

No. \_\_\_\_\_

**IN THE  
SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, 2018

\_\_\_\_\_

Daverne Michael Foy, *Petitioner*,

vs.

United States of America, *Respondent*.

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On Petition for a Writ of Certiorari to  
the United States Court of Appeals for the Fifth Circuit

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**APPENDIX TO PETITION FOR A WRIT OF CERTIORARI**

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# Appendix A

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

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No. 17-50908  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

November 29, 2018

Lyle W. Cayce  
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAVERNE MICHAEL FOY,

Defendant - Appellant

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Appeal from the United States United States District Court  
for the Western District of Texas  
USDC No. 1:17-CR-172-1

---

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:\*

Daverne Michael Foy appeals the 90-month, above-guidelines sentence he received upon pleading guilty to conspiracy to distribute and possess with intent to distribute 100 kilograms or more of marijuana. Foy asserts that the district court plainly erred by applying an upward variance based on uncharged criminal conduct. He also contends that his sentence is

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

No. 17-50908

procedurally and substantively unreasonable. The Government asks us to enforce the waiver, contained in the plea agreement, of Foy's right to appeal his sentence "on any ground, including . . . the determination of any period of confinement[.]"

"[A] defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992). We review de novo whether the appeal waiver bars Foy's appeal. *See United States v. Keele*, 755 F.3d 752, 754 (5th Cir. 2014). In so doing, we "conduct a two-step inquiry: (1) whether the waiver was knowing and voluntary and (2) whether the waiver applies to the circumstances at hand, based on the plain language of the agreement." *United States v. Bond*, 414 F.3d 542, 544 (5th Cir. 2005).

Foy does not argue that his appeal waiver was in any way unintelligent or involuntary and has therefore waived that issue. *See United States v. Reagan*, 596 F.3d 251, 254 (5th Cir. 2010). In any event, the record reflects that Foy's waiver of his appeal rights was "a voluntary, knowing, and intelligent act." *United States v. Guerra*, 94 F.3d 989, 995 (5th Cir. 1996). Furthermore, the waiver applies to the circumstances at issue in this case; the sole exception, permitting an appeal of a sentence exceeding the statutory maximum, is inapplicable. *See* 21 U.S.C. § 841(b)(1)(B)(vii). Although the district court wrongly advised Foy that he could appeal his above-guidelines sentence notwithstanding the waiver, it did so only at sentencing; as such, the court's misstatement "ha[d] no effect on the validity of the waiver." *United States v. Gonzalez*, 259 F.3d 355, 358 (5th Cir. 2001).

Because Foy made an informed and voluntary waiver of his right to appeal his sentence on the grounds he now advances, the Government is entitled to enforcement of the plea agreement. *See United States v. Story*, 439 F.3d 226, 230 n.5 (5th Cir. 2006). Accordingly, Foy's appeal is DISMISSED.

# Appendix B

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

\_\_\_\_\_  
No. 17-50908  
\_\_\_\_\_

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

DAVERNE MICHAEL FOY,

Defendant - Appellant



A True Copy  
Certified order issued Jan 08, 2019

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

\_\_\_\_\_  
Appeal from the United States District Court  
for the Western District of Texas  
\_\_\_\_\_

**ON PETITION FOR REHEARING**

Before HIGGINBOTHAM, ELROD, and DUNCAN, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

A handwritten signature in black ink, appearing to read "SKD", followed by a horizontal line.

\_\_\_\_\_  
STUART KYLE DUNCAN  
UNITED STATES CIRCUIT JUDGE

# Appendix C



1 UNITED STATES DISTRICT COURT  
2 WESTERN DISTRICT OF TEXAS  
3 AUSTIN DIVISION

4 UNITED STATES OF AMERICA ) Docket No. A 17-cr-172(1) SS  
5 )  
6 vs. ) Austin, Texas  
7 )  
8 DAVERNE MICHAEL FOY ) September 29, 2017

9 TRANSCRIPT OF SENTENCING  
10 BEFORE THE HONORABLE SAM SPARKS

11 APPEARANCES:

12 For the United States: Mr. Gregg N. Sofer  
13 Assistant U.S. Attorney  
14 816 Congress Avenue, Suite 1000  
15 Austin, Texas 78701

16 For the Defendant: Mr. Michael M. Burke  
17 Peek & Toland  
18 1214 East 7th Street  
19 Austin, Texas 78702

20 Court Reporter: Ms. Lily Iva Reznik, CRR, RMR  
21 501 West 5th Street, Suite 4153  
22 Austin, Texas 78701  
23 (512) 391-8792

24  
25 Proceedings reported by computerized stenography, transcript  
produced by computer.

