NO. _____

In The
Supreme Court of the United States

DERRICK WENZEL SIMMONS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Jonathan A. Gladstone
LAW OFFICES OF JONATHAN GLADSTONE
700 Melvin Avenue, Suite 6
Annapolis, Maryland 21401
(410) 974-6903
gladstonelaw@yahoo.com

Counsel for Petitioner

Dated: December 15, 2017

THE LEX GROUP[DC] ♦ 1825 K Street, NW ♦ Suite 103 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroup.com

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UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4583

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERRICK WENZEL SIMMONS, a/k/a Derrick W. Simmons,

Defendant - Appellant.

Appeal from the United States District Court for the District of Maryland, at Greenbelt. Peter J. Messitte, Senior District Judge. (8:15-cr-00376-PJM-2)

Submitted: August 1, 2017 Decided: August 11, 2017

Before NIEMEYER, MOTZ, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Jonathan A. Gladstone, LAW OFFICES OF JONATHAN GLADSTONE, Annapolis, Maryland, for Appellant. Stephen M. Schenning, Acting United States Attorney, Kelly O. Hayes, Assistant United States Attorney, Greenbelt, Maryland, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Derrick Wenzel Simmons pled guilty to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (2012). The district court imposed a sentence of 108 months' imprisonment, which Simmons challenges on appeal. Because we previously granted the Government's motion to dismiss Simmons' appeal in part, *United States v. Simmons*, No. 16-4583 (4th Cir. Apr. 27, 2017) (unpublished order), the sole remaining issue before us is whether Simmons' sentence is substantively reasonable.

We "review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard." *Gall v. United States*, 552 U.S. 38, 41 (2007). Because Simmons "does not claim that the district court committed any procedural error," save for the previously dismissed issue, our review "is limited only to substantive reasonableness." *United States v. Howard*, 773 F.3d 519, 528 (4th Cir. 2014). "When reviewing the substantive reasonableness of a sentence, we examine the totality of the circumstances to see whether the sentencing court abused its discretion in concluding that the sentence it chose satisfied the standards set forth in [18 U.S.C.] § 3553(a)." *United States v. Gomez-Jimenez*, 750 F.3d 370, 383 (4th Cir. 2014). In reviewing a sentence outside the Guidelines range, we "consider whether the sentencing court acted reasonably both with respect to its decision to impose such a sentence and with respect to the extent of the divergence from the sentencing range." *United States v. Washington*, 743 F.3d 938, 944 (4th Cir. 2014). If a court's deviation from the Guidelines range "is a substantial one, we must more carefully scrutinize the reasoning offered by the district court in support of the sentence. The farther the court

diverges from the advisory guideline range, the more compelling the reasons for the divergence must be." *United States v. Hampton*, 441 F.3d 284, 288 (4th Cir. 2006) (ellipses omitted). However, "an appellate court *must* defer to the trial court and can reverse a sentence *only* if it is unreasonable, even if the sentence would not have been the choice of the appellate court." *United States v. Evans*, 526 F.3d 155, 160 (4th Cir. 2008).

Although Simmons' 108-month sentence reflects a significant increase from the applicable Sentencing Guidelines range of 37 to 46 months' imprisonment, we conclude that the district court's explanation adequately supports such an increase. The district court noted the dangerous circumstances surrounding the instant offense, Simmons' repeated involvement with firearms despite his status as a felon, the goals of deterring Simmons from future crimes and promoting respect for the law, and the need to protect the public from Simmons. In view of the totality of these circumstances, the district court's variant sentence was not an abuse of discretion.

The Government has moved to strike Simmons' reply brief on the ground that the brief presents arguments not previously raised. Because Simmons' brief is an appropriate document to file with this court and was timely submitted, *see* Fed. R. App. P. 28(c), we decline to strike the filing. Nonetheless, the gist of the Government's argument is well taken; thus, we do not consider the substance of the Simmons' novel arguments, as they have been forfeited. *United States v. Rosen*, 557 F.3d 192, 196 n.6 (4th Cir. 2009) ("We are unable to consider a claim raised for the first time by way of a reply brief.").

Accordingly, we deny the Government's motion to strike and affirm the district court's judgment. We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

AFFIRMED

FILED: August 11, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4583
(8:15-cr-00376-PJM-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DERRICK WENZEL SIMMONS, a/k/a Derrick W. Simmons

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, the judgment of the district court is affirmed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: April 27, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4583
(8:15-cr-00376-PJM-2)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

DERRICK WENZEL SIMMONS, a/k/a Derrick W. Simmons,

Defendant - Appellant.

O R D E R

Derrick Wenzel Simmons seeks to appeal the 108-month sentence imposed by the district court following his guilty plea, pursuant to a written plea agreement, to being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g) (2012). The Government has moved to dismiss the appeal in part as barred by the waiver of the right to appeal included in Simmons' plea agreement. Simmons does not dispute that his appellate waiver was entered knowingly and voluntarily.

Upon review of the record, we conclude that Simmons' challenge to the application of the four-level enhancement under U.S. Sentencing Guidelines Manual § 2K2.1(b)(6)(B)

(2015) falls within the scope of his appellate waiver. Accordingly, we grant the Government's motion to dismiss in part. The Clerk will reinstate the briefing schedule by separate order.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: September 18, 2017

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4583
(8:15-cr-00376-PJM-2)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

DERRICK WENZEL SIMMONS, a/k/a Derrick W. Simmons

Defendant - Appellant

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Niemeyer, Judge Motz and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

esp

United States District Court
District of Maryland

UNITED STATES OF AMERICA

v.

DERRICK W. SIMMONS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Case Number: PJM-8-15-CR-00376-002

USM Number: N/A
Defendant's Attorney: Kush Arora

Assistant U.S. Attorney: Deborah Johnston

THE DEFENDANT:
☒ pleaded guilty to count(s) 1 of the Indictment
☐ pleaded nolo contendere to count(s) _____, which was accepted by the court.
☐ was found guilty on count(s) _____ after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
Title 18 U.S.C. §922(g)(1)	Felon in Possession of a firearm alleging violation	June 9, 2015	1

The defendant is adjudged guilty of the offenses listed above and sentenced as provided in pages 2 through _____ of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984 as modified by United States v. Booker, 543 U.S. 220 (2005).

☐ The defendant has been found not guilty on count(s) _____
☐ Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

FILED ENTERED
LODGED RECEIVED
SEP - 9 2016
AT GREENBELT
CLERK U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

September 1, 2016
Date of Imposition of Judgment

9/8/16

Peter J. Messitte Date
Senior United States District Judge

Name of Court Reporter: Lisa Bankins

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of ***108 months as to Count 1 of the Indictment. Defendant shall receive credit for time served.***

☒ The court makes the following recommendations to the Bureau of Prisons:
That the defendant participate in any appropriate mental health evaluation and treatment program.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ a.m./p.m. on _____.
☐ as notified by the United States Marshal.

☐ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☐ before 2 p.m. on _____.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. §3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. §3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. §3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By:_____
DEPUTY U.S. MARSHAL

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of ***3 years as to Count 1 of the Indictment***.

The defendant shall comply with all of the following conditions:

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

A. STATUTORY CONDITIONS OF SUPERVISED RELEASE

1) The defendant shall not commit any federal, state or local crime.
2) In any felony case, the defendant shall not possess a firearm or ammunition as defined in 18 U.S.C. §921.
3) The defendant shall not illegally use or possess a controlled substance.
4) The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

5) Pursuant to Pub. Law 108-405, Revised DNA Collection Requirements Under the Justice for All Act of 2004, if applicable, the defendant shall cooperate in the collection of DNA while incarcerated in the Bureau of Prisons, or as directed by the probation officer.
6) If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

B. STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;
13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;
14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

C. SUPERVISED RELEASE ADDITIONAL CONDITIONS

MENTAL HEALTH

☒ The defendant shall satisfactorily participate in a mental health treatment program approved by the probation officer, which may include evaluation, counseling, and testing as deemed necessary by the probation officer.

