No. _____

IN THE

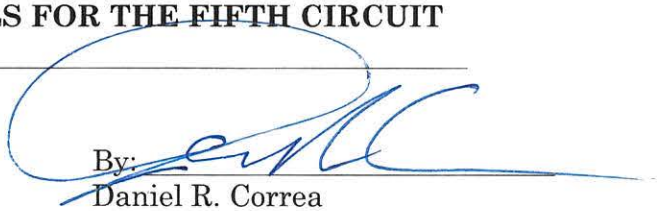
SUPREME COURT OF THE UNITED STATES

LARRY RAY LINCKS,
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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Petitioner LARRY RAY LINCKS 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 February 12, 2019.

ORDER BELOW

The order of the court of appeals, *United States v. Larry Ray Lincks*, No. 18-10760 (5th Cir. Feb. 12, 2019), is unpublished. A copy of the order is attached as Appendix A.

JURISDICTION

The order dismissing Petitioner's appeal was filed on February 12, 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 provision of the U.S. Code regarding the statute of conviction—21 U.S.C. §§ 841(a)(1) and 841(b)(1)(C)—and the Federal Rules of Criminal Procedure are reprinted in the Appendix at a0003-a0007.

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 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 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 after 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.

Larry Ray Lincks was charged with and plead guilty to one Possession of a Controlled Substance With the Intent to Distribute (21 U.S.C. §§ 841(b)(1)(C)). In the plea agreement, he stipulated to the following facts:

> [F]rom in or about March 2016 to September 2016, John Owen supplied Mr. Lincks with up to four ounces of Methamphetamine at a time. Owen would either personally deliver the methamphetamine to Lincks or pay a known individual $100 to

> deliver the drugs to Lincks. Lincks would then further distribute methamphetamine to four of five customers in several East Texas counties.
>
> Lincks further admits that on or about September 1, 2016, he possessed 16 grams of methamphetamine and 9 hydrocodone pills for trafficking. These items were seized that same day by Texas DPS.

The plea agreement between Lincks 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**: Lincks 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. Lincks has reviewed the guidelines with his attorney, but understands no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case. Lincks will not be allowed to withdraw his plea if his sentence is higher than expected. Lincks fully understands that the actual sentence imposed (so long as it is within the statutory maximum) is solely left to the discretion of the Court.

Notably, the plea agreement contained no clause divesting Lincks 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 Lincks entered his guilty plea and

the magistrate judge made her Federal Rule of Criminal Procedure 11 inquiries to determine whether the court should accept the plea agreement, the judge informed Lincks of the following with respect to sentencing:

> . . . I must inform each of you that in determining a sentence, it is the Court's obligation to calculate the applicable sentencing guideline range, to consider that range, any possible departures under the sentencing guidelines, as well as other sentencing factors found at 18, United States Code, Section 3553(a).
>
> The Court is not bound by facts that are stipulated between you and your attorney on the one hand and the government on the other. The Court can impose punishment that might disregard stipulated facts or even take into account facts that are not stipulated to. In that event, you might not even be permitted to withdraw your guilty plea.
>
> The Court will not be able to determine the guideline range that is appropriate in your case until after that presentence report I mentioned has been completed and you through your attorney and the government have had the opportunity to challenge the facts and conclusions reported by the probation officer.
>
> After the Court has determined what guideline range is appropriate under the facts of your case, the Court has the authority to impose a sentence that is within, above or below that guideline range, ***so long as the sentence imposed is reasonable and based on the facts and the law.***

At no time did the judge suggest that Lincks 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. Lincks about the appeal waiver as follows:

> THE COURT: So would you next look with me on page 5 at

> paragraph 11, which is titled "Waiver of Right to Appeal or Otherwise Challenge Sentence," and it indicates that you're doing just that. You're agreeing to waive your right to appeal and to otherwise challenge your sentence and conviction in this case except under the limited circumstances you reserved there in the third and last paragraph?
>
> DEFENDANT LINCKS: Yes.
>
> THE COURT: When you were discussing this particular provision with Mr. Wiley, did Mr. Wiley explain to you that the law gives you as a criminal defendant the right to appeal and challenge your sentence and conviction?
>
> DEFENDANT LINCKS: Yes, ma'am.
>
> THE COURT: Do you understand you have those rights?
>
> DEFENDANT LINCKS: Yes, ma'am.
>
> THE COURT: And did you voluntarily and of your own free will enter into that written plea agreement and written plea agreement supplement?
>
> DEFENDANT LINCKS: Yes, ma'am.

