No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

JAVIER CONTRERAS VARGAS,
also known as Cunado,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Does a sentence-appeal waiver that purportedly precludes a challenge to the sufficiency of enhancement evidence and the district court's interpretation and application of the sentencing guidelines frustrate the remedy fashioned by this Court in *U.S. v. Booker*, 543 U.S. 220 (2005), thereby rendering the waiver unconstitutional or void as against public policy?

II. Does a defendant knowingly and voluntarily waive his right to appeal the sufficiency of sentence-enhancement evidence and guidelines interpretation and application if the trial court does not specifically inform the defendant, as part of its Federal Rule of Criminal Procedure 11(b)(1)(N) disclosures, that the defendant is waiving his right to make such a challenge, though the plea agreement does not expressly waive the defendant's right to have his sentenced determined by constitutionally sufficient proof and in accordance with a correct guidelines range determination?

III. Did the plea agreement vest Petitioner with a contractual right to have his sentence determined with reference to a proper application of the Guidelines and upon sufficient proof, creating a condition precedent to enforceability of the sentence appeal waiver, the applicability of which requires appellate review of the court's guidelines application?

INTERESTED PARTIES

There are no parties to the proceeding other than those named in the case caption.

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Frank O. Bowman, *Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines*, 51 HOUSTON L. REV. 1227, 1266 (2014).....20

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner JAVIER CONTRERAS VARGAS respectfully requests that a writ of certiorari issue to review the order of the Court of Appeals dismissing the appeal, which order was filed on January 11, 2019.

ORDER BELOW

The order of the court of appeals, *United States v. Javier Contreras Vargas a/k/a Cunado*, No. 18-10747 (5th Cir. Jan. 11, 2019), is unpublished. A copy of the order is attached as Appendix A.

JURISDICTION

The order dismissing Petitioner's appeal was filed on January 11, 2019. *See* Appendix A. 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.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment right to have sentencing facts that could increase a defendant's sentence determined by a jury: "In all criminal prosecutions, the accused shall enjoy the right . . . to an impartial jury of the State and District wherein the crime shall have been committed." U.S. Const. amend. VI.

This case also involves the right to have a judge inform a defendant of the scope of an appellate waiver in a plea agreement prior to the district court accepting a defendant's plea: "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: . . . the terms of any plea-agreement provision waiving the right to appeal or collaterally attack the sentence." Fed. R. Crim. P. 11(b)(1)(N).

This case also implicates the Due Process Clause of the Fifth Amendment to the United States Constitution: "No Person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ." U.S. Const. amend V.

The pertinent provisions of the U.S. Code regarding the statute of conviction—21 U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii)), and 846—and the Federal Rules of Criminal Procedure are reprinted in the Appendix at 004a-011a.

STATEMENT OF THE CASE

1. Introduction

This case presents a recurring problem, one regularly and often overlooked by Courts of Appeals. A defendant signs a plea agreement, but retains his right to have sentencing facts that could increase his sentence range determined by constitutionally sufficient evidence. The plea agreement, in turn, contains a broad sentence appeal waiver that stands alone, about four paragraphs away from the paragraphs titled "Defendant's Agreement" and "Government's Agreement." The U.S. Courts of Appeals construe broad sentence-appeal waivers to preclude challenges to the sufficiency of sentencing evidence, as well as to the district court's interpretation and application of the Sentencing Guidelines. And, as a result, the defendant's only chance to challenge the sufficiency of the evidence and the interpretation and application of the guidelines is with the district court—the same court that must first accept the plea agreement before it becomes binding, according to Federal Rule of Criminal Procedure 11, and that, in turn, makes all factual and legal determinations at the sentencing hearing.

This whole arrangement is a problem because this Court included appellate review of sentences for unreasonableness as part and parcel of the remedy this Court fashioned in *United States v. Booker*, 543 U.S. 220 (2005), to preserve a

defendant's Fifth and Sixth Amendment rights when sentencing facts that could increase his sentence are determined by a judge, rather than a jury, on a preponderance of the evidence standard, rather than beyond a reasonable doubt. The urgency of this problem is underscored by the Guidelines central role in sentencing, which, as this Court recently reasoned, "means that an error related to the Guidelines can be particularly serious," serious enough that the fact of the erroneous Guidelines range itself can serve as evidence of an affect on substantial rights. *Molina-Martinez v. United States*, 136 S.Ct. 1338, 1345-1346, 1349 (2016).

The arrangement also creates a problem because in the standard plea agreement a defendant retains his right to have his sentence determined by constitutionally sufficient evidence and upon a correct interpretation and application of the guidelines. To preclude appellate review of challenges to the sufficiency of the evidence and the court's interpretation and application of the guidelines strips a defendant of the only remedy he has to enforce the benefit of his bargain at the time the deficient performance was rendered.

This Court should grant certiorari to provide uniformity in sentence-appeal waiver enforcement of challenges to the sufficiency of the evidence used to increase a criminal defendant's Guidelines-sentencing range and challenges to the district court's interpretation and application of the Guidelines.

2. Presentence Proceedings.

Javier Contreras Vargas was charged with and plead guilty to one count of Conspiracy to Possess With the Intent to Distribute a Controlled Substance (21

U.S.C. §§ 841(a)(1), 841(b)(1)(A)(viii)), and 846). In the plea agreement, he stipulated to the following facts:

> JAVIER CONTRERAS VARGAS admits that on or about April 22, 2015 he delivered approximately 1 kilogram of methamphetamine. . . . The delivery occurred in two parts. . . . The gross weight of the first package of methamphetamine was 557.5 grams. *The amount of pure methamphetamine in the first package was 474.9 grams* (+ or – 18.1 grams). The gross weight of the second package of methamphetamine was 626.8 grams. *The amount of pure methamphetamine in the second package was 477.7 grams* (+ or – 18.0 grams).
>
> Additionally, [he] admits that on May 23, 2015, . . . he received a shipment of methamphetamine . . . and that he paid $10,000 for the shipment.
>
> [He] further admits that July 7, 2015, the Dallas police department conducted a traffic stop and [he] was found to be in possession of 2 kilograms of methamphetamine. Officers subsequently searched his residence and found approximately 17 kilograms of methamphetamine, $25,137 in United States currency, and a firearm.

