APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 23, 2019
Lyle W. Cayce
Clerk

No. 18-10403
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTONIO FLORES, also known as Felipe Gallegos,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-279-1

Before JONES, HIGGINSON, and WILLETT, Circuit Judges.

PER CURIAM:*

Antonio Flores appeals the below-guidelines sentence of 216 months of imprisonment he received after pleading guilty, pursuant to a plea agreement, to conspiracy to possess with intent to distribute methamphetamine. He argues that the district court erred in applying certain guideline enhancements. Flores also raises a claim of ineffective assistance of counsel.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Government argues that the appeal is barred by the appeal waiver in the plea agreement.

We review de novo whether an appeal waiver bars an appeal. *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). The record shows that the waiver was knowing and voluntary. *See id.* at 754-55.

Flores asserts that the appeal waiver is unenforceable because the sentencing determination was not made in accordance with existing law and the terms of the plea agreement. That argument is unavailing as the district court complied with the plea agreement by considering the guidelines calculation, and Flores's objections to it, when sentencing him.

Additionally, Flores argues that a miscarriage of justice exception to the waiver should apply and that the waiver is void as a matter of public policy because appellate review of sentences is a necessary component of the advisory Guidelines as set forth in *United States v. Booker*, 543 U.S. 220 (2005). However, we repeatedly have declined to apply the miscarriage of justice exception. *See, e.g., United States v. Arredondo*, 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 (5th Cir. 2010). Also, we have upheld broad appeal waivers like the one in post-*Booker* cases. *See, e.g., United States v. Pizzolato*, 655 F.3d 403, 405 (5th Cir. 2011).

Flores also argues that his counsel was ineffective for not objecting to the firearm enhancement. The appeal waiver contained an exception for claims of ineffective assistance of counsel. However, the claim was not developed sufficiently in the district court to evaluate this claim. We therefore decline to consider Flores's ineffective assistance of counsel claim without prejudice to his right to assert his claim on collateral review. *See United States v. Isgar*,

739 F.3d 829, 841 (5th Cir. 2014); *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987).

As it is barred by the appeal waiver, the appeal is **DISMISSED**.

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APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10403
Summary Calendar

D.C. Docket No. 3:16-CR-279-1

United States Court of Appeals
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UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ANTONIO FLORES, also known as Felipe Gallegos,

Defendant - Appellant

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

Before JONES, HIGGINSON, and WILLETT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed.

APPENDIX C

No. 18-10403

IN THE
UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee.

v.

ANTONIO FLORES, also known as
Felipe Gallegos,
Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-CR-279-1
Honorable Sam A. Lindsay presiding

PETITION FOR REHEARING EN BANC

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Certificate of Interested Persons

UNITED STATES OF AMERICA,
Plaintiff-Appellee

No. 18-10403

ANTONIO FLORES, also known as
Felipe Gallegos,
Defendant-Appellant.

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. United States of America.
2. Antonio Flores

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Federal Rule of Appellate Procedure 35(b)(1) Statement

This appeal involves two exceptionally important questions. The panel decision in this matter runs contrary to United States Supreme Court decisions, and decisions by other courts of appeals, such that consideration by this Court sitting en banc is necessary.

1. 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?

The panel's decision as to this question runs contrary to the Supreme Court Decision in *U.S. v. Booker*, 543 U.S. 220 (2005).

2. 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?

The panel's decision as to this question runs contrary to the Supreme Court's decision in *Molina-Martinez v. U.S.*, 136 S.Ct. 1338 (2016). This question invokes the miscarriage of justice exception to sentence-appeal waivers, which this court has 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).

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Statement of the Issues

1. 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 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?

2. 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?

Statement of Course of Proceedings

The district court sentenced Flores to eighteen years in prison. The court found the evidence warranted a four-level leader enhancement pursuant to USSG § 3B1.1(a) and a two level weapon enhancement pursuant to § 2D1.1(b)(1), raising Flores' offense level from 34 to 37 with a criminal history category of II under the sentencing guidelines. *U.S. v. Antonio Flores*, No. 3:16-CR-279-1, in the United States District Court for the Northern District of Texas.

This Court dismissed Flores' appeal. A panel of this 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 this Court and broad appeal waivers like the one here have been upheld by this Court; and (4) Flores' ineffective of counsel claim was not sufficiently developed below. *U.S. v. Flores*, 2019 U.S. App. LEXIS 11925 (5th Cir. Apr. 23, 2019) (Hereinafter "Slip Op.").

