

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10747



UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAVIER CONTRERAS VARGAS, also known as Cunado,

Defendant - Appellant

A True Copy
Certified order issued Jan 11, 2019

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

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

Before SOUTHWICK, HAYNES and HO, Circuit Judges.

PER CURIAM:

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

IT IS FURTHER ORDERED that the alternative unopposed motion of appellee for extension of time of 30 days to file brief after denial of motion is DENIED AS MOOT.

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-10747

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAVIER CONTRERAS VARGAS, also known as Cunado,

Defendant - Appellant

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

O R D E R :

The Appellant's motion for a stay of the mandate pending petition for writ of certiorari is DENIED.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10747

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAVIER CONTRERAS VARGAS, also known as Cunado,

Defendant - Appellant

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

Before SOUTHWICK, HAYNES and HO, Circuit Judges.

PER CURIAM:

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

IT IS FURTHER ORDERED that the alternative unopposed motion of appellee for extension of time of 30 days to file brief after denial of motion is DENIED AS MOOT.



Certified as a true copy and issued
as the mandate on Feb 04, 2019

Attest:

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

Appendix D

Federal Rule of Criminal Procedure 11 provides:

(a) Entering a Plea.

(1) *In General*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea*. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea*. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination,

to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or

related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

Appendix E

21 U.S.C. §§ 841(a)(1) provides:

- (a) Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
 - (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
 - (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Appendix F

U.S.C. 21 U.S.C. § 841(b)(1)(A)(viii) provides:

(b)Penalties Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)

(A)In the case of a violation of subsection (a) of this section involving—

. . . .

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a serious drug felony or serious violent felony has become final, such person shall be sentenced to a term of imprisonment of not less than 15 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after 2 or more prior convictions for a serious drug felony or serious violent felony have become final, such person shall be sentenced to a term of imprisonment of not less than 25 years and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of

at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph.

No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

Appendix G

U.S.C. 21 U.S.C. § 846 provides:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

APPENDIX H

18-10747

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

JAVIER CONTRERAS VARGAS,
also known as **Cunado,**
Defendant - Appellant

Appeal from United States District Court
For the Northern District of Texas, Dallas Division
District Court No. 3:16-CR-130-N-12

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

The government moves to dismiss Vargas's appeal because he waived his right to bring it. He acknowledges the waiver, does not dispute that it was knowing and voluntary, and does not invoke any of its limited exceptions. Instead, he claims that the waiver is "unconstitutional and void as against public policy to the extent it prevents review of his sentence for reasonableness." (Brief at 15.) Vargas also argues that the waiver is not enforceable under contract principles for failure of a condition precedent and

consideration. (*Id.*) The record and binding case law, however, foreclose his arguments. Thus, the Court should hold Vargas to the benefit of his bargain, 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.

1. In exchange for the government not bringing additional charges, Vargas pleads guilty to a drug offense and waives his appellate rights.

Vargas, along with many codefendants, was named in a four-count superseding indictment. (ROA.151.) The indictment charged Vargas with Conspiracy to Possess With Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(A)(viii). Pursuant to a written plea agreement, Vargas pleaded guilty to a one-count superseding information, charging Vargas with conspiracy to possess with intent to distribute 500 grams or more of methamphetamine. (ROA.40, 132-40.)

Vargas'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 his conviction and sentence. He further waives his right to contest his conviction and sentence 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.136.)

Vargas acknowledged in the agreement that (1) the court would impose his sentence after consideration of the sentencing guidelines; (2) “no one can predict with certainty the outcome of the Court’s consideration of the guidelines in this case”; (3) he would “not be allowed to withdraw his plea if his sentence is higher than expected”; and (4) “he fully underst[ood] that the actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the Court. (ROA.133-34.) In exchange for Vargas’s plea and appellate waiver, the government agreed not to bring any additional charges. (ROA.135.)

Relevant here, the presentence report applied two-level upward adjustments for (i) possession of a firearm under USSG § 2D1.1(b)(1); (ii) the importation of methamphetamine from Mexico under USSG § 2D1.1(b)(5); and (iii) maintaining a premises for the manufacture or distribution of methamphetamine under USSG § 2D1.1(b)(12). (ROA.158.) The district court adopted the findings in the presentence report and sentenced Vargas at the bottom of the guideline range—235 months’ imprisonment. (ROA.63, 127-28.)

