

FILED

5:02 pm Sep 13 2019
Clerk U.S. District Court
Northern District of Ohio
Akron

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MARCO ANTONIO SERRANO,

Defendant.

) CASE NO.: 1:19CR365

) Judge Sara Lioi

) PLEA AGREEMENT

Pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure, and in consideration of the mutual promises set forth below, the United States Attorney's Office for the Northern District of Ohio (hereinafter "USAO"), by and through its undersigned attorney(s), and the defendant, MARCO ANTONIO SERRANO (hereinafter "Defendant"), agree as follows:

**MAXIMUM PENALTIES AND OTHER
CONSEQUENCES OF PLEADING GUILTY**

1. **Waiver of Constitutional Trial Rights.** Defendant understands that Defendant has the right to plead not guilty and go to trial. At trial, Defendant would be presumed innocent, have the right to trial by jury or, with the consent of the United States, to trial by the Court, the right to the assistance of counsel, the right to confront and cross-examine adverse witnesses and subpoena witnesses to testify for the defense, the right to testify and present evidence, and the right to be protected from compelled self-incrimination. Defendant understands that Defendant has the right to an attorney at every stage of the proceedings and, if necessary, one will be appointed to represent Defendant. Defendant understands that by pleading guilty, Defendant specifically and voluntarily waives each of these trial rights, except the right to counsel.

Defendant's Initials MS

APPENDIX A

Plea Agreement of Marco Antonio Serrano – page 2 of 11

Defendant understands that a guilty plea is a complete admission of guilt and if the Court accepts the guilty plea, the Court will find Defendant guilty without a trial.

2. **Statutory Penalties.** Defendant understands that the statutory maximum penalties, and minimum penalties if applicable, for the count(s) to which Defendant agrees to plead guilty are as follows:

Count	Statute and Description of Offense	Statutory Sentence Per Count
1	Title 21 U.S.C. § 841(a)(1): Possession Of A Controlled Substance With The Intent To Distribute	Maximum imprisonment: 20 years
		Maximum Statutory fine: \$1,000,000
		Maximum period of supervised release: 3 years
		Special assessment: \$100

3. **Special Assessment.** As set forth above, Defendant will be required to pay a mandatory special assessment of \$100 for each count of conviction, for a total of \$100, due immediately upon sentencing.

4. **Costs.** The Court may order Defendant to pay the costs of prosecution and sentence, including but not limited to imprisonment, community confinement, home detention, probation, and supervised release.

5. **Restitution.** The Court may order Defendant to pay restitution as a condition of the sentence, probation, and/or supervised release.

6. **Violation of Probation/Supervised Release.** If Defendant violates any term or condition of probation or supervised release, such violation could result in a period of incarceration or other additional penalty as imposed by the Court. In some circumstances, the combined term of imprisonment under the initial sentence and additional period of incarceration could exceed the maximum statutory term.

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 3 of 11

7. **Immigration Consequences.** Defendant understands that a convicted person 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.

PLEA AND OTHER CHARGE

8. **Agreement to Plead Guilty.** Defendant agrees to plead guilty to the Information in this case.

ELEMENTS OF THE OFFENSE

9. The elements of the offense to which Defendant will plead guilty are:

Title 21 U.S.C. § 841(a)(1): Possession Of A Controlled Substance With The Intent To Distribute
1: Defendant possessed a controlled substance;
2: Defendant knew the substance was a controlled substance; and
3: Defendant intended to distribute the controlled substance.

SENTENCING STIPULATIONS AND AGREEMENTS

10. **Sentencing Guidelines.** Defendant understands that sentencing rests within the discretion of the Court; that federal sentencing law requires the Court to impose a sentence which is sufficient, but not greater than necessary, to comply with the purposes of 18 U.S.C. § 3553(a), and that the Court must consider among other factors the advisory United States Sentencing Guidelines in effect at the time of sentencing and that in determining the sentence, the Court may depart or vary from the advisory guideline range.

11. **Presentence Report.** Defendant understands that the advisory guideline range will be determined by the Court at the time of sentencing, after a presentence report has been prepared by the U.S. Probation Office and reviewed by the parties. Defendant further understands that the USAO may provide to the U.S. Probation Office all known information regarding Defendant's conduct subject to its limited use under U.S.S.G. § 1B1.8 and except as protected under the proffer agreement if any.

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 4 of 11

12. **Joint Recommendation to Use the Advisory Sentencing Guidelines**

Computation. After considering the factors in 18 U.S.C. § 3553(a), the parties agree to recommend that the Court impose a sentence within the range and of the kind specified pursuant to the advisory Sentencing Guidelines in accordance with the computations and stipulations set forth below. Neither party will recommend or suggest in any way that a departure or variance is appropriate, either regarding the sentencing range or regarding the kind of sentence.

13. **Sentencing Recommendations Not Binding on the Court.** Defendant understands that the recommendations of the parties will not be binding upon the Court, that the Court alone will decide the advisory guideline range under the Sentencing Guidelines, whether there is any basis to depart from that range or impose a sentence outside the advisory guideline range, and what sentence to impose. Defendant further understands that once the Court has accepted Defendant's guilty plea, Defendant will not have the right to withdraw such a plea if the Court does not accept any sentencing recommendations made on Defendant's behalf or if Defendant is otherwise dissatisfied with the sentence.

14. **Allocation.** Defendant understands and agrees that the USAO reserves the opportunity to speak at Defendant's sentencing. The USAO agrees that Defendant reserves the right of allocation at sentencing.

15. **Stipulated Guideline Computation.** The parties agree that the following calculation, using the current advisory Sentencing Guidelines Manual, represents the correct computation of the applicable offense level.

Count 1: Possession with Intent to Distribute		
Base offense level	16	§2D1.1(a)(5) and (c)(12)
Total Offense Level before Acceptance of Responsibility	16	

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 5 of 11

For purposes of determining Defendant's statutory penalty and imprisonment range under the United States Sentencing Guidelines, Defendant and the USAO agree and stipulate that the amount of drugs conspired to be possessed with the intent to distribute and distributed in Count 1 is 124.5 grams of cocaine, a Schedule II controlled substance, which corresponds to a combined base offense level of 16 pursuant to U.S.S.G. § 2D1.1(c)(12). However, the parties realize that Defendant may be classified as a career offender based upon his prior criminal record. The parties agree that if Defendant is found to be a career offender, his adjusted base offense level will be 32 pursuant to U.S.S.G. § 4B1.1(b).

Unless otherwise agreed to below, the parties agree that no other specific offense characteristics, Guideline adjustments or Guideline departures apply.