The plea agreement between Mr. Vargas and the United States contained a waiver of right to appeal from or to collaterally attack his conviction or sentence, reserving his right to directly appeal a sentence exceeding the statutory maximum punishment, or an arithmetic error at sentencing, or to challenge the voluntariness of the waiver of appeal, or to bring a claim of ineffective assistance of counsel. The agreement also included the following clause pertaining to sentencing:

> 4. **Court's sentencing discretion and role of the Guidelines**: The defendant understands that the sentence in this case will be imposed by the Court after consideration of the United States Sentencing Guidelines. The guidelines are not binding on the Court, but are advisory only. The defendant reviewed the guidelines with his attorney, but understands that no one can predict with certainty the outcome of the Court's consideration of

> the guidelines in this case. The defendant will not be allowed to withdraw his plea if his sentence is higher than expected. The defendant fully understands that the actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the Court.

Notably, the plea agreement contained no clause divesting Mr. Vargas of any right to have sentencing facts that could increase the Guidelines-sentencing range determined by constitutionally sufficient evidence, or divesting him of any right to have the Guidelines-sentencing range determined upon a proper interpretation and application of the sentencing guidelines by the district court.

At his Rearraignment Hearing, wherein Mr. Vargas entered his guilty plea and the magistrate judge made his Federal Rule of Criminal Procedure 11 inquiries to determine whether the court should accept the plea agreement, the judge informed Mr. Vargas of the following with respect to sentencing:

> Now, I need to describe to you how sentencing works in federal court. In this court, it is the judge who decides the sentence, whether a defendant is convicted by a jury or upon a plea of guilty. The United States Supreme Court has ruled that those guidelines are not mandatory but rather are only advisory. That means that the district judge must consider the guidelines, but is not required to follow them.
>
> To determine a sentence, the district judge must calculate what the guidelines provide as a range of sentences for a particular case, and then consider that range, consider possible departures upward or downward from that range. The guidelines may also provide for and consider other sentencing factors under Title 18 U.S.C. Section 3553(a).
>
> . . . .
>
> The district judge will not be able to determine what guidelines are provided as a range of sentence for your case until a presentence report has been prepared by the U.S. Probation Office. To put that together, the probation officer will interview

> you and the government about the facts of the case. You have agreed to certain facts that are in your factual resume, but the presentence report may not contain all the same facts that are in your factual resume and it may contain some facts that are not in your factual resume at all.
>
> If that happens, you might not be permitted to withdraw your plea of guilty. But you will have the opportunity to make objections to the presentence report before sentencing. Then, to decide your sentence, the district judge will consider the presentence report, any objections made to that report, and any evidence presented at the sentencing hearing.

At no time did the judge suggest that Mr. Vargas waived by his plea agreement his right to have the facts that could increase his range of sentence determined by constitutionally sufficient proof, or his right to have the Guidelines-sentencing range determined upon a proper interpretation and application of the sentencing guidelines by the district court.

The judge also informed Mr. Vargas about the sentence-appeal waiver as follows:

> The Court: As I explained to you earlier, you have the right to appeal. Do you understand that in paragraph 11 of the plea agreement you [sic] agreeing to give up your right to appeal except in the limited circumstances set out in paragraph 11?
>
> Defendant: Yes, I do.
>
> The Court: Your plea agreement also has a waiver of your right to otherwise challenge conviction or sentence. You have the right to challenge your conviction and sentence through writ of habeas corpus or motion to vacate. Do you understand that in paragraph 11 you are agreeing to give up your conviction and/or sentence except in the limited circumstances set out in paragraph 11?
>
> Defendant: I understand.

At no time did the judge expressly inform Mr. Vargas that the broad sentence-appeal waiver in his plea agreement could preclude him from seeking appellate review for error of the sufficiency of evidence that increased the range of sentence determined by the sentencing judge or to challenge the sentencing judge's interpretation and application of the guidelines.

3. Presentence investigation report.

The PSR revealed no criminal history for Mr. Vargas and no prior criminal conduct by him. Contrary to a criminal history, the PSR noted that Mr. Vargas completed a high-school level education, earned a college degree in information technology, passed certification examinations in computer education and technical computer hardware, and that he desired to obtain a master's degree in forensic information technology. Mr. Vargas worked at an automobile parts store during college and moved up to maintaining inventory databases and invoicing databases after he completed college, all the while working as a teacher at his former preparatory school, teaching information technology and database programming.

Notwithstanding his education and work history and lack of any prior criminal history or conduct, the PSR recommended a total offence level of 41.

The PSR set Mr. Vargas' base-offense level at 38, attributing to him 45.84 kilograms of methamphetamine or 40.34 kilograms of methamphetamine (actual). The PSR also sought and recommended a two-level weapon enhancement under U.S.S.G. §2D1.1(b)(1). The PSR also sought and recommended an additional two-level importation enhancement pursuant to U.S.S.G. § 2D1.1(b)(5), and a two-level

"maintaining a premises" enhancement pursuant to U.S.S.G. § 2D1.1(b)(12).

a. Base Offense Level Calculation

The PSR attributed to Mr. Vargas 45.84 kilograms of methamphetamine, with an average purity of 88%, resulting in Mr. Vargas being accountable under the PSR for 40.34 kilograms of methamphetamine (actual) for guideline computation purposes. Of the 45.84 kilograms, one kilogram was from a controlled purchase facilitated by a confidential source on April 22, 2015. Two kilograms were seized from Mr. Vargas' vehicle when he was arrested, and 16.61 kilograms were seized from his residence shortly thereafter, totaling 18.61 kilograms seized on July 7, 2015. From his stipulated facts, the PSR attributed to Mr. Vargas a total of 19.61 kilograms.

