No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

ANTONIO FLORES,
also known as "Felipe Gallegos",
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 broad appeal waiver included in a plea agreement between a defendant and the United States preclude appellate review of the district court's findings if the district judge created a constitutionally impermissible appearance of partiality by testifying against the defendant?

INTERESTED PARTIES

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

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Petitioner ANTONIO FLORES respectfully requests that a writ of certiorari issue to review the opinion of the Court of Appeals dismissing the appeal, which opinion was filed on April 23, 2019.

ORDER BELOW

The opinion of the court of appeals, *U.S. v. Flores*, 2019 U.S. App. LEXIS 11925 (5th Cir. Apr. 23, 2019) is unpublished. A copy of the opinion is attached as Appendix A.

JURISDICTION

The opinion dismissing Petitioner's appeal was filed on April 23, 2019. *See*

Appendix A. Petitioner timely filed a Petition for Rehearing En Banc on May 7, 2019. *See* Appendix C. The Court of Appeals denied Flores' Petition for Rehearing En Banc on July 12, 2019. *See* Appendix D. 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 implicates the Due Process Clause of the Fifth Amendment to the United States Constitution: "No Person shall . . . be deprived of life, liberty, or property, without due process of law; . . . ." U.S. Const. amend V.

The pertinent provisions of the U.S. Code regarding the statute of conviction—21 U.S.C. § 841(a)(1) and (b)(1)(C)—are reprinted in the Appendix at a0035.

STATEMENT OF THE CASE

1.

Antonio Flores was indicted in the Northern District of Texas on one count of Conspiracy to Possess With the Intent to Distribute Methamphetamine (21 U.S.C. §§ 841(a)(1) & (B)(1)(C)). Flores entered a plea agreement with the United States, wherein he agreed to plead guilty to this count. Flores filed a Factual Resume outlining the facts upon which he agreed to plead guilty, stating in relevant part:

On both July 6, 2015 and October 13, 2015, controlled purchases

> of approximately one kilogram of a mixture and substance containing a detectable amount of methamphetamine, a Schedule II controlled substance, were made from the defendant and others. The defendant participated in these deliveries of methamphetamine knowingly and intentionally.

Flores did not stipulate to facts pertaining to his relationship with or his ranking, if any, in relation to others within the group alleged to have been associated with the conspiracy charge.

The plea agreement contained a broad appeal waiver, reserving Flores' 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 Presentence Report ("PSR") recommended a four-level enhancement, alleging that Flores "was an organizer or leader in the criminal activity that involved five or more participants." The PSR asserted:

> The defendant recruited a cooperating coconspirator to sell narcotics, decided how much distributors would receive for their participation, as well as what each person's cut would be. In addition, the defendant introduced CHS I to major suppliers of cocaine and "Ice."

The report also asserted that Flores "allowed CHS 1 to pay the remainder $500 for a kilogram of cocaine at a later date, signifying decision making authority."

Flores' trial counsel filed an objection to the leader/organizer enhancement:

> Defendant Flores denies and objects to the assertion that his conduct was sufficient to describe him as a leader in the conspiracy. Flores did not make any managerial decisions and at all times was acting at the direction of others.

At the sentencing hearing, the government called the lead case agent in the

investigation to testify in support of the leader enhancement. The district judge asked the government's witness about the alleged $500 debt mentioned in the PSR. The witness testified that the decision to allow someone to pay money that is owed at a later time is a decision that "has to be made by somebody higher up . . . [because] the money is very important to them, . . . [and waiting] increases the exposure for both his supplier, himself, and the source."