16. **Acceptance of Responsibility.** The USAO has no reason to believe at this time that Defendant has not clearly and affirmatively accepted personal responsibility for Defendant's criminal conduct. The USAO agrees to recommend a three (3) level reduction for acceptance of responsibility under U.S.S.G. § 3E1.1(a) and (b), provided Defendant's conduct continues to reflect Defendant's acceptance of responsibility. Defendant understands it will be up to the Court at the time of sentencing to determine whether a reduction for acceptance of responsibility is appropriate.

17. **Criminal History Category.** The parties have no agreement about the Criminal History Category applicable in this case. Defendant understands that the Criminal History Category will be determined by the Court after the completion of a Pre-Sentence Investigation by the U.S. Probation Office.

WAIVER OF APPEAL AND POST-CONVICTION ATTACK

18. Defendant acknowledges having been advised by counsel of Defendant's rights, in limited circumstances, to appeal the conviction or sentence in this case, including the appeal

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 6 of 11

right conferred by 18 U.S.C. § 3742, and to challenge the conviction or sentence collaterally through a post-conviction proceeding, including a proceeding under 28 U.S.C. § 2255. Defendant expressly and voluntarily waives those rights, except as specifically reserved below. Defendant reserves the right to appeal: (a) any punishment in excess of the statutory maximum; or (b) any sentence to the extent it exceeds the maximum of the sentencing imprisonment range determined under the advisory Sentencing Guidelines in accordance with the sentencing stipulations and computations in this agreement, using the Criminal History Category found applicable by the Court. Nothing in this paragraph shall act as a bar to Defendant perfecting any legal remedies Defendant may otherwise have on appeal or collateral attack with respect to claims of ineffective assistance of counsel or prosecutorial misconduct.

WAIVER OF STATUTE OF LIMITATIONS

19. Defendant waives all defenses based on the statute of limitations with respect to any prosecution that is not already time-barred by the applicable statute of limitation on the date of Defendant's signing of this agreement and that is commenced within one year after any of the following events: (1) Defendant fails to plead guilty at the plea proceeding or the Court refuses to accept a guilty plea by Defendant pursuant to this agreement; (2) the Court permits Defendant to withdraw a guilty plea entered pursuant to this agreement or otherwise vacates such a guilty plea; or (3) the conviction obtained pursuant to this agreement is vacated, overturned, or otherwise set aside. Defendant understands the waiver of the statute of limitations is effective immediately upon Defendant's signing of this agreement and is not conditioned upon the approval of this agreement by the Court.

FACTUAL BASIS AND RELEVANT CONDUCT

20. Defendant agrees that the following summary fairly and accurately sets forth Defendant's offense conduct and a factual basis for the guilty plea. Defendant further agrees that

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 7 of 11

the facts set forth in the summary are true and could be established beyond a reasonable doubt if the case were to proceed to trial:

a. On or about April 22, 2018, in the Northern District of Ohio, Eastern Division, Defendant MARCO ANTONIO SERRANO, did knowingly and intentionally possess with intent to distribute approximately 124.5 grams of a mixture or substance containing a detectable amount of cocaine, a Schedule II controlled substance.

b. More specifically, On April 22, 2018, at approximately 10:05 p.m., Lorain Police K-9 Officer Jamie Ball, in a marked patrol vehicle, observed a white Jeep Cherokee, bearing Ohio license plate number GUM-8309, at about the intersection of Reid Avenue and West 8th Street.

c. This intersection is controlled by stop signs in all directions. Officer Ball observed the Jeep, while it was travelling north on Reid Avenue, stop at or before the limit line of the stop sign to the south of the intersection while signaling its intention to turn West onto West 8th Street.

d. Notably, a pedestrian was then in the crosswalk to the West of the intersection, blocking the Jeep's path. Instead of waiting at or before the limit line for the pedestrian to clear, the Jeep moved forward to obstruct the pedestrian crosswalk to the South of the intersection. Obstructing a pedestrian crosswalk is a violation of Lorain City Ordinance 331.33.

e. Additionally, as the Jeep turned West, Officer Ball observed that the window tint on the front driver-side window appeared to be darker than permitted under Ohio Revised Code 4513.241, and the rules promulgated from that section. Based on these violations of law, Officer Ball initiated a traffic stop of the Jeep approximately a block later at about the intersection of West 8th Street and Lovett Place.

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 8 of 11

f. Officer Ball stopped and approached the Jeep. MARCO ANTONIO SERRANO (“SERRANO”), was the driver and sole-occupant. SERRANO rolled down the front driver-side window of the vehicle. Officer Ball immediately smelled the scent of burnt marijuana. Officer Ball’s canine companion, Titan, was then in his patrol car. Officer Ball decided to initiate an investigation into the source of the burned marijuana by deploying Titan and searching the vehicle.

g. In preparation to conduct his investigation, Officer Ball removed SERRANO from the Jeep and patted him down for officer safety. Officer Ball felt an unusual bulge of suspected narcotics in SERRANO’s groin-area. Officer Ball removed a softball-sized bag of 124.5 grams of what was later identified as cocaine from inside SERRANO’s pants.

h. SERRANO was later read his rights under Miranda and acknowledged that he understood those rights. SERRANO was asked what the substance in the bag was and he admitted that it was cocaine.

i. SERRANO intended to distribute the cocaine.

21. The amount of drugs possessed and distributed by Defendant during the course of the conspiracy and/or directly attributable to Defendant’s actions and reasonably foreseeable within the conspiracy was 124.5 grams of cocaine, a Schedule II controlled substance. Defendant knew that the substance Defendant was possessing with intent to distribute was actually cocaine.

22. Defendant acknowledges that the above summary of Defendant’s conduct does not set forth each and every fact that the USAO could prove at trial, nor does it encompass all of the acts which Defendant committed in furtherance of the offense(s) to which Defendant is pleading guilty.

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 9 of 11

OTHER PROVISIONS

23. **Financial Statement.** Defendant agrees upon request to submit to the USAO, prior to the date of sentencing, a complete and accurate financial statement on a Financial Statement of Debtor Form to be provided by the USAO.

24. **The Parties are Free to Advise the Court about Matters Not Expressly Addressed.** This agreement is silent about all aspects of the determination of sentence not expressly addressed herein, and the parties are free to advise the Court of facts and to make recommendations to the Court with respect to all aspects of sentencing not agreed to herein.

25. **Consequences of Breaching the Plea Agreement.** Defendant understands that if Defendant breaches any promise in this agreement, commits additional crimes, obstructs justice, attempts to withdraw Defendant's guilty plea, or if Defendant's guilty plea is rejected by the Court or is vacated or set aside, the USAO will be released from all of its obligations under this agreement and may institute or maintain any charges and make any recommendations with respect to sentencing that otherwise would be prohibited under the terms of the agreement. Defendant understands, however, that a breach of the agreement by Defendant will not entitle Defendant to withdraw, vacate, or set aside Defendant's guilty plea or conviction.

