The court clarified its question, asking, "What do you understand that you are giving up by agreeing not to petition pursuant to 28 U.S.C. [§] 2255?" *Id.* Charles's attorney then interjected to ask if he could have a moment to speak with his client, which the court allowed. After the pause, Charles said, "Yes, Your Honor, I understand that looking at my conviction, giving up my appeal." *Id.* When the district court indicated that it had not understood – or had not heard – Charles's response, Charles repeated, "I'm in [f]ederal [c]ourt, looking at my conviction, giving up appeal." *Id.* The court proceeded to describe the import of the collateral attack waiver, explaining that what Charles was "agreeing to essentially . . . [was] that [he would] not petition this [c]ourt to allege that there was something wrong legally or factually" with "any of the proceedings that had occurred in this case from the time [he was] arrested to the time [he was] sentenced." *Id.* at 33. The district court asked Charles if he understood, and Charles responded that he did.

Finally, the district court instructed Charles to turn to the signature page of the plea agreement and asked him whether he recognized the signature. Charles

confirmed that the signature on the agreement was his. After the district court directed him to read the lines above his signature, Charles read aloud: "I have read the entire agreement and discussed it with my attorney. I understand all its terms and am entering into it knowingly and voluntarily." *Id.* at 34. The district court then asked Charles if his statement was correct, and Charles confirmed that it was.

In sum, the district court did what Rule 11(b)(1)(N) commands: it informed Charles that he was waiving his right to appeal, and it ensured that Charles understood the terms of that waiver. If Charles was confused during his plea hearing, any confusion suggested by the plea allocution was only about the meaning of the collateral attack waiver as it pertained to section 2255. Charles's answers exhibited no confusion about the waiver of appeal . Moreover, Charles's argument that the district court's colloquy led him to think that he was *only* waiving his collateral attack rights is unsupported, and in fact contradicted, by the record. The plea agreement clearly explained that "[t]he defendant agrees not to file an appeal . . . in the event that the Court imposes a term of imprisonment of 210 months or below," and the district court made sure that Charles understood what it meant to give up that right. *Id.* at 14; *see id.* at 32. Given this record,

Charles "has not established a Rule 11(b)(1)(N) error to satisfy the first step of the plain error test," and we are left with no doubt that Charles "made a knowing and voluntary waiver" of his right to appeal. *Cook*, 722 F.3d at 482. His waiver is therefore binding. *See id.* at 483; *Burden*, 860 F.3d at 53.

For the foregoing reasons, we **DISMISS** the appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court