The other 27.23 kilograms that made up the Government's 45.84 kilograms it attributed to Mr. Vargas came from an extrapolation from a ledger located during a search of Mr. Vargas' residence. The extrapolation method in the PSR, however, did not detail whether the ledger included the April 22, 2015, kilogram from the controlled purchase, or any of the other kilograms the Government attributed to Mr. Vargas. The PSR also did not list any specific details of the entries in the ledgers, including dates, or the language in which the ledger entries were written.

b. Weapon Enhancement

The PSR centered its weapon enhancement recommendation on a disassembled rifle found in a bedroom, under a bed at Mr. Vargas' residence during a search of the premises. Mr. Vargas was not in his residence when the search took

place. The search took place after Dallas County Sheriff's deputies placed Mr. Vargas under arrest following a vehicle search, which occurred away from his residence.

Mr. Vargas objected to the PSR's weapon-enhancement facts, stating that the weapon was found disassembled, making it improbable that the weapon was connected to the offense. The Government filed a response to Mr. Vargas' objections to the PSR and an addendum to the PSR. The addendum included a summary of the Government's response:

> As noted in the Presentence Report, the gun was found in close proximity (the same apartment) to drugs, drug proceeds, and a methamphetamine conversion laboratory. Furthermore, the Fifth Circuit has held that an enhancement under USSG §2D1.1(b)(1) is applicable to a disassembled firearm that could be readily converted to an operable firearm. *See* U.S. v. Ryles, 988 F.2d 13 (5th Cir. 1993). Furthermore, USSG §1B1.1, comment. (n.1(G)) defines a firearm as "(i) any weapon (including a starter gun) which will or is designed to or *may readily be converted* to expel a projectile by the action of an explosive [or] (ii) *the frame or receiver of any such weapon*" (emphasis added). The evidence in the instant offense revealed all of the parts needed to assemble the firearm (including the receiver of the firearm) were located under a bed. Agents assembled the firearm following the execution of the search warrant and ensured it was a functioning firearm.

The addendum to the PSR provided no additional information regarding the firearm—no information on how far apart the component parts of the rifle were from one another, how long it took to assemble the rifle, or what test law enforcement conducted to ensure "it was a functioning firearm."

c. Importation of Methamphetamine Enhancement.

The PSR recommended and sought a two-level enhancement pursuant to

U.S.S.G. § 2D1.1(b)(5), alleging Mr. Vargas' offense involved the importation of methamphetamine. The PSR alleged that Mr. Vargas received shipments of methamphetamine from coconspirators who drove trucks from Mexico. The PSR did not allege nor point to any facts supporting that Mr. Vargas knew from where the trucks transporting the methamphetamine were coming, that he knew the origin of any methamphetamine he might have received, or that he expressly agreed with any other "coconspirator" to import methamphetamine from Mexico.

4. Sentencing hearing.

At the sentencing hearing on June 11, 2018, the district judge overruled Mr. Vargas' objection to the weapon enhancement. Mr. Vargas' counsel pointed out that the rifle found was disassembled and added, "I'm not sure if there was even any ammunition that was recovered that went with that rifle." The court responded: "As I understand it, the definition of weapon includes simply a receiver, and there was so I think there was a weapon there."

After hearing both sides, the court announced that it was "adopting the factual contents of the presentence report and the addendum as my factual determination in connection with sentencing." The court's sentence determination went as follows:

> Here the Guideline calculation yields offense level 41, Criminal History Category I, and a sentencing range of 324 to 405 months. I'm going to grant the Government's 5k motion, which puts us down to offense level 38, Criminal History Category I, and a sentencing range of 235 to 293 months. I find under the circumstances with the 5k motion that the Guidelines adequately reflect the seriousness of the offense conduct as well as the other statutory sentencing factors of § 3553(a). Therefore, I see no

> reason to vary from the Guidelines in imposing sentence.
>
> I note that the Government recommends a sentence of 252 months. It's typically my practice when there is a 5k motion to sentence at the bottom end of the range, and with respect to the Government's recommendation, I think it's more important for me to be predictable and, therefore, I'm going to sentence the Defendant at the bottom of the range to 235 months in the custody of the Bureau of Prisons.

The court subsequently entered a judgment. Mr. Vargas filed his notice of appeal on June 22, 2018.

5. Appellate Proceeding

Mr. Vargas filed his Appellant's Brief on December 5, 2018. In his brief, he challenged the sufficiency of the evidence presented by the government to warrant the sentence enhancements that increased the Guidelines-sentence range adopted by the district court. He also challenged the district court's interpretation and application of the firearm, importation, and "maintaining a premises" enhancements.

With respect to the importation enhancement, Mr. Vargas requested that the Fifth Circuit reconsider its holdings in *U.S. v. Foulks*, 747 F.3d 914 (5th Cir. 2014), and *U.S. v. Serfass*, 684 F.3d 548 (5th Cir. 2012), which apply a § 2D1.1(b)(5) enhancement to a defendant (1) even when the defendant is not personally involved in the importation and (2) even when the defendant lacked actual knowledge that the drugs at issue were imported. Mr. Vargas argued that the sentencing guidelines, U.S.S.G. § 1B1.3(a)(1)(A)-(B), require the court to determine specific offense characteristics, like those under § 2D1.1(b), on the basis of the "acts and

omissions . . . caused by the defendant," or acts committed by others within the scope of conduct to which the defendant agreed, which suggests that the defendant's personal involvement or knowledge must be taken into account in connection with any determination whether to impose the sentence enhancement. He also pointed to a recent Ninth Circuit Court of Appeals opinion that criticized the Fifth Circuit's interpretation of the importation enhancement, *U.S. v. Job*, 871 F.3d 852, 870 (9th Cir. 2017).

Mr. Vargas also challenged the validity and enforceability of the sentence-appeal waiver in his plea agreement. He argued that appellate review of sentences for unreasonableness is a necessary component of the remedies articulated in *U.S. v. Booker*, 543 U.S. 220, 226-27 (2005), which cannot be waived without re-creating the initial unconstitutional conditions the *Booker* Court sought to remedy or without frustrating the public policies articulated in the *Booker* opinion, namely "to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."