26. **Agreement not Binding on other Jurisdictions and Agencies.** Defendant understands that this plea agreement is binding only on the United States Attorney's Office for the Northern District of Ohio. It does not bind any other United States Attorney, any other federal agency, or any state or local government.

27. **Defendant is Satisfied with Assistance of Counsel.** Defendant makes the following truthful statements: I have discussed this case and this plea agreement in detail with my attorney who has advised me of my Constitutional and other trial and appeal rights, the

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 10 of 11

nature of the charges, the elements of the offenses the United States would have to prove at trial, the evidence the United States would present at such trial, possible defenses, the advisory Sentencing Guidelines and other aspects of sentencing, potential losses of civil rights and privileges, and other potential consequences of pleading guilty in this case. I have had sufficient time and opportunity to discuss all aspects of the case in detail with my attorney and have told my attorney everything I know about the charges, any defenses I may have to the charges, and all personal and financial circumstances in possible mitigation of sentence. I am satisfied with the legal services and advice provided to me by my attorney.

28. **Agreement Is Complete and Voluntarily Entered.** Defendant and Defendant's undersigned attorney state that this agreement, including any addendums discussed in open court and on the record at the time of the change of plea (if any), is the entire agreement between Defendant and the USAO and that no other promises or inducements have been made, directly or indirectly, by any agent or representative of the United States government concerning any plea to be entered in this case. In particular, no promises or agreements have been made with respect to any actual or prospective civil or administrative proceedings or actions involving Defendant, except as expressly stated herein. In addition, Defendant states that no person has threatened or coerced Defendant to do or to refrain from doing anything in connection with this case, including Defendant's decision to enter a guilty plea. Finally, Defendant acknowledges that this agreement cannot be modified unless in writing and subject to approval by the Court.

Defendant's Initials MS

Plea Agreement of Marco Antonio Serrano – page 11 of 11

SIGNATURES

Defendant: I have read (or have had read to me) this entire plea agreement and have discussed it with my attorney. I have initialed each page of the agreement to signify that I understand and approve the provisions on that page. I am entering this agreement voluntarily and of my own free will. No threats have been made to me, nor am I under the influence of anything that could impair my ability to understand this agreement.

Marco Serrano
Marco Antonio Serrano
Defendant

6-11-19
Date

Defense Counsel: I have read this plea agreement and concur in Defendant pleading in accordance with terms of the agreement. I have explained this plea agreement to Defendant, and to the best of my knowledge and belief, Defendant understands the agreement.

J. Anthony Rich
J. Anthony Rich (OH: 0066295)
Counsel for Defendant

6-11-19
Date

United States Attorney's Office: I accept and agree to this plea agreement on behalf of the United States Attorney for the Northern District of Ohio.

Justin Seabury Gould
Justin Seabury Gould (OH: 0084584)
Assistant United States Attorney
United States Court House
801 West Superior Avenue, Suite 400
Cleveland, OH 44113
(216) 622-3869
(216) 522-2403 (facsimile)
Justin.Gould@usdoj.gov

July 26, 2019
Date

APPROVED:

Sara Lioi
Sara Lioi
United States District Court Judge

9/10/2019
Date

Defendant's Initials _____

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs.

MARCO ANTONIO SERRANO,

Defendant.

Case No. 1:19CR365

Akron, Ohio

Tuesday, December 3, 2019

11:15 a.m.

TRANSCRIPT OF SENTENCING HEARING
BEFORE THE HONORABLE SARA LIOI
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: Justin Seabury Gould
Office of the U.S. Attorney - Cleveland
Carl B. Stokes U.S. Courthouse
801 Superior Avenue, West, Suite 400
Cleveland, Ohio 44113
(216) 622-3600

For the Defendant: J. Anthony Rich
Attorney at Law
The City Center, Suite 101-B
300 Broadway
Lorain, Ohio 44052
(440) 245-2274

Court Reporter: Caroline Mahnke, RMR, CRR, CRC
Federal Building & U.S. Courthouse
2 South Main Street, Suite 568
Akron, Ohio 44308
(330) 252-6021

Proceedings recorded by mechanical stenography; transcript
produced by computer-aided transcription.

1 Tuesday, December 3, 2019

2 THE COURT: Please call the case.

3 THE DEPUTY CLERK: The case before the Court is
4 Case Number 1:19CR365, United States of America versus Marco
5 Antonio Serrano.

6 THE COURT: All right. And counsel, please
7 identify yourself for the record.

8 MR. GOULD: Good morning, Your Honor. On behalf
9 of the United States of America, I am Assistant United
10 States Attorney Justin Seabury Gould.

11 MR. RICH: May it please the Court, Your Honor.
12 On behalf of the defendant, Marco Antonio Serrano, J.
13 Anthony Rich.

14 THE COURT: All right. And then we also have, of
15 course, Mr. Serrano present. And we also have United States
16 Probation Officer Michelle Spaulding present.

17 So good morning to all.

18 THE PROBATION OFFICER: Good morning, Your Honor.

19 THE COURT: All right. By way of an information,
20 Mr. Serrano pleaded guilty to one count of possession with
21 intent to distribute cocaine.

22 The case is set today for sentencing.

23 The Court has received and reviewed the final
24 presentence report. This is actually the second time that
25 we've gathered for the sentencing hearing because I, at the

1 last hearing, I wanted to make sure that Mr. Serrano had
2 sufficient time to read and review the final presentence
3 report and to discuss it with his attorney.

4 So, counsel, I understand that you have received and
5 reviewed a copy of the final presentence report.

6 MR. RICH: I did, Your Honor.

7 MR. GOULD: Yes, Your Honor.

8 THE COURT: And, Mr. Serrano, I understand that
9 you have now had sufficient time to read the final
10 presentence report and review it with your attorney; is that
11 correct?

12 THE DEFENDANT: Yes, ma'am.

13 THE COURT: Do you need any additional time, sir?

14 THE DEFENDANT: No, ma'am.

15 THE COURT: Okay. As set forth in the addendum
16 to the report, the Court understands that there are no
17 objections to the information contained in the report.

18 So we'll then proceed with review of the sentencing
19 options.

20 Because of the amount of drugs involved in this
21 offense, the base offense level is 16.

22 Because Mr. Serrano qualifies as a career offender,
23 however, his offense level becomes a 32.

24 There is a two-level reduction because Mr. Serrano has
25 accepted responsibility.

1 Does the government intend to move for the additional
2 one-level reduction for acceptance?

3 MR. GOULD: So moved, Your Honor.

4 THE COURT: The Court will grant the motion,
5 making the total offense level 29.

6 Because Mr. Serrano is classified as a career
7 offender, his criminal history becomes a VI, notwithstanding
8 what it would be outside of that consideration. And so the
9 advisory guideline range of imprisonment for an offense
10 level of 29 and a criminal history category of VI is 151 to
11 188 months.

