

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

Steven Gomez, Petitioner,

v.

United States of America, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
NO. 18-10321

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QUESTION PRESENTED

Can an appeal waiver executed at the time of a defendant's plea waive the right to appeal constitutional error occurring at sentencing months after execution of the appeal waiver? Does a defendant have a due process right to be sentenced by a judge who treats the sentencing guidelines as advisory and not mandatory? If so, does that right survive an appeal waiver?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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PETITION FOR WRIT OF CERTIORARI
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No. 18-10321

Petitioner, Steven Gomez, respectfully petitions this Court for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit filed on August 22, 2018 dismissing his appeal.

OPINIONS BELOW

The order of the United States Court of Appeals for the Fifth Circuit in *United States v. Gomez*, No. 18-10321 (5th Cir. August 22, 2017) dismissing the appeal is reproduced in Appendix A. The government's motion to dismiss the appeal is reproduced in Appendix B. The judgment entered by the district court is reproduced in Appendix C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The United States District Court, Northern District of Texas, Dallas Division, had jurisdiction pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor 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

Proceedings Below

On March 9, 2017, a complaint was filed in the Dallas Division of the Northern District of Texas naming Steven Gomez as a defendant. ROA.8. Simultaneously, the government sought Gomez's detention pending trial. ROA.13. Gomez had an initial appearance before a United States Magistrate Judge who found him indigent and appointed counsel. ROA.17. Gomez waived preliminary and detention hearings, ROA.18, 19, and was detained pending trial. ROA.20.

On March 22, 2017, a superseding indictment¹ charged Gomez with multiple drug and firearm offenses some carrying a maximum punishment of 40 years or life while one, a section 924(c) count, required its sentence be stacked on any other sentence. ROA.35. Gomez executed a plea agreement and pleaded guilty to a violation of 21 U.S.C. § 841(a)(1) & (b)(1)(C), which carried a maximum punishment of 20 years. ROA.48, 93. Gomez's plea agreement contained an appeal waiver. ROA.98. This appeal waiver excepted only the following: a sentence exceeding the statutory maximum punishment, arithmetic errors at sentencing, the voluntariness of his guilty plea or the appeal waiver, and claims of ineffective assistance of counsel. ROA.98.

Gomez filed a sentencing memorandum arguing for a significantly reduced sentence. ROA.146. On March 3, 2018, Gomez was sentenced to 235 months. ROA.63. Gomez objected to the reasonableness of his sentence. ROA.91. Gomez timely gave notice of appeal. ROA.70.

As required by circuit precedent, at the onset of the direct appeal, counsel inquired of the government whether it would enforce the appeal waiver. *See United States v. Acquaye*, 452 F.3d 380, 382 (5th Cir. 2006). AUSA Wes Hendrix, appellate chief for the U.S. Attorney for the Northern District of Texas, indicated that the government would enforce the appeal waiver. Gomez did not challenge the validity or voluntariness of this waiver. *See United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005). Nor did Gomez invoke any of its exceptions. Rather, Gomez contended that precluding this appeal based on it would deprive him of due process of law. *See*

¹ Gomez was added to an existing case; he was not named in the original indictment.

Appellant's Brief at 12–13. This was so because the district court treated the sentencing guidelines as mandatory or, alternatively, failed to appreciate the scope of its discretion to vary from the advisory sentencing guidelines. Appellant's Brief at 7–11.

Because Gomez had executed the appeal waiver as part of his plea agreement, the government moved the Fifth Circuit to dismiss his appeal. Government's Motion at 2 *et seq.* (citing ROA.98). The Court of Appeals for the Fifth Circuit granted the government's motion and dismissed Gomez's appeal.

Statement of Relevant Facts

At sentencing, the district court made comments that showed it either believed the sentencing guidelines were mandatory or, at least, did not appreciate the breadth of its sentencing discretion. Initially, the district court treated the sentencing guidelines as mandatory and binding:

So I don't -- the Court doesn't decide that the drug laws are this stiff or whatnot. Our lawmakers do; *our Sentencing Commission does. And the idea is to try to make everything fair for everyone. So anyone else in the United States of America in federal court with your background, your age and your crime would be looking at exactly the same amount of time.*

ROA.86–87 (emphasis added). Later, the district court seemingly recognized some sentencing discretion but still did not appreciate its scope believing it had only limited discretion under certain circumstances to vary from the sentencing guidelines: “So I'm looking for something -- I mean, the Court has some discretion to go above or below the guidelines.” ROA.88. The district court then sentenced Gomez to 235 months imprisonment, which was

the bottom of the 235–240 month advisory sentencing guidelines range, ROA.63, 120, which had been reduced from 235–293 months by operation of the 20 year statutory maximum punishment for this offense. ROA.120; USSG § 5G1.1(c)(1).