2. The plea agreement is valid and bars this appeal.

Vargas acknowledges the appellate waiver in his brief. (Brief at 5, 15.) He does not challenge its validity or attempt to invoke any of the waiver's limited exceptions. (*See id.*) The government agrees that the waiver is valid, enforceable, and covers the issue raised on appeal. The sentencing issues he raises—whether the district court erred by applying enhancements for (i) possession of a firearm under USSG § 2D1.1(b)(1); (ii) the importation of methamphetamine from Mexico under USSG § 2D1.1(b)(5); and (iii) maintaining a premises for the manufacture or distribution of methamphetamine under USSG § 2D1.1(b)(12)—do not fall within the limited exceptions to his waiver.

Despite Vargas's concessions, he seeks to avoid his bargained-for appellate waiver by claiming it is unconstitutional, void as against public policy, and invalid under contract principles for failure of a condition precedent and consideration. (Brief at 21-29.) But his arguments are wholly undermined by binding case law and the record. First, this Court has repeatedly rejected the contention that knowing and intelligent waivers of appellate rights are unconstitutional or otherwise unenforceable. *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir.1992) (“We hold that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his

sentence.”); *United States v. Hammeren*, 518 F. App’x 296, 297 (5th Cir. 2013) (holding that the appellant’s “remaining contentions challenging the validity of the appeal waiver are foreclosed by *United States v. Melancon*”).

Second, Vargas’s contract-based arguments ignore the record. He asserts that the plea agreement is void because (1) in his view, the court miscalculated the advisory guideline range, so (2) the condition-precedent and expected consideration of the district court considering the guidelines before sentencing failed. But the plea agreement’s plain language makes manifest that although the district would consider the guidelines before sentencing, “no one can predict with certainty the outcome of the Court’s consideration of the guidelines in this case.” (ROA.133.) The court, of course, did in fact consider the advisory guidelines before imposing sentence. (ROA.123-29.)

Additionally, Vargas agreed in his plea agreement that he would not be permitted to withdraw his plea if the sentence were higher than expected and that the sentence imposed “is solely in the discretion of the Court.” (ROA.133-34.) Finally, Vargas received more than adequate consideration for his agreement given that the government, for its part, agreed not to bring any additional charges. (ROA.135.)

Because Vargas “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 Vargas’s brief.

Respectfully submitted,

Erin Nealy Cox
United States Attorney

s/ Wes Hendrix
Wes Hendrix
Assistant United States Attorney
Chief, Appellate Division
Texas Bar No. 24041086
1100 Commerce Street, Third Floor
Dallas, Texas 75242
Telephone: 214.659.8684
wes.hendrix@usdoj.gov

CERTIFICATE OF CONFERENCE

I certify that I conferred with Daniel Correa, counsel for Vargas, regarding this motion. Vargas 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 Vargas's attorney, Daniel Correa, through the Court's ECF system on January 4, 2019, 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 1,041 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: January 4, 2019

APPENDIX I

No. 18-10747

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee.

v.

JAVIER CONTRERAS VARGAS,
also known as Cunado,
Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-CR-00130-N-12
Honorable David C. Godbey presiding

**APPELLANT’S RESPONSE TO UNITED STATES’ MOTION TO DISMISS
THE APPEAL**

Appellant Javier Contreras Vargas respectfully requests that this Court deny the government’s motion to dismiss his appeal. Mr. Vargas supports his request as follows:

1. The sentence-appeal waiver should be held unconstitutional or void as against public policy.

The government incorrectly states that Mr. Vargas does not challenge the

validity of the sentence-appeal waiver. (*See* Motion to Dismiss at 4.) Mr. Vargas asserts that the sentence-appeal waiver is unconstitutional and/or void as against public policy. (Brief at 21-24.) If the sentence appeal waiver is either unconstitutional or void as against public policy, it is invalid. *See e.g., Panasonic Co., Div. of Matsushita Elec. Corp. of America v. Zinn*, 903 F.2d 1039, 1041 (5th Cir. 1990 (“Where the subject matter of the contract is legal, but the contract contains an illegal provision that is not an essential feature of the agreement, the illegal provision may be severed and the valid portion of the contract enforced.”)) (citing *Williams v. Williams*, 569 S.W.2d 867, 871 (Tex. 1978)).