12 Any objection to this advisory guideline sentence
13 calculation?

14 MR. GOULD: No, Your Honor.

15 MR. RICH: No, Your Honor.

16 THE COURT: All right. The remainder of the
17 sentencing options are set forth in the report, and the
18 Court will adopt the remainder of the options since there
19 are no objections to the report.

20 The Court notes there is a special assessment of \$100
21 that must be imposed pursuant to the statute and the
22 guidelines.

23 So very briefly now, we will review the nature and
24 circumstances of the offense.

25 On April 22, 2018, members of the Lorain County Drug

1 Task Force, HIDTA, and DEA Cleveland district office
2 conducted a surveillance of a residence on Livingston Avenue
3 in Lorain, Ohio, the known residence of Pearson King,
4 Senior, a coconspirator in the Serrano drug trafficking
5 organization.

6 Mr. -- is it SER-RON-O or SER-RAN-O?

7 THE DEFENDANT: SER-RON-O.

8 THE COURT: Mr. Serrano was observed entering Mr.
9 King's home and exiting shortly thereafter.

10 Mr. Serrano was stopped for a traffic violation, and
11 the vehicle smelled of burnt marijuana.

12 Mr. Serrano was removed from the vehicle and patted
13 down for safety reasons.

14 The officer felt an unusual bulge of suspected
15 narcotics in Mr. Serrano's groin area.

16 The officer removed a softball-sized bag of grams of
17 what was later identified as cocaine from inside Mr.
18 Serrano's pants.

19 Mr. Serrano possessed 124.5 grams of cocaine.

20 More details regarding the offense are outlined in
21 paragraphs 7 through 15 of the presentence report and also
22 paragraphs 20 and 21 of the plea agreement.

23 So with that, counsel, any objection to the nature and
24 circumstances of the offense as summarized and adopted by
25 the Court?

1 MR. GOULD: No, Your Honor. Thank you.

2 MR. RICH: No, Judge.

3 THE COURT: Very well.

4 Next, the history and characteristics of Mr. Serrano.

5 He is 40 years old. He has two juvenile
6 adjudications. One for felonious assault, and one, due
7 regard to private property.

8 He has 26 adult convictions ranging from no driver's
9 license to felonious assault.

10 Five of his adult convictions involved domestic
11 violence.

12 Also has, as I said, assault convictions, felonious
13 assault convictions, felonious assault with firearm
14 specification, attempted felonious assault. They're
15 outlined in the report. That is, his criminal history is
16 outlined in the report. But suffice it to say that he does
17 have a somewhat extensive criminal history beginning at the
18 age of 17.

19 Mr. Serrano indicates that he is close with his family
20 members. He grew up in a middle class neighborhood where
21 there was no drugs or violence.

22 He did suffer some verbal abuse by some of his family
23 members, but nonetheless remains close with, in particular,
24 I believe his mother and other family members.

25 Mr. Serrano was in a gang for a number of years until

1 fairly recently where he has tried to extricate himself from
2 the gang because of the violence that he personally
3 experienced and attempts on his life and his family's life.

4 He was married in 2013, however he and his wife are
5 separated.

6 He has six children by four different women. Three of
7 the children are adults, and three are juveniles between the
8 age of 6 and 17.

9 Mr. Serrano also has a grandson, a very young
10 grandson.

11 He is in fair physical health, sustained an injury in
12 2001 to his knee, and he has had several surgeries to
13 correct the damage. He also reported some broken bones
14 throughout the years.

15 He does have mental health diagnoses, which are set
16 forth in the report.

17 He does have other mental health conditions. He has
18 been placed on suicide watch and began using drugs at the
19 age of 11.

20 He also has a substance abuse problem, particularly
21 involving marijuana and cocaine.

22 He's also on -- he received -- for a time he received
23 Social Security disability benefits.

24 He attended school into the 11th grade and then
25 obtained his GED while in custody.

1 So with that, any objection to the history and
2 characteristics of Mr. Serrano as summarized by the Court?

3 MR. GOULD: No, Your Honor. Thank you.

4 MR. RICH: No, Your Honor.

5 THE COURT: Okay. So now we'll hear from the
6 parties relative to an appropriate sentence in this case.

7 And we will begin with you, Mr. Rich. Anything you
8 wish to say on behalf of your client relative to an
9 appropriate sentence?

10 MR. RICH: May it please the Court, Your Honor.

11 I think the Court is aware pursuant to the plea
12 agreement, although counsel would normally address 3553
13 sentencing factors, there is a fine line --

14 THE COURT: Sure.

15 MR. RICH: -- for counsel not to breach the plea
16 agreement, put my client in jeopardy of the government
17 withdrawing the plea agreement and proceeding here today.

18 I would like to address certain things with the
19 understanding of that we're not allowed to ask for a
20 downward variance.

21 THE COURT: Sure.

22 MR. RICH: As the Court's aware, he did start
23 substance abuse at the age of 11. I would respectfully
24 submit when you start abusing substances at age 11, there is
25 probably not a lot of upward in regards to that.

1 I would ask that the Court consider him during his
2 incarceration being in the drug program.

3 THE COURT: Certainly.

4 MR. RICH: And also a reentry program for him
5 since he's still, at least in my eyes, a young person.

6 I understand the Court clearly has to impose a
7 sentence sufficient but not greater than necessary.

8 I would further ask, for his family's sake and his
9 sake, that if the Court could consider putting him in an
10 institution as close to home as possible.

11 In regards to a couple of the cases that the Court has
12 brought up, I would just like the Court to maybe understand
13 the circumstances.

14 I know by operation of the law, the felonious assault
15 case under the 2903.11(A)(2) under the state which is the
16 predicate offense, Your Honor, I was counsel on that case.
17 The case was somewhat of an aggravated menacing. However,
18 the defendant also had an F-2 trafficking case at the time.
19 And so we pled to the felonious assault.

20 And again, it's a predicate offense. There is nothing
21 we can do about that, as well as the trafficking. But I
22 know the Court addressed the issue with the felonious
23 assault with the firearm.

24 THE COURT: Sure.

25 MR. RICH: It could arguably have been an

1 aggravated menacing, however, based upon the other charges
2 we had, it was in the defendant's best interest to accept
3 responsibility for that.

