

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MARCUS ARENELL EVANS,
also known as "MD",

Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

By: _____

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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 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?

INTERESTED PARTIES

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

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**PETITION FOR WRIT OF CERTIORARI
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Petitioner MARCUS ARENELL EVANS 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 March 7, 2019.

ORDER BELOW

The order of the court of appeals, *United States v. Marcus Arenell Evans*, No. 18-11024 (5th Cir. Mar. 7, 2019), is unpublished. A copy of the order is attached as Appendix A.

JURISDICTION

The order dismissing Petitioner's appeal was filed on March 7, 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 (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 is 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.

On October 24, 2017, a Grand Jury charged Marcus Arenell Evans with one count of Conspiracy to Distribute a Controlled Substance. The indictment alleged that from January 2015 to the date of the indictment Evans conspired with others to “possess with the intent to distribute a mixture or substance containing a

detectable amount of cocaine, its salts, optical and geometric isomers, and salts of isomers . . . in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(C).”

Evans entered into a plea agreement with the United States, wherein he agreed to plead guilty to the one count against him. On February 13, 2018, Evans filed a Factual Resume outlining the facts by which he agreed to plead guilty to Count One. The stipulated facts stated, in relevant part:

2. MARCUS ARENELL EVANS admits that on several occasions during the period of the conspiracy he obtained cocaine from co-defendants Marcus Wright and Dominique Gage in the Northern District of Texas. He admits that he distributed the drugs to his customers in exchange for payment. . . .

3. For example, Evans admits that on February 17, 2016, he told co-defendant Dominique Gage to tell co-defendant Marcus Wright to bring him seven grams of cocaine (“bring him 7”). Wright then told Evans to grab seven grams of cocaine from co-defendant Janara Wright. Evans admits that he got seven grams of cocaine.

4. He admits that on August 2, 2016, he was arrested at 2363 Summit, Dallas, Texas. He admits that he and co-conspirator Rondetric Turner possessed drugs, a digital scale, packaging for drugs, and two firearms at the location, however the two (2) firearms belonged to Rondetric Turner.

5. He further stipulates that during the period that the conspiracy was ongoing, he possessed with the intent to distributed and/or distributed 140 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

The plea agreement between Evans and the United States contained a waiver of right to appeal from 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.

3. Presentence investigation report.

From his adolescence to his arrest in the underlying offense, Evans struggled with substance abuse. At age 13, he first consumed alcohol and progressed into a cycle of consumption, consuming 72 ounces of beer and a half bottle of liquor (shared with others) “every day” up to age 32. He graduated into marijuana use at age 14 (three to four times per week up to age 30), Xanax at age 16 (daily use up to age 18), and Ecstasy at age 18 (three times per week up to age 31). His addiction to and dependency on drugs was so acute that he believed “he needed drugs and being involved with the instant offense meant he did not have to buy drugs for himself, as he was given drugs.”

The investigation that ultimately led to Evans’ arrest started with a joint investigation by the Dallas Police Department and the Federal Bureau of Investigations that purportedly identified Marcus Wright, Michael Deon Johnson, and Shiwana Shaunette Potter as “key suppliers of various drugs to 65 Groveside [street gang] members.” The Presentence Investigation Report (“PSR”) alleged that Marcus Wright was the “main leader of this conspiracy” who “supplied and operated at least four trap houses in the Pleasant Grove area” and “directed the actions of most of the codefendants.” The PSR also alleged that “[s]everal codefendants operated trap houses for Marcus Wright.” One such trap house, according to the PSR, was located on Summit Lane in Dallas, of which the PSR identified Dominique Gage as “an operator.” According to the PSR, the investigation revealed that Evans

“would help operate the drug house at Summit Lane on behalf of Gage.” The PSR also noted, however, that “other individuals **would also work for Gage** at the Summit Lane address, but it was not clear whether or not Evans had authority over these individuals.”

a. Base Offense Level Calculation

The PSR attributed to Evans the equivalent of 104.19 kilograms of marijuana. From wiretaps, the government attributed to Evans 17.5 grams of crack cocaine, and 14 grams of powder cocaine, and 28 grams of MDMA (Ecstasy). The PSR also attributed to Mr. Evans 108.5 grams of powder cocaine based on his stipulation that he possessed with intent to distribute 140 grams of cocaine, “which was 108.5 grams more cocaine tha[n] wiretaps revealed,” attributing only the lower number because no information was supplied suggesting that any portion of the “additional cocaine was crack cocaine.” And, the PSR attributed to Evans 3.2 grams of PCP that Dallas police officers seized following a search of the Summit Lane address.