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)

10:37:12 1 THE COURT: 17-CR-172, United States vs. Daverne Foy.

10:37:16 2 MR. SOFER: Gregg Sofer for the United States.

10:37:20 3 MR. BURKE: Good morning, your Honor.

10:37:21 4 Michael Burke for Mr. Foy.

10:37:23 5 THE COURT: Mr. Burke.

10:37:28 6 If you'll tell me your full name, please, sir.

10:37:31 7 THE DEFENDANT: Daverne Michael Foy.

10:37:33 8 THE COURT: Your birth date?

10:37:35 9 THE DEFENDANT: 11-8-70.

10:37:36 10 THE COURT: And have you had the opportunity to sit

10:37:38 11 down and review what they call a presentence report prepared by

10:37:41 12 the probation department in your case with Mr. Burke?

10:37:44 13 THE DEFENDANT: Yes, sir.

10:37:45 14 THE COURT: And have you told him everything that you

10:37:48 15 know about those representations in that report so that he could

10:37:52 16 give you his best advice?

10:37:53 17 THE DEFENDANT: Yes, sir.

10:37:54 18 THE COURT: And are you satisfied with his legal

10:37:57 19 representation?

10:37:58 20 THE DEFENDANT: Yes, sir.

10:37:58 21 THE COURT: All right. The guideline range calculated

10:38:07 22 by the probation department is 87 to 108 months, with the

10:38:12 23 information that Mr. Foy is 46 years old. His criminal record

10:38:22 24 began in 1991 with conspiracy to distribute crack cocaine from

10:38:31 25 January of 2011 to April of 2013. In that same timeframe, he was

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10:38:38 1 convicted of possession of crack cocaine, possession of  
10:38:41 2 distributing marihuana and a firearm. He's had six other  
10:38:47 3 arrests.

10:38:48 4 He has five children by five different wives and a  
10:38:54 5 girlfriend that doesn't have a child yet. I don't have any  
10:39:00 6 information on supporting those children. He's obviously smart,  
10:39:05 7 high school graduate, went to Huston-Tillotson for a while and  
10:39:10 8 he's had some computer programming.

10:39:17 9 I have no objections from the government. I have three  
10:39:20 10 objections from the defense. The obstruction of justice element  
10:39:29 11 of the probation officer's calculation, and the acceptance of  
10:39:35 12 responsibility, and the adult criminal convictions.

10:39:46 13 So, Mr. Burke, do you wish to produce any evidence or  
10:39:49 14 just argue on those cases?

10:39:52 15 MR. BURKE: Besides the memorandum, your Honor, just  
10:39:54 16 brief oral argument, and I think we could move through those  
10:39:57 17 objections fairly quickly.

10:39:58 18 THE COURT: All right.

10:40:00 19 MR. BURKE: First, your Honor, number three on the  
10:40:02 20 objection for the adult category criminal history, that objection  
10:40:04 21 obviously is stated well in the presentence investigation report,  
10:40:07 22 so we're going to be waiving that objection.

10:40:09 23 THE COURT: All right.

10:40:10 24 MR. BURKE: With regard to --

10:40:11 25 THE COURT: Wait.

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10:40:12 1 MR. BURKE: Yes, sir.

10:40:13 2 THE COURT: We've gotta slow down. I'm a little slow.

10:40:16 3 MR. BURKE: Sorry, Judge.

10:40:16 4 THE COURT: That's all right. The record will show  
10:40:18 5 that it is waived, but I still must make a determination, so I  
10:40:24 6 overrule it for the record.

10:40:26 7 MR. BURKE: Yes, sir.

10:40:27 8 THE COURT: But it will show it's waived. Okay.

10:40:31 9 MR. BURKE: Thank you, Judge.