He also challenged the enforceability of the sentence-appeal waiver when a defendant seeks the benefit of his bargain under the plea agreement. Specifically, Mr. Vargas argued that he had a contractual right to have his sentence determined upon constitutionally sufficient proof and a correct interpretation and application of the sentencing Guidelines to yield the appropriate Guidelines range the court considers in imposing an appropriate sentence. And, 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 interpretation or application of the guidelines, the sentence-appeal waiver is unenforceable for failure to perform a condition precedent to its enforcement or for failure of consideration.

Rather than file an Appellee's Brief, the Government filed a motion to dismiss the appeal due to the sentence-appeal waiver in the plea agreement. *See* Appx. H. Mr. Vargas filed a reply to the government's motion four days later. *See* Appx. I.

In its motion to dismiss, the government made three primary arguments, to which Mr. Vargas responded. First, the government argued that Fifth Circuit precedent affirms the validity of a sentence-appeal waiver as part of a valid plea agreement, citing *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992). Appx. 015a. Mr. Vargas responded to this argument by pointing out *Melancon* predated *U.S. v. Booker*—the case upon which Mr. Vargas relied in his Brief to challenge the validity of the sentence-appeal waiver. Appx. 021a-022a. Mr. Vargas also argued that no case, to his knowledge, addressed the validity of a sentence-appeal waiver in light of the full breadth of remedies articulated by this Court in *U.S. v. Booker*. Appx. 022a.

Second, and in response to Mr. Vargas' argument that the plea agreement created a condition precedent to enforcement of the sentence-appeal waiver, the

government argued that Mr. Vargas received the benefit of his bargain because the district court "consider[ed] the guidelines." Appx. 015a-016a. Mr. Vargas responded by pointing out the government did not deny in its motion that the plea agreement created a condition precedent; rather, the government simply stated that the condition was satisfied. Appx. 023a-025a. He also responded by pointing out that even if the court "considered the guidelines," his argument in his Brief was that the condition precedent required the court 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, . . . [and] with reference to a correct 'interpretation of the guidelines." Appx. 023a-025a.

On January 11, 2019, the district court granted the government's motion to dismiss Mr. Vargas' appeal. Two weeks later Mr. Vargas filed a motion to stay the mandate pending his petition for writ of certiorari. In the motion, Mr. Vargas articulated the issues for which he sought review. The primary issue centered on the validity of the sentence-appeal waiver, but he also questioned whether the sentence-appeal waiver is made knowingly and voluntarily if the defendant is not informed by the district court that he is giving up the remedial protections articulated in *U.S. v. Booker*. Appx. 031a-032a. On January 29, 2019, the district court denied Mr. Vargas' motion to stay the mandate. The mandate issued on February 4, 2019. *See* Appx. C.

REASONS FOR GRANTING THE PETITION

I. The questions presented are central to resolving a long-standing dispute over the import of this Court's

remedial opinion in *U.S. v. Booker*.

As a prophylactic remedy 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,[1] this Court rendered the sentencing guidelines merely advisory, rather than mandatory, and articulated two substantive rights for criminal defendants: (1) a sentencing judge is required to consult the sentencing guidelines and the factors in 18 U.S.C. 3553(a) in making its sentencing decision, and (2) courts of appeal must review the sentence for unreasonableness.[2] Although the *Booker* Court did not use the term "right" in reference to appellate review for unreasonableness, the *Booker* remedial opinion made clear that appellate review was a necessary component to remedy the otherwise unconstitutional practice of having judges determine sentencing facts that could increase a defendant's sentence on a preponderance of the evidence

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[1] *U.S. v. Booker*, 543 U.S. 220, 226-27 (2005) (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.); *see also U.S. v. Henry*, 472 F.3d 910, 918 (D.C. Cir. 2007) (Kavanaugh, J., concurring) ("In *Booker* a five-Justice majority of the Supreme Court held that the United States Sentencing Guidelines were unconstitutional under the Fifth and Sixth Amendments 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. The logical upshot of this part of *Booker* (what is known as 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.").

[2] *Booker*, 542 U.S. at 245-46, 264; *see also Henry*, 472 F.3d at 918-19 ("In some tension with the *Booker* constitutional opinion, however, a different five-Justice majority of the *Booker* court also held (in what is known as the *Booker* remedial opinion) that 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, along with other factors specified in 18 U.S.C. 3553(a). . . . 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.").

standard:

> As we have said, the Sentencing Commission remains in place, writing Guidelines, collecting information about actual district court sentencing decisions, undertaking research, and revising the Guidelines accordingly. . . . The district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing. . . . The courts of appeals review sentencing decisions for reasonableness. ***These features of the remaining system***, ***while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction***, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary.[3]

Courts of Appeals have largely assumed that a defendant can—prior to sentence determination—waive his right to appeal the reasonableness of his sentence even when, as here, the complained of error is lack of sufficient evidence and improper interpretation or application of the Guidelines, leading to a sentence under an incorrect Guidelines range. This assumption, in turn, is built on another assumption—that "appellate review for unreasonableness" is not an integral component to the *Booker* remedy.[4]

These Courts of Appeals justify reliance on their assumptions by pointing to

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[3] *Booker*, 542 U.S. at 264-65 (emphasis added).

