No. 24-____

IN THE

Supreme Court of the United States

BRETT MORRIS MCALPIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The Sentencing Reform Act of 1984 created a statutory right of appellate review of sentences for criminal defendants. 18 U.S.C. § 3742; 98 Stat. 2011 (Oct. 12, 1984). The Court, in *Garza v. Idaho*, 586 U.S. 282 (2019), and in *Puckett v. United States*, 556 U.S. 129 (2009), has held that principles of contract law govern the formation and interpretation of plea agreements.

Petitioner Brett Morris McAlpin pleaded guilty to all counts of a criminal information. McAlpin sought appellate review of his sentence, claiming the sentence was both procedurally and substantively unreasonable.

The government moved to dismiss the appeal, invoking the appeal waiver provision of a purported plea agreement. McAlpin argued that the plea agreement failed, for lack of consideration, to create a valid contract, and the appeal waiver could not deny his right to appellate review of his sentence. The court of appeals dismissed the appeal and denied en banc rehearing.

The Question Presented is:

Should an appeal waiver in a plea agreement be enforced when the plea agreement confers no benefit on the defendant in exchange for his guilty plea, thereby eliminating the statutory right of appellate review established by Congress in 18 U.S.C. § 3742?

The Second Circuit, in *Lutchman v. United States*, 910 F.3d 33, 37-38 (2018), answered that such an appeal waiver was not enforceable against a defendant seeking review of the sentence.

Contradicting the Second Circuit with the ruling against Brett Morris McAlpin, the Fifth Circuit now creates a circuit split calling for the Court's review.

PARTIES TO THE PROCEEDING

Petitioner Brett Morris McAlpin was Defendant-Appellant before the United States Court of Appeals for the Fifth Circuit and Defendant in the United States District Court for the Southern District of Mississippi.

Respondent United States of America was Plaintiff-Appellee before the Fifth Circuit and Plaintiff-Prosecution in the United States District Court for the Southern District of Mississippi.

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

United States v. Brett Morris McAlpin, No. 23-CR-62-1, United States District Court for the Southern District of Mississippi. Judgment entered April 1, 2024.

United States v. Brett Morris McAlpin, No. 24-60181, United States Court of Appeals for the Fifth Circuit. Direct appeal from criminal sentence. Order of dismissal entered January 31, 2025. Petition for rehearing was denied on March 20, 2025.

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PETITION FOR A WRIT OF CERTIORARI

Brett Morris McAlpin respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit. This petition presents complementary but distinct issues to those raised in *Hunter v. United States*, No. 24-1063, *petition for certiorari pending* (filed Apr. 4, 2025). While Hunter addresses which constitutional violations may overcome an otherwise valid appeal waiver, this case addresses whether an appeal waiver should be enforced when the underlying plea agreement lacks consideration entirely.

OPINION BELOW

The opinion of the court of appeals (Pet.App. 1a-4a) is unreported but available at 2025 WL 354984. The order (Pet.App. 5a) denying the petition for rehearing is unreported.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals judgment entered on January 31, 2025. The order denying rehearing entered on March 20, 2025.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. Amend. V.

> … nor be deprived of life, liberty, or property, without due process of law; ….

18. U.S.C. § 3742

> (a) A defendant may file a notice of appeal in the district court for review of an otherwise final sentence ….

Full text of 18 U.S.C. § 3742 appears at Pet.App. 6a-11a.

STATEMENT OF THE CASE

One cannot give nothing for something, yet consider the exchange to be enforceable as a contract agreement.

Petitioner Brett McAlpin voluntarily pleaded guilty. McAlpin never sought, nor does he seek, to withdraw that plea. McAlpin solely seeks review of his sentence. Whatever the outcome of appellate review, McAlpin will stay convicted and serve a (perhaps reduced) prison sentence.

McAlpin never sought to enforce the plea agreement, nor claimed any breach of the plea agreement, because that plea agreement offered McAlpin nothing that would not have come to McAlpin otherwise. In effect, McAlpin entered an open guilty plea to the court.

The plea agreement was not contested nor in issue, until the government, to deny McAlpin's appeal of his sentence, invoked an appeal waiver. That appeal waiver is no bar to McAlpin's appeal, because it is part of an invalid contract.

The Court has judged federal plea agreements by the principles of contract law, which have become central to the nationwide criminal justice system. Congress mandated a fundamental statutory right to appeal sentences. Accordingly, the Court should apply those contract law principles to give effect to Congress's mandate.

Principles of contract law dictate that the plea agreement (including appeal waiver) was void for lack of consideration. Actual consideration for the surrender of constitutional and statutory rights is absent from McAlpin's case. McAlpin received nothing

under the plea agreement, that would not have been afforded McAlpin had he pleaded simply to all counts.

A clear split now divides the Second and Fifth Circuits on this issue. The Second Circuit recognizes that appeal waivers cannot preclude appellate review of a sentence, when no consideration supported the plea agreement with appeal waiver. In McAlpin's case, the Fifth Circuit directly contravenes the Second Circuit to enforce an appeal waiver, and this calls for the Court to resolve a conflict.

FACTUAL BACKGROUND

Brett McAlpin and five codefendants consented to a Bill of Information filed on July 31, 2023. C.A. ROA.14. The charges concerned police brutality on January 24, 2023, and conspiracy to obstruct justice. Brett faced seven counts, under 18 U.S.C. §§ 241, 242 and 1512. Pet.App. 1a; C.A. ROA.14.

A senior officer in the headquarters of the Rankin County, Mississippi Sheriff's Office (RCSO), Brett McAlpin was the Chief Investigative Officer of the RCSO. C.A. ROA.351, 407. The criminal episode began after McAlpin asked sheriff's deputies to visit and inspect a home, in response to neighbors' complaints. C.A. ROA.262-63. The responding deputies, a team who fancied themselves "Lieutenant Middleton's Goon Squad," abused their authority to unlawfully enter the home and terrorize the two black men they found there, including attempted mock execution and threatened sexual assault. C.A. ROA.263-64. McAlpin arrived last and was peripheral to the scene, but McAlpin confessed to his failure to intervene and stop the abuse, as well as to participating in the attempted cover up and obstruction of an investigation. C.A. ROA.171.

In August 2023, the Civil Rights Division of the Department of Justice offered one identical plea agreement to all of the defendants. C.A. ROA 7. The plea agreement dismissed no Count against McAlpin. Pet.App. 24a-32a. The government stipulated to no sentence, other than to accept the Guidelines sentence to be determined by the sentencing court. Pet. App. 24a-32a; C.A. ROA.348. No agreement addressed possible enhancements or reductions to any guidelines sentence calculation. Pet.App. 24a-32a; C.A. ROA.348. The plea agreement offered McAlpin nothing that he would not have otherwise received from the court in open plea to all counts with no plea agreement. Pet.App. 24a-32a.

McAlpin pleaded guilty to all seven Counts. Pet.App. 1a; C.A. ROA.340, 348. McAlpin waived rights to remain silent, to a jury trial, to present evidence, to compulsory process for witnesses, to cross-examine witnesses, to seek post-conviction remedies in habeas or Section 2255 proceedings, and to appeal his conviction or sentence. Pet.App. 30a; C.A. ROA.164-66, 344-46. A plea supplement invited McAlpin to assist the Civil Rights Division, with no promise for a recommendation to reduce Brett's sentence. C.A. ROA.350.

The court arraigned McAlpin in August 2023. C.A. ROA.6. He pleaded guilty to all Counts of the Information. Pet.App. 1a; C.A. ROA.7, 105. The district court accepted McAlpin's plea and adjudicated him guilty. C.A. ROA.7, 171.

McAlpin filed a sentencing memorandum in March 2024, objecting to the Guidelines sentencing range calculation. C.A. ROA.611. McAlpin also objected to paragraphs nos. 75 — 122 in the revised Presentence Investigation Report (PSR). C.A. ROA.643. Those paragraphs described "Offense Behavior Not Part of Relevant Conduct," specifically unrelated allegations

against McAlpin from isolated occasions spanning June 2018 to February 2021. C.A. ROA.386-94. The Civil Rights Division submitted no objections to the PSR. C.A. ROA.416.

The government did submit a sentencing memo to the court plus a Supplement with Exhibits, filed under seal. C.A. ROA.432. Those sealed exhibits were reports of interviews with past subjects of McAlpin's RCSO investigations over a five year period. C.A. ROA.441-605. The reports (solicited and created after McAlpin had pleaded guilty) are heavily redacted. *E.g.,* C.A. ROA. 447-53, 455-62, 485-86, 512-22.

The court adopted the entire revised PSR. C.A. ROA.300. At offense level 39, criminal history category I, the Guidelines sentencing range was 262-327 months. C.A. ROA.299.