Flores' counsel argued that the PSR failed to address whether Flores made any decisions or communicated any decisions "solely on [his] own will, or whether he was merely transmitting this information to someone else." The district judge responded to Flores' counsel's argument as follows:

> Here's my point, Mr. Key, on the $500 that was allowed later . . . I have signed a lot of wiretaps, orders for wiretaps. **I know how drug organizations operate.** When you are talking about a large amount of money, they are serious about their money. Several things can get you killed or dealt with in a bad way. Come up short on drugs, come up short on money, or the drug is not as pure as has been represented. And if the drug dealers cannot get to you, they will harm your family.
>
> What I'm getting to is this. If there is going to be a delay in payment, that cannot be made by a run-of-the-mill person. The reason I know that is based on 20 years that I have been doing wiretaps and so forth. And one thing that I have to do before I authorize a wiretap is to read a long affidavit from the task force officer or the FBI agent or the DEA agent, or whomever who has done the investigation. And many times I hear conversations where somebody wants to delay payment, cannot come up with the money, and what is often said is, I will have to check with someone else who is higher up. The person to whom the other person is talking cannot make that decision independently.
>
> And what I'm telling you is, if it's going to be involving payment or involving a quantity of drugs, if it deviates from the original deal, ***I have always*** seen a situation that it has to be made by

somebody who is higher up in the organization. ***That's based on my experience or observation in dealing with wiretaps or drug offenses and so forth.*** And the reason is that these folks do not want to be cheated out of their money. Once the price is agreed upon or payment is agreed upon, the parties are expected to carry through on that. And if the parties do not carry through, there can be severe consequences.

I will tell you this. You may say $500 is not that much. Well, the bottom line is this: If it gets out that somebody else was able to pay less than what was agreed on, then that doesn't look well for the people who are dealing the drugs. And what it will also say to those who may be buying drugs that, I can get away with this or that. ***Those people at the top of these drug organizations do not want the buyers or purchasers of drugs to think they can play around with their money or play around with their drugs.***

As I stated before, if the drugs come up short, if the money comes up short, or if the drug is not what it's represented to be, you can find a body somewhere.

So I guess my bottom line is this. If your client can tell somebody they can pay something later, tell me why that would not indicate that he's not a run-of-the-mill person who is running a drug organization.

. . . .

I think you may have missed my point of explanation. $500 may seem small to us, but it's not just the quantity amount. Drug dealers who make plans for a certain amount of drugs or certain amount of money expect to be paid. If others who – those who were purchasing drugs do not live up to their end of the bargain, that makes the people who are supplying the drugs or who are enforcing it look weak. They do not wish to look weak. If it gets around in the drug world that, Hey, we are not supposed to pay him X amount of dollars, and I told him I couldn't pay this until later, or if it gets out that he excused or let me go and I didn't have to pay the thousand dollars or $500, if that gets out and then the leaders of the drug sales or drug trafficking organizations do not want it to be known in the drug world that they are easy on collecting their payments or that you can give them drugs that are lower quality than what they bargained for.

> ***It's not just a matter that deals with the amount of money. It deals with whether or not I am going to let people take advantage of me.***
>
> Let me put it to you like this. I guess this will bring it home. ***There have been situations where people have been beaten up, even shot for less than $500. The reason I know this is because, like I said, I have read reports from agents and officers where they fail to pay or delayed payment too long and action was taken.***
>
> As I stated before, it's not uncommon when there's a request for a delay in payment that that has to be run up to the higher-ups. I mean, to be honest with you, a lot of times they will say, No, before I can do that, I have to check with my people in Mexico. I have to check with my people in such and such. So what they are saying is, No, before I let you do that, I better check to see if it's okay with people who make decisions.

The district judge subsequently ruled the government sustained its burden to establish the four-level leader enhancement and sentenced Flores to eighteen years in prison, "the highest sentence that has been imposed on any other Defendant in this case."

2.

On appeal, Flores asserted that the trial judge provided testimony against Flores, thereby creating a constitutionally impermissible appearance of partiality, which should excuse enforcement of the broad sentence appeal waiver to review for miscarriage of justice. Flores further asserted that the error was harmful, because neither the PSR nor the government's witness at the sentencing hearing provided facts that Flores did anything other than act at the direction of others. And, neither the PSR nor the government's witness at the sentencing hearing provided any facts pertaining to the organizational style and structure of the criminal organization at

issue. Instead, the district judge provided what amounts to testimony concerning the practice and policies of drug enterprises generally, filling in the gaps in the government's evidence.