[4] *See e.g., U.S. v. McKinney*, 406 F.3d 744, 747 & n.5 (5th Cir. 2005) (applying a broad sentence appeal waiver and stating, "*Booker* only strikes down the *mandatory* application of guidelines ranges that are based on facts not found by a jury beyond a reasonable doubt"); *U.S. v. Rubbo*, 396 F.3d 1330, 1332-33 (11th Cir. 2005) ("[T]he right to appeal a sentence based on *Apprendi/Booker* grounds can be waived in a plea agreement. Broad waiver language covers those grounds of appeal."); *U.S. v. Blick*, 408 F.3d 162, 169 n. 7 (4th Cir. 2005) (same); *U.S. v. Reeves*, 410 F.3d 1031, 1034 (8th Cir. 2005) (applying a sentence appeal waiver to a defendant's challenge of the district court's application of the guidelines and reasoning, "'Unless expressly reserved, . . . , the right to appellate relief under *Booker* is among the rights waived by a valid appeal waiver. . . .'") (quoting *U.S. v. Killgo*, 397 F.3d 628, 629 n.2 (8th Cir. 2005)); *U.S. v. Bradley*, 400 F.3d 459, 465 (6th Cir. 2005) (enforcing sentence-appeal waiver in the "aftermath of *Booker*"); *U.S. v. Roque*, 421 F.3d 118, 123-24 (2nd Cir. 2005).

contract law principles, asserting that a defendant may waive constitutional rights via a valid plea agreement.[5] But this Court made "appellate review of sentences" an integral component of its *Booker* remedy, an essential component of the minimum constitutional protections afforded a defendant under the Fifth and Sixth Amendments to the United States Constitution when a judge—not a jury—on a preponderance of the evidence standard—not beyond a reasonable doubt—decides sentencing facts that could increase the defendant's sentence. The standard language used in plea agreements, like the one here, preserves the defendant's right to have his sentence determined by constitutionally sufficient evidence; he does not waive this right to have sentencing facts determined by constitutionally sufficient evidence. By holding that a defendant waives by a broad sentence-appeal waiver a challenge to the sufficiency of the evidence used to increase his sentencing range, the Courts of Appeals have: (A) diminished procedural safeguards that accounted for a lesser burden of proof and heightened possibility of error, thereby frustrating Congress' public policy behind creating the sentencing guidelines; and (B) created an impermissible presumption of sufficient evidence.

A. Diminished Procedural Safeguards

This Court did not include "appellate review of sentences for unreasonableness" in its *Booker* remedial opinion by accident or merely in passing; rather, this Court included "appellate review" as part of its remedial scheme,

[5] *See* cases, *supra* note 4.

referring to the scheme as "these features of the remaining system."[6] Some procedural protection was necessary to ensure "the interest in fairness and reliability protected by the right to a jury trial—a common law right that defendants enjoyed for centuries and that is now enshrined in the Sixth Amendment—"that was no longer available to a criminal defendant under the Sentencing Reform Act.[7] Also, some procedural protection was necessary to fill the gap created by the Court's excise of mandatory application of the guidelines from the Sentencing Reform Act—mandatory application of the Guidelines promoted Congress' stated goal of uniformity to avoid sentencing disparities—which this Court replaced with discretionary application.[8]

"Appellate review of sentences for unreasonableness" is the procedural protection this Court selected to promote fairness and reliability, and to "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing

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[6] *Booker*, 542 U.S. at 264-65 (emphasis added).

[7] *Booker*, 543 U.S. 220, 244.

[8] *See Booker*, 543 U.S. at 300 (Scalia, j., dissenting):

> As a matter of policy, the difference between the regime enacted by Congress and the system the Court has chosen are stark. Were there any doubts about whether Congress would have preferred the majority's solution, these are sufficient to dispel them. First, Congress' stated goal of uniformity is eliminated by the majority's remedy. True, judges must still *consider* the sentencing range contained in the Guidelines, but that range is now nothing more than a suggestion that may or may not be persuasive to a judge when weighed against the numerous other considerations listed in 18 U.S.C.A. § 3553(a). . . . The result is certain to be a return to the same type of sentencing disparities Congress sought to eliminate in 1984.

disparities."[9] Notably, Justice Scalia's dissent in *Booker* proved correct—moving the guidelines from mandatory to advisory greatly increased interjudge sentencing disparities across the United States.[10] The problem with sentencing disparity is exacerbated by sentence-appeal waivers that preclude challenges to the sufficiency of enhancement evidence and to the district court's interpretation and application of the guidelines, because error is shielded from appellate review, the review of which could otherwise correct improper applications of the guidelines and unreasonable sentences. This shielding, in turn, skews the repository of information available to the Sentencing Commission, the information that it 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.

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[9] *Booker*, 542 U.S. at 264-65.

[10] *See Molina-Martinez v. U.S.*, 136 S. Ct. 1338, 1350 nn. 1-2 (2016):

> *See e.g.,* United States Sentencing Commission, Report on the Continuing Impact of *United States v. Booker* on Federal Sentencing 3 (2012) (*Booker* Report) ("[T]he Commission's analysis of individual judge data showed that the identify of the judge has played an increasingly important role in the sentencing outcomes in many districts"); Bowman, Dead Law Walking: The Surprising Tenacity of the Federal Sentencing Guidelines, 51 Houston L. Rev. 1227, 1266 (2014) ("Inter-Judge Disparity Has . . . Increased Since *Booker*"); *Scott*, Inter-Judge Sentencing Disparity After *Booker*: A First Look, 63 Stan. L. Rev. 1, 30 (2010) ("[I]n their guideline sentencing patterns, judges have responded in starkly different ways to *Booker*, with some following a 'free at last' pattern and others a 'business as usual' pattern").
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> Yang, Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from *Booker*, 89 N.Y.U. L. Rev. 1268, 1277, 1319-1232 (2014) (presenting "evidence of substantial interdistrict difference in sentencing outcomes").

