APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11024

A True Copy
Certified order issued Mar 07, 2019

Tyke W. Cayce

Clerk, U.S. Court of Appeals, Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARCUS ARENELL EVANS, also known as MD,

Defendant - Appellant

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

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that Appellee's unopposed alternative motion to extend time to file its brief until thirty (30) days from the Court's denial of the motion to dismiss the appeal is DENIED as unnecessary.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-11024

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

MARCUS ARENELL EVANS, also known as MD,

Defendant - Appellant

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

Before JONES, ELROD, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that Appellee's opposed motion to dismiss the appeal is GRANTED.

IT IS FURTHER ORDERED that Appellee's unopposed alternative motion to extend time to file its brief until thirty (30) days from the Court's denial of the motion to dismiss the appeal is DENIED as unnecessary.

APPENDIX C

Federal Rule of Criminal Procedure 11 provides:

(a) Entering a Plea.

(1) *In General.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination,

to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. §3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or

related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by Federal Rule of Evidence 410.

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

APPENDIX D

21 U.S.C. § 841 provides:

(a) Unlawful acts. Except as authorized by this title, 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 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], 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 1999 [21 USCS § 812 note]), 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, United States Code, 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, United States Code, 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.

APPENDIX E

18-11024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff - Appellee

v.

MARCUS ARENELL EVANS,
also known as MD,
Defendant - Appellant

Appeal from United States District Court
For the Northern District of Texas, Dallas Division
District Court No. 3:16-CR-373-M-25

UNITED STATES' MOTION TO DISMISS THE APPEAL OR, ALTERNATIVELY, FOR AN EXTENSION OF TIME

The government moves to dismiss Evans's appeal because he waived his right to bring it. He acknowledges the waiver, does not dispute that it was knowing and voluntary, and does not invoke any of its limited exceptions. Instead, he claims that the waiver is "unconstitutional and void as against public policy to the extent it prevents review of his sentence for reasonableness." (Brief at 11.) Evans also argues that the waiver is not enforceable under contact principles for failure of a condition precedent and

consideration. (*Id.*) The record and binding case law, however, foreclose his arguments. Thus, the Court should hold Evans to the benefit of his bargain, enforce the waiver, and dismiss this appeal. Should the Court deny this motion, the government requests a 30-day extension to file a merits brief.

1. In exchange for the government not bringing additional charges, Evans pleads guilty to a drug offense and waives his appellate rights.

Evans, along with many codefendants, was named in a superseding indictment. (ROA.9.) The indictment charged Evans with Conspiracy to Distribute a Controlled Substance, in violation of 21 U.S.C. §§ 846, 841(a)(1) & (b)(1)(C). (ROA.10-11.) Evans pleaded guilty pursuant to a plea agreement. (ROA.82, 109-15.)

Evans's plea agreement included a waiver of his right to appeal from his conviction and sentence. The waiver provides:

> The defendant waives the defendant's rights, conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742, to appeal from his conviction, sentence, fine and order of restitution or forfeiture in an amount to be determined by the district court. The defendant further waives the defendant's right to contest the conviction, sentence, fine and order of restitution or forfeiture in any collateral proceeding, including proceedings under 28 U.S.C. § 2241 and 28 U.S.C. § 2255. The defendant, however, reserves the rights (a) to bring a direct appeal of (i) a sentence exceeding the statutory maximum punishment, or (ii) an arithmetic error at sentencing; (b) to challenge

> the voluntariness of his plea of the defendant's plea of guilty or this waiver, and (c) to bring a claim of ineffective assistance of counsel.

(ROA.113.)

Evans acknowledged in his plea agreement that (1) the court would impose his sentence after consideration of the sentencing guidelines; (2) "no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case"; (3) he would "not be allowed to withdraw his plea if his sentence is higher than expected"; and (4) "he fully underst[ood] that the actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the Court. (ROA.110-11.) In exchange for Evans's plea and appellate waiver, the government agreed not to bring any additional charges. (ROA.112.)