The government argued in its Appellee's Brief that the district judge did not provide testimony against Flores, but "called upon its own knowledge of how drug conspiracies typically work—which it had gleaned from other drug cases over which it had presided." The government further argued that, just as a juror is allowed to process evidence based on "reason and common sense" and "in the light of common experience," a judge is also allowed to draw reason and common sense based on common experience, which, according to the government, is all the district judge did here.

In reply, Flores noted that the "experience" recounted by the district judge did more than comment on evidence introduced by the government. The judge went beyond what the government introduced. The judge discussed the intricacies of drug organizations and their hierarchical structures generally and applied those structures and hierarchies to Flores' circumstances. Pointing to his Appellant's Brief, Flores reiterated that the United States Supreme Court and Federal Rules of Evidence impose limitations to the "essential prerogatives of the trial judge" to explain and comment on evidence. *See Quercia v. U.S.*, 289 U.S. 466, 469-71 (1933) (stating a judge "may not either distort [the evidence] or add to it."); *see also In re Murchison*, 349 U.S. 133, 139 (1955) (commenting on the "spectacle of the trial judge presenting testimony upon which he must finally pass"); Fed. R. Evid. 605

("The presiding judge may not testify as a witness at the trial. A party need not object to preserve this issue."). Flores further argued that Federal Rule of Evidence 605 should apply to sentencing hearings, notwithstanding Rule 1101(d)(3), because the United States Supreme Court previously articulated the limitation to judge testimony in *Quercia* and *Murchison*, and because Congress has sought to protect the courts against even the appearance of partiality by prohibiting a judge from acting as a witness to a case over which he presides. *See* 28 U.S.C. § 455.

On April 23, 2019, the appellate court dismissed Flores' appeal. The court held (1) Flores knowingly and voluntarily agreed to the appeal waiver in the plea agreement; (2) the district court made its sentencing determination in accordance with existing law and the plea agreement terms; (3) the miscarriage of justice exception to appeal waivers has not been adopted by the court and broad appeal waivers like the one here have been upheld by the Fifth Circuit; and (4) Flores' ineffective of counsel claim was not sufficiently developed below. *See* Appendix A, *U.S. v. Flores*, 2019 U.S. App. LEXIS 11925 (5th Cir. Apr. 23, 2019).

3.

Flores filed a Petition for Rehearing En Banc on May 13, 2019. In his Petition, he argued that his appeal involves two exceptionally important questions. First, does a sentence-appeal waiver that purportedly precludes a challenge to the sufficiency of enhancement evidence and the district court's application of the sentencing guidelines frustrate the remedy fashioned by the United States Supreme Court in *U.S. v. Booker*, 543 U.S. 220 (2005), thereby rendering the waiver

unconstitutional or void as against public policy? Flores argued that appellate court's decision as to this question runs contrary to the United States Supreme Court Decision in *U.S. v. Booker*, 543 U.S. 220 (2005).

Second, does the appeal waiver in the plea agreement between Flores and the United States preclude appellate review of the district court's findings if the district judge created a constitutionally impermissible appearance of partiality by testifying against Flores? This question invokes the miscarriage of justice exception to sentence-appeal waivers, which the Fifth Circuit has expressly not adopted. A majority of other courts of appeals apply the miscarriage of justice exception when, as here, the sentence determination implicates fundamental rights or constitutional principles, or seriously affects the fairness, integrity, or public reputation of judicial proceedings: *U.S. v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001); U.S. *v. Khattak*, 273 F.3d 557, 563 (3rd Cir. 2001); *U.S. v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *U.S. v. Johnson*, 410 F.3d 137 (4th Cir. 2005); *U.S. v. McIntosh*, 492 F.3d 956, 959 (8th Cir. 2007); *U.S. v. Guillen*, 561 F.3d 527 (D.C. Cir. 2009); *U.S. v. Riggins*, 677 Fed.Appx 268 (6th Cir. Jan. 26, 2017); *U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017). *See* Appendix C, Petition for Review.