Challenges to the sufficiency of sentencing evidence and to the interpretation and application of the guidelines must survive any sentence-appeal waiver. A defendant does not waive his right to have his sentence determined upon constitutionally sufficient evidence and in accordance with a correct interpretation and application of the sentencing guidelines. *Booker* stands for the proposition that a defendant's Fifth and Sixth Amendment right to have a jury determine beyond a reasonable doubt sentencing facts that could increase his sentence is preserved when a judge determines by a preponderance of the evidence the same sentencing facts *only when* the complete remedial scheme articulated in *Booker* is afforded a defendant. Accordingly, a defendant's challenge to the sufficiency of the evidence and the district court's interpretation and application of the sentencing guidelines must survive a broad-sentence appeal waiver. Enforcement of such a broad sentence-appeal waiver, at worst, violates a defendant's Fifth and Sixth Amendment rights, and, at the very least, violates the express statutory public policy this Court sought to preserve and promote by its *Booker* remedy, i.e., '***to move sentencing in Congress' preferred direction***, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary."[11]

B. Impermissible Presumption of Sufficient Evidence and Lack of

[11] *Booker*, 542 U.S. at 264-65 (emphasis added); *see also* Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 253 (2005) ("For most legal rules, we accept that parties will bargain in the shadow of a few cases that do no reach judicial decision, and that some rules will be enforced less vigorously in some cases than in others. But sentencing rules are premised explicitly upon the goal of minimizing disparity between cases. Blind spots of enforcement are more costly when the very reason for the regulation being traded away inconsistently is consistency itself.").

Error.

Enforcing broad sentence-appeal waivers to preclude sufficiency of the evidence challenges as well as challenges to the district court's interpretation and application of the sentencing guidelines creates an impermissible presumption of sufficient evidence and lack of error. This Court "'warned against courts' determining whether error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon the examination of the record.'"[12] When an appellate court dismisses an appeal that challenges the sufficiency of the evidence and guidelines application and interpretation without reviewing the record, based on nothing more than the existence of a broad sentence-appeal waiver, it presumes the sufficiency of the evidence and presumes that the district court correctly interpreted and applied the guidelines to reach the correct sentencing range.

It is no argument to the contrary to state that the court merely enforces the terms of the agreement, which includes a sentence-appeal waiver. The plea agreement also includes a sentence determination based on sufficient evidence and an accurate interpretation and application of the guidelines, which make up part of the defendant's bargained-for consideration. In fact, before the court can accept the plea agreement and make it binding, it must inform the defendant, "in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline

[12] *Molina-Martinez v. U.S.*, 136 S.Ct. 1338, 1350 (2016) (Alito, J., and Thomas, J., concurring) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009)).

range."[13] A defendant is as entitled to receive the benefit of his bargain as the government, and both, presumably, must be able to enforce their contractual rights.

The central role the Guidelines play in sentence determinations, as this Court recently reasoned in *Molina-Martinez v. United States*, "means that an error related to the Guidelines can be particularly serious."[14] In *Molina-Martinez*, this Court granted certiorari to reconcile competing approaches between Courts of Appeals on "how to determine whether the application of an incorrect Guidelines range at sentencing affected the defendant's substantial rights."[15] The Fifth Circuit created a rigid rule—an "inflexible pro-government presumption" as the concurrence referred to it: A defendant seeking review of an unpreserved Guidelines error pursuant to Federal Rule of Criminal Procedure 52(b) cannot demonstrate prejudice by the error when "the ultimate sentence falls within what would have been the correct Guidelines range" absent "'addition evidence' to show that the use of the incorrect Guidelines range did in fact affect his sentence."[16]

The Fifth Circuit's approach failed to account for the fact that the Guidelines "inform and instruct the district court's determination of an appropriate sentence."[17] This Court held, since the Guidelines play a central role in sentencing, Courts of Appeals cannot bar a defendant from relief on appeal "simply because there is no

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[13] *See* Fed. R. Crim. P. 11(b)(1)(M).

[14] *Molina-Martinez v. U.S.*, 136 S.Ct. 1338, 1345-46 (2016) (quoting *Peugh v. U.S.*, 133 S.Ct. 2072, 2082-2083 (2013)).

[15] *Molina-Martinez*, 136 S.Ct. at 1345.

[16] *Molina-Martinez*, 136 S.Ct. at 1341-1342; 136 S.Ct. at 1351 n.4 (Alito, J., and Thomas, J., concurring).

[17] *Molina-Martinez*, 136 S.Ct. at 1346.

other evidence that the sentencing outcome would have been different had the correct range been used," and that a defendant can rely on the incorrect Guidelines range itself as evidence of an affect on substantial rights.[18]

This Court's opinion in *Molina-Martinez* was also informed, in part, by an underlying concern: "The Guidelines are complex, and so there will be instances when a district court's sentencing of a defendant within the framework of an incorrect Guidelines range goes unnoticed."[19] Importantly, the possibility of mistake, error, and uncertainty in sentencing determinations have long informed objections by courts, judges, academics, and practitioners to broad sentence-appeal waivers like the one at issue in Petitioner's case.[20] Citing to the Fourth Circuit Court of Appeals, one Fifth Circuit judge made the following observation:

> As the Fourth Circuit observed, "[A] defendant who waives his right to appeal does not subject himself entirely at the whim of the district court." *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992). Rather, "a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations." *United States v. Attar*, 38 F.3d 727, 732 (4th Cir. 1994). Therefore, a defendant should not be able to waive his right to appeal constitutional

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[18] *Molina-Martinez*, 136 S.Ct. at 1349.

[19] *Molina-Martinez*, 136 S.Ct. at 1342-1343.

[20] Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 238 (2005):

> Perhaps the most common objection to appeal waivers is that defendants are waiving the possibility of challenging future error, error which is unknowable at the time the waiver is signed. Some comments by defenders echoed this concern. "What I don't like about them is you are waiving something you don't know. You cannot know whether you are going to make a mistake, a number of things can happen. It's a dangerous thing to do. . . . Your client may suffer for it."