Statement of Facts

Antonio Flores was indicted in the Northern District of Texas on one count of Conspiracy to Possess With the Intent to Distribute Methamphetamine. Flores entered a plea agreement with the United States, wherein he agreed to plead guilty to this count.[1] 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.[2]

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.

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[1] ROA.193-198.
[2] ROA.34.

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.[3]

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."[4] 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."[5]

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."[6]

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.[7]

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

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[3] ROA.196-97 at ¶ 11.
[4] ROA.220 at ¶57.
[5] ROA.220 at ¶ 57; ROA.218-19 at ¶ 48.
[6] ROA.218-19 at ¶48.
[7] ROA.234.

asked the government's witness about the alleged $500 debt mentioned in the PSR in support of the leader enhancement. 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."[8]

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."[9] 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

[8] ROA.158:3-25.
[9] ROA.169:18-22.

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.[10]

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."[11]

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[10] ROA.171:9-175:6 (emphasis added).
[11] ROA.188:18-22.

Argument

I. The Panel's Decision Conflicts with Supreme Court Precedent.

1. This case presents a recurring problem. A defendant signs a plea agreement and retains his right to have sentencing facts that could increase his sentence range determined by constitutionally sufficient evidence, a right expressly preserved in accordance with United States Supreme Court precedent.[12] The plea agreement contains a broad sentence appeal waiver. Courts of Appeals generally construe broad sentence-appeal waivers to preclude challenges to the sufficiency of sentencing evidence, as well as to the district court's application of the guidelines.[13] 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 the United States Supreme

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[12] *See e.g., Apprendi v. New Jersey*, 530 U.S. 466 (2000) (holding "facts that increase mandatory minimum sentences must be submitted to the jury"); *Blakely v. Washington*, 542 U.S. 296, 303-04 (2004) ("When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all of the facts which the law makes essential to the punishment and the judge exceeds the proper authority."); *United States v. Booker*, 543 U.S. 220 (2005) ("Any fact which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt."); *Alleyne v. United States*, 570 U.S. 99 (2013) ("When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury.").

[13] *See U.S. v. McKinney*, 406 F.3d 744, 747 & n.5 (5th Cir. 2005).

Court included appellate review of sentences for unreasonableness as part and parcel of the remedy 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:

> 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.[14]

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.[15] Also, procedural protection was necessary to fill the gap created by *Booker's* excise of mandatory application of the guidelines from the Sentencing Reform Act—mandatory application of the Guidelines promoted

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[14] *Booker*, 542 U.S. at 264-65 (emphasis added).
[15] *Booker*, 543 U.S. 220, 244.

Congress' stated goal of uniformity to avoid sentencing disparities—which *Booker* replaced with discretionary application.[16] Appellate review of sentences for unreasonableness is part and parcel of the procedural protection *Booker* selected to promote fairness and reliability, and to "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities."[17]

The *Flores* panel addressed neither the role appellate review plays in the *Booker* scheme, nor Flores' argument that the appeal waiver was void as against public policy to the extent it runs afoul of the remedial scheme in *Booker*. Instead, the panel held that this Court "upheld broad appeal waivers like th[is] one in post-*Booker* cases," citing *United States v. Pizzolato*, 655 F.3d 403, 405 (5th Cir. 2011). Slip Op. at 2. *Pizzolato*, however, did not address the role appellate review played in *Booker* as that role relates to broad appeal waivers when the defendant did not waive his right to have his sentence determined by constitutionally sufficient evidence or to have his sentence determined in accordance with a proper

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

> As a matter of policy, the difference between the regime enacted by Congress and the system the Court has chosen are stark. . . . 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.

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

application of the sentencing guidelines. Flores' contends that the panel's opinion conflicts with the remedial scheme articulated in *Booker*.

2. The panel's reason for enforcing the broad appeal waiver—i.e., that this Court has done so in the past—to preclude sufficiency of the evidence challenges also creates an impermissible presumption of sufficient evidence and lack of error. The Supreme 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.'"[18]

The central role the Guidelines play in sentence determinations, as the Supreme Court reasoned in *Molina-Martinez v. United States*, "means that an error related to the Guidelines can be particularly serious."[19] In *Molina-Martinez*, the Supreme Court reviewed this Court's rule on "how to determine whether the application of an incorrect Guidelines range at sentencing affected the defendant's substantial rights," pursuant to Federal Rule of Criminal Procedure 52(b).[20] This Court required a defendant seeking review of an unpreserved Guidelines error to demonstrate prejudice by the error—when "the ultimate sentence falls within what would have been the correct Guidelines range"—with "'additional evidence' to

[18] *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)).