REASONS FOR GRANTING THE PETITION

Can an appeal waiver executed at the time of a defendant's plea waive the right to appeal constitutional error occurring at sentencing months after execution of the appeal waiver? Does a defendant have a due process right to be sentenced by a judge who treats the sentencing guidelines as advisory and not mandatory? If so, does that right survive an appeal waiver?

Introduction

Appeal waivers are a common feature of the criminal justice landscape. For example, data available in 2005 showed that 90% of plea agreements in the Ninth Circuit and 65% of plea agreements across all circuits included appeal waivers. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 231, 232 fig.7 (2005). An appeal waiver in a plea agreement is a contract and “classical contract theory supports the freedom to bargain over criminal punishment.” Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1910 (1992). An appeal waiver is often the result of a negotiation between the parties that is advantageous for both. David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 Wm. & Mary L. Rev. 1019, 1027–28 (1999). This promotes judicial efficiency and economy through the resolution of cases without trial. *See, e.g.*, *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992).

For example, in this case, Gomez pleaded guilty to an offense carrying a maximum punishment of 20 years though he was charged with an offense carrying a maximum sentence of life and an offense requiring a sentence stacked on any other sentence. *Compare* ROA.26, 28, *with* ROA.48.

On the other hand, an appeal waiver executed at the time of a guilty plea waives a right not yet existing and errors not yet made. A defendant has no right to appeal at the time he pleads guilty; that right only arises upon sentencing. *See, e.g.*, 18 U.S.C. § 3742(a) (“A defendant may file a notice of appeal in the district court for review of an otherwise final sentence . . .”). A defendant cannot know what errors might or will be made at sentencing in advance of sentencing: “[I]t is only then that the defendant knows what errors the district court has made—*i.e.*, what errors exist to be appealed, or waived.” *United States v. Melancon*, 972 F.2d 566, 572 (5th Cir. 1992) (Parker, J., concurring specially). Yet a waiver is “an intentional relinquishment or abandonment of a known right or privilege.” *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *see also McCarthy v. United States*, 394 U.S. 459, 466 (1969). Thus, an appeal waiver is seemingly inconsistent with the rule that a valid waiver of a right requires “actual and demonstrable knowledge of the contours of the right which is being waived.” Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const. L.Q. 127, 203 (1995) (citing *Jones v. Brown*, 89 Cal. Rptr. 651 (Ct. App. 1970)). Nonetheless, courts have held that a defendant waiving his right to appeal is stuck with whatever happens at sentencing, and if he does not care to shoulder that risk, “he can refuse to waive his right to appeal as a condition of the plea.” *United States v. Bolinger*, 940 F.2d 478, 480 & n.1 (9th Cir. 1991).

Again, Gomez’s case illustrates the point. When Gomez executed his appeal waiver, he had no idea that the district court would treat the sentencing guidelines as mandatory or binding. The Fifth Circuit dismissed the appeal

without considering whether a due process right to be sentenced by a court fully aware of its sentencing options survives an appeal waiver.

There's little consistency to what is included or excluded from appellate waivers. Apparently, no court has decided whether the due process right to be sentenced by a court fully-informed of the sentencing options survives an appeal waiver.

There's little consistency amongst the things included and excluded from the application of appellate waivers. Some constitutional rights are included; some are excluded. Some courts construe appellate waivers to include everything; others except things arising after the execution of the appellate waiver. Apparently, no court has decided whether the due process right to be sentenced by a court fully-informed of the sentencing options survives an appeal waiver.

In *United States v. Feichtinger*, 105 F.3d 1188 (7th Cir.), *cert. denied*, 117 S.Ct. 2467 (1997), the Seventh Circuit held that an error by the sentencing judge is not reviewable when the defendant has waived her right to appeal sentencing: “[A]n improper application of the guidelines is not a reason to invalidate a knowing and voluntary waiver of appeal rights.” *Id.* at 1190. The parties were bound by the contract they entered into including the appellate waiver. *See id.*; *see also United States v. Johnson*, 67 F.3d 200 (9th Cir. 1995).