10:40:32 10 With regard to the first and second objection, one  
10:40:35 11 thing needs to be straightened out with the Court that we've  
10:40:37 12 stipulated to with the government on Mr. Sofer's behalf. If he  
10:40:41 13 needs to say anything after I do, please do so. But the  
10:40:44 14 obstruction of justice stems from two incidents and it's  
10:40:48 15 stipulated that Mr. Foy, after being indicted and having being  
10:40:54 16 appointed counsel prior to that, had been notified by his counsel  
10:40:57 17 that he has been indicated and a date to turn himself in. The  
10:41:01 18 date came and he did not turn himself in; instead, he went on a  
10:41:07 19 trip to the United States Virgin Islands to see his family, and  
10:41:11 20 on May 2nd, came back and was arrested at the airport.

10:41:15 21 Is that correct?

10:41:16 22 THE COURT: It's basically what it says.

10:41:18 23 MR. BURKE: Correct. Okay.

10:41:20 24 But, Judge, you know, we don't believe that that rises  
10:41:24 25 to the level of obstruction of justice and it's based on two

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10:41:28 1 events. The timeframe between these events calculate four years  
10:41:32 2 from 2011 to --

10:41:33 3 THE COURT: That's why it's --

10:41:36 4 MR. BURKE: Sir?

10:41:36 5 THE COURT: That's why it's a good objection.

10:41:40 6 MR. BURKE: Yes, sir. Thank you, Judge.

10:41:42 7 Just to be a little bit more into the details is that  
10:41:47 8 the first event when he was served a subpoena from the grand jury  
10:41:50 9 two years after this criminal episode had stopped, he was  
10:41:54 10 appointed counsel, brought into court after the government sought  
10:41:58 11 a show cause hearing and then, an affidavit for warrant for his  
10:42:02 12 arrest. He was brought to court, provided counsel, provided  
10:42:05 13 information that the subpoena had sought and was released. He  
10:42:08 14 was not found in contempt. And two years after that date, Judge,  
10:42:12 15 is when he's indicted, which is, as your Honor's aware, four  
10:42:14 16 years from the date of this enterprise stopping.

10:42:18 17 And based on what we've submitted in our memorandum, I  
10:42:23 18 don't believe there's anything that the government could point to  
10:42:25 19 on a bad faith, a bad morale episode of Daverne while he was out  
10:42:30 20 during this time --

10:42:31 21 THE COURT: Well, let's think about that so you can  
10:42:34 22 respond to it. He found out -- I'm sure he was not happy about  
10:42:38 23 it. He found out he'd been indicted.

10:42:41 24 MR. BURKE: Yes, sir.

10:42:41 25 THE COURT: He's got a criminal history. His lawyer

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10:42:44 1 got the impression that he was going to turn himself in, so he  
10:42:48 2 told the U.S. Attorney or the marshal, whoever, he's going to  
10:42:57 3 turn himself in. Well, he wasn't going to turn in. He took a  
10:43:00 4 flight and he went away. And why he came back, it's just his own  
10:43:06 5 personal decision, I don't know, but I don't know how -- what is  
10:43:15 6 worse on the objection. Then when you just don't make yourself  
10:43:30 7 available intentionally, that's the problem.

10:43:34 8 Now, the next objection you have and I'm not over --  
10:43:39 9 I'm not ruling on it right now. The fact that you think you  
10:43:46 10 ought to get acceptance of responsibility, I agree with you.  
10:43:53 11 He's just impolite is what he is. But his plea agreement, he  
10:44:00 12 accepts the responsibility and he swears to it. The fact that he  
10:44:03 13 doesn't follow instructions very well, as 90 percent people do  
10:44:08 14 and get back to the probation officer and she gets her report out  
10:44:13 15 before he does any acceptance with her, it's just a matter, to  
10:44:19 16 me, of manners. But there's no question that he accepted his  
10:44:23 17 responsibility when he entered his plea and his plea agreement  
10:44:29 18 expressly says it. So that's no problem. So I sustain two.  
10:44:35 19 Three is waived or overruled.

10:44:38 20 And one, I'll hear arguments on the government.

10:44:42 21 MR. SOFER: I just want to make sure I understand. So  
10:44:45 22 your Honor is overruling the obstruction? Or that's the one you  
10:44:49 23 want to hear from the government.