DEFENDANT: DERRICK W. SIMMONS CASE NUMBER: PJM-8-15-CR-00376-002

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$ 100.00	$	$

☐ CVB Processing Fee $25.00

☐ The determination of restitution is deferred until Click here to enter a date.. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage

TOTALS $ _____ $ _____

☐ Restitution amount ordered pursuant to plea agreement _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ ***$100.00 Special Assessment shall be paid in full immediately.***

B ☐ $_____ immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than _____; or

D ☐ Installments to commence _____ day(s) after the date of this judgment.

E ☐ In _____ (*e.g. equal weekly, monthly, quarterly*) installments of $_____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Bureau of Prisons Inmate Financial Responsibility Program, are to be made to the Clerk of the Court.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

U.S. Department of Justice

United States Attorney
District of Maryland
Southern Division

William D. Moomau
Assistant United States Attorney
William.Moomau@usdoj.gov

Mailing Address:
6500 Cherrywood Lane, Suite 200
Greenbelt, MD 20770-1249

Office Location:
6406 Ivy Lane, 8th Floor
Greenbelt, MD 20770-1249

DIRECT: 301-344-0105
MAIN: 301-344-4433
FAX: 301-344-4516

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2016 JUN -6 P 12: 04
CLERK'S OFFICE
AT GREENBELT
BY _____ DEPUTY

May 10, 2016

Kush Arora, Esq.
Price Benowitz LLP
406 Fifth St NW, Suite 200
Washington, DC 20001

Re: United States v. Derrick Wenzell Simmons,
Crim. No. PJM-15-0376 (Indictment)
Crim. No. PJM-09-0004 (Petition on Supervised Release)

Dear Mr. Arora:

This letter, together with the Sealed Supplement, confirms the plea agreement which has been offered to the Defendant by the United States Attorney's Office for the District of Maryland ("this Office"). If the Defendant accepts this offer, please have him execute it in the spaces provided below. If this offer has not been accepted by **May 20, 2016**, it will be deemed withdrawn. The terms of the agreement are as follows:

Offenses of Conviction

1. The Defendant agrees to plead guilty to Count One of the above-captioned Indictment now pending against him, which charges him with Felon in Possession of a Firearm in violation of 18 U.S.C. § 922(g)(1). The Defendant also agrees to plead guilty to the petition alleging violations of the terms of his supervised release now pending against him (Criminal No. PJM 09-0004), which charges him with offenses including "Firearm Possession w/ Felony Conviction" in violation of the condition that the Defendant shall not commit another federal, state, or local crime. The Defendant admits that he is, in fact, guilty of those offenses and will so advise the Court.

Elements of the Offenses

2. The elements of the offenses to which the Defendant has agreed to plead guilty, and which this Office would prove if the case went to trial, are as follows:

Felon in Possession of a Firearm, Criminal No. PJM-15-0376 (Count One)

(1) the Defendant was convicted in any court of a crime punishable by imprisonment for more than one year, and his civil rights had not yet been restored;

(2) after that conviction, the Defendant knowingly possessed a firearm; and

(3) the possession charged was in or affecting interstate or foreign commerce.

Violation of Supervised Release, Criminal No. PJM-09-0004

(1) that the Defendant was on supervised release; and

(2) that the Defendant violated a condition of supervised release.

Penalties

3. The maximum sentences provided by statute for the offenses to which the Defendant is pleading guilty are as follows:

Felon in Possession of Firearm, Case No. PJM-15-0376: The maximum sentence provided by statute for the offense to which the Defendant is pleading guilty is as follows: ten years imprisonment, $250,000 fine and three years of supervised release. In addition, the Defendant must pay $100 as a special assessment pursuant to 18 U.S.C. § 3013, which will be due and should be paid at or before the time of sentencing. This Court may also order him to make restitution pursuant to 18 U.S.C. §§ 3663, 3663A, and 3664.[1] If a fine or restitution is imposed, it shall be payable immediately, unless, pursuant to 18 U.S.C. § 3572(d), the Court orders otherwise. The Defendant understands that if he serves a term of imprisonment, is released on supervised release, and then violates the conditions of his supervised release, his supervised release could be revoked - even on the last day of the term - and the Defendant could be returned to custody to serve another period of incarceration and a new term of supervised release. The Defendant understands that the Bureau of Prisons has sole discretion in designating the institution at which the Defendant will serve any term of imprisonment imposed.

Violation of Supervised Release, Case No. PJM 09-0004: Pursuant to 18 U.S.C. §§ 3583(e)(3) and 3583(h), the maximum sentence is two years imprisonment and three years of supervised release, less any term of imprisonment imposed upon revocation of supervised release.

Waiver of Rights

4. The Defendant understands that by entering into this agreement, he surrenders certain rights as outlined below:

a. If the Defendant had persisted in his plea of not guilty, he would have had the right to a speedy jury trial with the close assistance of competent counsel. That trial

[1] Pursuant to 18 U.S.C. § 3612, if the Court imposes a fine in excess of $2,500 that remains unpaid 15 days after it is imposed, the Defendant shall be charged interest on that fine, unless the Court modifies the interest payment in accordance with 18 U.S.C. § 3612(f)(3).

could be conducted by a judge, without a jury, if the Defendant, this Office, and the Court all agreed.

b. If the Defendant elected a jury trial, the jury would be composed of twelve individuals selected from the community. Counsel and the Defendant would have the opportunity to challenge prospective jurors who demonstrated bias or who were otherwise unqualified, and would have the opportunity to strike a certain number of jurors peremptorily. All twelve jurors would have to agree unanimously before the Defendant could be found guilty of any count. The jury would be instructed that the Defendant was presumed to be innocent, and that presumption could be overcome only by proof beyond a reasonable doubt.

c. If the Defendant went to trial, the Government would have the burden of proving the Defendant guilty beyond a reasonable doubt. The Defendant would have the right to confront and cross-examine the Government's witnesses. The Defendant would not have to present any defense witnesses or evidence whatsoever. If the Defendant wanted to call witnesses in his defense, however, he would have the subpoena power of the Court to compel the witnesses to attend.

d. The Defendant would have the right to testify in his own defense if he so chose, and he would have the right to refuse to testify. If he chose not to testify, the Court could instruct the jury that they could not draw any adverse inference from his decision not to testify.

e. If the Defendant were found guilty after a trial, he would have the right to appeal the verdict and the Court's pretrial and trial decisions on the admissibility of evidence to see if any errors were committed which would require a new trial or dismissal of the charges against him. By pleading guilty, the Defendant knowingly gives up the right to appeal the verdict and the Court's decisions.

f. By pleading guilty, the Defendant will be giving up all of these rights, except the right, under the limited circumstances set forth in the "Waiver of Appeal" paragraph below, to appeal the sentence. By pleading guilty, the Defendant understands that he may have to answer the Court's questions both about the rights he is giving up and about the facts of his case. Any statements the Defendant makes during such a hearing would not be admissible against him during a trial except in a criminal proceeding for perjury or false statement.

g. If the Court accepts the Defendant's plea of guilty, there will be no further trial or proceeding of any kind, and the Court will find him guilty.

h. By pleading guilty, the Defendant will also be giving up certain valuable civil rights and may be subject to deportation or other loss of immigration status. The Defendant recognizes that if he/she is not a citizen of the United States, pleading guilty may have consequences with respect to his/her immigration status. Under federal law, conviction for a broad range of crimes can lead to adverse immigration consequences, including automatic removal from the United States. Removal and other immigration consequences are the subject of

a separate proceeding, however, and the Defendant understands that no one, including his/her attorney or the Court, can predict with certainty the effect of a conviction on immigration status. Defendant nevertheless affirms that he/she wants to plead guilty regardless of any potential immigration consequences.

Advisory Sentencing Guidelines Apply

5. The Defendant understands that the Court will determine a sentencing guidelines range for this case (henceforth the "advisory guidelines range") pursuant to the Sentencing Reform Act of 1984 at 18 U.S.C. §§ 3551-3742 (excepting 18 U.S.C. §§ 3553(b)(1) and 3742(e)) and 28 U.S.C. §§ 991 through 998. The Defendant further understands that the Court will impose a sentence pursuant to the Sentencing Reform Act, as excised, and must take into account the advisory guidelines range in establishing a reasonable sentence.