While Mr. Vargas does not here challenge the validity of the Plea Agreement, he adamantly challenges the validity of the sentence-appeal waiver. The sentence-appeal waiver may be severed from the Plea Agreement. The government in its motion appears to intimately tie its promise not to bring additional charges to the sentence-appeal waiver provision. (Motion to Dismiss at 2, 5.) However, the government’s promise not to bring additional charges is found in paragraph 8 (“Government’s agreement”) of the Plea Agreement and is directly linked to the “Defendant’s agreement” in paragraph 7, neither of which mention the stand-alone sentence-appeal waiver in paragraph 11. (ROA.134-135 at ¶¶ 7-8, 136 at ¶ 11.)

To support its motion to dismiss, the government cites to this Court’s

decision in *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992), wherein this Court held “a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence.” However, *Melancon* was decided before the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), the case upon which Mr. Vargas relies to support his arguments against the validity of the sentence-appeal waiver here. The *Booker* remedial opinion made clear that appellate review was a necessary component to remedy the otherwise unconstitutional practice of having judges determine on a preponderance of the evidence standard—instead of the constitutional-minimum standard of beyond a reasonable doubt—sentencing facts that could increase a defendant’s sentence. (Brief at 21-24); *Booker*, 543 U.S. at 231-232, 264-65. And, the *Booker* remedial opinion made clear that appellate review of sentences is necessary to “move sentencing in Congress’ preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.” *Booker*, 543 U.S. at 264-65. This Court has not ruled on the validity of a sentence-appeal waiver based on the prophylactic remedy articulated in *Booker* against an otherwise unconstitutional application of less than beyond-a-reasonable-doubt burden of proof of facts sufficient to raise the sentence a criminal defendant could otherwise receive.

Mr. Vargas respectfully requests that this Court deny the government’s

motion to dismiss and order the government to file its Appellee's Brief in accordance with the extension requested by the government so that this Court may have adequate briefing to decide this important constitutional issue raised in his appeal and the reasonableness of his sentence.

2. Mr. Vargas' claims against the contractual enforceability of the sentence-appeal waiver involve misapplication of the guidelines, not merely "miscalculation of the guidelines."

Contrary to the government's assertion, Mr. Vargas does not seek to avoid "his bargained-for appellate waiver"; rather, he seeks to enforce the benefit of the bargain—to the extent the sentence-appeal waiver is found constitutional and not void as against public policy. The government attempts to reduce Mr. Vargas' contractual claims based on failure of a condition precedent and failure of consideration to the question whether or not the trial court "consider[ed] the guidelines." (Motion to Dismiss at 5). Mr. Vargas does not doubt that the trial court "considered" the guidelines. But, his claim is that, to the extent the trial court failed to determine his sentence "with reference to a proper application of the Guidelines, which would include adding enhancements to the sentencing calculation only upon sufficient proof and proper application," or failed to determine his sentence with reference to a correct "interpretation of the guidelines," the sentence-appeal waiver is unenforceable for failure to perform a condition precedent. (Brief at 25-28.) Notably, the government does not expressly

argue in its motion to dismiss that paragraph 4 (ROA.133 at ¶ 4) in the plea agreement, coupled with the prerequisites pursuant to Federal Rule of Criminal Procedure 11 to the trial court accepting the plea agreement, does not create a condition precedent.

In response to Mr. Vargas’ argument that the sentence-appeal waiver is unenforceable for failure of consideration, the Government responds that Mr. Vargas “received more than adequate consideration for his agreement given that the government, for its part, agreed not to bring any additional charges.” (Motion to Dismiss at 5.) Failure of consideration, however, is not concerned with the “adequacy” of consideration but with whether or not the promised performance failed after the agreement was reached. (Brief at 28.) Incorporating his argument concerning the condition precedent, Mr. Vargas contends that the sentence-appeal waiver is unenforceable “to the extent the district court affirmed the base offense level in the PSR or added enhancements to the base offense level, which increased the sentencing range in the guidelines, without sufficient proof to sustain the base offense level or enhancements, or based on an incorrect application of the guidelines,” because the bargained-for consideration for the sentence-appeal waiver included a promise of a proper application and interpretation of the guidelines and a sentence based upon legally sufficient proof. (Brief at 27-28.)

To the best of Mr. Vargas’ knowledge, this Court has not addressed the

enforceability of a sentence-appeal waiver based on failure of a condition precedent or failure of consideration with respect to the language in the plea agreement here and the circumstances described by Mr. Vargas in his brief. Mr. Vargas respectfully requests that this Court deny the government's motion to dismiss the appeal and order the government to file its Appellee's Brief in accordance with the extension requested by the government so that this Court may have adequate briefing to decide the merits of Mr. Vargas' contractual claims as well as the reasonableness of his sentence.