On the other hand, the Second Circuit considered an appeal of a sentence notwithstanding an appeal waiver when the basis of the appeal did not arise until after execution of the appeal waiver. In *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), defendant Kogut waived his right to appeal his sentence if it was within the agreed sentencing guidelines range. *Id.*

at 23 n.1. Kogut’s sentence was greater than those of his codefendants who generally received shorter sentences or some combination of imprisonment and home confinement. *Id.* at 21. The district judge seemingly relied, at least in part, on Kogut’s status as a naturalized citizen when imposing the harsher sentence. *Id.* After supplementation of the record by the district court for explanation of its bases for the sentence imposed, the Second Circuit reached the merits of the appeal. It did so because the disparity between Kogut’s and the codefendants’ sentences did not arise until after execution of the appeal waiver: “However, Kogut’s co-conspirators were all sentenced after him, and an objection based on an unconstitutional disparity could not have been made at the time of his sentencing. There was thus no waiver.” *Id.* at 23. It also did so because the waiver did not extend to the use of unconstitutional bases for sentencing. *Id.* at 22–23 (“[W]e see nothing in such an agreement that waives the right to appeal from an arguably unconstitutional use of naturalized status as the basis for a sentence.”).

Certain claims survive for appeal regardless of an appeal waiver. Those are ineffective assistance of counsel, *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994), *cert denied*, 115 S. Ct. 1957 (1995); *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995), sentencing based on a constitutionally-infirm factor such as race, *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994), and a sentence exceeded the statutory maximum. *United States v. Gibson*, 356 F.3d 761, 765 (7th Cir. 2004). A government breach of a plea agreement will vitiate an appeal waiver. *United States v. Bowe*, 257 F. 3d 336 (4th Cir. 2001). But some constitutional claims do not survive an appeal waiver. Violation of the Eighth Amendment’s prohibition against

cruel and unusual punishment and the Fifth Amendment's double jeopardy protection are not recognized exceptions to appellate waivers. *United States v. Davey*, 550 F.3d 653, 658 (7th Cir. 2008) ("We see no reservation in that waiver for constitutional arguments."); Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 249 & n.131 (2005) (finding cases in ten circuits enforcing appellate waivers against defendants' claims that their sentences violated their Fifth and Sixth Amendment rights).

Does a defendant have a due process right to be sentenced by a judge who treats the sentencing guidelines as advisory and not mandatory? It seems likely, but this Court has never so held instead labelling it procedural error.

Federal criminal sentencing are infected with due process. For example, the facts considered by the court at sentencing must be sufficiently reliable to satisfy due process and those facts must be proven by a preponderance of the evidence. *United States v. Watts*, 519 U.S. 148, 156, 117 S.Ct. 633, 136 L.Ed.2d 554 (1997) (per curiam). A criminal defendant must be present for sentencing. *Mempa v. Rhay*, 389 U.S. 128, 88 S.Ct. 254, 19 L.Ed.2d 336 (1967). A death penalty defendant must be allowed to rebut a claim of future dangerousness with evidence that he would not be eligible for parole if sentenced to life in prison. *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420, (2008); *Simmons v. South Carolina*, 512 U.S. 154, 168–69 (1994). Cases hold that a defendant has a due process right to be sentenced by a judge aware of all sentencing options. However, these cases arise in the context of review of state court cases.

This Court has held that a state defendant has a due process right to be sentenced by a jury properly instructed about the applicable range of punishment. In *Hicks v. Oklahoma*, 447 U.S. 343 (1980), this Court vacated and remanded a case for resentencing when the mandatory minimum sentence under which the defendant had been sentenced was unconstitutional. *Id.* at 345. Hicks was sentenced to 40 years under a statute with a 40-year mandatory minimum. *Id.* That statute was found constitutionally infirm. *Id.* The Oklahoma Court of Criminal Appeals denied him relief because the 40-year sentence imposed was within the revised range of punishment. *Id.* This Court granted “granted certiorari to consider the petitioner’s contention that the State deprived him of due process of law guaranteed to him by the Fourteenth Amendment.” *Id.* This Court concluded that it did:

Where, however, a State has provided for the imposition of criminal punishment in the discretion of the trial jury, it is not correct to say that the defendant’s interest in the exercise of that discretion is merely a matter of state procedural law. The defendant in such a case has a substantial and legitimate expectation that he will be deprived of his liberty only to the extent determined by the jury in the exercise of its statutory discretion, and that liberty interest is one that the Fourteenth Amendment preserves against arbitrary deprivation by the State. In this case Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury might have imposed a sentence equally as harsh as that mandated by the invalid habitual offender provision. Such an arbitrary disregard of the petitioner’s right to liberty is a denial of due process of law.