At no time did the judge expressly inform Lincks that the broad 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 investigation into Lincks' involvement in the purported conspiracy began on August 17, 2016, following the arrest of co-defendant John Craig Owen. In a

post-arrest interview immediately following his arrest, Owen identified Lincks as one of Owen's methamphetamine "customers." Owen told DPS agents "the most methamphetamine he provided Lincks was a quarter pound of methamphetamine which occurred within the past six weeks," delivering "up to three ounces of methamphetamine on each occasion he delivered to Lincks."

A few weeks later, DPS agents arrested Lincks and found 16 grams of methamphetamine in the motorcycle Lincks had been riding. The PSR stated the following with respect to a post-arrest interview in which Lincks participated:

> Lincks admitted he knew Owen and advised he obtained methamphetamine from Owen. Lincks admitted he purchased methamphetamine directly from Owen approximately "five times." Lincks stated he obtained "one half to two ounces at a time." Lincks indicated on one occasion Owen supplied him with "four ounces" of methamphetamine. Lincks will be held accountable for 4 ounces on one occasion (113.4 grams) and ½ ounce on 4 occasions (56.7 grams). Lincks advised Owen had unindicted coconspirator Ryan Cooprider deliver methamphetamine to Lincks on Owen's behalf "three or four times." Thus, Lincks will be held accountable for ½ ounce of methamphetamine on three occasions, which equates to 42.53 grams. Lincks stated he received methamphetamine from "Pete" on "five to six occasions" obtaining "one to two ounces at a time." Lincks will be held accountable for one ounce on five occasions, which equates to 141.75 grams. Lincks informed agents the person who supplied him with the most methamphetamine was "Tony." He noted "Tony" sold him up to ½ pound of methamphetamine. Accordingly, Lincks will be held accountable for 226.8 grams of methamphetamine. . . . Based on his post-arrest interview, Lincks will be held accountable for a total of 581.18 grams of methamphetamine.

The PSR provided no dates for the alleged methamphetamine transactions. Nor did the PSR identify to whom Lincks referred by "Pete" or "Tony." The indictment does not name anyone, by aka or otherwise, as "Pete" or "Tony." Further,

the PSR does not indicate, one way or another, whether Lincks received methamphetamine from "Pete" or "Tony" for personal use—as part of his personal addiction and daily coping mechanism—or to distribute.

The PSR and Factual Resume, on the other hand, directly linked methamphetamine received by Lincks from John Craig Owen to distribution by Lincks to "four of five customers in several East Texas counties." However, neither the PSR nor the Factual Resume indicated from the methamphetamine received by Lincks from Owen, either directly or through others, how much methamphetamine Lincks distributed or intended to distribute to others, as opposed to how much he intended for personal use.

The PSR recounted Lincks' life-long struggle with personal drug use and abuse. For much of his life, he self medicated to cope with symptoms of Attention Deficit Hyperactivity Disorder and anxiety. He first tried methamphetamine at age 26 "and continued to use methamphetamine daily." Methamphetamine made him feel "normal" and "was cheaper than going to the doctor for ADHD medication." Notwithstanding the clear personal drug-use history, the PSR attributed no amount of the drugs received by Lincks to personal use.

The PSR placed Lincks total offense level at 31, with a criminal history category VI. The base offense level was calculated at 30, plus a two-level weapon enhancement, and a two-level importation enhancement, the total decreased by three due to Lincks' acceptance of responsibility.

a. Base Offense Level Calculation

The PSR attributed to Lincks 597.18 grams of methamphetamine. The total included 16 grams seized at the time of his arrest, 170.1 grams from Owen directly, 42.53 grams from Owen through Ryan Cooprider (an "unindicted co-conspirator"), 141.75 grams from "Pete" at some unknown time, and 226.8 grams from "Tony" at some unknown time and over an unknown duration. The PSR does not indicate nor provide any facts to discount the likelihood that the 16 ounces of methamphetamine seized at the time of Lincks' arrest was from one of the noted transactions involving Owen (directly or indirectly), "Pete," or "Tony." Since the offense, according to the PSR, "involved at least 500 grams . . . of methamphetamine," the PSR set the base offense level at 30.