10:44:50 24 THE COURT: No. The Court's overruling his acceptance  
10:44:54 25 of responsibility -- the failure to give him acceptance of

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10:44:57 1 responsibility.

10:44:57 2 MR. SOFER: The Court is sustaining that objection and  
10:45:02 3 giving him acceptance.

10:45:02 4 THE COURT: Yes.

10:45:03 5 MR. SOFER: Yes, sir.

10:45:04 6 So -- and your Honor pointed out the most salient  
10:45:07 7 points of this, but, I mean, it is true, it's a long -- it is a  
10:45:10 8 long timeline, but at the first stop in the timeline, he's given  
10:45:15 9 a grand jury subpoena to appear before the grand jury, that was  
10:45:18 10 actually recorded by the agent who gave it to him. There was  
10:45:22 11 nothing ambiguous about the fact that he had been subpoenaed to  
10:45:24 12 come to the grand jury, and he simply blew it off. And he  
10:45:27 13 completely blew off the subpoena, eventually arrested, brought  
10:45:31 14 before the court --

10:45:32 15 THE COURT: And so did his codefendant --

10:45:34 16 MR. SOFER: Yes, sir.

10:45:34 17 THE COURT: -- by the way. They got together and  
10:45:36 18 decided they weren't going to go.

10:45:38 19 MR. SOFER: Absolutely.

10:45:39 20 And as the Court points out, so he knows there's  
10:45:41 21 something going on. I was there in the courtroom. The fact of  
10:45:45 22 the matter is, I remember Judge Lane telling him, I'm probably  
10:45:48 23 going to see you back here again. Yes, it took a long time, but,  
10:45:50 24 again, there was nothing ambiguous about, and there's no factual  
10:45:55 25 dispute about, the fact he was notified then that he'd been

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10:45:58 1 indicted for a serious crime and that he just, again, blew it off  
10:46:02 2 and, on top of that, got on an airplane, left the continental  
10:46:05 3 United States. Whether he was actually going to --

10:46:08 4 THE COURT: And he also failed to comply with the  
10:46:12 5 instructions of his counsel.

10:46:13 6 MR. SOFER: Yes, sir. To me, that -- and we've looked  
10:46:17 7 at the -- done some research on the law. There's no circuit --  
10:46:23 8 the Fifth Circuit, there's really very little law about this at  
10:46:25 9 all. And the only other circuit that has a lot of law was the  
10:46:28 10 Seventh Circuit seems to give the Court plenty of discretion.  
10:46:31 11 Here, there's nothing that -- it's in the discretion of the  
10:46:33 12 Court, and we think that this particular objection should be  
10:46:35 13 overruled.

10:46:37 14 THE COURT: Mr. Burke.

10:46:40 15 MR. BURKE: Yes, Judge.

10:46:41 16 Mr. Sofer points out, yes, there's not much case law on  
10:46:44 17 this in the Fifth Circuit, although they distinguish between  
10:46:47 18 obstructive and nonobstructive conduct stating two factors:  
10:46:49 19 Whether the conduct presents an inherently high risk that justice  
10:46:52 20 will be obstructed; and whether the conduct requires a  
10:46:54 21 significant amount of planning, as opposed to being the result of  
10:46:57 22 a spur-of-the-moment-decision setting for merely panic, confusion  
10:47:01 23 or mistake.

10:47:02 24 Judge, using that approach out of the Fifth Circuit,  
10:47:04 25 you know, when you look at his conduct, there is no inherently

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10:47:08 1 high risk of him obstructing justice. He was -- specifically  
10:47:12 2 with the first incident when he was served with the grand jury  
10:47:16 3 subpoena that said, you have an invitation to, it's a subpoena.  
10:47:18 4 It's a lawful court order.

10:47:20 5 He was appointed counsel at the time. After he was  
10:47:23 6 brought to court, he provided the information. I don't believe  
10:47:26 7 that that's obstructing justice. I think more so, the Court is  
10:47:29 8 really concerned about his flight to the United States Virgin  
10:47:32 9 Islands. That's why we submitted as Exhibit 1. And Exhibit 1 is  
10:47:36 10 his receipt, so to say, that he had purchased it almost a month  
10:47:40 11 prior to any contact by counsel from previous court-appointed  
10:47:44 12 counsel. And all of a sudden, he's supposed to, yes, upend his  
10:47:47 13 life and turn himself in at that time, but it had been two years.  
10:47:51 14 And so, that's why we don't believe that that would show another  
10:47:54 15 obstruction of justice to where he came back the day that the  
10:47:58 16 flight said he was coming back.