CONCLUSION

For the foregoing reasons, Defendant-Appellant JAVIER CONTRERAS VARGAS respectfully requests that this Court deny the government's Motion to Dismiss the Appeal and order the government to file its Appellee's Brief in accordance with the government's request for an extension.

Respectfully submitted,

/s/ Daniel R. Correa

Daniel R. Correa
Creedon PLLC
2595 Dallas Parkway, Suite 420
Frisco, Texas 75034
Phone: (972) 920-6864
Fax: (972) 920-3290
drcorrea@creedonpllc.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Brief for the Appellant Javier Contreras Vargas has been served by the 5th Circuit electronic filing system on all parties to this appeal on this 8th day of January 2019, and that any required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses and is virus free.

/s/ Daniel R. Correa

Daniel R. Correa

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this responsive motion complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this responsive motion contains 1111 words printed in a proportionally spaced typeface.
2. This responsive motion is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text produced by Microsoft Word Version 15.26 software.
3. Upon request, undersigned counsel will provide an electronic version of this

responsive motion and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this responsive motion and imposing sanctions against the person who signed it.

/s/ Daniel R. Correa

Daniel R. Correa

APPENDIX J

No. 18-10747

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee.

v.

JAVIER CONTRERAS VARGAS,
also known as Cunado,
Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-CR-00130-N-12
Honorable David C. Godbey presiding

APPELLANT’S MOTION TO STAY ISSUANCE OF MANDATE

Pursuant to Federal Rule of Appellate Procedure 41(d) and 5th Circuit Rule 41.1, Appellant Javier Contreras Vargas files this motion to stay the mandate. Appellant respectfully requests that this Court stay the issuance of the mandate in this matter pending Appellant’s petition to the United States Supreme Court for writ of certiorari to review the constitutionality or validity of the sentence-appeal waiver at issue. Appellant supports his motion as follows:

1. Appellant’s Petition for Writ of Certiorari Would Present a Substantial Question for Review.

According to 5th Circuit Rule 41.1, “A motion for a stay of the issuance of a mandate in a direct criminal appeal filed under Fed. R. App. P. 41 will not be granted simply upon request. Unless the petition sets forth good cause for stay *or clearly demonstrates that a substantial question is to be presented to the Supreme Court*, the motion shall be denied and the mandate thereafter issue forthwith.” The issue Mr. Vargas intends to submit to the United States Supreme Court for review is substantial, for it bears on the constitutionality or validity of the sentence-appeal waiver in his case.

To support its motion to dismiss, the government cited to this Court’s decision in *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992), wherein this Court held “a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence.” However, *Melancon* was decided before the Supreme Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), the case upon which Mr. Vargas relies to support his arguments against the validity of the sentence-appeal waiver here.

Neither this Court nor the United States Supreme Court has ruled on the validity of a sentence-appeal waiver based on the *Booker* remedial opinion’s inclusion of appellate review of sentences for reasonableness as part of the remedy to the *Booker* constitutional opinion. A majority of the *Booker* Court held the

Sentencing Guidelines unconstitutional under the Fifth and Sixth Amendments to the United States Constitution “to the extent that facts used to increase a criminal sentence (beyond what the defendant otherwise could have received) were not proved to a jury beyond a reasonable doubt.” *U.S. v. Henry*, 472 F.3d 910, 918 (D.C. Cir. 2007) (Kavanaugh J., concurring). As then judge, now Justice, Kavanaugh explained in his *Henry* concurrence, “[t]he logical upshot of [the *Booker* constitutional opinion] is that the Constitution is satisfied by a sentence in which sentencing facts are proved to a jury beyond a reasonable doubt.” *Id.* A different five-justice majority of the *Booker* court, however, held:

[T]hat the constitutional problem with the Guidelines is more readily solved not by requiring sentencing facts to be proved to a jury beyond a reasonable doubt, but instead by making the Guidelines one factor in the district court’s sentencing decision. . . . *The Booker remedial opinion also directed appellate courts to review district court sentences for “reasonableness”—a term not defined, but which the Court stated would help “to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.”*

Id. at 918-19.