> violations when he lacks the fundamental ability to be aware of their existence because they have not yet occurred. *See United States v. Melancon*, 972 F.2d 566, 572 (5th Cir. 1992) (Parker, Judge Robert, concurring) (A "right can not come into existence until after the judge pronounces sentence; it is only then that the defendant knows what errors . . . exist to be appealed or waived.").[21]

The same concerns that informed this Court's decision in *Molina-Martinez* arise with greater force when a broad sentence-appeal waiver purports to preclude appellate review of the sufficiency of sentencing evidence and the district court's interpretation and application of the guidelines. Courts of Appeals generally conduct a two-step inquiry to determine whether a sentence-appeal waiver precludes appellate review: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand.[22] Some Courts of Appeals, not the Fifth Circuit, add a third consideration: (3) whether failure to consider the defendant's challenge would result in a miscarriage of justice.[23] Under a two-prong analysis, the Fifth Circuit has construed broad and sweeping sentence-appeal waivers—such as "any ground whatsoever"—to cover challenges to the

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[21] *U.S. v. White*, 307 F.3d 336, 344 (5th Cir. 2002) (Dennis, j., dissenting).

[22] *See U.S. v. Kelly*, 915 F.3d 344, 348 (5th Cir. 2019).

[23] *See e.g., U.S. v. McIntosh*, 492 F.3d 956, 959 (8th Cir. 2007) (adding miscarriage of justice prong to sentence-appeal waiver analysis and placing the burden of proof for all three prongs on the government); *U.S. v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004) (adopting miscarriage of justice prong and applying *U.S. v. Olano*, 507 U.S. 725 (1993), substantial rights" analysis to the prong); U.*S. v. Khattak*, 273 F.3d 557, 563 (3rd Cir. 2001) ("Waivers of appeals, if entered into knowingly and voluntarily, are valid, unless they work a miscarriage of justice."); *U.S. v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001) (adopting miscarriage of justice exception to sentence-appeal waivers); *but see U.S. v. Powell*, 574 Fed.Appx 390, 394 (5th Cir. Jan. 26, 2014) (acknowledging other circuits adoption of a miscarriage of justice exception to sentence-appeal waivers, but stating "this court has not found it necessary to adopt or reject this step"); *cf. U.S. v. Fairly*, 735 Fed.Appx 153, 154 (5th Cir. Aug. 21, 2018) (holding "[w]e decline to adopt the miscarriage of justice exception to appellate waivers").

district court's application of the guidelines.[24] The same, though, has been true in three-prong jurisdictions, even when the specific court applies this Court's *United States v. Olano*, 507 U.S. 725 (1993), "substantial rights" analysis—the same analysis this Court used in deciding *Molina-Martinez*—to determine whether enforcing the sentence-appeal waiver would result in a miscarriage of justice; that is, even when the defendant's appeal centered on an incorrect Guidelines-range application, such as an improperly applied enhancement, these Courts of Appeals applied a rigid rule:

> [T]he miscarriage of justice exception to enforcement of a waiver of appellate rights . . . looks to whether "the waiver is otherwise unlawful," not to whether another aspect of the proceeding may have involved legal error. . . . [A]lleged errors in the [district] court's determination of [a] sentence . . . [improperly] "focus[] on the result of the proceeding, rather than on the right relinquished, [which is our focus when] analyzing whether an appeal waiver is [valid]."
> . . . .
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> Said more succinctly: "An appeal waiver is not 'unlawful' merely because the claimed error would, in the absence of waiver, be appealable. To so hold would make a waiver an empty gesture." *U.S. v. Leyva-Matos*, 618 F.3d 1213, 1217 (10th Cir. 2010) (citation omitted). "When faced with appellate waivers like the one in this case, we have consistently applied this principle and enforced such waivers accordingly." Id. Consequently, we have held that where a defendant "does not challenge the lawfulness of the waiver itself, enforcing the waiver as to his claim that the district court improperly applied [a Guidelines'] enhancement does not itself result in a miscarriage of justice." *Polly*, 630 F.3d at 1002.[25]

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[24] *See Kelly*, 915 F.3d at 349-350 (enforcing sentence-appeal waiver and holding "any ground whatsoever" language in sentence-appeal waiver included a challenge to the district court's application of the Armed Career Criminal Act enhancement).

[25] *U.S. v. Kurtz*, 702 Fed.Appx 661, 671 (10th Cir. 2017); *see also U.S. v. Grimes*, 739 F.3d 125, (3rd Cir. 2013) (relegating the miscarriage of justice exception to "unusual

Courts of appeals have justified enforcing broad sentence-appeal waivers to preclude review of a district court's Guidelines application as well as the sufficiency of the sentencing evidence the court used to determine the Guidelines range by pointing to the government's interest in receiving the benefit of its bargain—"saving the costs of prosecuting appeals."[26] But this is more an excuse than a justification, because the defendant also has an interest in receiving the benefit of his bargain, i.e., a sentence determination in accordance with constitutionally sufficient proof and a correct interpretation and application of the guidelines that the sentencing court uses to ascertain the Guidelines range, from which the court determines the appropriate sentence. The "justification" favors the government's interest in receiving the benefit of its bargain over the defendant's interest in the same. The "justification" also substitutes "mandatory presumptions and rigid rules for case-specific application of judgment, based upon examination of the record," which this Court has warned against.[27] And, the "justification" fails to account for the centrality of the Guidelines in informing and anchoring the district court's discretion in selecting an appropriate sentence.

Considering the centrality of the Guidelines to a court's determination of an appropriate sentence, and the complexity of the Guidelines that sometimes results in a district court's "sentencing of a defendant within the framework of an incorrect

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situations" that "implicate fundamental rights or constitutional principles"); *U.S. v. Andis*, 333 F.3d 886, 892 (8th Cir. 2003) (creating a per se rule for miscarriage of justice analysis: "an allegation that the sentencing judge misapplied the Sentencing Guidelines or abused his or her discretion is not subject to appeal in the face of a valid appeal waiver").

[26] *U.S. v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004).

[27] *Molina-Martinez*, 136 S.Ct. at 1350-51 (Alito, J., and Thomas, J., concurring).

guidelines range go[ing] unnoticed,"[28] construing broad sentence-appeal waivers to preclude challenges to the sufficiency of sentencing evidence and the court's interpretation and application of the guidelines, all of which inform the court's determination of the appropriate Guidelines-range and, thereby, the appropriate sentence, creates a constitutionally impermissible and conclusive presumption that the sentence was reasonable and the evidence was constitutionally sufficient to warrant the sentence.