Counsel from the Civil Rights Division spoke for the government. C.A. ROA.315. Counsel requested a sentence at the high end of the Guidelines range, 327 months. C.A. ROA.439, 608. Counsel urged the court consider reports of interviews alleging uncharged conduct against McAlpin, outside the scope of relevant conduct. C.A. ROA.317. The court denied defense objections and sentenced McAlpin to 327 months. Pet.App. 2a; C.A. ROA.328. The court ordered McAlpin's sentence run concurrently with a State sentence. C.A. ROA.308.

Sentencing of all six codefendants took place across three consecutive days in March 2024. C.A. ROA.9-10, 274, 323-24. For his role in the crime, Christian Dedmon was sentenced to 480 months. C.A. ROA.323. Daniel Opdyke received 210 months. C.A. ROA.324. Hunter Elward, the officer who pulled the trigger on his service weapon in attempted mock execution and

shot a victim, received 240 months. C.A. ROA.323-24. The court sentenced Lieutenant Jeffrey Middleton, the eponymous Goon Squad leader and officer in command on the scene, who did not receive a leadership role enhancement under U.S.S.G. § 3B1.1, to 200 months. C.A. ROA.274-80, 282, 325-26. Brett McAlpin was sentenced last, after three days of public spectacle and media attention, before an overflow courtroom. C.A. ROA.261, 315.

PROCEEDINGS BELOW

McAlpin timely noticed his appeal from the sentence on April 15, 2024. C.A. ROA.98, 395. The Fifth Circuit filed and docketed McAlpin's appellant brief in August 2024.

The government moved to dismiss McAlpin's appeal, citing an appeal waiver. Pet.App. 4a. McAlpin filed a brief opposing the motion in September 2024. McAlpin argued that the waiver could not block appeal, because the plea agreement failed under principles of contract law: McAlpin had received no consideration in exchange for the waiver.

On January 31, 2025, the court of appeals dismissed the appeal. Pet.App. 1a-4a. McAlpin filed a petition for en banc review on February 14, 2025. Pet.App. 5a. On March 20, 2025, the Court of Appeals denied the petition for rehearing. Pet.App. 5a.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Creates a Circuit Split.

The Fifth Circuit opinion conflicts with other circuits applying contract law principles to enforceability of appeal waivers.

The Second Circuit holds squarely opposite. *United States v. Lutchman*, 910 F.3d 33 (2018)[1], held an appeal waiver unenforceable when there was no consideration for the underlying plea agreement. "Lutchman argues that the waiver should not be enforced because the plea agreement conferred no benefit on him in exchange for the guilty plea. We agree." *Id*. at 37. App. 15a. Appeal waivers "are [not] enforceable on a basis that is unlimited and unexamined." *Id*. (Citing *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996)). Pet.App. 15a-16a. *Cf. United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004) ("a guilty plea can be challenged for contractual invalidity, including invalidity based on a lack of consideration."). For important public policy reasons to avoid "disrespect for the integrity of the court," the courts "must scrutinize waivers closely and apply them narrowly." 82 F.3d at 556. *See also United States v. Lajeunesse*, 85 F.4th 679, 691-92 (2d Cir. 2023) (holding "the appeal waiver does not bar this appeal and …. not all appellate waivers are enforceable.")

On this point, *Lutchman* remains controlling Second Circuit precedent. *United States v. Seamans*, No. 23-1031, 2024 WL 177708, *1 n.2 (2d Cir. Jan. 17, 2024); *see also Cook v. United States*, 111 F.4th 237, 241 (2d Cir. 2024) (Sullivan, Cir. J., concurring) ("appeal and

[1] The *Lutchman* opinion appears at Pet.App. 12a-23a.

collateral attack waivers [are] unenforceable … when the waiver was unsupported by consideration," citing *Lutchman*); *Cook v. United States*, 84 F.4th 118, 122 (2d Cir. 2023) (same).

The Fifth Circuit's decision creates a direct conflict by enforcing the appeal waiver in the absence of consideration to McAlpin, highlighting a fundamental disagreement about contract principles in plea agreements. The Court has repeatedly emphasized that plea agreements are governed by contract principles. A ruling that enforces an appeal waiver without consideration undermines this foundational principle.

II. The Dispute Over Appeal Waivers Extends Beyond the Second and Fifth Circuits.

The Third Circuit strictly construes appeal waivers. *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Saferstein*, 673 F.3d 237, 243 (3d Cir. 2012) ("must be construed to protect the defendant as the weaker bargaining party"). The Third Circuit declined "to adopt a blanket rule prohibiting all review" of waivers of appeals, and agreed with the Second Circuit that "provisions that exchange the right to appeal … may be too broad to be valid." 273 F.3d at 562. *See United States v. Goodson*, 544 F.3d 529, 535 (3d Cir. 2008) (applying *Khattak* and contract principles to permit appeal despite waiver).

The Fourth Circuit recognizes that "a defendant who executes a general waiver of the right to appeal his sentence in a plea agreement does not thereby subject himself to being sentenced entirely at the whim of the district court, but retains the right to obtain appellate review of his sentence on certain limited grounds." *United States v. Attar,* 38 F.3d 727, 732 (4th Cir. 1994) (cleaned up). *See also United States v. Divens*, 650 F.3d

343, 350 (4th Cir. 2011) ("a defendant's unconditional guilty plea in and of itself limits his grounds for appeal," undercutting justification for appeal waivers).

The Ninth Circuit case *United States v. Gonzalez*, 981 F.2d 1037 (1992), *merits opinion*, 16 F.3d 985 (1993), permits appeals in the face of waivers. The *Gonzalez* court denied the motion to dismiss the appeal, because Gonzales "call[ed] into question the validity of the waiver," therefore the "issue should be resolved by a merits panel." 981 F.2d at 1038. On the merits, the Ninth Circuit ruled that "because Gonzalez is not appealing the government's breach of the plea agreement," that plea agreement had "no bearing on whether Gonzalez may bring this appeal at all." 16 F.3d at 989 (also discussing reasons why the issue need not have been raised in the trial court).

Each sister circuit precedent contradicts the Fifth Circuit. The circuit split undermines national uniformity of federal criminal procedure, an exceptionally important issue. Pleas predominate federal criminal case dispositions, and the implications are grave and wide ranging.

The circuit split over appeal waivers more generally is thoroughly documented in the concurrent petition in *Hunter v. United States*, which demonstrates that defendants' ability to challenge unconstitutional sentences varies dramatically based solely on geography. 24-1063 Pet. 8-15.

III. The Question Presented Involves a Matter of Exceptional Importance to the Federal Criminal Justice System.

The overwhelming majority of federal criminal cases are resolved through plea bargains rather than trials. As demonstrated in *Hunter v. United States*, 24-1063 Pet.16, Sentencing Commission statistics for 2024

reveal that: guilty pleas comprise 97 percent of federal convictions; the majority of those convictions result from plea agreements; and most of those agreements contain broad appeal waivers. The systematic inclusion of these appeal waivers makes their enforceability standards a matter affecting the vast majority of federal criminal defendants.

According to the American Bar Association's 2023 Plea Bargain Task Force Report, approximately 98% of federal criminal cases end with plea bargains rather than trials. ABA Criminal Justice Section, 2023 Plea Bargain Task Force Report (2023 Task Force Report) 6 & n.2 (2023).

The Vera Institute of Justice reports that 90% of federal court convictions in 2014 were adjudicated through guilty pleas, with researchers estimating that more than 90% of these guilty pleas resulted from plea bargaining negotiations between prosecutors and defense counsel. Vera Inst. Just., *In the Shadows: A Review of the Research on Plea Bargaining* 1 & n.1 (Sept. 2020).

While specific statistics on the percentage of plea agreements containing appeal waivers are more limited, the available information indicates their widespread use:

- Appeal waivers have become standard components in most modern federal plea agreements, with defendants typically waiving their rights to appeal convictions and/or sentences in exchange for perceived benefits from prosecutors.
- The ABA Plea Bargain Task Force specifically identified appeal waivers as problematic, recommending that "prosecutors and

judges not demand or accept plea deals where defendants waive essential legal rights, such as the right to appeal" and receive exculpatory information. 2023 Task Force Report 25 (Principle Ten).

- In its recommendations, the ABA Task Force stated: "Although guilty pleas necessarily involve the waiver of certain trial rights, there are rights that defendants should never be required to waive in a plea agreement" including certain appeal rights. 2023 Task Force Report at 25 (Principle Ten).