10:47:59 17 Now, I'm not saying he presented himself at the airport  
10:48:02 18 and said, I'm here to present myself to the Western District and  
10:48:04 19 turn myself in. I'm not saying that's clear.

10:48:06 20 THE COURT: Inadvertently, he was because they were  
10:48:09 21 waiting for him.

10:48:10 22 MR. BURKE: Luckily, he did. But, you know, if the  
10:48:12 23 government was so, you know, zealously looking to go get him,  
10:48:18 24 he'd been here since 2011. They know where he lives, they know  
10:48:21 25 where he worked. If he took off on a flight to the Virgin

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10:48:26 1 Islands, they knew where he was, because like your Honor said,  
10:48:28 2 they were there to get him. And we just don't feel that that's  
10:48:31 3 high enough to warrant a plus-two increase based on obstruction  
10:48:34 4 of justice, your Honor.

10:48:46 5 THE COURT: How long was he gone?

10:48:48 6 MR. SOFER: On the trip, your Honor?

10:48:49 7 THE COURT: Yeah.

10:48:50 8 MR. SOFER: Left the day after -- I believe, left the  
10:48:52 9 day after he was indicted and returned on May 2nd.

10:48:56 10 MR. BURKE: Nine days, sir.

10:48:57 11 THE COURT: Nine days. And, of course, he called and  
10:49:04 12 told his lawyer and the government that he wasn't going to be  
10:49:07 13 there.

10:49:08 14 MR. SOFER: No, sir.

10:49:11 15 And not only that, but I'd proffer to the Court that we  
10:49:14 16 found his jail call which indicates his flight companion didn't  
10:49:18 17 know he had any kind of trouble, which, to me, would indicate  
10:49:21 18 that the woman that he was living with didn't have any knowledge  
10:49:26 19 he was turning himself in. So, to me, that indicates he's very  
10:49:29 20 unlikely to have turned himself in on May 2nd, anyway.

10:50:35 21 THE COURT: Okay. I'm going to sustain the objection  
10:50:37 22 to -- begrudgingly, I will say. I know it was intentional. You  
10:50:46 23 know, it's just like he's not involved in the earlier  
10:50:49 24 methamphetamines and we all know he was up to his neck in it, but  
10:50:55 25 he just laid that off on somebody else. So that will drop it

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10:50:59 1 down, what.

10:51:01 2 PROBATION OFFICER: Fifty-one to 63 months, your Honor,  
10:51:04 3 down to base offense level of 23. For a total offense level of  
10:51:10 4 23.

10:51:10 5 THE COURT: Base of 23?

10:51:11 6 PROBATION OFFICER: A total offense level of 23.

10:51:14 7 THE COURT: So if we knock out the -- my math's not  
10:51:22 8 that good.

10:51:22 9 PROBATION OFFICER: So a base offense level of 24 plus  
10:51:25 10 two for the weapon, and then, minus three for acceptance for a  
10:51:30 11 total of 23, 51 to 63 months.

10:51:35 12 THE COURT: Okay. With that -- those two rulings,  
10:51:54 13 then, do you know of any reason, Mr. Burke, we shouldn't proceed  
10:51:57 14 with sentencing?

10:51:58 15 MR. BURKE: No, sir.

10:51:58 16 THE COURT: Government have any reason to not proceed?

10:52:02 17 MR. SOFER: No, your Honor.

10:52:03 18 THE COURT: Mr. Foy, before I decide what to do with  
10:52:20 19 you, you have the right to say anything that you wish. I'll be  
10:52:23 20 glad to listen to anything you'd like to say.

10:52:29 21 THE DEFENDANT: I just like to say I respect the Court,  
10:52:37 22 respect the PSI, respect the probation officer. I appreciate my  
10:52:42 23 counsel. I'd like to say forgive me on my misconduct. And  
10:52:54 24 what's going on in the Virgin Islands right now, with all the  
10:52:58 25 destruction, my mind is really worried about my family. And I

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10:53:09 1 accept my responsibility, appreciate the patience that my family  
10:53:17 2 have given me, my friends, fiancé, my children.