Lincks' counsel objected to the base offense level calculation. He pointed out that Lincks post-arrest interview was made without counsel and did not include any dates concerning methamphetamine transactions. If the PSR included only the Owen transactions, Mr. Lincks base offense level would have "yield[ed] a base offense level of 24," rather than the "huge jump" to a base offense level of 30. His counsel further noted, "Without knowing the time frame of when the defendant purchased methamphetamine from 'Tony,'" for example, "it is possible" that the 226.8 grams purchased from "Tony" was part of an earlier state offense that occurred on August 10, 2014.

b. Importation Enhancement

The PSR also recommended and sought a two-level importation

enhancement. According to the PSR, the investigation and statements made by codefendants revealed that co-defendant Roberto Trevizo Munoz received methamphetamine shipments from a supplier in Mexico and provided this methamphetamine to distributors, including Owen. Since it is alleged that Owen supplied Lincks with methamphetamine, the PSR concluded the offense involved the importation of methamphetamine, warranting an enhancement pursuant to USSG § 2D1.1(b)(5). The PSR does not state that the source or supplier in Mexico was the sole methamphetamine source used by Roberto Trevizo Munoz or that he only supplied methamphetamine from Mexico to domestic distributors, such as Owen. The PSR does not state facts that suggest Lincks knew from where the methamphetamine originated or that he personally, directly or indirectly, participated in the importation of methamphetamine.

4. Sentencing hearing.

At the sentencing hearing, Lincks counsel focused on the base offense level calculation:

> Mr. Lincks' guidelines went from a 24 to 6 points later because of his admissions to the DPS special agents.
>
> His statement was only partially substantiated – the statement that he gave that day was only partially substantiated by **Owen**, who, coincidently, **is the only person that he knows in this entire conspiracy**. So the rest of what he said was not substantiated.

Lincks counsel further noted the fact that Lincks had been self-medicating with narcotics "for the better part of 30 years" and that Lincks could not get basic facts and timelines right when counsel first encountered him. Not until Lincks, due to

being incarcerated, had been weaned from narcotics and provided proper medical prescriptions did Lincks' counsel observe a marked difference in Lincks' ability to process information, focus, and improve in his memory. The Government, in turn, focused on statements that were corroborated by Owen, but admitted, "we didn't track down every portion of [Lincks'] confession with each supplier."

The Court addressed Lincks' counsel:

> Mr. Wiley, I think you make a good argument. But the bottom line is that I believe if you've got a confession, it's tape-recorded and it's corroborated to a great extent, I believe that, and I'm going to go with that. **I don't know that I would go with the amount ultimately, but here, in this context, I'm going to go with it.**

The district court sentenced Lincks to 188 months, the lowest end of the 31 total-offense-level range.

5. Appellate Proceeding

In his Appellant's Brief, Lincks challenged the sufficiency of the evidence presented by the government and in the PSR 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 importation enhancements.

With respect to the importation enhancement, Lincks 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 § 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. Lincks 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).

Lincks also challenged the validity and enforceability of the 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 appeal waiver when a defendant seeks the benefit of his bargain under the plea agreement. Specifically, Lincks 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 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. E. Lincks subsequently filed a response to the government's motion. *See* Appx. F.

In its motion to dismiss, the government made three primary arguments, to which Lincks 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 to *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992) and *United States v. McKinney*, 406 F.3d 744, 746-47 (5th Cir. 2005). Appx. a0011-a0112. Lincks responded to this argument by pointing out *Melancon* predated *U.S. v. Booker*. Appx. a0018-0023. Links also argued that *McKinney* does not address the central issue raised by him—whether an appeal waiver is unconstitutional or void as against public policy to the extent it purports to waive a defendant's right to

appellate review of his sentence for reasonableness when the complained of error is lack of constitutionally sufficient evidence and improper interpretation and application of the Guidelines. Appx. a0018-0023.

Second, and in response to Lincks' argument that the plea agreement created a condition precedent to enforcement of the sentence-appeal waiver, the government argued that Lincks received the benefit of his bargain because the district court "consider[ed] the guidelines." Appx. a0012-a0013. Lincks 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. a0023-a0024. 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. a0023-a0024.