The United States Department of Justice has issued guidance to prosecutors about appeal waivers in plea agreements: While DOJ policy permits prosecutors to incorporate appeal waivers into plea agreements, the Department recognizes that certain rights should not be waived, such as claims of ineffective assistance of counsel. U.S. Dep't Just., Just. Man. 9-16.330 (Jan. 2020).

The widespread use of appeal waivers has raised significant concerns about their impact on defendants' rights and the integrity of the criminal justice system. *E.g.,* Quin M. Sorenson, *Appeal Rights Waivers: A Constitutionally Dubious Bargain,* Fed. Law. 32, 33 (Oct./Nov. 2018) (defendants "should not and cannot be required to waive other rights and guarantees under the U.S. Constitution or statute merely for the privilege of accepting a plea agreement and admitting guilt.").

This prevalence data underscores the importance of the circuit split regarding the enforceability of appeal waivers when defendants receive no attributable benefit in exchange for pleading guilty. The Question Presented affects thousands of defendants annually.

As detailed in the concurrent petition in *Hunter v. United States*, No. 24-1063, *petition for certiorari pending* (Apr. 4, 2025), appeal waivers appear in virtually all federal plea agreements. The systematic inclusion of these waivers in almost all federal plea agreements makes the question of their enforceability when unsupported by consideration a matter of exceptional importance.

IV. The Decision Below Is Wrong.

Unlike the defendant in the pending *Hunter v. United States* petition, McAlpin's case presents an even more fundamental contract law violation: the complete absence of consideration. While Hunter challenges the scope of constitutional exceptions to appeal waivers, McAlpin demonstrates that no valid contract ever existed to support any waiver.

To interpret plea agreements, "courts are to apply general principles of contract law." *United States v. Cluff*, 857 F.3d 292, 298 (5th Cir. 2017). *See Garza*, 586 U.S. at 238 ("plea bargains are essentially contracts.").

The Fifth Circuit correctly notes that these contract principles apply, but overlooks that appeal waivers should be strictly construed in defendant's favor. Pet.App. 2a. *United States v. Winchel*, 896 F.3d 387, 389 (5th Cir. 2018) ("We construe any ambiguity in the plea agreement against the Government.") (citations omitted). Unlike *Winchel*, McAlpin raises the distinct issue of whether an enforceable contract ever existed. "[A]n appeal waiver does not bar claims outside its scope," *Garza*, 586 U.S. at 238, and it cannot bar any claim absent formation of an enforceable contract. *See also Puckett*, 556 U.S. at 137 (remedy can leave guilty plea valid despite failure of consideration in the plea agreement).

The Fifth Circuit previously applied "ordinary principles of contact interpretation, construing waivers narrowly and against the government." *United States v. Strother*, 977 F.3d 438, 442 (5th Cir. 2020); *see also United States v. Palmer*, 456 F.3d 484, 488 (5th Cir. 2006) ("Given our duty to construe appeal waivers narrowly, we read Palmer's appeal as having preserved his right to challenge his conviction" despite sentence appeal waiver).

The plea agreement is construed strictly against the government as drafter of the agreement. *Mastrobuono v. Shearson Lehman Hutton, Inc.,* 514 U.S. 52, 62-63 & n.10 (1995) ("the reason for this rule is to protect the party who did not choose the language from an unintended or unfair result"); *United States v. Purser*, 747 F.3d 284, 290 (5th Cir. 2014); *United States v. Elashyi*, 554 F.3d 480, 501 (5th Cir. 2010); *United States v. Somner*, 127 F.3d 405, 408 (5th Cir. 1997) (per curiam) (waiver "must be construed against the government").[2] *See also United States v. Standard Rice Co.,* 323 U.S. 106, 111 (1944) ("the United States as a contractor must be treated as other contractors under analogous situations."). The Court should give full benefit of the doubt to McAlpin, to permit review of the sentence.

The Fifth Circuit previously has evaluated plea bargains on appeal for adequacy of consideration. Pet.App. 2a. But the cited cases in the opinion below, having weighed consideration, do not address McAlpin's circumstances.

In *United States v. Smallwood*, the Fifth Circuit found a "bargain established that the government

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[2] *Cf. Austin v. Carpenter*, 3 So.3d 147, 149 (Miss. Ct. App. 2009) (where it is unclear who is to determine completion of condition precedent, ambiguity is interpreted against the drafter).

agreed to dismiss all other counts for which Smallwood was indicted." 920 F.2d 1231, 1240 (1991). No Counts against McAlpin have been dismissed. Pet.App. 2a, 24a-32a. C.A. ROA.340, 348.

In *United States v. Fields*, the Fifth Circuit applied contract law principles to find "consideration for the plea was the reduction in charges." 906 F.2d 139, 141-42 (1990). No charges against McAlpin were dismissed. Pet.App. 2a; C.A. ROA.340, 348.

The opinion below elides over McAlpin's claim that no valid contract was formed to support or invoke an appeal waiver, without applying governing contract principles. Pet.App. 1a-4a.

A. No contract forms without consideration. Contracts lacking consideration and their appeal waivers are not enforceable.

An essential element of a valid contract is mutual consideration. *See Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 862 (1983); *McCallum Highlands, Ltd. v. Washington Capital Dus, Inc.,* 66 F.3d 89, 93 (5th Cir. 1995) ("Consideration is a present exchange bargained for in return for a promise.").

McAlpin waived valuable constitutional rights — foregoing his rights to a trial by jury, to cross-examine witnesses, to call witnesses with compulsory process, and to appeal his sentence. Pet.App. 30a; C.A. ROA.340-54. *See generally Class v. United States*, 583 U.S. 174, 182 (2018). McAlpin committed to cooperate and assist DOJ investigations. Pet.App. 31a; C.A. ROA.348-54.

But the government exchanged, in reality, nothing. Pet.App. 31a; C.A. ROA.340-54. *See* 3 Williston on Contracts § 7:7 at 134-35 (4th ed. Richard A. Lord

2018); *Miami Coca-Cola Bottling Co. v. Orange Crush Co.*, 296 F. 693, 693 (5th Cir. 1924) ("the [promisor] did not promise to do anything, and could at any time cancel the contract. According to the great weight of authority such a contract is unenforceable."); *Pier 1 Cruise Experts v. Revelex Corp.*, 929 F.3d 1334, 1347 (11th Cir. 2019) ("where an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration").

The government dismissed no Counts against McAlpin. Pet.App. 24a, 31a; C.A. ROA.340-54. McAlpin pleaded guilty to each one. Pet.App. 24a; C.A. ROA.340-54. This added nothing to the sentence; the Sentencing Guidelines group Counts. U.S.S.G. § 3D1.1(a). C.A. ROA.395. Yet McAlpin paid a $100 special assessment for each count. 18 U.S.C. § 3013; U.S.S.G. § 5E1.3; Pet.App. 27a; C.A. ROA.10-11, 89, 331, 412.

The Fifth Circuit accepted uncritically the government's claimed consideration given to McAlpin. Pet.App. 2a. Although dismissing none of the Counts, the government would bring no new charges. Pet.App. 2a. The government would recommend a sentence within the Guidelines range. Pet.App. 2a. And the government would not oppose reduction of offense level for acceptance of responsibility. Pet.App. 2a. Each of these items offers nonexistent consideration.

First, a promise not to charge McAlpin again for the events of January 2023 in Rankin County, merely refrains from constitutionally prohibited double jeopardy. U.S. Const. amend. V. The government may not thereafter charge McAlpin, without violating the Fifth Amendment and the Court's precedents of *Blockburger v. United States,* 284 U.S. 299, 304 (1932) and *Whalen v. United States*, 445 U.S. 684, 691-92 (1980). As new charges are constitutionally forbidden,

it is no consideration, on the part of the government, to forbear a constitutional rights violation. Compare this argument of the court of appeals with the Second Circuit's finding in *Lutchman*, that no consideration existed where "the government has not articulated or identified any additional Counts that could have been proven at trial." Pet.App. 17a.

Second, a within-Guidelines sentencing recommendation is another illusory promise of something already due to McAlpin. A preexisting obligation, without new detriment on the promisor, fails consideration. *McCallum Highlands Ltd.,* 66 F.3d at 93 (citing 2 Williston on Contracts § 7:36 (1992)). DOJ policy always permits a Guidelines range sentence recommendation without approval — it is the standard approach. U.S. Dep't of Just., Just. Manual § 9-27.730 (2023) ("prosecutors should generally continue to advocate for a sentence within that [Guidelines] range"); Att'y Gen. Merrick Garland, Memorandum for All Federal Prosecutors, General Department Policies Regarding Charging, Pleas, and Sentencing at 5 (Dec. 16, 2022) (same). This Court's precedent mandates that any sentence calculation begin with the Guidelines range. *See Gall v. United States,* 552 U.S. 38, 50 (2007); *Rita v. United States*, 551 U.S. 338, 347 (2007).