Factual and Advisory Guidelines Stipulation

6. This Office and the Defendant understand, agree and stipulate to the Statement of Facts set forth in Attachment A hereto which this Office would prove beyond a reasonable doubt, and to the following applicable sentencing guidelines factors:

a. As to Count One, Felon in Possession of Firearm, Criminal No. PJM-15-0376 (Count One), the parties agree that the base offense level is **14**, pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2K2.1(a)(6)(A).

b. The parties agree that a **2**-level increase applies, pursuant to U.S.S.G. § 2K2.1(b)(4)(A), because the firearm was stolen.

c. This Office's position is that a **4**-level increase applies, pursuant to U.S.S.G. § 2K2.1(b)(6)(B), because the firearm was used in connection with another felony offense. The Defendant will oppose this enhancement.

d. The adjusted offense level as to Count One thus is either **20** (this Office's position) or **16** (the Defendant's position).

e. This Office does not oppose a **2**-level reduction in the Defendant's adjusted offense level, based upon the Defendant's apparent prompt recognition and affirmative acceptance of personal responsibility for his criminal conduct. This Office agrees to make a motion pursuant to U.S.S.G. § 3E1.1(b) for an additional **1**-level decrease in recognition of the Defendant's timely notification of his intention to plead guilty. This Office may oppose any adjustment for acceptance of responsibility if the Defendant (a) fails to admit each and every item in the factual stipulation; (b) denies involvement in the offense; (c) gives conflicting statements about his involvement in the offense; (d) is untruthful with the Court, this Office, or the United States Probation Office; (e) obstructs or attempts to obstruct justice prior to sentencing; (f) engages in any criminal conduct between the date of this agreement and the date of sentencing; or (g) attempts to withdraw his plea of guilty. If the Defendant obtains a 3-level

reduction, the final offense level as to Count One (Felon in Possession of Firearm, Criminal No. PJM-15-0376) will be either **17** (this Office's position) or **13** (the Defendant's position)

f. The parties stipulate and agree that the Defendant's criminal history category is IV, based upon the Pre-Plea Criminal History Report dated January 4, 2016, prepared by the United States Probation and Pretrial Services Office for the District of Maryland.

g. As to Violation of Supervised Release, Criminal No. PJM-09-0004, pursuant to U.S.S.G. § 7B1.1(a)(2), the advisory guidelines range for Grade B violations applies. Based upon a criminal history category of IV, pursuant to U.S.S.G. § 7B1.4(a), the parties agree that the advisory guidelines range for the violation of supervised release is 12-18 months. Pursuant to U.S.S.G. § 7B1.3(f), any term of imprisonment imposed upon the revocation of supervised release shall be ordered to be served consecutively to any sentence of imprisonment that the Defendant is serving, whether or not the sentence of imprisonment being served resulted from the conduct that is the basis of the revocation of supervised release.

h. This Office and the Defendant agree that with respect to the calculation of the advisory guidelines range, no other offense characteristics, sentencing guidelines factors, potential departures or adjustments set forth in the United States Sentencing Guidelines will be raised or are in dispute.

Obligations of the United States Attorney's Office

7. At the time of sentencing, this Office will recommend a reasonable sentence.

8. The parties reserve the right to bring to the Court's attention at the time of sentencing, and the Court will be entitled to consider, all relevant information concerning the Defendant's background, character and conduct.

Forfeiture of Firearms

9. The Defendant understands and agrees that as a result of his guilty plea, he will not be permitted to own, possess, or use a firearm and ammunition. The Defendant forfeits all right, title, and interest to and in the following firearms: an Israel Weapons Industries .40 caliber model Desert Eagle Semi-automatic pistol, serial number 38320011, and 11 cartridges of .40 S&W caliber ammunition; and a Smith and Wesson .357 Magnum caliber model 27-2 revolver, serial number N166136, and six cartridges of 357 magnum caliber, CCI brand ammunition.

10. The Defendant agrees to consent to the entry of orders of forfeiture for such property and waives the requirements of Federal Rules of Criminal Procedure 11(b)(1)(J), 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, advice regarding the forfeiture at the change-of-plea hearing, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment.

Kush Arora, Esq.
May 10, 2016

Waiver of Appeal

11. In exchange for the concessions made by this Office and the Defendant in this plea agreement, this Office and the Defendant waive their rights to appeal as follows:

a. The Defendant knowingly waives all right, pursuant to 28 U.S.C. § 1291 or otherwise, to appeal the Defendant's conviction;

b. The Defendant and this Office knowingly waive all right, pursuant to 18 U.S.C. § 3742 or otherwise, to appeal whatever sentence is imposed (including the right to appeal any issues that relate to the establishment of the advisory guidelines range, the determination of the defendant's criminal history, the weighing of the sentencing factors, and the decision whether to impose and the calculation of any term of imprisonment, fine, order of forfeiture, order of restitution, and term or condition of supervised release), except as follows: (i) the Defendant reserves the right to appeal any term of imprisonment to the extent that it exceeds a sentence based upon an offense level of **17** as to Count One and a consecutive sentence within the range of **12-18** months imprisonment in Case No. PJM-09-0004; (ii) and this Office reserves the right to appeal any term of imprisonment to the extent that it is below a sentence based upon an offense level of **13** as to Count One and a consecutive sentence within the range of **12-18** months imprisonment in Case No. PJM-09-0004.

c. Nothing in this agreement shall be construed to prevent the Defendant or this Office from invoking the provisions of Federal Rule of Criminal Procedure 35(a), or from appealing from any decision thereunder, should a sentence be imposed that resulted from arithmetical, technical, or other clear error.

d. The Defendant waives any and all rights under the Freedom of Information Act relating to the investigation and prosecution of the above-captioned matter and agrees not to file any request for documents from this Office or any investigating agency.

Obstruction or Other Violations of Law

12. The Defendant agrees that he will not commit any offense in violation of federal, state or local law between the date of this agreement and his sentencing in this case. In the event that the Defendant (i) engages in conduct after the date of this agreement which would justify a finding of obstruction of justice under U.S.S.G. § 3C1.1, or (ii) fails to accept personal responsibility for his conduct by failing to acknowledge his guilt to the probation officer who prepares the Presentence Report, or (iii) commits any offense in violation of federal, state or local law, then this Office will be relieved of its obligations to the Defendant as reflected in this agreement. Specifically, this Office will be free to argue sentencing guidelines factors other than those stipulated in this agreement, and it will also be free to make sentencing recommendations other than those set out in this agreement. As with any alleged breach of this agreement, this Office will bear the burden of convincing the Court of the Defendant's obstructive or unlawful behavior and/or failure to acknowledge personal responsibility by a preponderance of the evidence. The Defendant acknowledges that he may not withdraw his guilty plea because this Office is relieved of its obligations under the agreement pursuant to this paragraph.

Kush Arora, Esq.
May 10, 2016

Court Not a Party

13. The Defendant expressly understands that the Court is not a party to this agreement. In the federal system, the sentence to be imposed is within the sole discretion of the Court. In particular, the Defendant understands that neither the United States Probation Office nor the Court is bound by the stipulation set forth above, and that the Court will, with the aid of the Presentence Report, determine the facts relevant to sentencing. The Defendant understands that the Court cannot rely exclusively upon the stipulation in ascertaining the factors relevant to the determination of sentence. Rather, in determining the factual basis for the sentence, the Court will consider the stipulation, together with the results of the presentence investigation, and any other relevant information. The Defendant understands that the Court is under no obligation to accept this Office's recommendations, and the Court has the power to impose a sentence up to and including the statutory maximum stated above. The Defendant understands that if the Court ascertains factors different from those contained in the stipulation set forth above, or if the Court should impose any sentence up to the maximum established by statute, the Defendant cannot, for that reason alone, withdraw his guilty plea, and will remain bound to fulfill all of his obligations under this agreement. The Defendant understands that neither the prosecutor, his counsel, nor the Court can make a binding prediction, promise, or representation as to what guidelines range or sentence the Defendant will receive. The Defendant agrees that no one has made such a binding prediction or promise.