Appellant Javier Contreras Vargas seeks review by the United States Supreme Court of the following issue: **Is the sentence-appeal waiver in the Plea Agreement between Javier Contreras Vargas and the United States Government unconstitutional or void as against public policy.**

The issue as to the constitutionality of the sentence-appeal waiver presents a

substantial question for review. The issue is substantial as it directly bears on the scope of Appellant's right to have his sentence determined by constitutionally sufficient proof. The issue is also substantial because a consequence of the sentence-appeal waiver here is that error is shielded from appellate review. Appellate review could correct improper applications of the guidelines and unreasonable sentences. This shielding skews the repository of information the Sentencing Commission considers to make appropriate adjustments and revisions to the Guidelines in order to avoid or minimize sentencing disparities, thereby frustrating the Congressional purpose of the Guidelines and the United States Supreme Court's effort in *Booker* to promote Congress' purpose.

Further, it is clear from the facts of this case that Mr. Vargas did not waive his right to have his sentence determined upon sufficient proof. Considering *U.S. v. Booker* held that the Constitution requires sentencing facts that could increase a criminal sentence beyond what the defendant otherwise could have received to be proved to a jury beyond a reasonable doubt, and considering *Booker* also held that the constitutional remedy to sentencing facts being determined by a judge on a preponderance of the evidence standard includes appellate review of sentences for reasonableness, Mr. Vargas' petition raises a substantial question for the Supreme Court to review and he is likely to succeed in securing review of this issue.

A second but equally substantial question fairly follows from the issue

Appellant intends to raise in his petition for writ of certiorari: If appellate review of sentences for reasonableness remedies the constitutional problem of having judges determine sentencing facts on a preponderance of the evidence standard, does a defendant knowingly waive his right to appeal if he is never informed that waiving his right to appeal means he is also waiving the *Booker* remedial protection afforded by appellate review.

Appellant Javier Contreras Vargas respectfully requests that this Court stay the mandate in this matter pending Appellant's petition to the United States Supreme Court for writ of certiorari to review the constitutionality or validity of the sentence-appeal waiver at issue.

2. Good Cause Exists to Stay Mandate.

Local rule 41.1 disjoins the good cause showing and substantial question showing, and Appellant respectfully requests that this Court exercise its discretion to stay the mandate based on the substantiality of the question Appellant intends to submit for review. But, good cause does exist here to stay the mandate. A stay of the mandate will maintain the status quo pending resolution of a serious and substantial legal question. Appellant has already filed his Appellant's Brief. Should the Supreme Court rule in Appellant's favor, the case will remain pending in this Court and the United States can file its Appellee's Brief, thereby conserving time and judicial resources. Whereas, issuing the mandate will disrupt the status quo by

transferring jurisdiction to the District Court, and, as a result, delaying appellate review of Appellant's sentence should the Supreme Court rule in his favor. Any delay in appellate review of his sentence delays justice and, as a result, harms Mr. Vargas, the harm of which is irreparable.

CONCLUSION

For the foregoing reasons, Defendant-Appellant JAVIER CONTRERAS VARGAS respectfully requests that this Court stay issuance of the mandate for the 90-day period in which he must submit his petition for writ of certiorari to the United States Supreme Court. Defendant-Appellant also requests all other relief to which he has shown himself legally or equitably entitled.

Respectfully submitted,

/s/ Daniel R. Correa

Daniel R. Correa
Creedon PLLC
2595 Dallas Parkway, Suite 420
Frisco, Texas 75034
Phone: (972) 920-6864
Fax: (972) 920-3290
drcorrea@creedonpllc.com

CERTIFICATE OF CONFERENCE

I certify that on January 23, 2019, Counsel for Appellant emailed Counsel for Appellee concerning the content of this motion and relief sought herein. Counsel for Appellee responded on January 24, 2019, stating that Appellee takes no position on Appellant's motion to stay the mandate and will defer to this Court's preference.

/s/ Daniel R. Correa
DANIEL R. CORREA

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Motion for the Appellant Javier Contreras Vargas has been served by the 5th Circuit electronic filing system on all parties to this appeal on this 25th day of January 2019, and that any required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses and is virus free.

/s/ Daniel R. Correa
Daniel R. Correa

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this motion complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this motion contains 1,138 words printed in a proportionally spaced typeface.
2. This motion is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text produced by Microsoft Word Version 15.26 software.
3. Upon request, undersigned counsel will provide an electronic version of this motion and/or a copy of the word printout to the Court.
4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this motion and imposing sanctions against the person who signed it.

/s/ Daniel R. Correa
Daniel R. Correa