Last, the opinion states that a third point reduction for acceptance of responsibility supports the bargain. Pet.App. 2a. Again, the Fifth Circuit set itself in opposition to the Second Circuit in *Lutchman*: "a three-level reduction under Guidelines § 3E1.1 was available to Lutchman even in the absence of an agreement to waive his right to appeal." Pet. App. 17a.

Since 2013, the U.S. Sentencing Guidelines at Section 3E1.1 and Application Note 6 bar the government from refusing to move for the third level

reduction for acceptance of responsibility based on interests not identified in Section 3E1.1, such as whether the defendant agrees to waive his right to appeal. U.S. Sent'g Comm'n, U.S. Sent'g Guidelines Manual, App. C, Amend. 775 (Nov. 1, 2013) (affirming *United States v. Divens*, 650 F.3d 343 (4th Cir. 2011)).

The government promised McAlpin nothing that he would not otherwise receive for an open plea of guilty to all Counts. *United States v. Castillo,* 779 F.3d 318, 325-26 (5th Cir. 2015) (reversing denial of the third point for acceptance). *See also United States v. LaPierre*, 998 F.2d 1460, 1467 (9th Cir. 1993) (two point adjustment for acceptance may not be denied because defendant asserts his right to appeal); *United States v. Najera*, 915 F.3d 997 (5th Cir. 2019) (reversing denial of acceptance of responsibility credit where defendant had not contested factual guilt); *United States v. Kleinebreil*, 966 F.2d 945 (5th Cir. 1992) (pleading guilty on all Counts merits reduction for acceptance).

Acceptance of responsibility third point reduction is presumed for timely notification of intent to plead guilty. *United States v. Wheeler*, 322 F.3d 823, 826 (5th Cir. 2003) ("When the defendant meets §3E1.1(b)'s requirements, the sentencing court must grant the additional one-level reduction"). The third point for acceptance is mandatory once the conditions of § 3E1.1 are satisfied. *United States v. Palacios*, 756 F.3d 325 (5th Cir. 2014) (per curiam) (reversing because Government withheld motion for third point for defendant's refusal to waive right to appeal); *United States v. Torres-Perez,* 777 F.3d 764 (5th Cir. 2015) (same where error was not harmless). McAlpin timely entered his guilty plea at the same time he waived his right to grand jury indictment. C.A. ROA.340, 348.

The court of appeals noted it has previously rejected similar arguments, but cited inapposite cases. Pet.App. 2a. In *United States v. Fields*, the defendant attempted withdrawal of his guilty plea, claiming government breach of a valid plea agreement. 906 F.2d 139, 140-41 (5th Cir. 1990). The government has never accused McAlpin of breach. McAlpin has not withdrawn his plea, rather he argues the government wields an invalid waiver to bar his appeal of the sentence.

The court of appeals opinion, Pet.App. 3a, relied on *Smith v. Estelle,* which considered habeas review of a State conviction. 562 F.2d 1006 (5th Cir. 1977). Sentenced to life, Smith still faced ten State indictments. Texas dismissed six indictments in return for Smith's guilty pleas to the remaining four. 562 F.2d at 1006. Smith argued "that his plea agreement and the concomitant dismissal of his state appeal, were necessarily defective on a theory akin to the 'failure of consideration' doctrine of contract law." *Id*. at 1007.

Nothing was dismissed in any bargain with McAlpin. In any event, the Fifth Circuit did not reject Smith's contract argument, stating, "Although this 'failure of consideration' theory presents an interesting approach to the analysis of plea agreements, the circumstances of Smith's case simply do not raise the issue." *Id*. at 1008.

None of the foregoing aspects of the opinion below adequately addresses or dispels the contrary case law of this Court.

B. The Plea Agreement fails for lack of consideration. McAlpin received nothing for his detriment. The government's conditional promise was illusory.

The only difference in McAlpin's case from an open plea on all Counts would have been a suggested reward for cooperation. Yet that provision could never supply consideration. The Plea Supplement qualified that a 5K motion remained solely in the unreviewable and unchallengeable "discretion of the U.S. Attorney." C.A. ROA.349. The court of appeals inaccurately claimed this was valid consideration for McAlpin's plea. Pet.App. 2a.

This flawed 5K promise had no substance or heft as reciprocal consideration — It was illusory. An illusory promise cannot supply consideration. *M&G Polymers USA, LLC v. Tackett,* 574 U.S. 427, 440 (2015). *See* 3 Williston § 7:7 at 111-12.

The government's promise was no commitment; no constraining principle held the government to its bargain. *Wm. C. Atwater & Co. v. United States,* 262 U.S. 495, 498 (1923) (a promise, in order to constitute sufficient consideration to support another promise, must be binding); *NSK Ltd. v. United States,* 115 F.3d 965, 975 (Fed. Cir. 1997) (when a promisor may choose to perform solely on a whim, then the promise will not serve as consideration.).

The Fifth Circuit has previously noted the controlling contract law principle:

> Under Mississippi law, a contract obligation is illusory if the words of the agreement "do not purport to put any limitation on the freedom of the alleged promisor, **but leave his future action subject to his own**

> **future will**, just as it would have been had he said no words at all."

Hillman v. Loga, 697 F.3d 299, 303 (5th Cir. 2012) (emphasis added), *quoting Marshall Durbin Food Corp. v. Baker,* 909 So.2d 1267, 1275 (Miss. Ct. App. 2005); *Krebs ex rel Krebs v. Strange*, 419 So.2d 178, 182-83 (Miss. 1982).

Without constraint, the government's promise was flawed, false at worst, but nonetheless empty. Restatement (Second) of Contracts § 2 cmt. (e) (1981 & Supp. 2020). No level of cooperation could oblige the government to grant McAlpin a 5K motion. Restatement § 76 cmt. d.; *see Arnold v. Homeaway, Inc.*, 890 F.3d 546, 550 (5th Cir. 2018).

A 5K motion for reduced sentence remained entirely at the whim of the government. ROA.349. *See* 3 Williston § 7:7 at 113 ("Where promisor can choose one of two alternatives, and thereby escape without suffering a detriment or giving the other party a benefit, the promise is not consideration."); *Miami Coca-Cola,* 296 F. at 693.

The government offered nothing for McAlpin's relinquished rights, made in good faith but to his detriment. *Compare* Pet.App. 30a (¶8: "in exchange for the United States Attorney entering into this Plea Agreement") *with* Pet.App. 24a-32a (entirety of Plea Agreement states no specific detail of consideration or detriment offered by the government). Restatement § 77 cmt. a. "Such an illusory promise is neither enforceable against the one making it, nor is it operative as a consideration for a return promise." *Marshall Durbin Food Corp.*, 909 So.2d at 1275.

The contract was void from the start; its appeal waiver, null and void. *Willard, Sutherland & Co. v.*

United States, 262 U.S. 489, 493 (1923) ("There is nothing in writing which required the government to [perform as promised.] It must be held, for lack of consideration and mutuality, the contract was unenforceable"); *William C. Atwater & Co. v. United States,* 262 U.S. 495, 498 (1923) (same).

V. Coercive, "Take It or Leave It" Plea Agreements Demanding Appeal Waivers Implicate Fifth Amendment Due Process.

The Sentencing Reform Act specifically granted appellate review of sentences. 18 U.S.C. § 3742. Prior to the Act, there were no appeals from federal sentences. Courts should not allow this right to be eliminated without proper consideration.

This statutory right serves important interests in sentencing uniformity and fairness. The federal Sentencing Guidelines established a detailed code of regulations and procedures for federal sentencing, prioritizing applicability and predictable uniformity across the nation. *Rita v. United States*, 551 U.S. 338, 347-49 (2007) (detailing Congress's objectives). Different standards for enforcing appeal waivers create geographic disparities in justice.

The statutory appeal right of the individual defendant is a valuable personal right, whose loss implicates due process concerns under the Fifth Amendment. The surrender of an appeal right gives sufficient advantage for the government that the government will demand an appeal waiver provision in a plea agreement. That appeal right holds no less value to the negotiating defendant who should be protected from its loss through coercive imbalance of bargaining power, or offers of illusory consideration in sentence reductions. Congress specifically conferred

the right to appeal sentences. The Court should protect this right from elimination without proper consideration.

Basic notions of fairness suggest defendants should receive something in exchange for waiving important rights. Allowing consideration-free waivers of appeal leads to government overreach in plea negotiations.