Lincks 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 a0022-0023. On February 12, 2019, the district court dismissed Lincks appeal. The mandate issued on March 6, 2019. *See* Appx. B.

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 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

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[1] *U.S. v. Booker*, 543 U.S. 220, 226-27 (2005) (Stevens, J., joined by Scalia, Souter,

[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.").

> 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 of the *Booker* remedy.[4]

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

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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).

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

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 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 and lack of error.

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, 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

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

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 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

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[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.

[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

exacerbated by 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.

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

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> 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").

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 appeal waiver. Enforcement of such a broad 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 Error.

Enforcing broad 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

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[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.").

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 an 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 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

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[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)).

[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)).

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 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

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[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.

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

incorrect Guidelines range goes unnoticed."[19] Importantly, the possibility of mistake, error, and uncertainty in sentencing determinations has long informed objections by courts, judges, academics, and practitioners to broad sentence-appeal waivers like the one at issue in Petitioner's case.[20] 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 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 appeal waiver purports to preclude appellate

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[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."

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

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 an 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 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 appeal waiver would result in a miscarriage of justice; that is, even when the

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[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").

[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).

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]

Courts of appeals have justified enforcing broad 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

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[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 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").

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 guidelines range go[ing] unnoticed,"[28] construing broad 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

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[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).

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

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]

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

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[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).

> 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 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

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

[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").

sentencing outcomes has doubled since this Court moved from a mandatory-guidelines regime to an discretionary-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' interests in the same, 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 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

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[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");

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 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.

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

Respectfully submitted,

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May 13, 2019

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10760

A True Copy
Certified order issued Feb 12, 2019

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

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

LARRY RAY LINCKS,

Defendant–Appellant.

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

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.
PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED. Appellee's unopposed alternative motion for an extension of time to file its brief is DENIED as unnecessary.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-10760

A True Copy
Certified order issued Feb 12, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

versus

LARRY RAY LINCKS,

Defendant–Appellant.

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

Before SMITH, HIGGINSON, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that appellee's opposed motion to dismiss the appeal is GRANTED. Appellee's unopposed alternative motion for an extension of time to file its brief is DENIED as unnecessary.

A True Copy
Certified order issued Mar 06, 2019

Clerk, U.S. Court of Appeals, Fifth Circuit

APPENDIX C

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 D

21 U.S.C. § 841 provides:

(a) Unlawful acts. Except as authorized by this title, 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;

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

> **(1)**
>
> **(C)** In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years 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, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 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 6 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 the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

APPENDIX E

18-10760

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

LARRY RAY LINCKS,
Defendant - Appellant

Appeal from United States District Court
For the Northern District of Texas, Dallas Division
District Court No. 3:17-CR-017-B-18

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

The government moves to dismiss Lincks'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 19-22.) Lincks also argues that the waiver is not enforceable under contact principles for failure of a condition precedent and consideration. (Brief

at 22-27.) The record and binding case law, however, foreclose his arguments. Thus, the Court should hold Lincks 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 and dismissing others charges already brought, Lincks pleads guilty to a drug offense and waives his appellate rights.

Lincks, along with many codefendants, was named in a 30-count superseding indictment. (ROA.12-18.) The indictment charged Lincks 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) [Count 1];
- Possession With Intent to Distribute a Controlled Substance, in violation of 21 U.S.C. § 841(b)(1)(C) [Count 21]; and
- Possession of a Firearm by a Felon, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2) [Count 30].

(ROA.13, 14, 18.)

Pursuant to a written plea agreement, Lincks pleaded guilty to Count 21, charging Lincks with possession with intent to distribute a controlled substance. (ROA.41-43, 162-63.) Lincks's plea agreement included a waiver of his right to appeal from his conviction and sentence. The waiver provides:

> Lincks waives his rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction and sentence. [H]e 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. Lincks 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.166.) At his rearraignment, Lincks assured the magistrate judge that he had discussed the appellate-rights waiver with his counsel, understood the waiver, and agreed to it. (ROA.122-23.)

Lincks 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.163-34.) In exchange for Lincks's plea and appellate waiver, the government agreed (1) not to bring any additional charges and (2) to dismiss, at sentencing, the other charges of the superseding indictment. (ROA.165.)