Entire Agreement

14. This letter supersedes any prior understandings, promises, or conditions between this Office and the Defendant and, together with the Sealed Supplement, constitutes the complete plea agreement in this case. The Defendant acknowledges that there are no other agreements, promises, undertakings or understandings between the Defendant and this Office other than those set forth in this letter and the Sealed Supplement and none will be entered into unless in writing and signed by all parties.

If the Defendant fully accepts each and every term and condition of this agreement, please sign and have the Defendant sign the original and return it to me promptly.

Very truly yours,

Rod J. Rosenstein
United States Attorney

By: _____
William D. Moomau
Deborah A. Johnston
Assistant United States Attorneys

Kush Arora, Esq.
May 10, 2016

I have read this agreement, including the Sealed Supplement, and carefully reviewed every part of it with my attorney. I understand it, and I voluntarily agree to it. Specifically, I have reviewed the Factual and Advisory Guidelines Stipulation with my attorney, and I do not wish to change any part of it. I am completely satisfied with the representation of my attorney.

6-03-16
Date

Derrick Simmons
Derrick Wenzell Simmons

I am Derrick Wenzell Simmons' attorney. I have carefully reviewed every part of this agreement, including the Sealed Supplement, with him. He advises me that he understands and accepts its terms. To my knowledge, his decision to enter into this agreement is an informed and voluntary one.

6-3-16
Date

Kush Arora, Esq.

Kush Arora, Esq.
May 10, 2016

ATTACHMENT A
STATEMENT OF FACTS: DERRICK WENZELL SIMMONS

The United States and the Defendant, Derrick Wenzell Simmons, agree that if this case proceeded to trial, the United States would prove the following facts below beyond a reasonable doubt. They agree that these are not all of the facts that would be proved if this case proceeded to trial.

FILED
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
2016 JUN 6 P 12:04
CLERK'S OFFICE
AT BALTIMORE
BY DEPUTY

On June 9, 2015, Prince George's County (Maryland) Police Department officers located two motor vehicles in the Upper Marlboro area of Prince George's County that had been stolen the previous night during a commercial burglary in Baltimore, Maryland. One of these vehicles, a black 2000 Ford Mustang, with Maryland license plate number 7BP0480, was observed to be parked in the parking lot of a shopping plaza in the 5700 block of Crain Highway, Upper Marlboro, Maryland.

The Defendant, **DERRICK WENZELL SIMMONS ("SIMMONS")**, and **Clyde William Peterson ("Peterson")** were inside the stolen Ford Mustang. **SIMMONS** and **Peterson** were subsequently arrested by police. **SIMMONS** knowingly possessed an Israel Weapons Industries .40 caliber model Desert Eagle Semi-automatic pistol, serial number 38320011, loaded with 11 cartridges of .40 S&W caliber ammunition, which was recovered by police during the arrest. Police also recovered a Smith and Wesson .357 Magnum caliber, model 27-2 revolver, serial number N166136, loaded with six cartridges of 357 Magnum caliber, CCI during the arrest.

Prior to June 9, 2015, **SIMMONS** had been convicted of a crime punishable by more than one year of imprisonment, which prohibited him from legally possessing the above described firearm.

The loaded Israel Weapons Industries .40 caliber model Desert Eagle semi-automatic pistol, serial number 38320011, possessed by **SIMMONS,** was a firearm as defined in 18 U.S.C. § 921(a)(3), was manufactured outside the State of Maryland, and traveled in interstate

(cont'd)

commerce before being recovered in Maryland on June 9, 2015. Furthermore, this firearm had been reported stolen from its owner in Pender County, North Carolina on June 15, 2010.

* * *

I have read this statement of facts, and have carefully reviewed it with my attorney. I acknowledge that it is true and correct.

5-18-16
Date

Derrick Simmons
Derrick Wenzell Simmons

I am Derrick Wenzell Simmons' attorney. I have carefully reviewed the statement of facts with him.

May 18, 2016
Date

Kush Arora, Esq.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CASE NO. 16-4583**
	)	
DERRICK WENZEL SIMMONS,	)	
Defendant	)	

UNITED STATES OF AMERICA'S MOTION TO DISMISS APPEAL IN PART AND STAY BRIEFING SCHEDULE

The United States of America, by and through its undersigned counsel, hereby moves to dismiss a portion of the appeal filed by the Defendant-Appellant, Derrick Wenzel Simmons (hereinafter "Simmons" or the "Defendant"), and to stay the briefing Order while the Court considers the government's motion to dismiss in part. Pursuant to his plea agreement, and by virtue of having pled guilty, Simmons knowingly and voluntarily waived his appellate rights, including his right to appeal the advisory guidelines calculation, reserving only the right to appeal a sentence above the guideline range for an offense level of 17. Accordingly, the government requests that this Court dismiss the Defendant's appeal except for his appeal of the reasonableness of the above guideline sentence.

FACTUAL BACKGROUND

On July 6, 2015, the grand jury returned a single count Indictment charging the defendant, Derrick Wenzell Simmons, and his co-defendant, Clyde Peterson, with possession of a firearm after conviction of a crime punishable by more than one year in prison. Joint Appendix ("JA") 7. On June 3, 2016, pursuant to a plea agreement, the defendant appeared in court and entered a guilty plea to the single count charged in the Indictment and the violation of supervised release petition, pending in *United States v. Simmons*, Crim. No. PMJ-09-004.[1] JA 5.

In the plea agreement, the parties agreed to the sentencing guideline calculations with one exception. Specifically, the parties disagreed about the application of a four level adjustment, pursuant to U.S.S.G. § 2K2.1 (b)(6)(B), because the firearm was possessed in connection with another felony. JA 12. The parties further agreed the final offense level under the guidelines would be either an offense level of 17 or 13. JA 13. The plea agreement also contained a written appellate waiver as follows:

> In exchange for the concessions made by this Office and the Defendant in this plea agreement, this Office and the Defendant waive their rights to appeal as follows:

[1] The Defendant has not appealed the twelve-month consecutive sentence imposed for the violation of supervised release in PJM-09-004.

a. The Defendant knowingly waives all right, pursuant to 28 U.S.C. § 1291 or otherwise, to appeal the Defendant's conviction;

b. The Defendant and this Office knowingly waive all right, pursuant to 18 U.S.C. § 3742 or otherwise, to appeal whatever sentence is imposed (including the right to appeal any issues that relate to the establishment of the advisory guidelines range, the determination of the defendant's criminal history, the weighing of the sentencing factors, and the decision whether to impose and the calculation of any term of imprisonment, fine, order of forfeiture, order of restitution, and term or condition of supervised release), except as follows: (i) the Defendant reserves the right to appeal any term of imprisonment to the extent that it exceeds a sentence based upon an offense level of **17** and a consecutive sentence within the range of 12 to 18 months imprisonment in Case No. PJM-09-004; (ii) and this Office reserves the right to appeal any term of imprisonment to the extent that it is below a sentence based upon an offense level of **13**…

JA 14.

During the guilty plea hearing on June 3, 2016, the district court engaged in a detailed colloquy with the defendant, as required by Federal Rule of Criminal Procedure 11.[2] The court first asked the government to explain the salient provisions of the plea agreement, which the government did, specifically covering the appellate waiver. Exhibit A at 20. At the conclusion of the government's review of the plea agreement provisions, the defendant agreed the government's summary was

[2] The transcript of the Rule 11 proceeding was inadvertently omitted from the Joint appendix. For purposes of this motion, a copy is attached as Exhibit A.

accurate. Exh. A at 20.

The court and the Defendant engaged in the following colloquy regarding the appellate waiver:

THE COURT: All right. Now, the plea agreement does address your rights of appeal in this case, if any, and they are very limited. They appear at -- Paragraph 11 at page six. Basically you are giving up your right to appeal except for example that a sentence in connection with Count 1, the current -- possession charge exceeds a level of --offense level of 17 or to the extent that the consecutive sentence with regard to the violation would exceed a range of 12 to 18 months imprisonment, understood?