VI. This Case Presents an Excellent Vehicle for Resolving the Question Presented.

This case provides a compact and timely vehicle for the Court to clarify and forestall disruption of an important and necessary facet of federal criminal procedure. Unlike *Hunter v. United States*, which involves constitutional challenges to sentence conditions, this case presents pure questions of contract formation and consideration — fundamental principles that apply regardless of the specific constitutional violation alleged.

The present case comes to the Court in the posture of a dismissal, on jurisdictional grounds, of an appeal from an uncontested criminal conviction. There are no disputed facts in the case nor any unresolved trial issues.

The Question Presented leaves undisturbed McAlpin's conviction. McAlpin voluntarily pleaded guilty. McAlpin has never sought to withdraw or contradict his guilty plea to all of the Information's counts.

McAlpin made no claim or challenge against the plea agreement. McAlpin did not withdraw from the plea agreement, and he did not need to enforce the plea agreement. McAlpin did not breach the plea agreement, the government does not claim McAlpin breached the plea agreement, nor did McAlpin claim the government committed breach.

Congress granted a statutory right to appellate review of McAlpin's sentence. 18 U.S.C. § 3742.

McAlpin properly invoked that right by noticing his appeal. C.A. ROA.395. McAlpin briefed to the Fifth Circuit his valid claims of unreasonable sentencing that merit that court's review.

This case offers the straightforward legal question in a well-defined context, without dispute of material facts, but resting instead on the accepted face of the plea agreement documents. The case presents only that legal question, and presents it squarely and cleanly.

CONCLUSION

The Court should grant the petition for a writ of certiorari. Given the Court's request for response of the Solicitor General in *Hunter v. United States*, No. 24-1063, these related questions regarding appeal waiver enforceability may benefit from coordinated consideration.

Respectfully submitted,

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June 16, 2025

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: January 31, 2025]

No. 24-60181
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRETT MORRIS MCALPIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:23-CR-62-1

Before HAYNES, HIGGINSON, and DOUGLAS, *Circuit Judges*.

PER CURIAM:[*]

Brett Morris McAlpin pleaded guilty pursuant to a plea agreement to two counts of conspiracy against rights, three counts of deprivation of rights under color of law, one count of conspiracy to obstruct justice, and one count of obstruction of justice.

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[*] This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

McAlpin waived his right to appeal his conviction and sentence, as well as the manner in which it was imposed, on any ground, but he reserved the right to raise an ineffective assistance of counsel claim. He was sentenced within the advisory guidelines range to a total of 327 months of imprisonment, three years of supervised release, restitution in the amount of $79,500, and a $700 special assessment. He timely appealed.

First, McAlpin argues that the plea agreement is void because the Government did not provide any consideration to him in exchange for his agreement to plead guilty. We review de novo whether an appeal waiver bars an appeal. *United States v. Madrid*, 978 F.3d 201, 204 (5th Cir. 2020). Courts are guided by general principles of contract law in interpreting plea agreements, *see United States v. Winchel*, 896 F.3d 387, 388 (5th Cir. 2018), and this court has reviewed whether consideration was lacking for plea bargains, *see, e.g.*, *United States v. Smallwood*, 920 F.2d 1231, 1239-40 (5th Cir. 1991); *United States v. Fields*, 906 F.2d 139, 141-42 (5th Cir. 1990). Although McAlpin argues that no charges were dismissed, the Government did promise not to seek further criminal prosecutions of McAlpin for any acts or conduct disclosed by him to the Government as of the date of the plea agreement. In any event, McAlpin also received consideration as the Government agreed to recommend a sentence within the advisory guidelines range, to move for an additional one-level reduction for acceptance of responsibility, and to consider whether to exercise its discretion to move for a lower sentence under the policy statement in U.S.S.G. § 5K1.1 if it determined that McAlpin provided substantial assistance. We have rejected arguments that similar agreements lacked consideration. *See*

Fields, 906 F.2d at 141-42; *Smith v. Estelle*, 562 F.2d 1006, 1008 (5th Cir. 1977).

In addition, McAlpin argues that the Government breached the plea agreement by reneging on its agreement to file a § 5K1.1 motion and by presenting evidence at sentencing in violation of his due process rights. Because he did not raise this claim in the district court, we review for plain error. *See Puckett v. United States*, 556 U.S. 129, 136-41 (2009); *United States v. Kirkland*, 851 F.3d 499, 502-03 (5th Cir. 2017). To show plain error, McAlpin must establish a forfeited error that is clear or obvious and affects his substantial rights. *See Puckett*, 556 U.S. at 135. If he makes that showing, this court has the discretion to correct the error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.* The Government complied with its agreement to recommend a sentence within the guidelines range and to move for an additional one-level reduction for acceptance of responsibility. The plea agreement did not prohibit the Government from presenting evidence at McAlpin's sentencing, and the Government retained the sole discretion to decide whether to file a § 5K1.1 motion under the agreement. It ultimately did not do so. *See United States v. Barnes*, 730 F.3d 456, 459 (5th Cir. 2013); *United States v. Aderholt*, 87 F.3d 740, 742 (5th Cir. 1996). To the extent that McAlpin argues that the Government had an unconstitutional motive for not filing the motion, he has not made the requisite showing. *See Wade v. United States*, 504 U.S. 181, 186 (1992). Therefore, he has not shown any error, plain or otherwise. *See Puckett*, 556 U.S. at 135; *Wade*, 504 U.S. at 186.

McAlpin knowingly and voluntarily waived his right to appeal and, therefore, the appeal waiver is valid and enforceable. *See United States v. Kelly*, 915 F.3d 344, 348 (5th Cir. 2019). The plain language of the waiver applies to McAlpin's sentencing arguments. *See id.* Therefore, the Government's motion to enforce the appeal waiver is GRANTED, and the appeal is DISMISSED. *See id.* The Government's alternative motion for summary affirmance is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

[Filed: March 20, 2025]

No. 24-60181

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRETT MORRIS MCALPIN,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Mississippi
USDC No. 3:23-CR-62-1

ON PETITION FOR REHEARING EN BANC

Before HAYNES, HIGGINSON, and HO, *Circuit Judges*.

PER CURIAM:

Treating the petition for rehearing en banc as a petition for panel rehearing (5TH CIR. R.40 I.O.P.), the petition for panel rehearing is DENIED. Because no member of the panel or judge in regular active service requested that the court be polled on rehearing en banc (FED. R. APP. P.40 and 5TH CIR. R.40), the petition for rehearing en banc is DENIED.

APPENDIX C

United States Code
Title 18. Crimes and Criminal Procedure
Part II. Criminal Procedure
Chapter 235. Appeal

Currentness

18 U.S.C. § 3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3) (B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and-

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

(h) Application to a sentence by a magistrate judge.—An appeal of an otherwise final sentence imposed by a United States magistrate judge may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(i) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

(j) Definitions.—For purposes of this section—

(1) a factor is a "permissible" ground of departure if it—

(A) advances the objectives set forth in section 3553(a)(2); and

(B) is authorized under section 3553(b); and

(C) is justified by the facts of the case; and

(2) a factor is an "impermissible" ground of departure if it is not a permissible factor within the meaning of subsection (j)(1).

APPENDIX D

910 F.3d 33

UNITED STATES COURT OF APPEALS,
SECOND CIRCUIT

———

UNITED STATES OF AMERICA,

Appellee,

v.

EMANUEL L. LUTCHMAN,

Defendant-Appellant.

———

No. 17-291
August Term 2018
Argued: September 12, 2018
Decided: December 6, 2018

———

Appeal from United States District Court
for the Western District of New York
(Geraci, Ch.J.)

———

Attorneys and Law Firms

ALLEGRA GLASHAUSSER, Federal Defenders of New York, Inc., New York, NY, for Defendant-Appellant.

BRETT A. HARVEY, Asst. U.S. Atty., Rochester, NY (James P. Kennedy, Jr., U.S. Atty., Tiffany H. Lee, Asst. U.S. Atty., Rochester, NY, on the brief), for Appellee.

Before: NEWMAN, JACOBS, POOLER, Circuit Judges.

OPINION

Dennis Jacobs, Circuit Judge:

Emanuel L. Lutchman pleaded guilty to conspiracy to provide material support to a foreign terrorist organization in violation of 18 U.S.C. § 2339B(a)(1) and was sentenced in the United States District Court for the Western District of New York (Geraci, Ch.J.) to the statutory maximum of 240 months' imprisonment and 50 years' supervised release. Lutchman sought an offense-level reduction for conspiracy under United States Sentencing Guidelines ("U.S.S.G." or "Guidelines") § 2X1.1(b)(2), on the ground that consummation of the plot was dependent on assistance and participation of government agents. On appeal, Lutchman argues that his sentence was procedurally unreasonable because that reduction was denied and that his sentence was substantively unreasonable because it is greater than necessary given his mental illness. While Lutchman's plea agreement contained an appellate waiver, we conclude that the plea agreement was not supported by consideration and decline to enforce it to bar this appeal. Nevertheless, Lutchman's arguments on appeal are meritless.