Based on these attributions, the PSR calculated Evans base offense level at 24, which is the guidelines standard “if the offense involved at least 100 kilograms of marijuana, but less than 400 kilograms.” The PSR made no distinction between drugs that Evans possessed with intent to distribute, and drugs that were intended for his personal use, despite evidence in the PSR that Evans engaged in the instant offense as a means to get, free of cost, drugs for personal use.

b. Maintaining a Premises Enhancement

The PSR also recommended and sought a two-level “maintaining a premises” enhancement pursuant to U.S.S.G. § 2D1.1(b)(12), alleging Evans maintained a premises for the purposes of manufacturing or distributing a controlled substance. To support this enhancement, the PSR stated that “the investigation revealed the defendant helped operate, and distribute drugs from, the drug house located at [the Summit Lane address] on behalf of codefendant Gage.” A search of the Summit Lane address revealed “mail in a suitcase belonging to ‘Marcus Evans,’ and some “paperwork with the name ‘Marcus Evans’ in [a] closet,” and “a purse containing an identification card for ‘Francis Evans,’ two credit cards belonging to ‘Marcus Evans,’ [and] a bill addressed to ‘Francis Evans.’”

The PSR did not state that any mail in Evans name was addressed to the Summit Lane address, nor provide any information as to whether Evans was living at the Summit Lane address for any appreciable duration of time. The only information provided in the PSR about where Evans lived came from Evans: “He advised that at the time of his arrest for the instant offense, and for three months prior, he had been residing at [an address on Edgemont Avenue] in Dallas, Texas. . . .” Evans’ grandmother verified his personal history and background.

4. Sentencing hearing.

Evans’ trial counsel filed a sentencing memorandum on behalf of Evans, seeking a mitigating role adjustment, which the court took under consideration at the sentencing hearing, treating the memorandum as an objection. Evans’ counsel

raised an issue concerning the quantity of drugs attributed to Evans in the PSR, noting that, had “100 or less” kilograms been attributed to him, rather than the marijuana equivalent of 104 kilograms, then the base offense level would have been 22 instead of 24. The court noted: “I think there were a lot of drugs here that reasonably could have been attributed to him that weren’t.” Evans’ trial counsel stated that he thought the government was “very fair in not attributing certain things to [Mr. Evans],” but counsel added the following in response to the district judge’s comment: “Right. And I wanted to bring that up to at least let the Court know that we’re not, you know, running from necessarily everything. But, again, he’ll tell you that a lot of it was for personal use as well.” Counsel further elaborated on Evans’ history: “And then just to kind of reiterate what’s in my memo regarding the background that we kind of talked about on the record, my client has a drug problem, no doubt about it.” After hearing the government’s response, which did not address the personal drug use issue, the court denied the relief sought in the sentencing memorandum.

The court adopted the presentence report and held that the court was “of the view that a sentence at the low end of the guidelines is appropriate here.” In issuing the sentence, the court noted, “I think what motivated you was your own addiction.” The court sentenced Evans to 84 months imprisonment. Evans immediately filed a notice of appeal.

5. Appellate Proceeding

In his Appellant’s Brief, Evans challenged the sufficiency of the evidence

presented by the government and in the PSR to warrant the maintaining a premises enhancement that increased the Guidelines-sentence range adopted by the district court. He also challenged the sufficiency of evidence to warrant the base-offense level calculation and the trial court's adoption of that calculation.

With respect to the maintaining the evidence enhancement, Evans made the following argument:

[T]he Government did not prove application of the enhancement by a preponderance of the evidence. This enhancement is broken down into two separate but necessary components: (1) maintenance of the premises; and (2) the purpose for which the premises was primarily used.

To show that Mr. Evans "maintained" the premises, the guidelines instruct the court to consider two factors. First, the court considers whether Mr. Evans "held a possessory interest in (e.g., owned or rented) the premises at issue." The government never made the claim, and put on no evidence suggesting, that Mr. Evans owned or rented the premises. Mr. Evans, in fact, stated that he lived at another residence, which was verified by his grandmother. Though the PSR recounts that a search of the Summit Lane address revealed "mail **in a suitcase** belonging to 'Marcus Evans, and some "paperwork with the name 'Marcus Evans' in [a] closet," and "a purse containing an identification card for 'Francis Evans,' two credit cards belonging to 'Marcus Evans,' [and] a bill addressed to 'Francis Evans,'" the PSR did not state that any mail in Mr. Evans name was addressed to the Summit Lane address. Nor did the PSR provide any information as to whether Mr. Evans was living or staying at the Summit Lane address for any appreciable duration of time—a suitcase with a handful of belongings hardly suffices to show that he was "living" at the Summit Lane address. The record is void of sufficient evidence to demonstrate this first factor.