10:53:25 3 During those years, I've been working so hard. I've  
10:53:27 4 been working 10, 12-hour shifts. I also was going to Atlanta and  
10:53:33 5 teaching kids. That's where I was before all of this happened.  
10:53:41 6 I made a mistake and I regret everything. I'm just looking  
10:53:50 7 forward for positive when I get out. Thank you, your Honor.

10:53:59 8 THE COURT: Mr. Burk.

10:54:00 9 MR. BURKE: Nothing else, your Honor.

10:54:04 10 THE COURT: Government have anything to say?

10:54:05 11 MR. SOFER: Your Honor pointed out something before and  
10:54:07 12 I think it bears mentioning again, which is that now the  
10:54:12 13 defendant's facing pretty close to the statutory minimum in this  
10:54:17 14 case and that the Court has seen the other facts that relate to  
10:54:20 15 the indictment and the indictment of his codefendant, as well,  
10:54:24 16 and Mr. Foy did avoid, just barely, I'll have to say, being  
10:54:28 17 indicted for much more serious offenses. But he's got --

10:54:31 18 THE COURT: That's on your book.

10:54:33 19 MR. SOFER: It is. And I'm not suggesting that the  
10:54:37 20 Court sentence him for crimes that he's not been charged with. I  
10:54:42 21 think the circumstances, though, are important. And, again, the  
10:54:45 22 defendant has managed to get himself quite a good deal, and I  
10:54:49 23 recommend the higher end of the guidelines.

10:54:51 24 THE COURT: Probation have anything they want to say?

10:55:03 25 PROBATION OFFICER: No, your Honor.

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10:55:03 1 THE COURT: Anybody wish to speak at this sentencing?

10:55:08 2 The thing that bothers me, Mr. Foy, more than anything

10:55:16 3 else -- you make a good statement about what you've been doing

10:55:17 4 and whatnot, but what bothers me is you were doing the same thing

10:55:23 5 in 1990 and you got a good break. You got a sentence that could

10:55:31 6 have given you a lot more, 97 months. All the rest was within

10:55:44 7 the 97, and then, you got a break from the Congress, they reduced

10:55:46 8 your sentence. And then, you violated the terms of your

10:55:57 9 supervised release, brought it in to me, and I continued you or

10:56:02 10 didn't send you back to the penitentiary, and then, you do the

10:56:09 11 same thing again. It's identical with the same person, actually,

10:56:21 12 but that doesn't have anything to do with this sentence. It's

10:56:24 13 just obvious. Just the same person.

10:56:29 14 That's what bothers me. Then I look at the

10:56:37 15 requirements that I'm supposed to consider in the sentencing and

10:56:45 16 the nature and circumstance of the offense, well, distributing

10:56:54 17 all of that kilos of marihuana is bad. Your history and

10:57:03 18 characteristics, when you consider this offense, it's bad. It's

10:57:09 19 the same thing you went to the penitentiary before and you just

10:57:12 20 continued it. The seriousness of the offense, it's one of the --

10:57:18 21 it's a serious offense. Drug running and drug selling is one of

10:57:25 22 the real problems we have in the country, and it doesn't show any

10:57:29 23 respect for the law for you to do the same thing again, as soon

10:57:33 24 as you are through with the supervision of the first one.

10:57:38 25 To figure a just punishment, well, that's something

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10:57:41 1 we're discussing. To do a deterrence to criminal law and to  
10:57:47 2 protect the public from future crimes. Here, I've got a pattern  
10:57:53 3 that you've done, same thing, same way, distributing the drugs.  
10:57:59 4 How in the world do I know you're not going to try it again?  
10:58:03 5 You're 46 years old. You're young and that's all that you've  
10:58:10 6 been doing. You're smart. You should be in some sort of good  
10:58:16 7 employment, you know, computer programming education as well as  
10:58:20 8 having -- smart. Just one of those things that troubles me.

10:58:31 9 Do you have any response to that?

10:58:36 10 THE DEFENDANT: When I was young back then and I was  
10:58:46 11 avoiding it this time, I helped out my family and I should have  
10:58:54 12 said no, but I always been in trouble for helping people. And my  
10:58:58 13 grandmother always said, your kindness going to be your weakness.  
10:59:05 14 So I just need to learn to say no.