THE DEFENDANT: Yes.

THE COURT: And then the -- let me just see if I got this correct -- the Government reserves the right to appeal any sentence which would be indicated by an offense level of less than 13 and a consecutive sentence of less than 12 to 18 months, understood?

THE DEFENDANT: Yes.

THE COURT: And of course, if the Court imposes an illegal sentence beyond what the Statute provides, you can always appeal that, understood?

THE DEFENDANT: Yes.

THE COURT: Other than that you are giving up your right to appeal, is that clear?

THE DEFENDANT: Yes.

THE COURT: And are you doing that voluntarily?

THE DEFENDANT: Yes, Sir.

Exh. A at 26-27. Moreover, the Court explained to the defendant that he could not withdraw his plea if he did not like the Court's guideline determination. Exh. A at 23. At the conclusion of the Rule 11 proceeding, the Court confirmed the Defendant understood everything about the proceeding. Exh. A at 30.

On September 1, 2016, a sentencing hearing was held. After hearing argument and considering the memorandum and an affidavit filed by the parties, the court applied the four level adjustment and, as contemplated by the plea agreement, determined the offense level to be 17, resulting in a sentencing guideline range of 37 to 46 months imprisonment. JA 36-37. After carefully considering the factors set forth in 18 U.S.C. § 3553 (JA 53-55), the court imposed a variant sentence of 108 months in this case and added a consecutive 12 month term of imprisonment for the violation of supervised release in PJM-09-004. JA 56-57.

On September 9, 2016, the court's judgement was entered. JA 5. On September 12, 2016, the defendant filed a notice of appeal from the district court's judgment. JA 5.

On November 28, 2016, the defendant filed a brief in this court, in which he raised the following issues: (1) "whether applying a four level increase in the

guidelines for possessing a firearm in connection with another felony was proper"; and (2) "whether the above guideline sentence imposed was reasonable." Appellant's Brief at 5.

For the reasons set forth, the government respectfully requests that this Court dismiss argument one as it falls squarely within the waiver provisions of the plea agreement.

ARGUMENT

The Defendant's appeal of the trial court's calculation of the sentencing guidelines calculations should be dismissed because the defendant knowingly and intelligently specifically waived his right to appeal this issue.

With narrow exceptions not relevant here, a defendant's waiver of his right to appeal a conviction or sentence is valid and enforceable if such waiver was knowingly and intelligently made. *See United States v. Blick*, 408 F.3d 162, 168-171 (4th Cir. 2005); *United States v. General*, 278 F.3d 389, 399-401 (4th Cir. 2002); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994). Whether a defendant has waived his appellate rights is a legal question this Court considers *de novo*. *Blick*, 408 F.3d at 168. If a party files an appeal despite a knowing and intelligent waiver of that party's right to appeal, the proper remedy is the dismissal of the appeal. *See United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

"Plea bargaining is an 'important component[ ] of this country's criminal justice system.'" *United States v. Poindexter*, 492 F.3d 263, 269 (4th Cir. 2007) (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1970)). "Plea bargains rest on contractual principles," and each party should receive the benefit of their respective bargain. *United States v. Ringling*, 988 F.2d 504, 506 (4th Cir. 1993). Appellate waivers may apply to "fundamental constitutional rights such as the right to counsel, or the right to a jury trial." *Marin*, 961 F.2d at 496 (quoting *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990)). Whether an appellate waiver is made "knowingly and intelligently" depends upon the "totality of the circumstances, including the experience and conduct of the accused, as well as the accused's educational background and familiarity with the terms of the plea agreement." *United States v. Thornsbury*, 670 F.3d 532, 537 (4th Cir. 2012) (citing *General*, 278 F.3d at 400). Generally, "if a district court questions a defendant regarding the waiver of appellate rights during the Rule 11 colloquy and the record indicates that the defendant understood the full significance of the waiver, the waiver is valid." *Id.* (citing *United States v. Johnson*, 410 F.3d 137, 151 (4th Cir. 2005)).

In this case, the record makes clear that the defendant entered into a plea agreement with the government that contained a valid waiver of appeal provision, and that he did so knowingly and intelligently. The waiver of appeal specifically

included "the right to appeal any issues that relate to the establishment of the establishment of the advisory guidelines range." JA 14.

At the Rule 11 hearing, the district court reviewed all salient aspects of the plea agreement with the defendant and specifically drew the parties' attention to the waiver provision. *See Blick*, 408 F.3d at 169 ("Although [the determination whether the waiver was knowingly and intelligently made] is often made based on the adequacy of the plea colloquy – specifically, whether the district court questioned the defendant about the appeal waiver – the issue ultimately is evaluated by reference to the totality of the circumstances." (internal quotation marks omitted)); *see also General*, 278 F.3d at 400-01 (holding that defendant knowingly and intelligently waived his right to appeal even though the "district court did not . . . mention the appellate waiver provision or inquire specifically into whether [the defendant] understood the significance of the waiver provision"). Moreover, on the record, prior to accepting Simmons' guilty plea, the district court engaged in a lengthy plea colloquy with Simmons. In particular, the district court verified Simmons' educational level, his mental state and that he was not currently under the influence of alcohol or drugs, and was satisfied with his attorney's performance. *See* Exh. A at 7, 14-15, 30. The defendant also acknowledged that he was entering into that waiver provision voluntarily, *see* Exh. A at 27, and the Court found that as

a result of the Court's inquiry during the Rule 11 hearing, that the defendant's plea has been made "knowingly and voluntarily." Exh. A at 30.

Additionally, the defendant was represented by competent counsel at the time that he negotiated the plea agreement and at the time he entered the guilty plea itself. *See Attar*, 38 F.3d at 731 (noting the significance of being represented during a guilty plea). In short, the waiver provision which is the subject of this motion is exactly the type of knowing waiver which this Court views as "valid and enforceable." *Attar*, 38 F.3d at 732.

The knowing and voluntary nature of the defendant's entry into the plea agreement is additionally evidenced by defense counsel's active participation in the proceedings. In fact, in the plea agreement itself, defense counsel assured that he "carefully reviewed every part of this agreement, including the Sealed Supplement, with him [the defendant]" and that "to my [defense counsel's] knowledge, his decision to enter into this agreement is an informed and voluntary one." JA 16. The defendant, moreover, in the plea agreement itself, and then during the guilty plea colloquy, acknowledged that he was satisfied with the representation of his attorney. *See* JA 16; Exh. A 14-15, 30. Additionally, at no time during the plea colloquy did the defendant or his attorney indicate a lack of understanding about the scope of the waiver-of-appeal provision in the plea agreement, or of any other part of the plea

agreement. In fact, the defendant indicated that he had the opportunity to review the plea letter and understood it before he signed it and also signed to that affect in the plea agreement itself. *See* Exh. A 14-15. Therefore, based on the record before this Court, there is no indication that the defendant's waiver of his right to appeal his sentence was anything but knowing and intelligent.

Considering both the detailed Rule 11 colloquy and the appeal waiver provision within the plea agreement, it is clear that the defendant made a knowing and intentional relinquishment of his right to appeal the sentencing guideline calculations if the offense level was 17 or lower. Indeed, this type of waiver has routinely been enforced to dismiss appellate issues relating to sentencing guideline calculations, often in unpublished *per curiam* opinions. *See United States v. Yancey*, 463 F. App'x 202, 203 (4th Cir. 2012) (dismissing defendant's challenge to the drug weight calculation because he waived appellate rights, "reserving only the right to appeal a sentence above the guidelines range calculated at sentencing."); *United States v. Autry*, 382 F. App'x 325, 326 (4th Cir. 2010)(dismissing the appeal as it related to sentencing issues because the defendant waived that right under the plea agreement "to appeal whatever sentence is imposed, including any issues that relate to the establishment of the advisory Guideline range, reserving only the right to appeal from a sentence in excess of the applicable advisory Guideline range that

is established at sentencing...."); *United States v. Williams*, 153 F. App'x 206, 208 (4th Cir. 2005) (defendant's Sixth Amendment challenge to the calculation of his offense level was within the scope of appellate waiver where defendant only reserved the right to appeal an upward departure from his guideline range); and *United States v. Rooks*, 152 F. App'x 323, 324–25 (4th Cir. 2005) (because the defendant reserved only the right to appeal an upward departure from his guideline range, his challenge to the calculation of his criminal history category was waived).