Relevant here, the presentence report (i) assigned a base offense level of 30, under USSG § 2D1.1(c)(5), based on Lincks's responsibility for 597.18 grams of methamphetamine; (ii) increased the base offense level by two based on the importation of methamphetamine from Mexico under USSG § 2D1.1(b)(5); and (iii) denied a reduction for a mitigated role in the offense

under USSG § 3B1.2(b). (ROA.181, 203-04.) The district court adopted the findings in the presentence report and addendum sentenced Lincks at the bottom of the guideline range—188 months' imprisonment. (ROA.63, 141, 144-45, 156, 192, 205.)

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

Lincks acknowledges the appellate waiver in his brief. (Brief at 19.) He does not challenge its validity or attempt to invoke any of the waiver's limited exceptions. (Brief at 19-27.) 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 (i) adopting a base-offense level of 30, under USSG § 2D1.1(c)(5), based on Lincks's responsibility for 597.18 grams of methamphetamine; (ii) increasing the base offense level by two based on the importation of methamphetamine from Mexico under USSG § 2D1.1(b)(5); and (iii) denying a reduction for a mitigated role in the offense under USSG § 3B1.2(b)—do not fall within the limited exceptions to his waiver.

Despite Lincks'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 19-27.) 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*"). The Court has also rejected the notion that the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005),[1] has anything to say about the validity of appellate rights waivers in plea agreements. *See United States v. McKinney*, 406 F.3d 744, 746-47 (5th Cir. 2005).

Second, Lincks'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—the district court considering the guidelines before sentencing—failed. (Brief at 22-27.) 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

[1] (*See* Brief at 19-22.)

consideration of the guidelines in this case." (ROA.163; *see also* ROA.121.) The court, of course, did in fact consider the advisory guidelines before imposing sentence. (ROA.133-57, 205-06.) Additionally, Lincks agreed in his plea agreement that he would not be permitted to withdraw his plea if the sentence was higher than expected and that the sentence imposed "is solely in the discretion of the Court." (ROA.125-26, 163-64.) Finally, Lincks received more than adequate consideration for his agreement given that the government, for its part, agreed not to bring any additional charges and to dismiss charges that had already been brought. (ROA.160, 165.) *See United States v. Burns*, 433 F.3d 442, 498 (5th Cir. 2005).

Because Lincks "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). Requiring the government to brief the merits of Lincks's arguments on appeal about the district court's applications of the sentencing guidelines would deprive the government of the benefit of the bargain it negotiated: a bargain that included an appellate-rights waiver.

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 Lincks's brief.

Respectfully submitted,

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Attorneys for Appellee

CERTIFICATE OF CONFERENCE

I certify that I conferred with Lincks's attorney, Daniel Correa, and he is opposed to dismissal but unopposed to an extension of time.

/s/ Brian W. Portugal
Brian W. Portugal
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that this document was served on Lincks's attorney, Daniel Correa, through the Court's ECF system on January 30, 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/ Brian W. Portugal
Brian W. Portugal
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 1,278 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/ Brian W. Portugal
Brian W. Portugal
Assistant United States Attorney
Date: January 30, 2019

APPENDIX F

No. 18-10760

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee.

v.

LARRY RAY LINCKS,
Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:17-cr-17-18
Honorable Jane J. Boyle presiding

APPELLANT'S RESPONSE TO UNITED STATES' MOTION TO DISMISS

Appellant Larry Ray Lincks respectfully requests that this Court deny the government's motion to dismiss his appeal. Mr. Lincks contends that the sentence determination was made without sufficient proof, and without a proper application of the guidelines. The government has supplied no case law to this Court that expressly forecloses Mr. Lincks' right to seek by direct appeal the benefit of his bargain under the theories and arguments put forth in his brief. This Court, as a result, should deny the government's motion to dismiss and order it to file its

Appellee's Brief in accordance with the extension the government seeks.

1. Mr. Lincks did not waive his rights to have his sentence determined upon sufficient proof and a proper application of the guidelines, and now seeks the benefit of his bargain.

The Plea Agreement at issue here never purported to waive Mr. Lincks' right to have the government prove his total offense level by sufficient proof and to waive his right to have the court determine his sentencing range in accordance with a proper application of the Sentencing Guidelines. (ROA.162-66.) While it is true, as the Government states in its motion, that the Plea Agreement states that the "actual sentence imposed (so long as it is within the statutory maximum) is solely left to the discretion of the judge," it does not follow that Mr. Lincks waived his right to have the actual sentence accord with the minimum proof prescribed by law or that he waived his right to have the actual sentence conform to a correct interpretation of the guidelines. (ROA.163-64.); (*See also* Motion to Dismiss at 3.)