10:59:07 15 THE COURT: So it's your kindness that helps you for  
10:59:10 16 money distribute drugs?

10:59:13 17 THE DEFENDANT: Well, I just made a mistake.

10:59:17 18 THE COURT: Okay. Well, the other thing that concerns  
10:59:34 19 me is the timeframe of the government. But it doesn't -- you  
10:59:47 20 know -- anyway, pursuant to -- it's not just a mistake when  
10:59:54 21 you're sitting there with loaded gun.

10:59:59 22 When I take those considerations of 18 United States  
11:00:04 23 Code 3553(a) into consideration, your previous history, the fact  
11:00:12 24 that you are again with a gun in your distribution, I sentence  
11:00:23 25 you to 90 months in the custody of the United States Bureau of

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11:00:28 1 Prisons, followed by four-year term of supervised release.

11:00:32 2 On the supervised release, is it four or five years?

11:00:56 3 PROBATION OFFICER: Supervised release?

11:00:58 4 THE COURT: Yeah.

11:00:59 5 PROBATION OFFICER: Four to five.

11:00:59 6 THE COURT: Four to five. I'm going to place him on

11:01:02 7 five.

11:01:03 8 PROBATION OFFICER: Four years till life, your Honor.

11:01:05 9 THE COURT: Five years of supervised release. Within

11:01:09 10 72 hours of your release from the custody of the Bureau of

11:01:12 11 Prisons, you will report in person to the probation officer in

11:01:16 12 the district where you were released. On supervised release, you

11:01:20 13 will not commit any federal, state or local crime, and shall

11:01:24 14 comply with the mandatory and standard conditions adopted by the

11:01:28 15 Court, this district on November 28th, 2016, including that you

11:01:34 16 will submit your person, property, house, residence, vehicle,

11:01:37 17 papers, computers, and other electronic communication, or data

11:01:41 18 storage devices, or media, or office to a search conducted by the

11:01:46 19 United States probation officer. Failure to submit to a search

11:01:50 20 may be grounds of revocation.

11:01:52 21 The defendant will warn all occupants the premises may

11:01:55 22 be subject to searches pursuant to this condition. The probation

11:01:59 23 officer may conduct a search under the condition only when

11:02:03 24 reasonable suspicion exists that the defendant has violated a

11:02:07 25 condition of supervision or violation of the law. Any search

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11:02:11 1 must be conducted at a reasonable time and in a reasonable  
11:02:15 2 manner. And the reason for that special condition, of course, is  
11:02:19 3 that you have a history of selling drugs.

11:02:24 4           You'll participate in a substance abuse program and  
11:02:27 5 follow the rules and regulations of that program, will include  
11:02:31 6 testing and examination during and after program completion to  
11:02:35 7 ensure that you don't revert to the use of drugs. The probation  
11:02:40 8 officer will supervise the participation of the program, that is,  
11:02:46 9 the provider, location, modality, duration and intensity. During  
11:02:50 10 the treatment, the defendant will abstain from the use of all  
11:02:56 11 addictive drugs and alcohol and artificial drugs. And you will  
11:03:05 12 pay the cost of the program that you are able to pay.

11:03:17 13           You'll forfeit all right, title and interest to the  
11:03:21 14 Smith & Wesson, .40 caliber, semiautomatic pistol, Serial No.  
11:03:26 15 DSH1428; and the North American Arms, Model Mini Revolver, .22  
11:03:32 16 caliber pistol, Serial No.V19138; and all of the firearms,  
11:03:39 17 ammunition and accessories involved in the use of this offense  
11:03:44 18 when you were arrested.

11:03:47 19           Any other special provisions?

11:03:52 20           PROBATION OFFICER: No, your Honor.

11:04:05 21           THE COURT: I'm going to seal the presentence  
11:04:08 22 investigation and file it sealed. Nobody can come in and read  
11:04:11 23 about you, Mr. Foy. In the event of any appeal, it becomes part  
11:04:25 24 of the record.

11:04:29 25           THE DEFENDANT: Yes.