Id. at 346 (citations and footnote omitted).

This principle has been applied by courts reviewing state sentences. “The Supreme Court, this court and Louisiana’s highest court have held that the imposition of sentence by a judge or jury not aware of discretionary sentencing alternatives violates due process.” *Anderson v. Jones*, 743 F.2d 306,

308 (5th Cir. 1984) (citing *Hicks v. Oklahoma*, 447 U.S. 343 (1980); *Williams v. Maggio*, 730 F.2d 1048 (5th Cir. 1984); *State v. Hopkins*, 367 So.2d 346 (La. 1979)). “A defendant raising a genuine issue as to the sentencing judge’s knowledge and understanding of the range of sentencing discretion is entitled to a hearing before a judge other than the sentencing judge.” *Anderson*, 743 F.3d at 380 (citing *Williams v. Maggio*, 730 F.2d 1048 (5th Cir. 1984); *Hickerson v. Maggio*, 691 F.2d 792 (5th Cir. 1982)).

In *Hickerson v. Maggio*, 691 F.2d 792 (5th Cir. 1982), the trial judge stated as follows:

[T]he only sentence I could impose is life imprisonment. I have no discretion with regard to sentence.... Well, there's no discretion under the statute with this court. Therefore, under the statute, it is the sentence of this court ... that Mr. Emmett Hickerson be given to the custody of the Director of the Department of Corrections for a period of life imprisonment at hard labor.

Hickerson, 691 F.2d at 794. In fact, the trial judge had substantial discretion: “Hickerson might have been sentenced to one year in parish jail, followed by a period of probation, or placed on probation. Only if Hickerson were sentenced to a term in state prison was a life sentence required.” *Id.* at 794–95.

Petitioner can find no case considering whether a federal criminal defendant’s sentencing by a court treating the sentencing guidelines as mandatory rather than advisory implicates due process. Instead, since *Gall v. United States*, 552 U.S. 38, 51 (2008) a district court’s treating the Guidelines as mandatory is “procedural error.” Yet under *Hicks* and its progeny, a district court’s treating the sentencing guidelines as mandatory would seemingly be a due process violation.

This case squarely presents this issue. The district court sentenced Gomez believing the sentencing guidelines were mandatory or, at least, not appreciating the breadth of its sentencing discretion.

This case squarely presents this issue. The district court sentencing Gomez believing the sentencing guidelines were mandatory or, at least, did not appreciate the breadth of the sentencing discretion.

The district court treated the sentencing guidelines as mandatory and binding:

So I don't -- the Court doesn't decide that the drug laws are this stiff or whatnot. Our lawmakers do; *our Sentencing Commission does. And the idea is to try to make everything fair for everyone. So anyone else in the United States of America in federal court with your background, your age and your crime would be looking at exactly the same amount of time.*

ROA.86–87 (emphasis added). Indeed, uniformity of sentencing was the purpose of the sentencing guidelines. *United States v. Booker*, 543 U.S. 220, 233–34 (2005) (citing *Mistretta v. United States*, 488 U.S. 361, 391 (1989); *Stinson v. United States*, 508 U. S. 36, 42 (1993)). But the mandatory nature of the sentencing guidelines is long gone. Today, judges are free to vary from the sentencing guidelines for virtually any reason provided that the variance is substantively reasonable. The sentencing guidelines are merely “one factor among several” the sentencing judge must consider. *Kimbrough v. United States*, 552 U.S. 85, 90–91, 101, 128 S.Ct. 558, 169 L.Ed.2d 481 (2007). Indeed, the discretion today is so broad that judges may vary from the sentencing guidelines based on policy disagreements with the sentencing guidelines. *Pepper v. United States*, 131 S.Ct. 1299, 1247 (2011) (citing *United States v. Kimbrough*, 552 U.S. 85, 109–110 (2007)). The district court simply must articulate fact-specific reasons for the appropriateness of

the variance for the defendant. *See United States v. Mares*, 402 F.3d 511, 519 (5th Cir. 2011); *see also United States v. Mondragon-Santiago*, 564 F.3d 357, 362–64 (5th Cir. 2009); *United States v. Reinhart*, 442 F.3d 857, 863 (5th Cir. 2006) (explaining that a district court satisfies the standard in *Mares* by “enumerat[ing] the factors on which its sentence is based”). Yet the judge here expressed a belief that the sentencing guidelines were binding and that all similarly situated defendants were to receive the same time.