On July 12, 2019, the Fifth Circuit Court of Appeals denied Flores' Petition for Rehearing. The mandate issued on July 22, 2019. *See* Appendix E. Flores now petitions this Court to review what he considers grave constitutional error in his sentencing.

REASONS FOR GRANTING THE PETITION

I. A Circuit split exists as to whether courts of appeals should enforce a broad sentence-appeal waiver even if a miscarriage of justice results.

The Fifth Circuit Court of Appeals strictly enforces broad appeal waivers, making no exception for miscarriages of justice that may result from failing to consider a defendant's challenge. *See e.g., United States v. Arrendondo*, 702 F. App'x 243, 244 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1713 (2018); *United States v. De Cay*, 359 F. App'x 514, 516 (2010). In its *Flores* opinion, the Fifth Circuit rejected Flores' miscarriage of justice argument by stating, "we repeatedly have declined to apply the miscarriage of justice exception." Appendix _____. The Fifth Circuit is in the minority on this issue.

A majority of other courts of appeals apply a miscarriage of justice exception or some derivation of a miscarriage of justice exception when, as here, the sentence determination implicates fundamental rights or constitutional principles, or seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See U.S. v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001); U.*S. v. Khattak*, 273 F.3d 557, 563 (3rd Cir. 2001); *U.S. v. Johnson*, 347 F.3d 412, 415 (2nd Cir. 2003) (citing *United States v. Andis*, 333 F.3d 886 (2003), to support review of sentence despite appeal waiver when defendant alleges the sentence was based on constitutionally impermissible factor, which would constitute a miscarriage of justice); *U.S. v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *U.S. v. Johnson*, 410 F.3d 137 (4th Cir. 2005); *U.S. v. McIntosh*, 492 F.3d 956, 959 (8th Cir. 2007); *U.S. v. Guillen*, 561 F.3d 527

(D.C. Cir. 2009); *U.S. v. Riggins*, 677 Fed. App'x 268 (6th Cir. Jan. 26, 2017); *U.S. v. Litos*, 847 F.3d 906 (7th Cir. 2017). Manifest sentencing errors left uncorrected leave defendants who have waived their right to appeal before any sentencing error occurs "totally exposed to future vagaries (however harsh, unfair, or unforeseeable)" and may erode public confidence in the judicial system. *Teeter*, 257 F.3d at 23, 25. To avoid working injustice, these courts of appeals "decline to adopt a blanket rule prohibiting all review of certain otherwise valid waivers of appeal." *Khattak*, 273 F.3d at 562.

The error alleged by Flores goes to the heart of the administration of justice—the right to a fair and impartial judicial proceeding, which includes a fair and impartial fact finder. This Court has held that the Federal Constitution secured the common law prerogative of a trial judge to explain and comment on the evidence, but the trial judge's discretion are to be exercised "in conformity with the standards governing the judicial office." *Quercia v. U.S.*, 289 U.S. 466, 470 (1933). Although a federal judge possesses the privilege to comment on the facts, and analyze and dissect the evidence, "he may not either distort it or add to it." *Quercia*, 289 U.S. at 470. This Court "emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided'; that 'deductions and theories not warranted by the evidence should be studiously avoided.'" *Quercia*, 289 U.S. at 470.

The district judge in Flores' case made statements during the sentencing hearing that amounted to testimony. Those statements are recounted in the fact

section above. It is patent from the record here that the district judge's statements exceeded his privilege to comment on the facts and to analyze and dissect the evidence. The district judge here added to the information provided in the PSR and the testimony provided by the government's witness, and not in a trivial way. The judge filled in significant gaps in the government's witness' testimony and in the PSR. Neither the PSR nor the government's witness provided information about the standard practice of organizations in the drug trade, or about the standard practice in the specific organization in this case. The judge, however, outlined the standard practice of such organizations and their typical hierarchical structure, based on his own experience.