Relevant here, the presentence report applied a two-level upward adjustment for maintaining a premises for the manufacture or distribution of controlled substances under USSG § 2D1.1(b)(12). (ROA.129.) The district court adopted the findings in the presentence report and sentenced Evans at the bottom of the guideline range—84 months' imprisonment. (ROA.45, 102-03.)

2. The plea agreement is valid and bars this appeal.

Evans acknowledges the appellate waiver in his brief. (Brief at 4, 11.) He does not challenge its validity or attempt to invoke any of the waiver's

limited exceptions. (*See id.*) The government agrees that the waiver is valid, enforceable, and covers the issues raised on appeal. The sentencing issues he raises—whether the district court erred by applying an enhancement for maintaining a drug-involved premises and in calculating the applicable drug amount—do not fall within the limited exceptions to his waiver.

Despite Evans's concessions, he seeks to avoid his bargained-for appellate waiver by claiming it is unconstitutional, void as against public policy, and invalid under contract principles for failure of a condition precedent and consideration. (Brief at 16-24.) But his arguments are wholly undermined by binding case law and the record. First, this Court has repeatedly rejected the contention that knowing and intelligent waivers of appellate rights are unconstitutional or otherwise unenforceable. *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir.1992) ("We hold that a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence."); *United States v. Hammeren*, 518 F. App'x 296, 297 (5th Cir. 2013) (holding that the appellant's "remaining contentions challenging the validity of the appeal waiver are foreclosed by *United States v. Melancon*").

Second, Evans's contract-based arguments ignore the record. He asserts that the plea agreement is void because (1) in his view, the court miscalculated the advisory guideline range, so (2) the condition-precedent and expected

consideration of the district court considering the guidelines before sentencing failed. But the plea agreement's plain language makes manifest that although the district would consider the guidelines before sentencing, "no one can predict with certainty the outcome of the Court's consideration of the guidelines in this case." (ROA.110.) The court, of course, did in fact consider the advisory guidelines before imposing sentence. (ROA.102-03.) Additionally, Evans agreed in his plea agreement that he would not be permitted to withdraw his plea if the sentence were higher than expected and that the sentence imposed "is solely in the discretion of the Court." (ROA.110-11.) Finally, Evans received more than adequate consideration for his agreement given that the government, for its part, agreed not to bring any additional charges. (ROA.112.)

Because Evans "can point to no evidence in the record that his explicit waiver, included in the written plea agreement and signed by him and his counsel, was not informed and voluntary," this appeal should be dismissed. *United States v. Hoctel*, 154 F.3d 506, 508 (5th Cir. 1998) (dismissing the appeal based on an appellate waiver); *see also United States v. McKinney*, 406 F.3d 744, 746 (5th Cir. 2005) (same).

CONCLUSION

Given the above facts and authorities, this Court should enforce the appellate waiver and dismiss the appeal. Should the Court deny this motion, the government requests an extension of time of 30 days from the denial to respond to Evans's brief.

Respectfully submitted,

Erin Nealy Cox
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s/ Wes Hendrix
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CERTIFICATE OF CONFERENCE

I certify that I conferred with Daniel Correa, counsel for Evans, regarding this motion. Evans is opposed to dismissal, but unopposed to the alternative request for an extension of time.

s/ Wes Hendrix
Wes Hendrix
Assistant United States Attorney

CERTIFICATE OF SERVICE

I certify that this document was served on Evans's attorney, Daniel Correa, through the Court's ECF system on February 15, 2019, and that: (1) any required privacy redactions have been made; (2) the electronic submission is an exact copy of the paper document; and (3) the document has been scanned for viruses with the most recent version of a commercial virus scanning program and is free of viruses.

s/ Wes Hendrix
Wes Hendrix
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 1,000 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Calisto MT font.

s/ Wes Hendrix
Wes Hendrix
Assistant United States Attorney
Date: February 15, 2019

APPENDIX F

No. 18-11024

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee.

v.