For the reasons set forth herein, we affirm the judgment of the district court.

BACKGROUND

Lutchman was arrested during the course of a plot, coordinated with a member of the Islamic State of Iraq and the Levant ("ISIL"), to attack individuals at Merchant's Grill in Rochester, New York, with knives and a machete on New Year's Eve 2015. Late in that year, Lutchman used social media accounts to express support for ISIL and to share ISIL propa-

ganda in the form of images, videos, and documents promoting terrorism. Lutchman also collected terrorism-related materials, including how-to manuals for individuals seeking to conduct terrorist attacks in the United States.

One such document contained contact information for an ISIL member in Syria known as Abu Issa Al-Amriki, with whom Lutchman began communicating online in late December. On December 25 and 26, Lutchman told Al-Amriki that he wished to join ISIL overseas, but Al-Amriki replied that Lutchman must first prove his support for ISIL by attacking and killing nonbelievers in the United States. Lutchman assured Al-Amriki that he was planning an "operation" with a "brother." App'x at 14.

At about the same time, Lutchman planned a New Year's Eve attack with two individuals. Both of them ("Individual A" and "Individual B") were cooperating with the Federal Bureau of Investigation, as was a third individual whom Individual A arranged for Lutchman to meet ("Individual C"). Lutchman called his three supposed co-conspirators "brothers."

On December 27 and 28, Lutchman told Al-Amriki about the involvement of Individuals A, B, and C; announced his readiness to make his sacrifice; and vowed that there was no turning back from his plan. When Lutchman consulted Al-Amriki about the best target for the attack, he instructed Lutchman to find the most populated venue and kill as many people as he could.

Lutchman told Individual C on December 28 that he wanted to attack a bar or nightclub, using knives and a machete to kidnap and murder. As they drove

by Merchant's Grill, Lutchman suggested that as a potential target.

On December 29, Lutchman and Individual C went shopping at Walmart and acquired ski masks, knives, a machete, zip ties, duct tape, ammonia, and latex gloves. Lutchman lacked funds, so Individual C paid approximately $40 for the purchase, and Lutchman promised to reimburse him.

After more exchanges with Al-Amriki, Lutchman met Individual C on December 30 to film a video. Consistent with Al-Amriki's instructions, Lutchman pledged his allegiance to ISIL and stated his intention to "spill the blood" of nonbelievers. App'x at 18. Immediately afterward, Lutchman was arrested.

Lutchman entered into a plea agreement with the government on August 11, 2016. The district court imposed a sentence of 240 months of imprisonment, the statutory maximum for Lutchman's offense, and 50 years of supervised release. Lutchman now seeks vacatur of his sentence and a remand for resentencing.

DISCUSSION

A. Appeal Waiver

Lutchman's plea agreement recited the waiver of his right to appeal any sentence lesser than or equal to the statutory maximum of 240 months' imprisonment, which is the sentence imposed. Lutchman argues that the waiver should not be enforced because the plea agreement conferred no benefit on him in exchange for his guilty plea. We agree.

While "a defendant's right to appeal his sentence may be waived in a plea agreement," it is not the case "that these contractual waivers are enforceable on a

basis that is unlimited and unexamined." *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996), *superseded on other grounds as stated in United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013). "We construe plea agreements according to contract law principles...." *United States v. Riggi*, 649 F.3d 143, 147 (2d Cir. 2011) (internal quotation marks omitted). So, "a guilty plea can be challenged for contractual invalidity, including invalidity based on a lack of consideration." *United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004). Yet, "because plea agreements are unique contracts, we temper the application of ordinary contract principles with special due process concerns for fairness and the adequacy of procedural safeguards." *Riggi*, 649 F.3d at 147 (internal quotation marks omitted). Accordingly, "courts construe plea agreements strictly against the Government," which "is usually the party that drafts the agreement" and "ordinarily has certain awesome advantages in bargaining power." *Ready*, 82 F.3d at 559.

Lutchman's waiver of the right to appeal his sentence was unsupported by consideration. The plea agreement provided that Lutchman would waive indictment, plead guilty to a violation of 18 U.S.C. § 2339B(a)(1), and waive the right to appeal any sentence lesser than or equal to the 240-month maximum. The government would achieve "a conviction without the expense and effort of proving the charges at trial beyond a reasonable doubt" and save the time and expense of an appeal. *United States v. Rosa*, 123 F.3d 94, 97, 101 n.7 (2d Cir. 1997).

Lutchman, however, received no benefit from his plea beyond what he would have gotten by pleading guilty without an agreement. The government

refused to agree with Lutchman's contention that a three-level reduction under Guidelines § 2X1.1(b)(2) was applicable, and specifically reserved the right to argue to the district court that the reduction was inappropriate. True, the government agreed not to oppose a two-level reduction under Guidelines § 3E1.1(a) for Lutchman's acceptance of responsibility and agreed to move the district court to apply an additional one-level reduction under Guidelines § 3E1.1(b) for Lutchman's timely notification to the government of his intention to plead guilty. But a three-level reduction under Guidelines § 3E1.1 was available to Lutchman even in the absence of an agreement to waive his right to appeal. See U.S.S.G. § 3E1.1 cmt. 6 ("The government should not withhold [a § 3E1.1(b) motion] based on ... whether the defendant agrees to waive his or her right to appeal.").

Moreover, those reductions had no practical impact. Even after a three-level reduction to the respective Guidelines ranges advocated by each party, the bottom of the resulting ranges exceeded the statutory maximum. In fact and effect, the agreed-upon Guidelines range equaled the 240-month statutory maximum— a sentence the government expressly stated in the agreement that it would recommend. Furthermore, Lutchman pleaded guilty to the only count charged in the information, and the government has not articulated or identified any additional counts that could have been proven at trial.

The plea agreement here provided Lutchman with no increment of "certainty as to the extent of his liability and punishment," *Rosa*, 123 F.3d at 97, and it provided him no "chance at a reduced sentence," *Brunetti*, 376 F.3d at 95 (emphasis omitted). Because the agreement offered nothing to Lutchman that

affected the likelihood he would receive a sentence below the statutory maximum, the appellate waiver was unsupported by consideration, and we will not enforce it to bar this appeal. *See id*.; *see also United States v. Goodman*, 165 F.3d 169, 174 (2d Cir. 1999) (refusing to enforce appeal waiver because, inter alia, defendant "received very little benefit in exchange for her plea of guilty"). Accordingly, in the absence of a request by either party to remand because the plea agreement is unenforceable, we will sever the waiver from the plea agreement and proceed to the merits of Lutchman's arguments. *Goodman*, 165 F.3d at 175; see also *Ready*, 82 F.3d at 559 ("[C]ourts may apply general fairness principles to invalidate particular terms of a plea agreement.").

B. Procedural Reasonableness

Lutchman argues that he was not "about to complete ... but for apprehension" all of the "acts the conspirators believed necessary on their part for the successful completion of the substantive offense," U.S.S.G. § 2X1.1(b) (2), because he would have been unable to complete the attack without the assistance of government cooperators. He therefore argues that the district court committed procedural error when it refused to apply a 3-level reduction under Guidelines § 2X1.1(b)(2), and that his sentence therefore must be set aside as unreasonable.

"A district court commits procedural error where it fails to calculate (or improperly calculates) the Sentencing Guidelines range, treats the Sentencing Guidelines as mandatory, fails to consider the [18 U.S.C.] § 3553(a) factors, selects a sentence based on clearly erroneous facts, or fails adequately to explain the chosen sentence." *United States v. Robinson*, 702 F.3d 22, 38 (2d Cir. 2012) (citing *Gall v. United*

States, 552 U.S. 38, 51, 128 S.Ct. 586, 169 L.Ed.2d 445 (2007)). Our review for reasonableness is akin to a "'deferential abuse-of-discretion standard.'" *United States v. Cavera*, 550 F.3d 180, 189 (2d Cir. 2008) (in banc) (quoting *Gall*, 552 U.S. at 41, 128 S.Ct. 586). However, "[a] sentencing court's legal application of the Guidelines is reviewed de novo." *United States v. Desnoyers*, 708 F.3d 378, 385 (2d Cir. 2013) (internal quotation marks omitted).