In contending that the defendant has filed this appeal in violation of his plea agreement with the government, the government notes that the defendant's appeal does not fall within any recognized limit that can be placed on his otherwise valid waiver of appeal. For example, the defendant was not sentenced to a term of imprisonment that exceeds the maximum penalty provided by statute, nor does he appear to contend that his sentence was based on any impermissible factor, such as race. *See Attar*, 38 F.3d at 732; *Marin*, 961 F.2d at 496 (finding that a waiver was enforceable where the defendant was contesting the application of a sentencing guideline factor, and where he was not alleging that the sentence exceeded the maximum possible penalty or that the sentence was based on an impermissible factor). Moreover, there is no allegation by the defendant, nor is there any indication in the record, that the defendant was afforded ineffective assistance of

counsel or that the government engaged in any misconduct that would warrant this Court's creating an exception to that waiver in this case. *See Attar*, 38 F.3d at 732. Rather, by filing this appellate challenge to the guideline calculation, the defendant simply chooses to selectively ignore a provision of the plea agreement that he has deemed to be disadvantageous to him.

For these reasons, the United States respectfully requests that the Court dismiss argument one of the appeal. To allow the defendant to attack validity of the guideline calculations that were consistent with his plea agreement and which he expressly waived his right to any review, would contravene the very purpose of the inclusion of such provisions in plea agreements and would "eliminate the chief virtues of the plea system – speed, economy and finality." *United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) (*quoting Blackledge v. Allison*, 431 U.S. 63, 71 (1977)).

The United States further requests that the briefing schedule be stayed while this motion to dismiss is pending. Defense counsel has been consulted and advised he consents to stay the briefing schedule while this motion is pending.

CONCLUSION

For the foregoing reasons, the United States of America respectfully requests that this Court stay the briefing schedule and dismiss claim one of the instant appeal.

Respectfully submitted,

Rod J. Rosenstein
United States Attorney

By:_____/s/_____
Deborah A. Johnson
William Moomau
Assistant United States Attorneys

CERTIFICATE OF COMPLIANCE

1. This motion has been prepared using:

Microsoft Word, Times New Roman, 14 Point

2. EXCLUSIVE of the corporate disclosure statement; table of contents; table of citations; statement with respect to oral argument; any addendum containing statutes, rules, or regulations, exhibits and the certificate of service, the motion contains 2,765 words.

I understand that a material misrepresentation can result in the Court's striking the brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the brief and/or a copy of the word or line print-out.

/s/ *Deborah A. Johnston*
Deborah A. Johnston
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that on this ____ day of December 2016 a copy of the foregoing Government's Motion to Dismiss was sent by CM/ECF to following:

Jonathan A. Gladstone, Esq.
Law Offices of Jonathan Gladstone
700 Melvin Avenue, Suite 6
Annapolis, MD 21401

/s/
Deborah Johnston
Assistant United States Attorney

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DISTRICT

UNITED STATES OF AMERICA	:	
v.	:	Criminal Nos. 09-0004-PJM 15-0376-PJM
DERRICK WENZEL SIMMONS,	:	
Defendant.	:	
	:	Greenbelt, Maryland
		June 3, 2016

REARRAIGNMENT HEARING

BEFORE: THE HONORABLE PETER J MESSITTE, Judge

APPEARANCES:

DEBORAH A. JOHNSTON, Esq.
WILLIAM D. MOOMAU, Esq.
Office of the U.S. Attorney
6500 Cherrywood Lane, Suite 200
Greenbelt, Maryland 20770
On Behalf of the Government

KUSH ARORA, Esq.
Price Benowitz, LLP
406 Fifth Street, N.W.
Suite 200
Washington, D.C. 20001
On Behalf of Defendant

ALSO PRESENT: Special Agent Kevin Blakeman, FBI

Audio Operator: Ella Peterson

Transcription Company: CompuScribe
5100 Forbes Boulevard
Suite 101
Lanham, Maryland 20706

Proceeding recorded by electronic sound recording, transcript produced by transcription service.

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P R O C E E D I N G S

(Whereupon, at 2:15 p.m., the proceedings began.)

THE CLERK: All rise. The United States District Court for the District of Maryland is now in session. The Honorable Peter J. Messitte presiding.

THE COURT: Good afternoon, ladies and gentlemen. Be seated.

THE CLERK: The matter now coming before this Court for Criminal Action No. PJM-2009-004, United States of America versus Derrick W. Simmons. This matter comes before -- violation of supervised release and criminal action on PJM-15-00376, United States of America v. Derrick Simmons. This matter comes before this Court for a guilty plea.

THE COURT: All right. Counsel, identify yourselves for the Government and then --

MS. JOHNSTON: Good afternoon, Your Honor, Deborah Johnston, and Special Agent Kevin Blakeman of the FBI.

MR. ARORA: And good afternoon, Your Honor, Kush Arora, and seated next to me is Mr. Simmons.

THE COURT: All right. Let us see where were are. Let us start with the violation petition and then we will square that away and then see where we are on the plea agreement.

What I have is a petition in front of me that I signed on June 12th, 2015. Is that the petition --

MS. JOHNSTON: Yes, Your Honor.

THE COURT: -- that we are going on.

MR. ARORA: Yes, Your Honor, that is my understanding.

THE COURT: All right. Now, as I see it, he was charged with -- the Defendant was charged with a number of crimes in connection with the event of that day. As I understand it the felon in possession charge has been pulled out of there and that is the basis of the plea agreement. Is that correct?

MS. JOHNSTON: Your Honor, that is the basis of the plea agreement. It is also the basis of the violation of supervised release.

THE COURT: Well, what about the other crimes that were charged? What did Prince George's County do?

MS. JOHNSTON: Prince George's County has not proceeded with anything. They have deferred to our prosecution here on the felon in possession charge. I do not know if Baltimore is doing anything on the theft of the automobiles.

THE COURT: You say theft, you mean Baltimore U.S. Attorney or Baltimore State Court?

MS. JOHNSTON: State Court, Your Honor. The theft of the two vehicles. So, his admission here would be an admission based upon his guilty plea to the felon in

possession.

THE COURT: All right. Only that would be the single basis for the issue?

MS. JOHNSTON: Yes.

THE COURT: All right.

MS. JOHNSTON: And that is the one that will control the Guideline range on the violation of supervised release.

THE COURT: Well, it -- what I need to understand is the extent to which these charged crimes would factor in at sentencing in any way. Do they affect the Guidelines, will they be argued by the Government as far as the context, tell me.

MS. JOHNSTON: All right. Your Honor, they will be argued by the Government in terms of what is a reasonable sentence for the Court to impose. However, the Guideline on the petition for supervised release would be driven by his --

THE COURT: Felon in possession charge.

MS. JOHNSTON: Felon in possession charge. So, the Guidelines are not impacted but that conduct certainly is relevant. It will be brought to the Court's attention for use at the time of sentencing.

THE COURT: All right. You agree with that, Mr. Arora?

MR. ARORA: That will be that understanding, as well, Your Honor.

THE COURT: All right. Let me then first get the Defendant to admit the violation and then we will move to the plea agreement. Swear the Defendant, please, Madam Clerk.

(Whereupon, the Defendant, Derrick Simmons, was sworn.)

THE COURT: All right. Have a seat, sir. Pull the microphone close to you. State your full name.

THE DEFENDANT: Derrick Wenzel Simmons.

THE COURT: How old are you?

THE DEFENDANT: Forty-three years old.

THE COURT: And where were you living at the time of being taken into custody?

THE DEFENDANT: Um -- 8951 Town Center Circle.

THE COURT: Where is that?

THE DEFENDANT: Largo, Maryland.

THE COURT: Is that a house, apartment, what?