[19] *Molina-Martinez*, 136 S.Ct. at 1345-46.

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

show that the use of the incorrect Guidelines range did in fact affect his sentence."[21] The Supreme Court held 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.[22]

Courts of Appeals must recognize and account for the "Guidelines' central role in sentencing," as the Guidelines "inform and instruct the district court's determination of an appropriate sentence."[23] "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."[24]

The possibility of mistake, error, and uncertainty in sentencing determinations has long informed objections by courts, judges, academics, and practitioners to broad appeal waivers.[25] One Fifth Circuit judge observed:

"[A] defendant who waives his right to appeal does not subject

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[21] *Molina-Martinez*, 136 S.Ct. at 1341-1342.
[22] *Molina-Martinez*, 136 S.Ct. at 1349.
[23] *Molina-Martinez*, 136 S.Ct. at 1346.
[24] *Molina-Martinez*, 136 S.Ct. at 1342-1343.
[25] 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.

> 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.[26]

The panel here held the sentencing determination was made in accordance with existing law and per the terms of the plea agreement because "the district judge complied with the plea agreement by considering the guidelines, and Flores' objections to it, when sentencing him." Slip Op. at 1-2. However, Flores' challenge is more constitutionally acute. His challenge centers on the district judge's impermissible testimony in support of the four-level leader enhancement. Federal Rule of Evidence 605, which supplements 28 U.S.C. § 455, protects against the possibility of a judge acting as a material witness to a case over which he presides.[27] Rule 605 derives from the inherent limitations to the "essential prerogatives of the trial judge" to explain and comment on evidence.[28]

Flores contends that the panel's opinion runs contrary to the Supreme

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

[27] *See* FED. R. EVID. 605 advisory committee's note; *see also 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.").

[28] *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").

Court's admonishments in *Molina-Martinez*, and cases cited therein, by dismissing his appeal without review of the record to address the central points of error he raised. Specifically, this Court's two-step appeal waiver analysis, which does not allow an additional step for review of clear error, miscarriage of justice, or other constitutional infirmity, fails to account for the central role the guidelines play in sentencing determinations and creates a rigid rule that presumes constitutionally sufficient evidence and lack of error.

II. The Panel's Decision Conflicts with Most Circuit Courts of Appeals.

This Court conducts a two-step inquiry to determine whether a sentence-appeal waiver precludes appellate review: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand.[29] Most Courts of Appeals add a third consideration: (3) whether failure to consider the defendant's challenge would result in a miscarriage of justice.[30]

The miscarriage of justice exception seeks to avoid a "rigid taxonomy" of strict appeal waiver enforcement in the face of "egregious cases"[31] that "implicate fundamental rights or constitutional principles,"[32] or where the error at issue

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

[30] *See e.g., 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 U.S. 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).

[31] *Teeter*, 257 F.3d at 26.

[32] *U.S. v. Grimes*, 739 F.3d 125, 131 (3rd Cir. 2014).

"seriously affects the fairness, integrity or public reputation of judicial proceedings,"[33] or when the district court plainly errs in sentencing."[34] In adding this third step in the appeal waiver analysis, these Courts of Appeals adhere to the Supreme Court's admonition in *Molina-Martinez* to avoid rigid rules that preclude review of substantial error.

The miscarriage of justice exception should apply here. Central to Flores' challenge is whether the district judge impermissibly testified against him, thereby creating a constitutionally impermissible appearance of partiality. The error implicates fundamental rights and constitutional principles and seriously affects the fairness, integrity or public reputation of judicial proceedings.

The panel's opinion conflicts with the Courts of Appeals cases that adopt the miscarriage of justice exception to appeal waivers. The panel rejected Flores' miscarriage of justice argument, stating, "we repeatedly have declined to apply the miscarriage of justice exception." Slip Op. at 2. This Court should review *en banc* the panel's decision in order to bring the Fifth Circuit in line with the majority of other Courts of Appeals that have added the miscarriage of justice prong to appeal-waiver analyses.