4 As he sits here today, it's my belief, you know, he
5 understands the severity of what took place here, or
6 certainly what the severity could have been in regards to
7 what took place.

8 I think he's at the age that he's willing to accept
9 his responsibility and he's willing to own it, and he
10 understands the Court is going to impose a sentence that the
11 Court feels is sufficient but not greater than necessary in
12 order to protect the public as well as punish the offender.

13 So in that regard, Your Honor, I think obviously the
14 defendant would like to address the Court.

15 THE COURT: Sure.

16 With respect to placement, do you want me to say "as
17 near Lorain as possible"?

18 MR. RICH: That would be good, Your Honor, yes.
19 To Lorain County, yes.

20 THE COURT: Lorain County, yes, so he may be as
21 close to his family as possible.

22 You don't want any specific facility?

23 MR. RICH: Your Honor, I'm going to defer.

24 THE COURT: You just want it as close as possible
25 to his family?

1 MR. RICH: Right.

2 THE COURT: That's fair. Thank you.

3 All right. Mr. Serrano, this is your sentencing
4 hearing. And at this hearing you are permitted to address
5 the Court in mitigation of your sentence in this case. And
6 if you wish to address the Court, sir, you may do so now.

7 Did you have some information written down?

8 THE DEFENDANT: No, ma'am.

9 THE COURT: Okay. Then you may stand and address
10 the Court.

11 THE DEFENDANT: Your Honor, first I would like
12 to -- I would like to take responsibility. I have no
13 excuses for any of my actions, and I want to be on record
14 that I take full responsibility for what I've done.

15 And my whole life, my mom and my dad have been coming
16 to things like this. And I'm embarrassed about it. I'm
17 sorry to them and my family because I feel like I let them
18 down as a son.

19 And, you know, my father wakes up every Saturday, one
20 Saturday out of every month to come see me at 4:00 in the
21 morning with my kids, and I'm ashamed of that, too.

22 And I've never -- I've been incarcerated before, Your
23 Honor. I've tried to change myself. And I have. You know,
24 this last year and a half, I've done everything that I can
25 to separate myself from the gangs and from the streets. In

1 doing so has put two of my children's lives in jeopardy as
2 well as my own.

3 And this whole year and a half I've done nothing but
4 try to better myself. And it's not really much I can do at
5 CCA. I took the only class that they offer on my own which
6 was the drug class.

7 I've tried everything I can to stay away from
8 everything at CCA that would get me in trouble. I don't
9 know if you have any -- I have no disciplinary write-ups. I
10 have one write-up that I just got recently for basically
11 just being too nice to a CO. I basically was the one
12 charged. I haven't gotten in any fights. I haven't gotten
13 any disrespect tickets. I stopped doing drugs.

14 I just -- this whole situation really took
15 a -- changed my life in every aspect.

16 I have six children who I love very much.

17 My oldest three, I've been locked up most of their
18 life. And my oldest son, he graduates from Ohio University
19 this year. And my 17-year-old graduates from high school
20 this year. And I'm not going to be able to see them. And
21 they don't deserve that.

22 And I missed my oldest son's high school graduation
23 because I was incarcerated, too, and that's -- they don't
24 deserve that.

25 I did everything, and I have done everything I can to

1 separate myself from the Latin Kings. And just everything
2 and everybody I've been around has to change. I hope -- I
3 just want an opportunity, Your Honor, to make right my
4 wrongs.

5 There is a time I could have told you, Your Honor,
6 that I sold drugs to support my family. And that's half
7 true and half not true. The other half is selfish. I was
8 selfish because it was easier. It helped support my drug
9 habit. And if I really loved my family, I wouldn't have put
10 myself in that situation to get taken away from them.

11 So I can't stand or say to anybody that what I've done
12 is because I want to support my family because that's only
13 half the truth. The other half is I was -- it was easier.

14 Right now, I would be happy working at Foot Locker,
15 taking out the trash, just so I could pick up my daughter,
16 help my son with his homework.

17 So I've messed up my whole life, the majority of it.
18 And I just want to make the next 40 years of my life fixing
19 it. And I just hope I get that opportunity.

20 I take responsibility for what I've done. I don't
21 blame nobody. But I do ask the Court, if I can, please, to
22 try to do right, you know, fix what I've done wrong. I just
23 hope I get that opportunity.

24 I'm sorry to my parents, that they have to be here for
25 this again. And I can promise them and myself I'm never

1 going to do this again because I can't do no more time. And
2 I don't want them to come to another prison and see me no
3 more.

4 So with that, Your Honor, I'm sorry. And I don't got
5 no more else to say.

6 THE COURT: Thank you, Mr. Serrano.

7 All right. Mr. Gould, is there anything you wish to
8 say on behalf of the United States relative to an
9 appropriate sentence in this case?

10 MR. GOULD: Thank you, Your Honor.

11 Your Honor, as you've outlined, the guideline sentence
12 in this case is 151 months to 188 months.

13 I recognize the severity and implication of that range
14 of sentence, and it is my goal today to explain to the Court
15 and those present why that is an appropriate sentence.

16 As the Court is aware, you look at an individual's
17 criminal history to get a take of who that person is, the
18 type of life that they've lived and the crime that they've
19 participated in. And that reaches a score.

20 In this case, that score was a natural level IV. But
21 because of the career offender provision, we go to a level
22 VI.

23 I want to discuss, because that level VI really only
24 shows and highlights scorable behavior, the things that that
25 initial score of IV does not take into account.

1 Domestic violence, March of 1999 twice, April of '99,
2 July of 1999, none of which were scored; aggravated
3 menacing, March of 2000, not scored; aggravated menacing,
4 October of 2001, not scored; assault, September of 2002, not
5 scored; assault, December of 2002, not scored; domestic
6 violence, felony 5, endangering children, January 2003, not
7 scored; violation of a protection order, May of 2003, not
8 scored; violation of a protection order, June of 2003, not
9 scored; violation of protection order, September of 2003,
10 not scored; conspiracy to forge counterfeit obligations in
11 federal court, not scored.

12 Let me talk for a moment, as I am there, about the
13 implications of the gang-related behavior which fueled the
14 drug trafficking trade in the Northern District of Ohio, not
15 just for the sake of selling drugs but to fuel the criminal
16 enterprise of those drug trafficking organizations and the
17 gangs that commit them.

18 Mr. Serrano has talked about his affiliation and
19 participation with the Latin Kings.

20 You see the behavior of using counterfeit dollar bills
21 in order to procure actual merchandise as a means by which
22 those criminal street gangs use to further the drug trade
23 and to fund their criminal enterprises.