Lutchman's sentence was not procedurally unreasonable. As an initial matter, a Guidelines § 2X1.1(b)(2) reduction would have had no impact. Even if the three-level reduction under § 2X1.1(b)(2) had been applied, the resulting Guidelines range would have been 262-327 months—which exceeds the 240-month statutory maximum sentence that was imposed. The Supreme Court has previously counseled that relevant statements of the sentencing judge may counter "any ostensible showing of prejudice the defendant may make" regarding an improper calculation of the Guidelines range. *Molina-Martinez v. United States,* —— U.S. ——, 136 S.Ct. 1338, 1347, 194 L.Ed.2d 444 (2016). Here, the district court found that "the only sentence" that would accomplish the goals of sentencing "is the maximum sentence ... of 20 years imprisonment." App'x at 98. Thus, the district court's statements suggest that it would have considered Lutchman's 240-month sentence appropriate even with a slight reduction in the Guidelines range. We will not disturb a sentencing determination on the basis of a Guidelines calculation error that had no impact on the sentence imposed. Cf. *United States v. Bermingham*, 855 F.2d 925, 931 (2d Cir. 1988) ("[D]isputes about applicable guidelines need not be resolved where the sentence falls within either of two arguably applicable guideline

ranges and the same sentence would have been imposed under either guideline range.").

In any event, the district court did not err in determining that a reduction under Guidelines § 2X1.1(b)(2) is inapplicable to Lutchman. The "relevant question" in determining whether that reduction applies is "whether the conspiracy ripened into a substantially completed offense or came close enough to fruition." *United States v. Downing*, 297 F.3d 52, 62 (2d Cir. 2002) (internal citations, quotation marks, alterations, and emphasis omitted). The district court did not abuse its discretion in determining that the substantive offense—"knowingly provid[ing] material support or resources to a foreign terrorist organization" in violation of 18 U.S.C. § 2339B(a)(1)—came close enough to fruition to render the § 2X1.1(b)(2) reduction inappropriate. In December 2015, Lutchman shared propaganda and expressed support for ISIL, a group he knew was a foreign terrorist organization engaged in ongoing terrorist activity. He initiated contact with an ISIL member in Syria, Al-Amriki, to plan a terrorist attack in the name of ISIL, and pledged allegiance to ISIL in a martyrdom video intended for use as ISIL propaganda. As to the attack itself, Lutchman planned to attack and possibly abduct victims at Merchant's Grill, and he accompanied Individual C to purchase weapons and other materials for the attack, which included two knives, a machete, and ammonia to destroy potential DNA in the event that Lutchman's blood was spilled during the attack. Therefore, the district court did not abuse its discretion when it concluded "but for the intervention of law enforcement in this case, the defendant would have completed all the acts for this particular offense." App'x at 68.

Lutchman argues that he should have received the Guidelines § 2X1.1(b) (2) reduction because he was assisted by government informants throughout and would have been unable to purchase weapons or successfully complete the attack without their help. However, the fact that "[i]t may be unlikely, or even impossible, for a conspiracy to achieve its ends once the police have detected or infiltrated it" is "not dispositive in determining whether a three-level reduction is warranted under section 2X1.1(b)(2), because that section determines punishment based on the conduct of the defendant, not on the probability that a conspiracy would have achieved success." *United States v. Medina*, 74 F.3d 413, 418 (2d Cir. 1996) (emphasis omitted). As discussed above, Lutchman's conduct advanced the substantive offense—a deadly attack on Merchant's Grill in the name of ISIL—to the verge of fruition. Lutchman "had the independent ability to control how far things would go"; it is not to be regretted that "preparations and arrangements proceeded under the eye of the police, and, because of that, the police were in a position to stop the progress of the crime before it reached the threshold of completion." *Id.* at 419. "The surveillance and infiltration by the police did not affect [Lutchman's] free will, and did not make the crime a police exercise. The district court did not err in denying a three-level downward departure under section 2X1.1 of the Guidelines." *Id.*

C. Substantive Reasonableness

Lutchman argued in the district court that his mental illness was a mitigating factor. The district court recognized that it was, but also concluded that, along with other factors, it contributed to the need for a statutory maximum sentence. The result,

Lutchman argues on appeal, is a sentence longer than necessary to serve the goals of sentencing. He argues that his sentence is therefore substantively unreasonable.

"Substantive reasonableness is also reviewed for abuse of discretion...." *Desnoyers*, 708 F.3d at 385. "In examining the substantive reasonableness of a sentence, we review the length of the sentence imposed to determine whether it cannot be located within the range of permissible decisions." *United States v. Matta*, 777 F.3d 116, 124 (2d Cir. 2015) (internal quotation marks omitted). We will "set aside a district court's substantive determination only in exceptional cases." *Cavera*, 550 F.3d at 189 (emphasis omitted).

Lutchman's sentence is located within the range of permissible decisions, and we therefore cannot conclude that it is substantively unreasonable. The district court considered Lutchman's "long history of mental health issues" and found that those issues "probably explain[ ] some of [his] conduct." App'x at 92-93. At the same time, the court found that Lutchman's mental disorder, history of violence, and substance abuse impaired his ability to appreciate the severity of his conduct and thereby "created a real danger in the community." *Id.* at 97. Since Lutchman's mental health thus cut "both ways," the court concluded that the only way "to protect the public from further crimes" was to impose the maximum sentence of imprisonment. *Id.* at 97-98. This was not an abuse of discretion. We are satisfied that the district court's colloquy makes clear that it considered the parties' arguments and had a reasoned basis for its decision. *Cavera*, 550 F.3d at 193.

Lutchman's behavior at the end of the sentencing proceeding validated the district court's conclusion. Lutchman had maintained a pretense of remorse that was dropped after the sentence was announced. Lutchman then laughed, reaffirmed his allegiance to ISIL's leader, and stated that more individuals like him would "rise up." App'x at 98-102. We see no error in the imposition of the statutory maximum sentence.

CONCLUSION

For the foregoing reasons, we hereby AFFIRM the judgment of the district court.

APPENDIX E

LOGO
Department of Justice

PLEA AGREEMENT

[Filed: August 3, 2023]

Subject: United States v. Brett Morris McAlpin
Criminal No. 3:23cr62TSL-LGI

Date: July 31, 2023

To: Aafram Y. Sellers
Attorney for the Defendant
Brett Morris McAlpin

From: Erin O. Chalk
Glenda R. Haynes
Assistant United States Attorneys
Southern District of Mississippi
Criminal Division

Christopher J. Perras
Special Litigation Counsel
Daniel Grunert
Trial Attorney
Civil Rights Division
Department of Justice

Brett Morris McAlpin, Defendant herein, and Aafram Y. Sellers, attorney for Defendant, have been notified and understand and agree to the items contained herein, as well as in the Plea Supplement, and that:

1. Counts of Conviction. It is understood that, as of the date of this plea agreement, Defendant and Defendant's attorney have indicated that Defendant desires to plead guilty to Counts 1, 2, 3, 10, 11, 12,

and 13 as charged in the Information, charging him with violations of Title 18, United States Code, Section 241, Conspiracy Against Rights, Title 18, United States Code, Section 242, Deprivation of Rights Under Color of Law, Title 18, United States Code, Section 1512(k), Conspiracy to Obstruct Justice, and Title 18, United States Code, Section 1512(b)(3), Obstruction of Justice. Defendant has read the charges against him contained in the Information and the charges have been fully explained to him by his attorney. Defendant fully understands the nature and elements of the crimes with which he has been charged. Defendant enters this plea because he is in fact guilty of the crimes charged in the Information and agrees that this plea is voluntary and not the result of force, threats, or coercion.

2. Sentence. Defendant understands that the maximum penalty for Counts 1 and 13 charged in the Information, charging a violation of Title 18, United States Code, Section 241 is not more than 10 years imprisonment for each count; a term of supervised release of not more than 3 years; and a fine of up to $250,000, the maximum penalty for Counts 2, 3, and 10 charged in the Information, charging a violation of Title 18, United States Code, Section 242 is not more than 10 years in prison for each count; a term of supervised release of not more than three years; and a fine of up to $250,000, the maximum penalty for Count 11 charged in the Information, charging a violation of Title 18, United States Code, Section 1512(k) is not more than 20 years imprisonment; a term of supervised release of not more than 3 years; and a fine of up to $250,000, the maximum penalty for Count 12 charged in the Information, charging a violation of Title 18, United States Code, Section 1512(b)(3) is not more than 20 years imprisonment; a

term of supervised release of not more than 3 years; and a fine of up to $250,000; unless Defendant meets the requirements of Title 18, United States Code, Section 3553(f), in which case the mandatory minimum sentence shall not apply. Defendant further understands that if a term of supervised release is imposed, that term will be in addition to any prison sentence Defendant receives; further, if any of the terms of Defendant's supervised release are violated, Defendant can be returned to prison for the entire term of supervised release, without credit for any time already served on the term of supervised release prior to Defendant's violation of those conditions. It is further understood that the Court may require Defendant to pay restitution in this matter in accordance with applicable law. Defendant further understands that Defendant is liable to make restitution for the full amount of the loss determined by the Court, to include relevant conduct, which amount is not limited to the count of conviction. Defendant further understands that if the Court orders Defendant to pay restitution, restitution payments cannot be made to the victim directly but must be made to the Clerk of Court, Southern District of Mississippi. Defendant understands that an order of forfeiture will be entered by the Court as a part of Defendant's sentence and that such order is mandatory.