Conclusion

This Court should grant Mr. Flores' petition for rehearing *en banc*.

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[33] *Hahn*, 359 F.3d at 1328.
[34] *Teeter*, 257 F.3d at 26.

Respectfully submitted,

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Certificate of Service

I certify that this document has been served by ECF or email on May 7, 2019, upon all counsel of record.

/s/ Daniel R. Correa
Daniel R. Correa

Certificate of Compliance

I certify that on May 7, 2019, this document was transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the Court's CM / ECF document filing system.

I certify that (1) required privacy redactions have been made, 5th Cir. R. 25.2.13; (2) the electronic submission is an exact copy of the paper document, 5th Cir. R. 25.2.1; and (3) the electronic submission has been scanned with the most recent version of commercial virus-scanning software and was reported free of viruses.

I certify that this brief complies with the type-volume limitation of Rule 35(b)(2) and 5th Cir. R. 35.5 because it does not exceed 15 pages and contains only 3,884 words, excluding material not counted under Rule 32, and complies with the typeface and style requirements of Rule 32(a) and (c)(2) because it was prepared in Microsoft Word using 14-point Times New Roman typeface.

/s/ Daniel R. Correa
Daniel R. Correa

IN THE UNITED STATES COURT OF APPEALS
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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:16-CR-279-1

Before JONES, HIGGINSON, and WILLETT, Circuit Judges.

PER CURIAM:*

Antonio Flores appeals the below-guidelines sentence of 216 months of imprisonment he received after pleading guilty, pursuant to a plea agreement, to conspiracy to possess with intent to distribute methamphetamine. He argues that the district court erred in applying certain guideline enhancements. Flores also raises a claim of ineffective assistance of counsel.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

The Government argues that the appeal is barred by the appeal waiver in the plea agreement.

We review de novo whether an appeal waiver bars an appeal. *United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). The record shows that the waiver was knowing and voluntary. *See id.* at 754-55.

Flores asserts that the appeal waiver is unenforceable because the sentencing determination was not made in accordance with existing law and the terms of the plea agreement. That argument is unavailing as the district court complied with the plea agreement by considering the guidelines calculation, and Flores's objections to it, when sentencing him.

Additionally, Flores argues that a miscarriage of justice exception to the waiver should apply and that the waiver is void as a matter of public policy because appellate review of sentences is a necessary component of the advisory Guidelines as set forth in *United States v. Booker*, 543 U.S. 220 (2005). However, we repeatedly have declined to apply the miscarriage of justice exception. *See, e.g., United States v. Arredondo*, 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 (5th Cir. 2010). Also, we have upheld broad appeal waivers like the one in post-*Booker* cases. *See, e.g., United States v. Pizzolato*, 655 F.3d 403, 405 (5th Cir. 2011).

Flores also argues that his counsel was ineffective for not objecting to the firearm enhancement. The appeal waiver contained an exception for claims of ineffective assistance of counsel. However, the claim was not developed sufficiently in the district court to evaluate this claim. We therefore decline to consider Flores's ineffective assistance of counsel claim without prejudice to his right to assert his claim on collateral review. *See United States v. Isgar*,

739 F.3d 829, 841 (5th Cir. 2014); *United States v. Higdon*, 832 F.2d 312, 314 (5th Cir. 1987).

As it is barred by the appeal waiver, the appeal is **DISMISSED**.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-10403

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ANTONIO FLORES, also known as Felipe Gallegos,

Defendant - Appellant

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

ON PETITION FOR REHEARING EN BANC

(Opinion 4/23/2019, 5 Cir., _____, _____ F.3d _____)

Before JONES, HIGGINSON, and WILLETT, Circuit Judges.

PER CURIAM:

(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

Edith H. Jones

UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
April 23, 2019
Lyle W. Cayce
Clerk

No. 18-10403
Summary Calendar

D.C. Docket No. 3:16-CR-279-1

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

ANTONIO FLORES, also known as Felipe Gallegos,

Defendant - Appellant

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

Before JONES, HIGGINSON, and WILLETT, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the appeal is dismissed.

Certified as a true copy and issued as the mandate on Jul 22, 2019

Attest: Lyle W. Cayce
Clerk, U.S. Court of Appeals, Fifth Circuit

21 U.S.C. 841

(a)Unlawful acts Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

. . . .

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

(1)

. . . .

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.