24 You see details of that counterfeit trade outlined in
25 paragraph 53 of the PSI.

1 And then we reach the first scored conviction:
2 Felonious assault, February of 2011; trafficking in heroin,
3 felony 2, in two counts, December of 2011; domestic
4 violence, June of 2012; and attempted felonious assault,
5 December of 2014.

6 This is an individual who has a history of violating
7 Court orders, who has a history of Court involvement without
8 it causing him to stop violating the law, a history of not
9 only violence, but participation in the drug trade as well
10 as criminal street gangs.

11 I've spoken to you about that gang-related drug
12 activity. You know well the effect that it has on the
13 community and the price that this community pays for
14 individuals like Mr. Serrano who live a life of criminality
15 and who sell drugs and participate in the drug trafficking
16 trade. We know that price.

17 But I want to highlight for the Court and those
18 present the personal price that Mr. Serrano highlighted
19 briefly in his comments to the Court.

20 He stated that his participation with these
21 organizations and his participation in the drug trade placed
22 two of his children at risk. That came very close to home
23 as part of this case.

24 As this Court and defense counsel are aware, this case
25 involved a series of telephone recordings which were

1 intercepted between the defendant and certain other
2 individuals. Those were provided to defense counsel in
3 discovery.

4 And as has been provided and disclosed to the
5 defendant, and as this Court is aware, the Department of
6 Justice and my office, along with its law enforcement
7 partners, have certain duties that arise when we undertake
8 certain law enforcement techniques, like T3's.

9 And in this case -- and some of those duties include
10 ensuring that no harm comes to other individuals, should, in
11 the course of the recording or interception of electronic or
12 wire communication, it become clear that an individual's
13 life is in danger or severe property damage is possible, and
14 that law enforcement has the opportunity to stop it.

15 And we did come across that in this case. And in
16 fact, an individual had been sent to kill the defendant's
17 son and was stopped by law enforcement, as a result of the
18 interceptions that we had in this case against the defendant
19 and other individuals, around the corner from the
20 defendant's home.

21 THE COURT: This was all part of the drug
22 trafficking organization?

23 MR. GOULD: Yes, Your Honor.

24 THE COURT: And the activities of that
25 organization?

1 MR. GOULD: Yes, Your Honor.

2 This happened at a time where the flow of drugs into
3 the Northern District of Ohio was difficult from the source
4 of supply which was coming from Mexico.

5 When times like that occur, the power differential
6 between those who may have source of supply and those who do
7 not causes violence, we see.

8 In this case, the defendant was able to procure a
9 source of supply, as is outlined in the PSI and plea
10 agreement in this case, but that did not come without
11 consequences. And it was only because of the threat to the
12 defendant's family's life and other individuals in the area
13 where the defendant lived that this operation was stopped.

14 That's the personal price that this defendant placed
15 his family at risk to.

16 And it is that price that this defendant should be
17 aware of and think of for each and every one of the months
18 that he is incarcerated.

19 It is an appropriate sentence based on the history of
20 criminality and the expense, as I've placed on the record,
21 of the criminality in this case.

22 The potential consequences, not just the actual
23 consequences to the community of the drug trade, but the
24 potential consequences that were stopped only for the
25 valiant efforts of law enforcement, that that 151 to 188

1 months is appropriate.

2 This is an individual who has not been deterred. This
3 is an individual who has continued to participate with
4 criminal street gangs, who has continued to participate in
5 high-level drug trafficking organizations, who has continued
6 to place the community and his family at risk.

7 He was not stopped -- and I understand and I believe
8 that his remorse is genuine when he talks about the risk to
9 his children. I don't believe that's something that he ever
10 wanted.

11 And I think that in my conversations with him he has
12 been genuine in his understanding that he really did place
13 them in clear and present danger that was able to be
14 outlined and defined based on the calls in this case.

15 That's why the government would ask this Court to
16 impose a sentence at 151 months in this case, taking into
17 consideration not just the severity of the crime but the
18 defendant's sincere remorse and his desire to participate in
19 programs that may turn his life around.

20 As this Court is aware, there is a First Step Act
21 which went into place, placing into account additional
22 resources and services for incarcerated individuals.
23 Unfortunately, the case law in this district and across the
24 country does not allow the Court at this time to take into
25 consideration the length of sentence in terms of the

1 rehabilitative abilities of the justice system.

2 But I will simply say that in response to the
3 defendant's request for those services, that there will be,
4 hopefully, based on that Next Step Act, an opportunity for
5 him to participate in more intensive rehabilitate services
6 while he is incarcerated.

7 And I hope that, especially in light of the extensive
8 sentence that the guidelines suggest in this case, that the
9 defendant takes advantage of them.

10 Not only that --

11 THE COURT: You're talking about under the First
12 Step Act?

13 MR. GOULD: Yes, Your Honor.

14 THE COURT: And what about placement in a halfway
15 house for a longer period of time?

16 MR. GOULD: That is a potential opportunity
17 should his behavior while he is in the institution --

18 THE COURT: Sure.

19 MR. GOULD: -- warrant that.

20 So we not only have the services that are increased
21 while you are incarcerated, services that are -- or
22 provisions that are intended to increase contact between the
23 defendant's family and him, specifically requiring,
24 independent of the Court's suggestion, that the defendant be
25 placed I believe it's within 100 miles as the crow flies

1 from his home address, but then you also have, as the Court
2 has wisely outlined, the opportunity to return to the
3 community in a more structured setting for a longer period
4 of time prior to being released to supervised release.

5 This is an opportunity for the defendant to stop the
6 cycle of violence and stop the cycle of drug trafficking
7 that has already touched his family. That his family has
8 the opportunity now to surround not just him but his
9 children with the support that they need to ensure that they
10 don't follow in his -- in their father's footsteps.

11 This is the sincere hope of the government, that the
12 defendant takes the opportunity for whatever period of time
13 this Court sees fit to incarcerate him to insure that when
14 he returns to the community, in perhaps even a decade or
15 more of time, that he is wiser and more prepared to finally
16 and permanently stop committing illegal acts, stop
17 participating in criminal street gangs, and live the life
18 that he has stated to this Court he wants to once and for
19 all.

20 Thank you.

21 THE COURT: Thank you, Mr. Gould.

22 Pursuant to Title 18, United States Code, Section
23 3553(a), when sentencing, the Court is required to impose a
24 sentence sufficient but not greater than necessary to comply
25 with the purposes of sentencing set forth in the sentencing

1 statute.

2 In determining a sentence, the Court is required to
3 consider the applicable factors set forth in the sentencing
4 statute.

5 And we've already discussed a number of the factors.
6 We've discussed the nature and circumstances of the offense,
7 the history and characteristics of Mr. Serrano.

8 The Court is aware of the requirement that the Court
9 avoid unwarranted sentencing disparities among defendants
10 with similar records who have been found guilty of similar
11 conduct.