Second, the court considers "the extent to which [Mr. Evans] controlled access to, or activities at, the premises." The PSR did not specifically address this issue. Rather, the PSR stated that Mr. Evans "would help operated the drug house at Summit Lane on behalf of Gage," and that "other individuals would also work

for Gage at the Summit Lane address, but it was not clear whether or not Evans had authority over these individuals.” Notably, the PSR also does not state one way or another whether Mr. Evans worked at the Summit Lane address on behalf of Gage more or less than any of these “other individuals.” The only clear inference one may draw from the information in the PSR is that Gage controlled access to, and activities at, the premises. Without sufficient evidence demonstrating that Mr. Evans controlled access to, or activities at, the premises, the government failed to sustain its burden to show that the enhancement applied to Mr. Evans.

Even were this Court to find that the PSR’s information was sufficient to show that Mr. Evans maintained the premises, the record is void of any consideration by the court below as to whether one of the primary purposes of Mr. Evans’ “maintaining the premises” was to manufacture or distribute drugs, nor does the PSR provide sufficient information to warrant an affirmative determination on that issue. For example, the PSR provides insufficient information concerning “how frequently the premises was used by the defendant for manufacturing or distributing controlled substances,” as opposed to how frequently the premises was used for some other purpose, such as hanging out.

The government did not present sufficient evidence to demonstrate that Mr. Evans maintained the premises at issue and presented insufficient evidence to show that one of Mr. Evans primary use of the premises was to manufacture or distribute drugs. As a result, the district court should not have applied a § 2D1.1(b)(12) enhancement to Mr. Evans’ sentence. This error was harmful as it increased the range of sentence Mr. Evans otherwise could have received absent the enhancement. Minus the two-level enhancement, Mr. Evans total offense level would have been 23 instead of 25, with a sentencing range of 70 to 87 months instead of 84 to 105 months. Since the sentencing judge determined that the low end of the guidelines served as an appropriate punishment, it is reasonable to assume that the judge would also have imposed a sentence on the low end of the guidelines minus the two-level maintaining-a-premises enhancement, a difference of over one-year imprisonment.

In his brief, Evans also challenged the validity and enforceability of the appeal waiver in his plea agreement. He argued first that the Plea Agreement

nowhere waived his right to have his sentence determined by constitutionally sufficient evidence. He next 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, Evans 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 appeal waiver in the plea agreement. *See* Appx. E. Evans 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 Evans responded. First, the government argued that Fifth Circuit precedent affirms the validity of an appeal waiver as part of a valid plea agreement, citing to *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992). Appx. a0010-a0011. Evans responded to this argument by pointing out *Melancon* predated *U.S. v. Booker*. Appx. a0019. Evans also argued that the government cited to no cases addressing 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.

Second, and in response to Evans' argument that the plea agreement created a condition precedent to enforcement of the sentence-appeal waiver, the government argued that Evans received the benefit of his bargain because the district court "consider[ed] the guidelines." Appx. a0012-a0013. Evans 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. a0021-a0023. 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. a0021-a0023.

Evans also questioned whether the 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 a0020-0021. On March 7, 2019, the district court dismissed Evans appeal. The mandate issued on March 29, 2019. *See* Appx. B. Evans now petitions this Court to review what he considers grave constitutional error in his sentencing.

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

¹ *U.S. v. Booker*, 543 U.S. 220, 226-27 (2005) (Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.); *see also U.S. v. Henry*, 472 F.3d 910, 918 (D.C. Cir. 2007) (Kavanaugh, J., concurring) (“In *Booker* a five-Justice majority of the Supreme Court held that the United States Sentencing Guidelines were unconstitutional under the Fifth and Sixth Amendments to the extent that facts used to increase a criminal sentence (beyond what the defendant otherwise could have received) were not proved to a jury beyond a reasonable doubt. The logical upshot of this part of *Booker* (what is known as the *Booker* constitutional opinion) is that the Constitution is satisfied by a sentence in which sentencing facts are proved to a jury beyond a reasonable doubt.”).

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 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

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.”).

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

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 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

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.

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 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

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

⁷ *Booker*, 543 U.S. 220, 244.

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

“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

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 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”).

....

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”).

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 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 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.

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 not 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.”).

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)).

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 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

¹³ See Fed. R. Crim. P. 11(b)(1)(M).

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

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

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 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

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.

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

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 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

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).

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

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 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].”

....

Said more succinctly: “An appeal waiver is not ‘unlawful’ merely because the claimed error would, in the absence of waiver, be

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).

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 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

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”).

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

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 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

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.

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 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.

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

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).

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 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

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").

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")

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 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

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");

³⁵ Fed. R. Crim. P. 11(b)(1)(M).

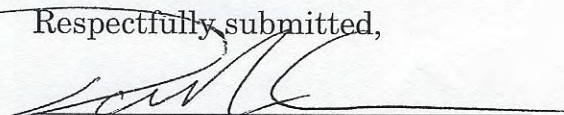
proscribed by Federal Law, to have a sentence determination that accords with the correct Guidelines range, or at minimum to have the court determine the correct Guideline range and impose a sentence with some reference to it.

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.

Respectfully submitted,



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