THE DEFENDANT: Apartment 103. Apartment.

THE COURT: Was it your apartment, was it somebody's apartment?

THE DEFENDANT: It was my mom.

THE COURT: How long had you been there?

THE DEFENDANT: A -- a year.

THE COURT: All right. Are you married or single?

THE DEFENDANT: Single.

THE COURT: And how far did you go in school?

THE DEFENDANT: Third year in college.

THE COURT: What is the last job that you held?

THE DEFENDANT: I worked as a -- electrician with the Associated Building Contractors.

THE COURT: Where was that?

THE DEFENDANT: It's in Fairfax, Virginia.

THE COURT: All right. Are you under the influence of any alcohol or drug this afternoon?

THE DEFENDANT: No, Sir.

THE COURT: Are you under the care of any psychiatrist, psychologist or mental health professional?

THE DEFENDANT: A -- psychologist.

THE COURT: Who is that?

THE DEFENDANT: I think her name is Megan Simmons.

THE COURT: All right. Is it somebody in connection with you supervised release?

THE DEFENDANT: No. No.

THE COURT: You put you --

THE DEFENDANT: This is --

THE COURT: How did you come to this person?

THE DEFENDANT: It's through Chesapeake Detention Center.

THE COURT: Is the part of though the supervised release in this case or --

MS. JOHNSTON: I believe he might be seeing somebody while he is at the Detention Facility where he is being held.

THE COURT: All right.

MR. ARORA: That is correct, Your Honor.

THE COURT: Is he only being held on this charge then?

MR. ARORA: That is correct.

THE COURT: All right. Did -- is that when you started seeing this person when you went into custody?

THE DEFENDANT: Yes.

THE COURT: All right. Which was when?

THE DEFENDANT: June -- well, since I been there, since July 9th of 2015.

THE COURT: Since July 9th, 2015. All right.

THE DEFENDANT: Yes, Sir.

THE COURT: Now, Mr. Simmons, do you recollect back in October of 2009 you were found guilty of a charge of possession of a firearm after conviction of a felony?

THE DEFENDANT: Yes.

THE COURT: And in connection with that case you were given a jail term of 78 months, you recollect that?

THE DEFENDANT: Yes.

THE COURT: And then put on supervised release for a period of three years following. Understood?

THE DEFENDANT: Yes.

THE COURT: All right. And there were certain terms and conditions of your release, you recollect that?

THE DEFENDANT: Yes.

THE COURT: And one of the conditions was that you shall not commit any crime, Federal, State or local. You understand that?

THE DEFENDANT: Yes.

THE COURT: All right. Now, as I understand it you are prepared to admit that you committed the crime of being a felon -- yet again of being a felon in possession of a firearm, is that correct?

THE DEFENDANT: Yes.

THE COURT: All right. We will go through that at the plea stage. But right now I am trying to understand to that and being the basis for you -- for your admission of the violation of supervised release. Is that correct?

THE DEFENDANT: Yes.

THE COURT: All right. And you understand then with regard to that violation the Court is in a position to revoke your supervised release and impose a sentence in connection with that. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Now you could with regard to that matter, and I will say the same thing in connection with the plea, you could contest the charge, you do not have to admit it, the Government would have to put its proof, and in this case with the provisional supervised release, simply to my reasonable satisfaction. You could confront and cross-examine the Government's witness and you could call your own witnesses, understood?

THE DEFENDANT: Yes.

THE COURT: But I am told now that you are prepared to admit this violation and from that you are going to go forward and also admit that you committed the offense in connection with the charge itself, is that correct?

THE DEFENDANT: Yes, Sir.

THE COURT: All right. Now, has anybody made any promise to you about what the disposition of this case is going to be?

THE DEFENDANT: No.

THE COURT: So, you understand that, at least in theory, I have a right to sentence you in connection with the -- with the violation of supervised release, whatever the Guideline calculation is there. What is the calculation on that alone?

MS. JOHNSTON: Your Honor, the maximum sentence is

two years imprisonment. The Guideline calculation for this violation is 12 to 18 months.

THE COURT: All right. So, that you understand that, that might well be something that could be imposed in addition to whatever the Court was going to impose in connection with the plea, understood?

THE DEFENDANT: Yes.

THE COURT: And you are making this admission then freely and voluntarily?

THE DEFENDANT: Yes.

THE COURT: All right. And you understand the Government's statement that there are other alleged crimes that you committed in connection with that date that the Government will bring to the Court's attention at the time that we take your -- sentence you for the plea, understood?

MR. ARORA: May we have the Court's indulgence?

(Pause - Defendant and Counsel confer)

THE COURT: Mr. Arora.

THE DEFENDANT: Yes, I understand.

THE COURT: All right. All right. All right. Well, the Court does find unless the Government -- the Defendant do not need to allocute on this, the Court does find that the Defendant is in violation of the condition of the supervised release for being yet again a felon in possession of a firearm on or about June 9th, 2015, in

violation of the condition that -- directed that he not commit any crime, Federal, State or local.

Now, with that in mind, are you ready to go forward on the plea?

MS. JOHNSTON: Yes, Your Honor. Defer sentencing on the violation until the --

THE COURT: All right.

MS. JOHNSTON: -- sentencing on the underlying --

THE COURT: All right. Now, Mr. Simmons, we are in sort of a second phase of this proceeding right now where I understand that there is an agreement that you have reached with the Government relative to this -- the charge of being a felon in possession. As to which the most recent event, June 9th, 2015, will be the basis. Understood?

THE DEFENDANT: Yes.

THE COURT: All right. You understand you are still under oath with regard to this plea, I do not need to swear you again, understood?

THE DEFENDANT: Yes.

THE COURT: All right. Now, again, there is a document entitled Indictment, which charges you with being a felon in possession of a firearm. It consists of two pages. One is a Count 1 for being felon in possession and then there is a forfeiture allegation on page two. Have you seen the document entitled Indictment?

THE DEFENDANT: Yes.

THE COURT: All right. And have you gone over it with your attorney?

THE DEFENDANT: Yes.

THE COURT: And have you told him everything you know about the case?

THE DEFENDANT: Yes.

THE COURT: All right. Now, the record shows that on July 29th, 2015 when you were arraigned, you entered a plea of not guilty, is that right?

THE DEFENDANT: Yes.

THE COURT: All right. Now, I am advised that since that time you have reached an agreement with the Government relative to that charge, is that also correct?

THE DEFENDANT: Yes.

THE COURT: All right. Now, what I have is -- in front of me is a letter addressed to Mr. Arora. It consists of ten pages. There are signature lines on the page eight -- you are -- under the name of -- or over the name of Derrick Wenzel Simmons, and Kush Arora, there are signatures and there is the date 6/3/16 to the left. And then on page ten, likewise there are signature lines for Derrick Wenzel Simmons and Kush Arora with again the date that seems to be different there from the earlier date, May 18th, 2016. What is going on here?

MS. JOHNSTON: Yes, Your Honor. What is going on here is that we had to PDF the file to Mr. Arora. When he reviewed it with Mr. Simmons at the Detention Facility he signed page ten, the last page, and overlooked the page eight signature line. So, today he came in and signed page eight. The plea agreement is the plea agreement that his attorney reviewed with him on the May 18th, 2016 date. They just overlooked the first signature page.

THE COURT: All right. You agree with that, Mr. Arora?

MR. ARORA: That is all correct, Your Honor.

THE COURT: So, we will consider the date, final date on the agreement, that 6/3/16 is the date of the agreement?

MS. JOHNSTON: That is fine, Your Honor.

THE COURT: All right. The letter was dated May 10, 2016 to Mr. Arora. Is that the plea agreement you reached with the Government?

THE DEFENDANT: Yes.

THE COURT: Have you gone over that with your attorney?

THE DEFENDANT: I'm sorry?

THE COURT: Have you gone over that agreement with your attorney?

THE DEFENDANT: Yes.

THE COURT: Has he explained it to you?

THE DEFENDANT: Yes, he has.

THE COURT: Have you had an opportunity to ask him questions about it?

THE DEFENDANT: Yes.