The judge's testimony alone created an impermissible presumption: no matter how small the amount of money, any person who tells another person that he can pay that money at a later time is a "run-of-the-mill person who is running a drug operation." As in *Quercia*, where the Supreme Court reversed conviction because the trial judge told the jury that wiping one's hands is "'almost always an indication of lying,'" here the district judge "put his own experience, with all the weight that could be attached to it, in the scale against the accused." *Quecia*, 289 U.S. at 471-72; *see also Hickory v. U.S.*, 160 U.S. 408, 421-23 (1896) (holding a statement in jury charge that "no one who was conscious of innocence would resort to concealment" amounted to a statement by the judge that "all men who did so were necessarily guilty").

This Court's opinions in *Quercia* and *Murchison* aim to preserve actual

impartiality and the appearance of impartiality in judicial proceedings. Congress also sought to ensure actual impartiality as well as the appearance of impartiality in every judicial proceeding, sentencing not excluded, by prohibiting a judge from acting as a material witness to a case over which he presides. *See e.g.,* 28 U.S.C. § 455; *U.S. v. Poludniak,* 657 F.2d 948, 954 (8th Cir. 1981) ("Since the goal of the judicial-disqualification statute is to ensure not only actual impartiality, but also the appearance of impartiality, it is not necessary that actual bias or prejudice be present before actual disqualification is required."); *U.S. v. Jaramillo,* 745 F.2d 1245, 1248 (9th Cir. 1984) ("The purpose of section 455(a) is to protect the courts against even the appearance of partiality.").

Likewise, Federal Rule of Evidence 605 bolsters the importance of the appearance of impartiality in judicial proceedings. Federal Rule of Evidence 605 "is a broad rule of incompetency"—a judge is automatically incompetent to testify in a proceeding before him. Rule 605 supplements 28 U.S.C. § 455 in an attempt to prevent the possibility of a judge acting as a witness, not limited to a "material witness," to a case over which he presides:

> In view of the mandate of 28 U.S.C. § 455 that a judge disqualify himself in "any case in which he * * * is or has been a material witness," the likelihood that the presiding judge might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.
>
> The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on

> objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? **Can he, in a bench trial, avoid an involvement destructive of impartiality**?

See FED. R. EVID. 605 advisory committee's note (emphasis added).

In many cases, like this one, the only opportunity for a fair and impartial fact finder to hear a defendant's case comes at sentencing. Rule 605 adds the additional lawyer of protection needed to effect the purposes that underlie 28 U.S.C. 455. *See e.g., U.S. v. Blanchard*, 542 F.3d 1133, 1148-49 (7th Cir. 2008) (holding district judge comments on his own personal observation of the defendant violated Rule 605 by "'add[ing] new evidence which the prosecution was otherwise unable to establish'") (*quoting U.S. v. Nickl*, 427 F.3d 1286, 1294 (10th Cir. 2005)); *U.S. v. Berber-Tinoco*, 510 F.3d 1083, 1091 (9th Cir. 2007) (concluding district judge "violated Rule 605 when he interjected his own observations" on facts which were neither in the record nor reasonably derived therefrom, but did not violate Rule 605 where he merely summed up the evidence). Although Federal Rule of Evidence 1101(d)(3) states that the rules of evidence do not apply to sentencing proceedings, Rule 605 must apply to sentencing proceedings by virtue of its purpose and pedigree. *See* Fed. R. Evid. 1101(e) ("A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.").

Further, this Court has noted sentencing proceedings are part of a criminal case and a defendant does not lose Fifth Amendment privileges, such as the right to

not be compelled to be a witness against himself, at the precise stage that, from the defendant's point of view, "was most important." *Mitchell v. United States*, 526 U.S. 314, 327 (1999). It follows that a defendant does not lose at the sentencing proceeding his Fifth Amendment right to due process, which includes a fair and impartial determination of the sentencing evidence and sentencing determination.

These authorities—this Court's holdings in *Quercia* and *Murchison*, 28. U.S.C. 455, and Federal Rule of Evidence 605—aim to preserve actual impartiality and the appearance of impartiality, which is an essential and basic requirement of due process:

> A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.