3. Determination of Sentencing Guidelines. It is further understood that the United States Sentencing Guidelines are advisory only and that Defendant and Defendant's attorney have discussed the fact that the Court must review the Sentencing Guidelines in reaching a decision as to the appropriate sentence in this case, but the Court may impose a sentence other than that indicated by the

Sentencing Guidelines if the Court finds that another sentence would be more appropriate. Defendant specifically acknowledges that Defendant is not relying upon anyone's calculation of a particular Sentencing Guideline range for the offenses to which Defendant is entering this plea, and recognizes that the Court will make the final determination of the sentence and that Defendant may be sentenced up to the maximum penalties set forth above.

4. Breach of This Agreement and Further Crimes. It is further understood that should Defendant plead guilty and should Defendant fail or refuse to abide by any part of this plea agreement, fail to agree to the terms of the plea agreement with the State of Mississippi Attorney General's Office arising out the same incident with victims M.J. and E.P., or commit any further crimes, then, at its discretion, the U.S. Attorney may treat such conduct as a breach of this plea agreement and Defendant's breach shall be considered sufficient grounds for the pursuit of any prosecutions which the U.S. Attorney has not sought as a result of this plea agreement, including any such prosecutions that might have been dismissed or otherwise barred by the Double Jeopardy Clause, and any federal criminal violation of which this office has knowledge.

5. Financial Obligations. It is further understood and specifically agreed to by Defendant that, at the time of the execution of this document or at the time the plea is entered, Defendant will then and there pay over the special assessment of $100.00 per count required by Title 18, United States Code, Section 3013, to the Office of the United States District Court Clerk; Defendant shall thereafter produce proof of payment to the U.S. Attorney or the

U.S. Probation Office. If the Defendant is adjudged to be indigent, payment of the special assessment at the time the plea is entered is waived, but Defendant agrees that it may be made payable first from any funds available to Defendant while Defendant is incarcerated. Defendant understands and agrees that, pursuant to Title 18, United States Code, Section 3613, whatever monetary penalties are imposed by the Court will be due and payable immediately and subject to immediate enforcement by the United States as provided in Section 3613. Furthermore, Defendant agrees to complete a Department of Justice Financial Statement no later than the day the guilty plea is entered and provide same to the undersigned AUSA. Defendant also agrees to provide all of Defendant's financial information [sic] the Probation Office and, if requested, to participate in a pre-sentencing debtor's examination. If the Court imposes a schedule of payments, Defendant understands that the schedule of payments is merely a minimum schedule of payments and not the only method, nor a limitation on the methods, available to the United States to enforce the judgment. If Defendant is incarcerated, Defendant agrees to participate in the Bureau of Prisons' Inmate Financial Responsibility Program regardless of whether the Court specifically directs participation or imposes a schedule of payments. Defendant understands and agrees that Defendant shall participate in the Treasury Offset Program until any and all monetary penalties are satisfied and paid in full by Defendant.

6. Transferring and Liquidating Assets. Defendant understands and agrees that Defendant is prohibited from transferring or liquidating any and all assets held or owned by Defendant as of the date this Plea Agreement is signed. Defendant

must obtain prior written approval from the U.S. Attorney's Financial Litigation Unit prior to the transfer or liquidation of any and all assets after this Plea Agreement is signed and if Defendant fails to do so the Defendant understands and agrees that an unapproved transfer or liquidation of any asset shall be deemed a fraudulent transfer or liquidation.

7. Future Direct Contact With Defendant. Defendant and Defendant's attorney acknowledge that if forfeiture, restitution, a fine, or special assessment or any combination of forfeiture, restitution, fine, and special assessment is ordered in Defendant's case that this will require regular contact with Defendant during any period of incarceration, probation, and supervised release. Further, Defendant and Defendant's attorney understand that it is essential that defense counsel contact the U.S. Attorney's Financial Litigation Unit immediately after sentencing in this case to confirm in writing whether defense counsel will continue to represent Defendant in this case and in matters involving the collection of the financial obligations imposed by the Court. If the U.S. Attorney does not receive any written acknowledgment from defense counsel within two weeks from the date of the entry of Judgment in this case, the U.S. Attorney will presume that defense counsel no longer represents Defendant and the Financial Litigation Unit will communicate directly with Defendant regarding collection of the financial obligations imposed by the Court. Defendant and Defendant's attorney understand and agree that such direct contact with Defendant shall not be deemed an improper *ex parte* contact with Defendant if defense counsel fails to notify the U.S. Attorney of any continued legal representation within two weeks after the date of entry of the Judgment in this case.

8. Waivers. Defendant, knowing and understanding all of the matters aforesaid, including the maximum possible penalty that could be imposed, and being advised of Defendant's rights to remain silent, to trial by jury, to subpoena witnesses on Defendant's own behalf, to confront the witnesses against Defendant, and to appeal the conviction and sentence, in exchange for the U.S. Attorney entering into this plea agreement and accompanying plea supplement, hereby expressly waives the following rights:

a. the right to appeal the conviction and sentence imposed in this case, or the manner in which that sentence was imposed, on the grounds set forth in Title 18, United States Code, Section 3742, or on any ground whatsoever, and

b. the right to contest the conviction and sentence or the manner in which the sentence was imposed in any post-conviction proceeding, on any ground whatsoever, including but not limited to a motion brought under Title 28, United States Code, Section 2255, and any type of proceeding claiming double jeopardy or excessive penalty as a result of any forfeiture ordered or to be ordered in this case, and

c. any right to seek attorney fees and/or costs under the Hyde Amendment, Title 18, United States Code, Section 3006A, and the Defendant acknowledges that the government's position in the instant prosecution was not vexatious, frivolous, or in bad faith, and

d. all rights, whether asserted directly or by a representative, to request or receive from any department or agency of the United States any records pertaining to the investigation or pros-

ecution of this case, including without limitation any records that may be sought by Defendant or by Defendant's representative under the Freedom of Information Act, set forth at Title 5, United States Code, Section 552, or the Privacy Act of 1974, at Title 5, United States Code, Section 552a.

e. Defendant further acknowledges and agrees that any factual issues regarding the sentencing will be resolved by the sentencing judge under a preponderance of the evidence standard, and Defendant waives any right to a jury determination of these sentencing issues. Defendant further agrees that, in making its sentencing decision, the district court may consider any relevant evidence without regard to its admissibility under the rules of evidence applicable at trial.

f. Notwithstanding the foregoing, Defendant retains the right to pursue a claim of ineffective assistance of counsel.

Defendant waives these rights in exchange for the United States Attorney entering into this plea agreement and accompanying plea supplement.

9. Complete Agreement. It is further understood that this plea agreement and the plea supplement completely reflects all promises, agreements and conditions made by and between the United States and Defendant.

Defendant and Defendant's attorney of **record declare that the terms of this plea agreement have been:**

1. READ BY OR TO DEFENDANT;

2. EXPLAINED TO DEFENDANT BY DEFENDANT'S ATTORNEY;

3. UNDERSTOOD BY DEFENDANT;

4. VOLUNTARILY ACCEPTED BY DEFENDANT; and

5. AGREED TO AND ACCEPTED BY DEFENDANT.

WITNESS OUR SIGNATURES, as set forth below.

DARREN J. LAMARCA
United States Attorney

/s/ Erin O. Chalk _____ August 3, 2023
ERIN O. CHALK Date
Assistant United States Attorney

/s/ Glenda R. Haynes _____ 8-3-2023
GLENDA R. HAYNES Date
Assistant United States Attorney

KRISTEN M. CLARKE
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

/s/Christopher J. Perras ___ 8/3/23
CHRISTOPH J. PERRAS Date
Special Litigation Counsel
Civil Rights Division

/s/ Daniel Grunert _____ 8-3-23
DANIEL GRUNERT Date
Trial Attorney
Civil Rights Division

/s/ Brett Morris McAlpin ___ 8-3-23
BRETT MORRIS MCALPIN Date
Defendant

/s/ Aafram Sellers _____ 8/3/23
AAFRAM SELLERS Date
Attorney for Defendant