MARCUS ARENELL EVANS,
also known as "MD",
Defendant – Appellant.

Appeal from the United States District Court
for the Northern District of Texas
No. 3:16-CR-373-N-25
Honorable Barbara M. G. Lynn presiding

APPELLANT'S RESPONSE TO UNITED STATES' MOTION TO DISMISS

Appellant Marcus Arenell Evans respectfully requests that this Court deny the Government's motion to dismiss his appeal. Mr. Evans contends that the sentence determination was made without sufficient proof, and without a proper application of the guidelines. The Government supplied no case law to this Court that expressly forecloses Mr. Evans' right to seek by direct appeal the benefit of his bargain under the theories and arguments put forth in his brief. This Court, as a result, should deny the Government's motion to dismiss and order it to file its

Appellee's Brief in accordance with the extension the Government seeks.

1. Mr. Evans did not waive his rights to have his sentence determined upon sufficient proof and a proper application of the guidelines, and now seeks the benefit of his bargain.

The Plea Agreement at issue here never purported to waive Mr. Evans' right to have the government prove his total offense level by sufficient proof or to waive his right to have the court determine his sentencing range in accordance with a proper application of the Sentencing Guidelines. (ROA.109-115.) While it is true, as the Government states in its motion, that the Plea Agreement states that the "actual sentence imposed (so long as it is within the statutory maximum) is solely in the discretion of the judge," it does not follow that Mr. Evans waived his right to have the actual sentence accord with the minimum proof prescribed by law or that he waived his right to have the actual sentence conform to a correct interpretation of the guidelines. (ROA.110-111.); (*See also* Motion to Dismiss at 3.)

Rather, it follows that Mr. Evans retained these rights. This Court's opinion in *United States v. Mares* is instructive here. The district court is under a "duty" to consider the Guidelines "to determine the applicable Guidelines range even though the judge is not required to sentence within that range." 402 F.3d 511, 519 (5th Cir. 2005). This Court continued:

> Relatedly, *Booker* contemplates that, with the mandatory use of the Guidelines excised, the Sixth Amendment will not impede a sentencing judge from finding all facts relevant to sentencing. . . . **The sentencing judge is entitled to find by a preponderance**

> **of the evidence all the facts relevant to the determination of a Guideline sentencing range** and all facts relevant to the determination of a non-Guidelines sentence.

Id. (emphasis added) (citing *U.S. v. Booker*, 543 U.S. 220, 233-34 (2005)). It follows from this Court's opinion that a sentencing judge is *not entitled* to find by *less than* a preponderance of the evidence all the facts relevant to the determination of a Guideline sentencing range.

Important here, Mr. Evans raises on appeal serious issues pertaining to the sufficiency of the proof put forth by the Government to support the "maintaining a premises" enhancement pursuant to U.S.S.G. § 2D1.1(B)(12). The Government was required to prove two necessary elements for the enhancement to apply: (1) maintenance of the premises (2) for the primary purpose of manufacturing or distributing drugs. U.S.S.G. § 2D1.1(b)(12), comment 17; (Brief at 25.) The Government supplied no proof to demonstrate the first element. The district court was required to consider whether Mr. Evans "held a possessory interest in (e.g., owned or rented) the premises at issue." U.S.S.G. § 2D1.1(b)(12), comment 17; (Brief at 25.) The PSR supplied no evidence suggesting that Mr. Evans owned or rented the premises or that he held any possessory interest in the premises at issue. (Brief at 25-27.) The district court was also required to consider "the extent to which [Mr. Evans] controlled access to, or activities at the premises." The PSR did not explicitly address this issue and supplied no evidence for the court to consider

one way or another whether Mr. Evans exerted any control over the premises. (Brief at 26-28.)

2. This Court has not decided the validity of a sentence-appeal waiver in light of the Remedial Opinion in *United States v. Booker*.