Alternatively, the court, to the extent it believed it had discretion, believed it had only limited discretion to vary from the sentencing guidelines.

I'm sorry about what happened with your mother. I do not buy it as any kind of excuse that you were doing this to help her, because you didn't help her at all. It's a very sad thing that happened, but that's not an excuse.

So I'm looking for something -- I mean, the Court has some discretion to go above or below the guidelines. And again, I was looking to see some of these other co-conspirators have different sentences, but again their activity was different. You pretty much have bought the farm here with the kind of conduct you have engaged in, all the weapons, all the different kinds of drugs. And obviously, clearly, you may have not been head of the cartel or trafficker, but you were there making it happen at least at a managerial level, and that's just serious consequences.

And there's nothing here before the Court that would cause me, other than just purely arbitrariness, because I feel sorry for you, to go below the guidelines. And that, unfortunately, in my view, is not good enough reason to do that.

ROA.87–88 (emphasis added). Trial courts don't have some discretion; they have almost unlimited discretion provided the sentence is substantively reasonable, *Gall v. United States*, 552 U.S. 38, 46 (2007), and explained. *Id.* at 51. In this case, Gomez argued at sentencing several factors that he believed supported a below-guidelines sentence. ROA.78–81, 146. While the district court was free to reject those as bases supporting a below-guidelines sentence in the exercise of its discretion, they were nonetheless factors that

could have supported a below-guidelines sentence had the district court, in the exercise of its discretion, believed they justified one. Here, however, the district court seemed to believe its discretion was limited or was searching for something that would trigger that discretion.

Gomez tried to raise this but was rebuffed. He cast the district court's viewing the sentencing guidelines as mandatory as a due process violation that should be excepted from his appeal waiver. Appellant's Brief 7-13. The government moved the Circuit Court to dismiss his appeal based on the waiver, and the Circuit Court granted this motion in a one-sentence order.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the order of the United States Court of Appeals for the Fifth Circuit in this matter.

Dated: November 20, 2018.

Respectfully submitted,

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August 22, 2018

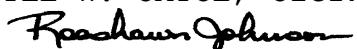
MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 18-10321 USA v. Steven Gomez
USDC No. 3:16-CR-500-5

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



By:
Roeshawn A. Johnson, Deputy Clerk
504-310-7998

Mr. Leigh Warren Davis
Mr. James Wesley Hendrix

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10321

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

STEVEN GOMEZ,

Defendant - Appellant



A True Copy
Certified order issued Aug 22, 2018

Tyke W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

Appeal from the United States District Court
for the Northern District of Texas

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that appellee's alternative motion for an extension of thirty (30) days from denial of motion to dismiss to file an appellee's brief is DENIED AS MOOT.

B

18-10321

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

STEVEN GOMEZ,
Defendant - Appellant

Appeal from United States District Court
For the Northern District of Texas
Dallas Division
District Court No. 3:16-CR-500-B-5

**UNITED STATES' MOTION TO DISMISS THE APPEAL,
OR, ALTERNATIVELY, FOR AN EXTENSION OF TIME**

The government moves to dismiss Gomez's appeal because he waived his right to bring it. He acknowledges the waiver and does not challenge its validity or invoke any exceptions to it. Instead, he claims that enforcing the waiver would violate his right to due process, but the record and case law prove otherwise. Thus, the Court should enforce the waiver and dismiss this appeal. Should the Court deny this motion, the government requests a 30-day extension to file a merits brief.

Pursuant to a written plea agreement, Gomez pleaded guilty to one count of conspiracy to possess with intent to distribute a controlled substance. (ROA.26-28, 63, 93.) As part of the plea, the government agreed to dismiss the remaining three counts—two drug counts and an 18 U.S.C. § 924(c) count. (ROA.63, 97.)