Rather, it follows that Mr. Lincks retained these rights. This Court's opinion in *United States v. Mares* is instructive here. The district court is under a "duty" to consider the Guidelines "to determine the applicable Guidelines range even though the judge is not required to sentence within that range." 402 F.3d 511, 519 (5th Cir. 2005). This Court continued:

> Relatedly, *Booker* contemplates that, with the mandatory use of the Guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing. . . . **The sentencing judge is entitled to find by a preponderance**

> **of the evidence all the facts relevant to the determination of a Guideline sentencing range** and all facts relevant to the determination of a non-Guidelines sentence.

Id. (emphasis added) (citing *U.S. v. Booker*, 543 U.S. 220, 233-34 (2005)). It follows from this Court's opinion that a sentencing judge is *not entitled* to find by *less than* a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range.

2. This Court has not decided the validity of a sentence-appeal waiver in light of the Remedial Opinion in *United States v. Booker*.

A second question arises: If Mr. Lincks retained the right to have his sentence determined by sufficient proof and proper application of the guidelines, and the sentencing judge is not entitled to find by less than sufficient proof all the facts relevant to the determination of a Guidelines sentencing range, can the government by contract deprive Mr. Lincks of the ability to enforce these rights?

Mr. Lincks contends the answer to this second question is "no." The Remedial Opinion in *United States v. Booker* made clear that appellate review of sentences for reasonableness 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 19-22); *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.

Mr. Lincks maintains that the government cannot by contract circumvent the remedy the United States Supreme Court put in place to protect criminal defendants' constitutional rights and to promote congress' purposes when the error claimed by the defendant is lack of sufficient evidence or incorrect interpretation or application of the guidelines. A consequence of the sentence-appeal waiver here is that 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. *See Booker*, 543 U.S. at 264-65.

Important here, Mr. Lincks raises on appeal serious issues pertaining to the sufficiency of the proof put forth by the government to support the base offense level calculation. In calculating the base offense level, the government attributed drugs to Mr. Lincks supplied by two partially-identified persons, at an unknown time, and for an unknown purpose, relying on an inference, without direct proof,

that these drugs were supplied in furtherance of the underlying conspiracy. But an equal (and perhaps more plausible based on the PSR) inference may be draw that the drugs at issue were for personal use. (Brief at 29-32.) The equal inference rule, under a preponderance of the evidence standard, would cancel out the government's inference—"Where two equally justifiable inferences may be drawn from the facts proven, one for and the other against the Plaintiff, neither is proven, and the verdict must be against him who had the burden of proof." *Texas Co. v. Hood*, 161 F.2d 618, 620 (5th Cir. 1947).

Equally important here, Mr. Links raises on appeal serious issues pertaining to the application of the importation enhancement. The government's evidence does not sufficiently prove that the drugs possessed by Mr. Lincks actually originated from Mexico, or that Mr. Lincks knew from where the drugs originated, or that Mr. Lincks even knew who the domestic supplier was at all. The Guidelines make clear that the actions of others may only be attributed to Mr. Lincks when those actions are within the scope of the criminal activity to which "the particular defendant agreed to jointly undertake." The government's evidence does not support that Mr. Lincks agreed to any importation of drugs. (Brief 36-42.); U.S.S.G. § 1B1.3(a)(1)(B) & application note 3(B).

The government contends the answer to the second question raised above is yes. But the government cites to two inapposite opinions in support of its

contention. First, 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. Lincks relies to support his arguments against the validity of the sentence-appeal waiver here.

Second, the government cites to *United States v. McKinney*, 406 F.3d 744, 746-47 (5th Cir. 2005), for the proposition that this Court rejected that *Booker* "has anything to say about the validity of appellate rights waivers in plea agreements." (Motion at 5.) The government's statement is too broad. This Court in *McKinney* agreed with two other circuits that *Booker* did "not alter the plain meaning of appeal-waiver provisions in valid plea agreements." *Id.* at 747 n.5. But, this Court did not address in *McKinney* the issue raised by Mr. Lincks—Is the sentence-appeal waiver unconstitutional or void as against public policy to the extent it purports to waive his right to appellate review of his sentence for reasonableness when the complained of error is lack of sufficient evidence and improper interpretation or application of the Guidelines.