A second question arises: If Mr. Evans retained the right to have his sentence determined by sufficient proof and proper application of the guidelines, and the sentencing judge is not entitled to find by less than sufficient proof all the facts relevant to the determination of a Guidelines sentencing range, can the Government by contract deprive Mr. Evans of the ability to enforce these rights?

Mr. Evans contends the answer to this second question is "no." The Remedial Opinion in *United States v. Booker* made clear that appellate review of sentences for reasonableness was a necessary component to remedy the otherwise unconstitutional practice of having judges determine on a preponderance of the evidence standard—instead of the constitutional-minimum standard of beyond a reasonable doubt—sentencing facts that could increase a defendant's sentence. (Brief at 16-20.); *Booker*, 543 U.S. at 231-232, 264-65. And, the *Booker* remedial opinion made clear that appellate review of sentences is necessary to "move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Booker*, 543 U.S. at 264-65.

Mr. Evans maintains that the government cannot by contract circumvent the

remedy the United States Supreme Court put in place to protect criminal defendants' constitutional rights and to promote congress' purposes when the error claimed by the defendant is lack of sufficient evidence or incorrect interpretation or application of the Guidelines. A consequence of the sentence-appeal waiver here is that error is shielded from appellate review, the review of which could otherwise correct improper applications of the guidelines and unreasonable sentences. This shielding, in turn, skews the repository of information available to the Sentencing Commission, the information that it considers to make appropriate adjustments and revisions to the Guidelines in order to avoid or minimize sentencing disparities, thereby frustrating the Congressional purpose of the Guidelines. (Brief at 19-20.); *see Booker*, 543 U.S. at 264-65.

The Government contends the answer to the second question raised above is yes. The Government cites to this Court's decision in *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992), wherein this Court held "a defendant may, as part of a valid plea agreement, waive his statutory right to appeal his sentence." However, *Melancon* was decided before the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), the case upon which Mr. Evans relies to support his arguments against the validity of the sentence-appeal waiver here. The Government cites to no case addressing the application of *Booker* to a sentence-appeal waiver under the circumstances described by Mr. Evans in his brief.

The answer to the issue raised here by Mr. Evans lies specifically in the way this Court interprets and understands the *Booker* remedial opinion's inclusion of appellate review of sentences for reasonableness:

> 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***.

Booker, 542 U.S. at 264-65 (emphasis added). If appellate review is an integral component of the *Booker* remedy, then the government cannot circumvent by contract what the Supreme Court has mandated to promote Congress' purpose.

Also, if appellate review of sentences for reasonableness is part and parcel of the *Booker* Court's remedy to the constitutional problem of having judges determine sentencing facts on a preponderance of the evidence standard, then appellate review cannot be waived when the issue concerns the sufficiency of the evidence or improper interpretation or application of the guidelines. This must especially be true if the defendant was never informed that, by waiving appellate review of his sentence for reasonableness, he is waiving constitutional protections instituted by the United States Supreme Court and that his sentence will stand even

if the evidence falls short of the constitutionally prescribed minimum and even if the trial court misinterprets or misapplies the Guidelines. This latter concern implicates whether Mr. Evans was entitled to know about these constitutional protections and the consequences of waiving them. After all, nowhere in the record does anyone specifically and expressly inform Mr. Evans that he is waiving by the sentence-appeal waiver his right to enforce his right to have his sentence determined by sufficient proof and a correct application of the guidelines. A fair question, in other words, is raised whether Mr. Evans knowingly and intelligently agree to the sentence-appeal waiver.

Mr. Evans respectfully requests that this Court deny the government's motion to dismiss and order the government to file its Appellee's Brief so that this Court may have adequate briefing on these important constitutional issues.