Gomez's plea agreement included a waiver of his right to appeal from his conviction and sentence. The waiver provides:

The defendant waives the defendant's rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from the conviction, sentence, fine and order of restitution or forfeiture in an amount to be determined by the district court. The defendant further waives the defendant's right to contest his conviction, sentence, fine and order of restitution or forfeiture in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. The defendant, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing; (b) to challenge the voluntariness of his plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

(ROA.98.)

Gomez acknowledges the appellate waiver in his brief. (Brief at 12.) He makes no challenges to its validity, nor does he attempt to invoke any of the waiver's exceptions. (Brief at 12) ("Gomez does not challenge the validity of this waiver. Nor does Gomez invoke any of its exceptions.") (internal citation omitted). The government agrees that the waiver is valid, enforceable, and covers the issue raised on appeal. The sentencing issue he raises—whether the

district court allegedly erred by treating the sentencing guidelines as mandatory or failed to appreciate the scope of its discretion to vary downward—does not fall within the limited exceptions to his waiver.

Despite Gomez's concessions, he seeks to avoid his bargained-for appellate waiver because “precluding this appeal would deprive him of due process of law.” (Brief at 12.) Specifically, he asserts that (1) the district court treated the sentencing guidelines as mandatory, and (2) as a result, it would violate due process to enforce the waiver and fail to remand for resentencing. The argument, however, rests on a faulty assumption. The record makes clear that the district court, of course, understood that the guidelines were advisory only and that it had discretion to vary from the guideline range: “The Court recognizes the conclusions expressed in the Presentence Report and the Addendum to the Report, including the sentencing guidelines, are advisory only. In determining the sentence, the Court considered the advisory guidelines pursuant to U.S. v. Booker, 2005 125 S.Ct. 738 (2005), as well as statutory concerns listed in 18 USC Section 3553(a).” (ROA.133.) Additionally, the court’s scheduling order for sentencing noted that the guidelines were advisory, (ROA.56), the PSR noted that the guidelines were advisory, (ROA.111, 115), and the PSR listed factors “that may warrant a sentence outside of the advisory guideline system.” (ROA.122.) The plea

agreement, which the Court accepted, states explicitly that “[t]he guidelines are not binding on the Court, but are advisory only.” (ROA.95.) This record leaves no doubt that the experienced district court judge was well aware of this fundamental precept of federal sentencing law.

Moreover, during the sentencing hearing, the court explained that although the court could vary downward, the circumstances did not justify it:

So I'm looking for something -- I mean, the Court has some discretion to go above or below the guidelines. . . .

And there's nothing here before the Court that would cause me, other than just purely arbitrariness, because I feel sorry for you, to go below the guidelines. And that, unfortunately, in my view, is not good enough reason to do that.

So I do this -- I don't do it lightly. I don't do it without feeling bad that you are this young and looking at this. But I think the appropriate sentence is at the bottom of the guidelines, 235 months in custody. That will be the sentence.

(ROA.88.)

Thus, Gomez's argument fails a factual matter because the court did not believe the guidelines were mandatory or cabined its sentencing discretion. In any event, the case he cites for support does not permit him to avoid his appellate waiver. *Anderson v. Jones*, a 28 U.S.C. § 2254 proceeding, involved a state judge who may have believed mistakenly that the law required a life sentence, and this Court remanded for an evidentiary hearing “to determine the sentencing judge's understanding of the range of sentencing discretion

accorded him by Louisiana law.” 743 F.2d 306, 307 (5th Cir. 1984). The case does not address the enforceability of appellate waivers under the federal sentencing guidelines, and, again, there is no doubt here that the district court understood the permissible range of punishment. Thus, there can no due process violation and no basis to avoid the waiver.

Because Gomez “can point to no evidence in the record that his explicit waiver, included in the written plea agreement and signed by him and his counsel, was not informed and voluntary,” this appeal should be dismissed. *United States v. Hoctel*, 154 F.3d 506, 508 (5th Cir. 1998) (dismissing the appeal based on an appellate waiver); *see also United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005) (same).

CONCLUSION

Given the above facts and authorities, this Court should enforce the appellate waiver and dismiss the appeal. Should the Court deny this motion, the government requests an extension of time of 30 days from the denial to respond to Gomez’s brief.