The answer to the issue raised here by Mr. Lincks lies specifically in the way this Court interprets and understands the *Booker* remedial opinion's inclusion of

appellate review of sentences for reasonableness:

> 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.***

Booker, 542 U.S. at 264-65 (emphasis added). If appellate review is an integral component of the *Booker* remedy, then the government cannot circumvent by contract what the Supreme Court has mandated to promote Congress' purpose.

Also, if appellate review of sentences for reasonableness is part and parcel of the *Booker* Court's remedy to the constitutional problem of having judges determine sentencing facts on a preponderance of the evidence standard, then appellate review cannot be waived when the issue concerns the sufficiency of the evidence or improper interpretation or application of the guidelines. This must especially be true if the defendant was never informed that, by waiving appellate review of his sentence for reasonableness, he is waiving constitutional protections instituted by the United States Supreme Court and that his sentence will stand even if the evidence falls short of the constitutionally prescribed minimum and even if the trial court misinterprets or misapplies the Guidelines. This latter concern

implicates whether Mr. Lincks was entitled to know about these constitutional protections and the consequences of waiving them. After all, nowhere in the record does anyone specifically and expressly inform Mr. Lincks that he is waiving by the sentence-appeal waiver his right to enforce his right to have his sentence determined by sufficient proof and a correct application of the guidelines. A fair question, in other words, is raised whether Mr. Lincks knowingly and intelligently agree to the sentence-appeal waiver.

Mr. Lincks respectfully requests that this Court deny the government's motion to dismiss and order the government to file its Appellee's Brief so that this Court may have adequate briefing on these important constitutional issues.

3. The sentence-appeal waiver was subject to a condition precedent.

Contrary to the government's assertion, Mr. Lincks does not seek to avoid "his bargained-for appellate waiver"; rather, he seeks to enforce the benefit of the bargain. (Motion at 4.) 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 4-5). But, Mr. Lincks' 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 22-27.) Notably, the government does not expressly argue in its motion to dismiss that paragraph 4 (ROA.163-64 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. If a condition precedent is created, then it must be enforceable in some way.

To Mr. Lincks' knowledge, this Court has not addressed the enforceability of a sentence-appeal waiver based on failure of a condition precedent or failure of consideration[1] with respect to the circumstances described by Mr. Lincks. Mr. Lincks requests that this Court deny the government's motion to dismiss the appeal and order the government to file its Appellee's Brief so that this Court may have adequate briefing to decide the merits of Mr. Lincks' contractual claims as well as the reasonableness of his sentence.

4. The government incorrectly construes its promise in exchange for an appellate waiver.

The government concludes without support from the contract's four corners that its promise not to bring additional charges was directly tied to Mr. Lincks' promise to waive his right to appeal. The law requires this Court to construe the

[1] Failure of consideration is not concerned with the "adequacy" of consideration, as the government contends, but with whether or not the promised performance failed after the agreement was reached. (Brief at 26-27.)

contract against the drafter, the government. And, it is patently clear that the Government's promise not to bring additional charges was only tied to Mr. Lincks promises in paragraph no. 6, which does not mention a waiver of appeal. (ROA.164 at ¶ 6.) It is clear by the contract itself that the Defendant's and Government's agreements, each delineated respectively in paragraphs 6-8 of the Plea Agreement, had nothing, or little to do with paragraph 11, which for the first time mentions a waiver of appeal.

CONCLUSION

Appellant Larry Ray Lincks 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

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing responsive motion has been served by the 5th Circuit electronic filing system on all parties to this appeal on this 1st day of February 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 2,256 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

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

LARRY RAY LINCKS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

CERTIFICATE OF SERVICE

I Hereby Certify, pursuant to Supreme Court Rule 29.5(b), that on this 13th day of May, 2019, true copies of the Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari were mailed to the Clerk, United States Supreme Court, 1 First Street, N.E., Washington, D.C. 20543, and to the Solicitor General of the United States, Room 5616, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

Accordingly, all parties have been served.

By: _____

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ATTORNEY FOR PETITIONER, LARRY RAY LINCKS

May 13, 2019.