12 So now the Court needs to determine the sentence and
13 the need for the sentence imposed in this case.

14 So we have Mr. Serrano who is 40 years old and who has
15 a fairly extensive criminal history, as we discussed,
16 beginning at the age of 17.

17 Due to the nature of some of his prior offenses, he is
18 a career offender.

19 And as the assistant United States attorney noted,
20 that does in fact affect his sentence in this case.

21 The offense conduct in this case is serious in that
22 the distribution of drugs causes significant harm to the
23 community. And again, as has been noted here today, it not
24 only affects the community and the public as a whole, but in
25 this case it affected Mr. Serrano personally in that he

1 placed his children at risk.

2 And it is -- I mean, if that is not a sobering fact
3 and detail of this conduct, I don't know what could be more
4 sobering.

5 Additionally, in looking at Mr. Serrano's record, he,
6 at least from the record itself, he has not made effort to
7 comply with the law and is either unwilling or incapable of
8 being a law-abiding citizen.

9 Although he does come to the Court today, and he has
10 expressed remorse, but the Court cannot overlook his record
11 in committing prior drug offenses, violent offenses,
12 including domestic violence and felonious assault and
13 assault, as Mr. Gould noted.

14 He has served periods of incarceration in the past,
15 but the past sentences have not deterred his criminal
16 conduct and involvement. He continues to be involved in
17 criminal activity.

18 And, again, this places the community at risk because
19 of the nature of the conduct, and also Mr. Serrano and his
20 family.

21 The Court acknowledges that Mr. Serrano has some
22 mental health issues and some substance abuse issues.

23 The Court also agrees with the government that he, Mr.
24 Serrano, today -- and his attorney -- that Mr. Serrano today
25 comes before the Court at least expressing remorse that

1 appears to be genuine. And I would think that remorse comes
2 in part from the realization that he really did place
3 himself, and in particular his children, at risk by his
4 conduct and behavior.

5 So given all the factors that the Court is required to
6 consider in this case, the Court finds that a low-end
7 guideline sentence is appropriate, and therefore, pursuant
8 to the Sentencing Reform Act of 1984, Title 18, United
9 States Code, Section 3553(a), it is the judgment of the
10 Court that the defendant, Marco Serrano, is hereby committed
11 to the custody of the Bureau of Prisons for a term of 151
12 months.

13 The Court will recommend that Mr. Serrano be permitted
14 to participate in the RDAP program, that he be placed as
15 close to Lorain County as possible so that he may be as
16 close to his family members as possible, that Mr. Serrano be
17 permitted to participate in any trades programs offered at
18 the facility, and that he be permitted to take advantage of
19 the benefits flowing from the First Step Act and in
20 particular benefits that are available to him while
21 incarcerated and the benefits that may be available to him
22 at a halfway house so that he may, as he transitions back
23 into the community, transition in a structured setting so
24 that perhaps he is more successful as he reenters the
25 community.

1 Also, although the program is voluntary, the Court
2 will make a recommendation that Mr. Serrano, if he chooses,
3 be permitted to participate in the drug -- in the Court's,
4 rather, in the Court's reentry program. I believe it will
5 benefit him. But again, that is a choice he needs to make
6 once he segues back into the community and is on supervised
7 release.

8 Upon release from imprisonment, he shall be placed on
9 supervised release for a term of five years.

10 Within 72 hours of release from the custody of the
11 Bureau of Prisons, he shall report in person to a United
12 States Pretrial Services and Probation Office in the
13 sentencing district or in the district to which he is
14 released.

15 Based upon a review of Mr. Serrano's financial
16 condition, the Court is going to waive the fine in this
17 case, finding that he does not have the ability to pay a
18 fine.

19 He must pay, however, a special assessment to the
20 United States, and that special assessment is due and
21 payable immediately.

22 While on supervision he must comply with the mandatory
23 and standard conditions that have been adopted by this Court
24 and set forth in Part D of the presentence investigation
25 report.

1 And he must comply with the following additional
2 conditions:

3 He must refrain from any unlawful use of a controlled
4 substance and submit to one drug test within 15 days of
5 release from imprisonment and to at least two periodic drug
6 tests thereafter as determined by the Court.

7 He shall participate in an approved program of
8 substance abuse testing and/or outpatient or inpatient
9 substance abuse treatment as directed by his supervising
10 officer and abide by the rules of the treatment program.

11 His probation officer will supervise his participation
12 in the program.

13 Mr. Serrano shall not obstruct or attempt to obstruct
14 or tamper in any fashion with the efficiency and accuracy of
15 any prohibited substance testing.

16 He must undergo a mental health evaluation and/or
17 participate in a mental health treatment program and follow
18 the rules and regulations of that program.

19 His probation officer, in consultation with his
20 treatment provider, will supervise his participation in the
21 program. He must participate in a cognitive behavioral
22 therapy program as directed by his probation officer and
23 abide by the rules of any treatment plan in that regard.

24 He must take all mental health medications that are
25 prescribed by his treating physician.

1 He must not communicate or otherwise interact with any
2 known members of the Latin Kings gang or any other gang
3 without first obtaining permission of his probation officer.

4 He must cooperate in the collection of DNA as directed
5 by his probation officer.

6 The mental health treatment is being imposed because
7 of his mental health conditions as outlined in the
8 presentence report.

9 The substance abuse treatment and testing condition is
10 being imposed because of his substance abuse history.

11 He must also submit his person, property, house,
12 residence, vehicle, papers, computers, other electronic
13 communications or data storage devices or media or office to
14 a search conducted by a United States probation officer.
15 Failure to submit to a search may be grounds for revocation
16 of release.

17 He must warn any other occupants that the premises may
18 be subject to searches pursuant to this condition.

19 His probation officer may conduct a search under this
20 condition only when reasonable suspicion exists that he has
21 violated a condition of supervision and that the areas to be
22 searched contain evidence of this violation. Any search
23 must be conducted at a reasonable time and in a reasonable
24 manner.

25 This condition is being imposed because of the nature

1 of this offense and the fact that he was involved in this
2 drug trafficking organization and for officer safety.

3 Obviously the gang condition is being imposed because
4 of his association with gangs.

5 And so with that, counsel, do you have any objections
6 or know of any reason why the sentence as stated by the
7 Court should not be imposed?

8 MR. GOULD: No, Your Honor. Thank you.

9 MR. RICH: No, Your Honor.

10 THE COURT: All right. Mr. Serrano, do you have
11 any questions regarding your sentence in this case?

12 THE DEFENDANT: No, ma'am.

13 THE COURT: All right. I do hope you take the
14 time that you will be incarcerated to take advantage of the
15 programs that are offered at the institution so that you can
16 better segue back into the community, and that you, if you
17 wish, also take advantage of the Court's reentry program at
18 the appropriate time.