II. The questions addressed in this petition raise national concerns that require immediate attention and rectification.

The issues raised in this petition deserve this Court's immediate attention to lend uniformity to federal criminal defendants' procedural rights, and parity between the government's and defendants' contractual rights and expectations in plea agreements.

The urgency presented by this petition cannot be overstated. As this Court has noted, the vast majority (up to 95%) of federal criminal convictions across the United States are obtained by pleas, not trials, making plea-bargaining "central to the administration of the criminal justice system."[29] Of the criminal convictions obtained by plea, the vast majority of plea agreements include sentence-appeal waivers.[30]

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[28] *Molina-Martinez*, 136 S.Ct. at 1343, 1345-46, 1349.

[29] *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (pointing out that "pleas account for 95% of all criminal convictions").

[30] Nancy J. King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 Duke L.J. 209, 212 (2005) (finding in an empirical study of 971 federal plea agreements that about two-thirds contained sentence-appeal waivers).

Sentence-appeal waivers vary on a case-by-case basis, but many contain broad waivers, such as the one presented in the present case, that create a separate class of defendants—ones subject to the whims of the district judge who accepted the plea agreement in the first place; ones insulated from the protections afforded by appellate review:

> By making sentences virtually unreviewable, the widespread use of enforceable sentencing appeal waivers results in a functional return to the preSRA system. The appellate system exists "to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system." Once a broad sentence appellate waiver is executed, a sentencing court can impose virtually any sentence within the statutory limits without the fear of appellate intermeddling. Circumventing appellate review increases the risk that district courts will break with national trends in sentencing, ignore the recommendations of the Guidelines, and impose sentences that are out of alignment with other sentences in comparable prosecutions. Without the specter of an appellate court vacating the sentence as unreasonable, the district court commands almost free rein over the sentence. Such lack of oversight results in a greater likelihood of idiosyncratic sentences.
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> Absence of appellate review also results in a dearth of precedential case law. Thus, district courts that seek to impose within-Guidelines sentences or otherwise follow the dictates of the sentencing statutes have fewer common law guideposts to follow. With fewer guideposts, well-meaning district courts are more likely to inadvertently deviate from acceptable sentencing practices and outcomes. Coupled with the potential inability of the appellate court to correct an error because of an appellate waiver, the lack of appellate sentencing case law compounds the likelihood of non-uniform sentences.[31]

Relatedly, as the discussion above concerning the miscarriage of justice prong to assess sentence-appeal waivers reveals, Courts of Appeals apply inconsistent and

[31] Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 366-67 (2015).

incommensurable sentence-appeal waiver exceptions and standards to the exceptions that fail to afford criminal defendants adequate protection against even blatant error by a sentencing judge, based on nothing more than the presence of a broad sentence-appeal waiver.[32]

Post *Booker* empirical studies reveal that interdistrict difference in sentencing outcomes has doubled since this Court moved from a mandatory-guidelines regime to an advisory-guidelines regime.[33] Insulting appellate review of sentences for evidence sufficiency and a district court's interpretation and application of the guidelines exacerbates this problem.

Parity between the contractual expectations of the plea agreement parties is also lacking in Courts of Appeals, as sentence-appeal waiver analyses favor the government's interest in its benefit of the bargain over criminal defendants, even though appeal waivers must be construed against the government.[34] When Courts of Appeals focus on the defendant's right to receive the benefit of his bargain, they uniformly point to government concessions in the plea agreement, such as declining to bring additional charges, making it a foregone conclusion that the defendant must have received the full benefit of his bargain if the government did not bring

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[32] *See also id.* at 353 n.35 (detailing courts' and scholars' respective critiques of "the miscarriage of justice exception for its vagueness and inconsistent administration").

[33] Yang, Have Interjudge Sentencing Disparities Increased in an Advisory Guidelines Regime? Evidence from *Booker*, 89 N.Y.U. L. REV. 1268, 1277, 1319-1232 (2014) (presenting "evidence of substantial interdistrict difference in sentencing outcomes")

[34] *See e.g., U.S. v. De-La-Cruz Castro*, 299 F.3d 5, 13 (1st Cir. 2002) (explaining that it will apply the miscarriage of justice exception sparingly to avoid depriving "the government of the benefit of its waiver of appeal bargain"); *Hahn*, 359 F.3d at 1325 (recognizing appeal waivers are to be construed against the government but emphasizing the importance of the government receiving the benefit of its bargain by saving the costs of prosecuting appeals");

additional charges.

The Courts of Appeals do not focus on the fact that no plea agreement under Federal Rule of Criminal Procedure 11(b), like the one at issue in this petition, includes a waiver of the defendants' right to have his sentence determined by reference to a proper interpretation and application of the guidelines and upon sufficient sentencing evidence to warrant enhancements from which the court determines the Guidelines range. Nor on the fact that the plea agreement expressly carves out a provision that informs the defendant "the sentence in this case will be imposed by the Court after consideration of the United States Sentencing Guidelines." Nor on the fact that the district court is required to inform the defendant, prior to accepting the plea and its attendant agreement, that the sentencing court has an "obligation to calculate the applicable sentencing-guideline range and to consider that range."[35] In short, little to no attention is paid to a criminal defendant's expectation interest in the bargain he has struck, derived from the plea agreement itself, and the circumstances surrounding its execution proscribed by Federal Law, to have a sentence determination that accords with the correct Guidelines range, or at minimum to have the court determine the correct Guideline range and impose a sentence with some reference to it.

A sentence without any appreciable reference to a correct Guidelines range denies the defendant the benefit of his bargain. A defendant should be able to rely on that fact alone as a basis for the court to review the district court's

[35] Fed. R. Crim. P. 11(b)(1)(M).

determination, to ensure the Guidelines range was correct. That is, a defendant must be allowed to seek the benefit of his bargain by appellate review.

CONCLUSION

Petitioner humbly submits that this Court should grant the petition.

Respectfully submitted,

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April 11, 2019