3. The sentence-appeal waiver was subject to a condition precedent.

Contrary to the government's assertion, Mr. Evans does not seek to avoid "his bargained-for appellate waiver"; rather, he seeks to enforce the benefit of the bargain. (Motion at 4.) The government attempts to reduce Mr. Evans' contractual claims based on failure of a condition precedent and failure of consideration to the question whether or not the trial court "consider[ed] the guidelines." (Motion to Dismiss at 4-5). But, Mr. Evans' claim is that, to the extent the trial court failed to determine his sentence "with reference to a proper application of the Guidelines,

which would include adding enhancements to the sentencing calculation only upon sufficient proof and proper application," or failed to determine his sentence with reference to a correct "interpretation of the guidelines," the sentence-appeal waiver is unenforceable for failure to perform a condition precedent. (Brief at 20-23.) Notably, the government does not expressly argue in its motion to dismiss that paragraph 4 (ROA.163-64 at ¶ 4) in the plea agreement, coupled with the prerequisites pursuant to Federal Rule of Criminal Procedure 11 to the trial court accepting the plea agreement, does not create a condition precedent. If a condition precedent is created, then it must be enforceable in some way.

To Mr. Evans' knowledge, this Court has not addressed the enforceability of a sentence-appeal waiver based on failure of a condition precedent or failure of consideration[1] with respect to the circumstances described by Mr. Evans. But if a condition precedent was created, then the Government did clearly not meet it, as the Government did not sustain its burden to prove application of the "maintaining a premises" enhancement to Mr. Evans' sentence. The fact that the district court applied this enhancement without sufficient proof constitutes clear error.

Mr. Evans requests that this Court deny the Government's motion to dismiss the appeal and order the Government to file its Appellee's Brief so that this Court

[1] Failure of consideration is not concerned with the "adequacy" of consideration, as the government contends, but with whether or not the promised performance failed after the agreement was reached. (Brief at 24.)

may have adequate briefing to decide the merits of Mr. Evans' contractual claims as well as the reasonableness of his sentence.

4. The government incorrectly construes its promise in exchange for an appellate waiver.

The government concludes without support from the contract's four corners that its promise not to bring additional charges was directly tied to Mr. Evans' promise to waive his right to appeal. The law requires this Court to construe the contract against the drafter, the Government. And, it is patently clear that the Government's promise not to bring additional charges was only tied to Mr. Evans promises in paragraph no. 6, which does not mention a waiver of appeal. (ROA.111 at ¶ 6.) It is clear by the contract itself that the Defendant's and Government's agreements, each delineated respectively in paragraphs 6 and 7 of the Plea Agreement, had nothing, or little to do with paragraph 10, which for the first time mentions a waiver of appeal. (ROA.111 at ¶ 6; 112 at ¶ 7; 113 at ¶ 10.).

CONCLUSION

Appellant Marcus Arenell Evans respectfully requests that this Court deny the Government's Motion to Dismiss the Appeal and order the Government to file its Appellee's Brief in accordance with the government's request for an extension.

Respectfully submitted,

/s/ Daniel R. Correa

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing responsive motion has been served by the 5th Circuit electronic filing system on all parties to this appeal on this 18th day of February 2019, and that any required privacy redactions have been made, the electronic submission is an exact copy of the paper document, and the document has been scanned for viruses and is virus free.

/s/ Daniel R. Correa
Daniel R. Correa

CERTIFICATE OF COMPLIANCE

Pursuant to 5TH CIR. R. 32.2.7(c), undersigned counsel certifies that this responsive motion complies with the type-volume limitations of 5TH CIR. R. 32.2.7(b).

1. Exclusive of the portions exempted by 5TH CIR. R. 32.2.7(b)(3), this responsive motion contains 2,057 words printed in a proportionally spaced typeface.

2. This responsive motion is printed in a proportionally spaced, serif typeface using Times New Roman 14 point font in text produced by Microsoft Word Version 15.26 software.

3. Upon request, undersigned counsel will provide an electronic version of this responsive motion and/or a copy of the word printout to the Court.

4. Undersigned counsel understands that a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in 5TH CIR. R. 32.2.7, may result in the Court's striking this responsive motion and imposing sanctions against the person who signed it.

/s/ Daniel R. Correa
Daniel R. Correa