

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

CHARLES RAY FULMER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

APPENDIX

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Northern District of Texas

APPENDIX A

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 18-11642

United States Court of Appeals
Fifth Circuit

FILED

January 10, 2020

Lyle W. Cayce
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

CHARLES RAY FULMER,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:18-CR-34-1

Before HIGGINBOTHAM, JONES, and DUNCAN, Circuit Judges.

PER CURIAM:*

On May 29, 2018, Appellant Charles Ray Fulmer was charged in a superseding information with one count of attempting to transfer obscene material to a minor in violation of 18 U.S.C. § 1470. The next day, Fulmer pled guilty pursuant to a written plea agreement in which he waived his right to appeal. At Fulmer's sentencing, three of the victim's family members addressed the court and asked that Fulmer be given the maximum statutory

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

sentence. Afterwards, the government presented argument, during which counsel made the following statement:

As the Court is aware, Your Honor, the government entered into a plea agreement with Mr. Fulmer. I am—I believe I am ethically bound to not advocate for a variance or a departure, and I’ve represented to opposing counsel that I will not do that in court today. But the family has also asked me to put in context this plea agreement and the full scope of the defendant’s behavior, and I also believe that I’m ethically required to do so and I owe it to the victim’s family.

Fulmer was subsequently sentenced to the statutory maximum (120 months of imprisonment) and four years of supervised release.

Fulmer now appeals, arguing for the first time that the above-quoted statement proves the government agreed, as part of the plea agreement, not to seek an upward variance, and the government breached that agreement by putting on witnesses who asked for a maximum sentence. Based on the alleged breach, Fulmer contends his sentence should be vacated and the case remanded to a different district court judge for resentencing.¹ We disagree and affirm.

Because Fulmer did not object to the Government’s alleged breach of the plea agreement, our review is for plain error. *United States v. Casillas*, 853 F.3d 215, 217 (5th Cir. 2017). Under plain error review, a defendant must show a clear or obvious error that affected his substantial rights. *Id.* If that showing is made, this court may exercise its discretion to correct the error, provided the error “seriously affects the fairness, integrity or public reputation

¹ Although Fulmer waived his right to appeal in the plea agreement, an appeal waiver does not affect a defendant’s “ability to raise a breach argument because an alleged breach of a plea agreement may be raised despite a waiver provision.” *United States v. Roberts*, 624 F.3d 241, 244 (5th Cir. 2010). Fulmer’s appeal is therefore properly before the court.

of judicial proceedings.” *Id.* (quoting *Puckett v. United States*, 556 U.S. 129, 135, 129 S. Ct. 1423, 1429 (2009)).

“In evaluating whether a plea agreement was breached, we apply general principles of contract law.” *United States v. Hebron*, 684 F.3d 554, 558 (5th Cir. 2012). The court looks to the “language of the [plea agreement], unless ambiguous, to determine the intention of the parties.” *United States v. Long*, 722 F.3d 257, 262 (5th Cir. 2013) (quoting *In re Conte*, 206 F.3d 536, 538 (5th Cir. 2000)). Thus, when a plea agreement is unambiguous, we “generally will not look beyond the four corners of the document.” *Id.* “The defendant bears the burden of demonstrating the underlying facts that establish breach by a preponderance of the evidence.” *United States v. Roberts*, 624 F.3d 241, 246 (5th Cir. 2010). “If the Government breaches a plea agreement, the defendant is entitled to specific performance of the agreement with sentencing by a different judge.” *United States v. Munoz*, 408 F.3d 222, 226 (5th Cir. 2005).

Neither party argues the plea agreement was ambiguous. Nor do the parties dispute that the plea agreement contained no promise not to seek an upward departure. The plea agreement did, however, contain a merger clause, confirming that it represented the complete agreement between Fulmer and the government.² Fulmer confirmed this at the sentencing hearing, testifying that he had read the plea agreement, reviewed it with his attorney, was not

² The merger clause provided that

This document is a complete statement of the parties’ agreement and may not be modified unless the modification is in writing and signed by all parties. This agreement supersedes any and all other promises, representations, understandings, and agreements that are or were made between the parties at any time before the guilty plea is entered in court. No promises or representations have been made by the United States except as set forth in writing in this plea agreement.

promised anything to convince him to plead guilty outside of what was contained in the plea agreement, and all the terms of his agreement with the government were set forth in the plea agreement. Based on the four corners of the agreement, therefore, the government was not contractually prohibited from seeking an upward variance and could not have breached the plea agreement by doing so.

This would seem to be the end of the matter. But, as Fulmer points out, this court has previously declined to limit its breach inquiry to the terms of a plea agreement when evidence indicates the government made an extrinsic promise that the defendant reasonably relied on in pleading guilty. *See, e.g., United States v. Melton*, 930 F.2d 1096, 1098–99 (5th Cir. 1991). *Melton* dealt with a plea agreement that was transmitted with a cover letter from the prosecutor stating that the government would recommend a downward departure based on the defendant’s “full and complete debriefing and substantial assistance to the government.” *Id.* at 1098. The promise contained in the cover letter was not included in the plea agreement. *Id.* Although the defendant ultimately pled guilty, the government failed to seek a downward departure at sentencing, and on appeal, the defendant argued the government’s failure to do so constituted a breach of the plea agreement. *Id.* In considering the issue, this court declined to ignore the cover letter, reasoning that “the government may neither misrepresent its intentions nor renege on representations reasonably relied and acted upon by defendants and their counsel in instances such as is here presented.” *Id.*