Respectfully submitted,

Erin Nealy Cox
United States Attorney

s/ Wes Hendrix

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CERTIFICATE OF CONFERENCE

I certify that I conferred with Leigh Davis, counsel for Gomez, regarding this motion. Gomez is opposed to dismissal, but unopposed to the alternative request for an extension of time.

s/ Wes Hendrix

Wes Hendrix
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that this document was served on Gomez's attorney, Leigh Davis, through the Court's ECF system on August 3, 2018, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Wes Hendrix
Wes Hendrix
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,014 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Calisto MT font.

s/ Wes Hendrix
Wes Hendrix
Assistant United States Attorney
Date: August 3, 2018

C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS DALLAS DIVISION

UNITED STATES OF AMERICA

JUDGMENT IN A CRIMINAL CASE

v.

STEVEN GOMEZ

Case Number: 3:16-CR-00500-B(5)
USM Number: 55491-177

Leigh W Davis
Defendant's Attorney

THE DEFENDANT:

<input type="checkbox"/>	pleaded guilty to count(s)	
<input checked="" type="checkbox"/>	pleaded guilty to count(s) before a U.S. Magistrate Judge, which was accepted by the court.	Count 4 of the nine-count superseding Indictment filed March 22, 2017
<input type="checkbox"/>	pleaded nolo contendere to count(s) which was accepted by the court	
<input type="checkbox"/>	was found guilty on count(s) after a plea of not guilty	

The defendant is adjudicated guilty of these offenses:

<u>Title & Section / Nature of Offense</u>	<u>Offense Ended</u>	<u>Count</u>
21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(C) - Conspiracy to Possess With Intent to Distribute a Controlled Substance	03/09/2016	4

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)

Counts 5, 6, and 7 of the superseding Indictment is are dismissed on the motion of the United States as to this defendant.

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.

March 1, 2018

Date of Imposition of Judgment



Signature of Judge

JANE J. BOYLE, UNITED STATES DISTRICT JUDGE
Name and Title of Judge

March 2, 2018

Date

DEFENDANT: STEVEN GOMEZ
CASE NUMBER: 3:16-CR-00500-B(5)

IMPRISONMENT

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

235 months as to count 4. It is ordered the sentence imposed shall run concurrently with any sentence imposed in the pending state criminal charges for Manufacture/Deliver Controlled Substance, Case No. F-1630237; Manufacture/Deliver Controlled Substance, Case No. F-1630238; and Possession of a Controlled Substance, Case No. F-1630239, in the 363rd Judicial District Court of Dallas County, because they are related to the instant federal offense.

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

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 2 p.m. on
 as notified by the United States Marshal.
 as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By
DEPUTY UNITED STATES MARSHAL

DEFENDANT: STEVEN GOMEZ
CASE NUMBER: 3:16-CR-00500-B(5)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **three (3) years.**

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must 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 you pose a low risk of future substance abuse. (*check if applicable*)
4. You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. (*check if applicable*)
5. You must cooperate in the collection of DNA as directed by the probation officer. (*check if applicable*)
6. You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, et seq.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which you reside, work, are a student, or were convicted of a qualifying offense. (*check if applicable*)
7. You must participate in an approved program for domestic violence. (*check if applicable*)

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

DEFENDANT: STEVEN GOMEZ
CASE NUMBER: 3:16-CR-00500-B(5)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at www.txnp.uscourts.gov.

Defendant's Signature _____

Date _____

DEFENDANT: STEVEN GOMEZ
CASE NUMBER: 3:16-CR-00500-B(5)

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall participate in mental health treatment services as directed by the probation officer until successfully discharged. These services may include medications prescribed by a licensed physician. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$10 per month.

DEFENDANT: STEVEN GOMEZ
CASE NUMBER: 3:16-CR-00500-B(5)

CRIMINAL MONETARY PENALTIES

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

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	\$100.00	\$.00	\$.00	\$.00

The determination of restitution is deferred until after such determination. An *Amended Judgment in a Criminal Case (AO245C)* will be entered.
 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. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

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:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22

** 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: STEVEN GOMEZ
CASE NUMBER: 3:16-CR-00500-B(5)

SCHEDULE OF PAYMENTS

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

- A Lump sum payments 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 20 (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:
It is ordered that the Defendant shall pay to the United States a special assessment of \$100.00 for Count 4 which shall be due immediately. Said special assessment shall be paid to the Clerk, U.S. District Court.

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

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

- Defendant shall receive credit on his restitution obligation for recovery from other defendants who contributed to the same loss that gave rise to defendant's restitution obligation.
- 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) JVTA Assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.