19 So with that, Mr. Serrano, the Court hereby advises
20 you that you can appeal your conviction if you believe that
21 your guilty plea was somehow unlawful or involuntary or if
22 there is some other fundamental defect in the proceedings
23 that was not waived by your guilty plea.

24 You also have a statutory right to appeal your
25 sentence under certain circumstances, particularly if you

1 think the sentence is contrary to law.

2 If you do not have enough funds to allow you to take
3 an appeal, you have the right to have somebody appointed to
4 represent you in prosecuting an appeal, and you would have
5 the right to appeal without cost to you.

6 Also, you have the right to apply for leave to appeal
7 in forma pauperis. And in that event the clerk of court
8 will prepare and file a notice of appeal upon your request.

9 Be advised that with few exceptions, any notice of
10 appeal must be filed within 14 days of the entry of this
11 Court's judgment.

12 Sir, do you understand all that I've said relative to
13 your right to an appeal?

14 THE DEFENDANT: Yes, ma'am.

15 THE COURT: All right. And, Mr. Rich, I trust
16 that if your client wishes to file a notice of appeal you
17 will assist him in that regard?

18 MR. RICH: I would do that, Your Honor.

19 THE COURT: All right. And with that, that
20 concludes this proceeding, and Mr. Serrano is remanded to
21 the custody of the marshals so that he may be placed at an
22 appropriate institution to serve his sentence in this case.

23 MR. GOULD: Thank you, Your Honor.

24 THE DEPUTY CLERK: All rise.

25 (Proceedings concluded at 12:10 p.m.)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

C E R T I F I C A T E

I certify that the forgoing is a correct transcript from the record of proceedings in the above-entitled matter.

S/Caroline Mahnke 3/30/20

Caroline Mahnke, RMR, CRR, CRC Date

No. 19-4218

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Nov 05, 2020
DEBORAH S. HUNT, Clerk

UNITED STATES OF AMERICA,)
)
Plaintiff-Appellee,)
)
v.)
)
MARCO ANTONIO SERRANO,)
)
Defendant-Appellant.)

O R D E R

Before: COOK, WHITE, and MURPHY, Circuit Judges.

Defendant Marco Antonio Serrano appeals the district court’s judgment after pleading guilty, pursuant to a negotiated plea agreement, to possession with intent to distribute a controlled substance in violation of 21 U.S.C. § 841(a)(1). The government moves to dismiss the appeal, arguing that Serrano’s appeal is barred by an appellate-waiver provision in his plea agreement. Serrano opposes the motion.

“Criminal defendants may waive their right to appeal as part of a plea agreement so long as the waiver is made knowingly and voluntarily.” *United States v. Swanberg*, 370 F.3d 622, 625 (6th Cir. 2004) (citation omitted). “This Court reviews the question of whether a defendant waived his right to appeal his sentence in a valid plea agreement de novo.” *Id.* at 626 (quoting *United States v. Smith*, 344 F.3d 479, 483 (6th Cir. 2003)).

No. 19-4218

-2-

Serrano does not expressly argue that his appellate waiver was not knowing or voluntary, nor could he; at the plea hearing, the magistrate judge went to great lengths to ensure that Serrano understood the substance and effect of his guilty plea and the plea agreement. Likewise, on its face, Serrano's 151-month sentence falls within the scope of the waiver; it was at the bottom of the guidelines range and far below the statutory maximum, and he does not allege on appeal that his sentence was the result of prosecutorial misconduct or ineffective assistance of counsel.

Still, Serrano argues that the district court's mandatory application of the career-offender enhancement falls outside the scope of the waiver. He asserts that he was entitled to presume that the district court would follow the law when imposing sentence. In *United States v. Booker*, 543 U.S. 220, 245 (2005), the Supreme Court held that the "provision of the federal sentencing statute that ma[de] the Guidelines mandatory" was unconstitutional and severed it from the statute. Since then, courts have considered it a "significant procedural error" to treat the guidelines as mandatory. *Gall v. United States*, 552 U.S. 38, 51 (2007).

Serrano's argument rests on the premise that the district court did not understand that it had discretion to sentence below the applicable Guidelines range. The plea agreement provided that neither party would recommend or suggest that a departure or variance is appropriate, but also provided that the district court alone would decide whether there is any basis to depart from the range or impose a sentence outside the range. There is no basis to conclude that the district court did not understand its authority under either the agreement or *Booker*.

Serrano's argument is further contradicted by the transcript of the sentencing hearing, which illustrates the district court's consideration of the 18 U.S.C. § 3553(a) factors to "impose a sentence sufficient, but not greater than necessary." The court listed the relevant factors—the nature and circumstances of the crime, the history and characteristics of the defendant, the need to

No. 19-4218

-3-

avoid unwarranted sentencing disparities—and discussed each one. Accordingly, when the district court found that 151 months in prison was “appropriate,” that finding was based on the court’s considerations of the sentencing factors rather than the mechanical application of a mandatory sentencing formula.

Serrano’s argument that dismissing his appeal would violate public policy is also unpersuasive. It is well settled in the federal courts that “a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court.” *United States v. Freeman*, 640 F.3d 180, 193 (6th Cir. 2011) (quoting *United States v. Caruthers*, 458 F.3d 459, 471 (6th Cir. 2006)). Serrano argues that the dramatic difference between the lowest potential within-guidelines sentence—12 months based on a base offense level of 16 minus three levels for accepting responsibility and a criminal history category of I—to the highest possible within-guidelines sentence—188 months based on the career-offender enhancement and a criminal history category of VI—is unjust. But Serrano was not left at the whim of the district court—he reserved the right to appeal sentences above the guidelines range or greater than the statutory maximum.

Finally, Serrano argues that, by challenging his sentence under *Booker*, he is asserting that his sentence exceeds the statutory maximum. Serrano misreads *Booker*, which, in addition to making the guidelines advisory, turned on the proposition that “[a]ny fact (other than a prior conviction) 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.” 543 U.S. at 244. Serrano’s qualification for the career-offender enhancement was based solely on his prior convictions and the conduct admitted in his

No. 19-4218

-4-

plea agreement. *See* USSG § 4B1.1(a). It relied on no judge-found facts. In short, Serrano knowingly and intelligently waived the right to appeal his 151-month sentence.

The motion to dismiss is **GRANTED**.

ENTERED BY ORDER OF THE COURT

A handwritten signature in black ink, appearing to read "Deborah S. Hunt", is written over a horizontal line.

Deborah S. Hunt, Clerk