Compare *Melton* to *Long*, where the prosecutor had emailed defense counsel before the defendant’s guilty plea and promised not to seek a leader/organizer enhancement at sentencing. *Long*, 722 F.3d at 259. As in *Melton*, this promise was not contained in the plea agreement and was not

complied with at sentencing. *Id.* at 261–62. However, *Long* distinguished the case from *Melton*, finding that “the e-mail exchange was not attached to the plea agreement, was completed weeks prior to [the defendant’s] guilty plea, and copies thereof were not transmitted contemporaneously with the plea.” *Id.* at 263–64. Pointing to the defendant’s declarations during the plea colloquy that no extrinsic promises induced his guilty plea, we concluded that “reliance on the e-mail exchange would be unreasonable in light of the plea agreement’s merger clause stating that the written plea agreement constitutes the complete agreement among the Government, [the defendant], and [the defendant’s] counsel.” *Id.* at 264.

This case is even weaker than the facts in *Long*. Assuming the government promised not to seek an upward variance, the record is unclear as to when the promise was made. Nothing in the record indicates how the promise was conveyed, what its terms were, or whether Fulmer relied on it in pleading guilty. Unlike *Melton* and *Long*, where the documents containing the promises were part of the record, we have before us only the government’s allusion to some promise during the sentencing colloquy. Further, as in *Long*, the written plea agreement included a merger clause, and Fulmer unequivocally represented to the district court before pleading guilty that he had not relied on any promises outside of those contained in the plea agreement. *See Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 1629 (1977) (“Solemn declarations in open court carry a strong presumption of verity.”). Indeed, on appeal, Fulmer does not even argue he relied on the government’s promise. Therefore, even if the government promised not to seek an upward variance, it is unreasonable to conclude that Fulmer relied on that promise in pleading guilty.

For these reasons, the government did not breach the plea agreement, and the judgement of the district court is **AFFIRMED**.

APPENDIX B

United States District Court**Northern District of Texas**

Lubbock Division

UNITED STATES OF AMERICA

v.

CHARLES RAY FULMER
Defendant.Case Number: 5:18-CR-00034-C(01)
USM No. 57045-177**JUDGMENT IN A CRIMINAL CASE**
(For Offenses Committed On or After November 1, 1987)

The defendant, CHARLES RAY FULMER, was represented by Daniel W. Hurley.

The defendant pleaded guilty to count 1 of the superseding information filed May 29, 2018. Accordingly, the court has adjudicated that the defendant is guilty of the following offenses:

<u>Title & Section</u>	<u>Nature of Offense</u>	<u>Date of Offense</u>	<u>Count Number</u>
18 U.S.C. § 1470	Attempted Transfer Of Obscene Material To A Minor	03/17/2017	1

As pronounced on December 7, 2018, the defendant is sentenced as provided in pages 1 through 4 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of \$100.00, for count 1 of the superseding information, which shall be due immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material change in the defendant's economic circumstances.

Signed this the 7th day of December, 2018.


 SENIOR DISTRICT JUDGE SAM R. CUMMINGS
 UNITED STATES DISTRICT COURT

DEFENDANT: CHARLES RAY FULMER
CASE NUMBER: 5:18-CR-00034-C(01)

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 120 months as to count 1.

The defendant is remanded to the custody of the U.S. Marshal Service.

The Court recommends incarceration at FCI Seagoville, Texas.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

DEFENDANT: CHARLES RAY FULMER
CASE NUMBER: 5:18-CR-00034-C(01)

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: 3 years.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

- ☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.
- ☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon.
- ☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer.
- ☒ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense.
- ☐ The defendant shall participate in an approved program for domestic violence.
- ☐ The defendant must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

- 1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
- 2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer.
- 3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
- 4) The defendant shall support his or her dependents and meet other family responsibilities.
- 5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.
- 6) The defendant shall notify the probation officer at least ten days prior to any change in residence or employment.
- 7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician.
- 8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.
- 9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.
- 10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.
- 11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.
- 12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.
- 13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: CHARLES RAY FULMER
CASE NUMBER: 5:18-CR-00034-C(01)

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall have no unsupervised contact with persons under the age of 18, nor shall the defendant loiter near places where children may frequently congregate. The defendant shall neither seek nor maintain employment or volunteer work at any location and/or activity where persons under the age of 18 congregate and the defendant shall not date or befriend anyone who has children under the age of 18, without prior permission of the probation officer.
2. The defendant shall neither possess nor have under his control any sexually oriented, or sexually stimulating materials of adults or children. The defendant shall not patronize any place where such material is available.
3. The defendant shall not possess, have access to, or utilize a computer or internet connection device without permission of the Court.
4. The defendant shall not utilize or possess a camera, recording device, camcorder, or other similar device during the term of supervised release, without prior approval by the probation officer.
5. The defendant shall participate in sex offender treatment services as directed by the probation officer until successfully discharged. These services may include psycho-physiological testing (i.e., clinical polygraph, plethysmograph, and the ABEL screen) to monitor the defendant's compliance, treatment progress, and risk to the community. The defendant shall contribute to the costs of services rendered (copayment) at a rate of at least \$25.00 per month.
6. The defendant shall abstain from the use of alcohol and all other intoxicants during the term of supervision.
7. The defendant must not communicate, or otherwise interact, with Jane Doe, either directly or through someone else, without first obtaining the permission of the probation officer.