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11:04:31 1 THE COURT: And the government may use their copies.  
11:04:35 2 And I'm giving you a letter that tells you, you have 14  
11:04:38 3 days to file a notice of appeal, that is, to tell Mr. Burke to  
11:04:41 4 file a notice of appeal if you wish to appeal any of this. You  
11:04:45 5 have a plea agreement, but I'm sentencing you over the applicable  
11:04:53 6 guidelines that I've calculated. So regardless of the plea  
11:04:56 7 agreement, you have the right to appeal. All you have to do is  
11:04:59 8 tell your lawyer to file a notice of appeal within 14 days, and  
11:05:03 9 he will do so.  
11:05:07 10 Anything further, Mr. Burke?  
11:05:09 11 MR. BURKE: No, sir.  
11:05:11 12 MR. SOFER: I may have missed it, your Honor, but I  
11:05:13 13 think you did not discuss the fine or the mandatory assessment.  
11:05:15 14 THE COURT: There will be no fine in the case, but I  
11:05:17 15 do, of course, impose the \$100 mandatory assessment under the  
11:05:23 16 Victims of Crime Act, which Mr. Foy must pay immediately. Thank  
11:05:28 17 you.  
11:05:28 18 MR. BURKE: Thank you, your Honor.  
11:05:29 19 THE COURT: Thank you. Thank you for taking this case,  
11:05:31 20 Mr. Burke.

21 (End of proceedings.)

22

23

24

25

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)

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UNITED STATES DISTRICT COURT)  
WESTERN DISTRICT OF TEXAS )

I, LILY I. REZNIK, Certified Realtime Reporter, Registered Merit Reporter, in my capacity as Official Court Reporter of the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

WITNESS MY OFFICIAL HAND this the 2nd day of January, 2018.

/s/Lily I. Reznik  
LILY I. REZNIK, CRR, RMR  
Official Court Reporter  
United States District Court  
Austin Division  
501 W. 5th Street, Suite 4153  
Austin, Texas 78701  
(512) 391-8792  
Certification No. 4481  
Expires: 12-31-18

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U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)

# Appendix D

UNITED STATES DISTRICT COURT

Sam Sparks  
Judge


Western District of Texas  
501 West Fifth Street, Suite 4120  
Austin, Texas 78701-3822

512/916-5230

FILED

September 29, 2017

SEP 29 2017

CLERK, U.S. DISTRICT CLERK  
WESTERN DISTRICT OF TEXAS  
BY  DEPUTY

Mr. Daverne Foy

Re: United States of America v. Daverne Foy; No. A-17-CR-172(1)-SS, in the United States District Court for the Western District of Texas, Austin Division

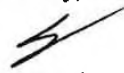
Dear Mr. Foy:

You are advised that you may appeal the sentence imposed by this Court under certain circumstances set out in Title 18 U.S.C. § 3742(a)(1). Under Rule 4(b) of the Federal Rules of Appellate Procedure, a notice of appeal must be filed with the United States District Clerk within fourteen (14) days after the entry of the judgment or order appealed from.

If you desire him to do so, the District Clerk will, upon request, prepare and file the notice of appeal on your behalf, but, of course you must make the request within the fourteen (14) day period indicated. In addition to stating that you are taking the appeal, your notice of appeal must designate the portions of the proceedings not already on file which you deem necessary that the reporter include in the record. Such designation must, of course, in any event be made within fourteen (14) days after filing the notice of appeal. See Rule 10(b), Federal Rules of Appellate Procedure.

If you were represented at trial by employed counsel, but you are unable to pay the cost of the appeal, you have the right to apply to the Court for leave to appeal in forma pauperis, in accordance with Rule 24(a), Federal Rules of Appellate Procedure. Your application to appeal in forma pauperis must be filed with the Clerk within the fourteen (14) day period, otherwise, it may not be considered by the Court. If, however, you were permitted to proceed in the district court as one who is financially unable to obtain adequate defense (that is, if the court appointed an attorney to represent you at trial), then you may proceed on appeal in forma pauperis without further authorization, unless the Court certifies in writing that you are not entitled to so proceed. In either case, you must also file or request the District Clerk to file the notice of appeal within the fourteen (14) day period provided by Rule 4(b), Federal Rules of Appellate Procedure.

Sincerely,

  
Sam Sparks

lm

17-50908.93