In re Murchison, 349 U.S. 133, 136 (1955).

Flores contends that the review of his sentence on appeal is necessary to avoid and correct a miscarriage of justice and respectfully asks this Court to grant his Petition and bring the Fifth Circuit in line with the majority of Circuit Courts of Appeals that reject a blanket rule prohibiting all review based merely on the presence of a broad appeal waiver, notwithstanding the constitutional dimension of the alleged error. *Khattak*, 273 F.3d at 562.

II. The Fifth Circuit's Blanket Rule Against Review of Sentences for Miscarriage of Justice Creates an Impermissible Presumption of Sufficient Evidence and Lack of Error.

Enforcing broad appeal waivers to preclude sentence review when a defendant alleges deprivation or violation of fundamental rights or constitutional

principles, or alleges errors that seriously affect the fairness, integrity, or public reputation of judicial proceedings 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.'" *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)). When an appellate court dismisses an appeal that challenges the proceeding as lacking fairness and impartiality because the judge provided testimony against the defendant, testimony that essentially filled in gaps in the government's evidence, and the dismissal is based on nothing more than the existence of a broad sentence-appeal waiver, it presumes the sufficiency of the evidence and presumes that any deprivation of constitutional or fundamental rights was harmless.

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." *Molina-Martinez v. U.S.*, 136 S.Ct. 1338, 1345-46 (2016) (quoting *Peugh v. U.S.*, 133 S.Ct. 2072, 2082-2083 (2013)). 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." *Molina-Martinez*, 136 S.Ct. at 1345. 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." *Molina-Martinez*, 136 S.Ct. at 1341-1342; 136 S.Ct. at 1351 n.4 (Alito, J., and Thomas, J., concurring).

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." *Molina-Martinez*, 136 S.Ct. at 1346. 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. *Molina-Martinez*, 136 S.Ct. at 1349.

This Court's opinion in *Molina-Martinez* was 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." *Molina-Martinez*, 136 S.Ct. at 1342-1343. 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. *See* Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L. J. 209, 238 (2005): 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.").

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

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 a sentence when a defendant alleges that the sentence determination was based on constitutionally impermissible factors or in violation of constitutional rights, such as the right to due process. Considering the centrality of the Guidelines to a court's determination of an appropriate sentence, which includes the judge determining the sentencing facts that inform and justify the guideline range, broad appeal waivers should not preclude challenges to a sentence based on constitutionally impermissible factors, or violations of constitutional rights, or errors that undermine the fairness, integrity, or public reputation of judicial

proceedings. To create such a blanket rule against review of a sentence, even for miscarriage of justice, based on nothing more than the presence of a broad appeal waiver creates a constitutionally impermissible and conclusive presumption that the sentence was reasonable, the evidence was sufficient, and any constitutional violation was harmless.

III. The question addressed in this petition raises national concerns that require immediate attention and rectification.

The issue raised in this petition deserves 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 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." *Missouri v. Frye*, 566 U.S. 134, 143-44 (2012) (pointing out that "[n]inety-seven percent of federal convictions . . . are the result of guilty pleas."). Of the criminal convictions obtained by plea, the vast majority of plea agreements include sentence-appeal waivers. 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). In most federal criminal cases, then, the sentencing hearing is the only proceeding in which the defendant has an opportunity for a fair and impartial hearing on the facts alleged against him,

At the sentencing hearing, the judge, not a jury, determines the sufficiency of the facts and hears testimony.

Sentence-appeal waivers vary on a case-by-case basis, but many contain broad waivers, such as the one presented in the present case. Without an exception to broad appeal waivers for miscarriages of justice, defendants are largely subject to the whims of the district judge who accepted the plea agreement in the first place and becomes 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 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.

Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 366-

67 (2015).

Insulting appellate review of sentences for manifest error involving fundamental rights or constitutional principles, or manifest error that affects the fairness, integrity, or public reputation of judicial proceedings exacerbates this problem.

CONCLUSION

Petitioner humbly submits that this Court should grant his petition.

Respectfully submitted,

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October 10, 2019