THE COURT: And are you satisfied that he has answered these questions to you?

THE DEFENDANT: Yes, he has.

THE COURT: Now, the question of being at this point, with regard to the charge of being a felon in possession of a firearm, what is your plea today?

THE DEFENDANT: Guilty.

THE COURT: All right. Now, what I am going to do is ask Ms. Johnston for the Government to recite what the basis terms of the agreement are so afterwards I am going to ask you whether that is your understanding of what you agreed to. Please pay careful attention. Remember you are under oath and I am going to ask you if that is your agreement and whether the facts are accurate, you have to answer accurately or you are subject to separate prosecution for perjury or false statement. You understand that?

THE DEFENDANT: Yes.

THE COURT: All right, Ms. Johnston.

MS. JOHNSTON: Thank you, Your Honor. Under the terms of the plea agreement the Defendant has agreed to plead

guilty to the count in the Indictment, which charges him with being a felon in possession of a firearm in violation of 18 USC 922(g)(1).

He understands that the elements of that offense, that the Government would have to prove if the matter proceeded to trial, was that the Defendant was convicted in a court of a crime punishable by imprisonment for more than one year and his civil rights have not been restored. Two, that after that conviction he not only possessed a firearm, and three, that the possession charge was in or affecting interstate performed commerce.

`As part of his plea agreement he has also agreed to admit the violation of supervised release which the Court has already covered with him.

He understands that the maximum sentence that the Court can impose for the felon in possession of a firearm charge is 10 years imprisonment, a $250,000.00 fine, and three years of supervised release. He also understands that he will be required to pay a $100.00 special assessment.

He understands, as well, that if he is ordered to serve a period of supervised release and he violates any conditions of supervised release he could be sentenced to an addition period of incarceration.

He also understands that the Bureau of Prisons has sole discretion in designating where he shall serve his

sentence.

Your Honor, I believe the Court will go over the waiver of rights?

THE COURT: Yes, I will.

MS. JOHNSTON: Okay. Under the terms of the plea agreement the parties have agreed that the Court will calculate a sentencing Guideline range. And the Court -- and the Defendant understands that the Court will take that Guideline range into account when establishing a reasonable sentence.

The parties have agreed to the Statement of Facts as attached to the plea agreement.

The parties have agreed to the following applicable sentencing Guideline factors. That as to Count 1, the felon in possession charge, the base offense level is 14. The parties have agreed that a two level increase applies because a firearm was stolen. And it is the Government's position that a four level increase applies because a firearm was used in connection of another felony offense.

The Defendant has reserved the right to oppose this enhancement. As a result the parties have agreed that the adjusted offense level to Count 1 is either 20 or 16.

The parties have also agreed that the Government is not going oppose a two level reduction for acceptance of responsibility. Based upon the Defendant's prompt

recognition of his -- and acceptance of his responsibility in this offense.

The Defendant also understands that the Government is going to move for a one level additional decrease based upon his timely notification of his intent to plead guilty.

However, the Defendant understands that the Government may oppose any adjustment for acceptance of responsibility if he fails to meet all of the items in the factual stipulation, if he otherwise denies involvement in the offense, if he gives conflicting statements about the offense, if he is otherwise untruthful with the Court or the Government or the United States Probation Office, if he attempts to obstruct justice, if he engages in any criminal conduct after the date of this agreement or if he attempts to withdraw his guilty plea.

If he receives a three level downward adjustment for acceptance of responsibility the parties have agreed that the final offense level will be either a 17 or a 13. The parties have also agreed that his criminal history category is a Category 4 based upon the pre-plead criminal history prepared by the United States Probation Office.

The parties have also agreed that under the -- with regard to the violation of supervised release that there is an advisory Guideline range of 12 to 18 months. And the parties understand that this sentence will be ordered to be

served consecutively to any sentence posed for the felon in possession charge.

The parties have also agreed that there are no other Guideline factors or characteristics or departures or adjustments that will be raise or are in dispute.

The Defendant understands that at the time of sentencing the Government will recommend a reasonable sentence. And he also understands that at the time of sentencing the parties can bring all relevant information concerning the Defendant's background, character and contact to the Court's attention.

The Defendant has also agreed to forfeit the firearms that were recovered in this instance as described in the plea agreement. There are two of those firearms with ammunition. He has agreed to consent to that order of forfeiture.

He understands that the Court is not a party to this agreement and that the Court could, after -- reviewing the presentence report the Court could determine that a sentence up to the Statutory maximum of 10 years and the additional two years on supervised release. And if the Court opposed that Statutory maximum sentence he would not have any means to withdraw his guilty plea.

He also has given up his right to appeal the sentence in this case.

The Court's indulgence, my copy skipped a page.

That he has agreed to waive his right to appeal his guilty plea -- he has also waived his right to appeal any sentence except to the following extent. He has reserved the right to appeal any term of imprisonment if it exceeds a sentence based upon an offense level of 17 and a consecutive sentence within a range of 12 to 18 months.

He has also waived his right to request any information under the Freedom of Information Act. And he understands that should he engage in any kind of obstructive conduct or commits any other offense between the time of the agreement and his sentencing, that the Government could move to be relieved of its responsibilities under the plea agreement. At which time, and if the Government were relieved of its responsibilities, he could not for that reason alone withdraw his guilty plea.

That summarizes the terms of the plea agreement.

THE COURT: All right. Mr. Simmons, you heard that recitation. Is it accurate?

THE DEFENDANT: Yes.

THE COURT: All right. Let me go over a few basic items with you at this time, so that we are clear. The offense to which you are pleading now, felon in possession, carries a possible maximum of 10 years in prison, up to $250,000.00 in fines and a three year supervised release.

Understood?

THE DEFENDANT: Yes.

THE COURT: And then I have already recited to you, as well, what the exposure is with regard to the violation supervised release, you understand that?

THE DEFENDANT: Yes.

THE COURT: And as I understand the agreement the gun charge is kind of a mandatory charge, is that correct? Or where are we on this in terms of numbers?

MS. JOHNSTON: Your Honor, the sentence for the supervised release is to be imposed consecutive.

THE COURT: Oh, that -- that is per the agreement?

MS. JOHNSTON: That is per -- that is the per agreement and per the sentencing Guidelines.

THE COURT: Oh, that is what I -- all right. That is what I meant to say that there would be a consecutive sentence in this case, you understand that?

Now, there is no agreement as to what the Government is going to recommend with regard to the violation of supervised release and I am not a party to that in any event. But then the other sentence, there is at least an agreement as to how far I can go. And again, the Court is not bound by either of those, understood?

THE DEFENDANT: Yes.

THE COURT: Theoretically I can sentence you up to

the maximum provided by Statute, understood?

THE DEFENDANT: Yes.

THE COURT: All right. Now, you understand that given the jail term, and you are in jail right, and then put on supervised release you should know well now that if you violate supervised release in the future you would be put back in jail without credit for time served on supervised release, understood?

THE DEFENDANT: Yes.

THE COURT: All right. Now, there has been reference to sentencing Guidelines, we have gone over that, I think before, but I want to be sure that you understand. Have you talked about sentencing Guidelines with your attorney?

THE DEFENDANT: Yes.

THE COURT: And do you understand this is a procedure whereby you, as an offender, are given a score based on your criminal history and the nature of your offense is given a score, then the Court consults the sentencing table and that indicates what the recommended sentence is for you in the case, understood?

THE DEFENDANT: Yes.

THE COURT: Now, until I see the final report from the Probation Office, I am not going to know what your Guideline range is, understood? You can raise issues,

challenge the -- the findings and I gather there will be some latitude to do that under the agreement. But once I make my findings as to what your Guideline range is -- which by the way is not mandatory, as I say it is strongly suggested but not mandatory -- you would not be able to withdraw your plea simply because you do not like my decision. Is that understood?

THE DEFENDANT: Yes.

THE COURT: All right. Now, you understand that there is, I think I mentioned, there is a -- a fine up to $250,000.00. There is a special assessment of $100.00 that will be due and payable at the time of sentencing in connection with this offense, understood?

THE DEFENDANT: Yes.

THE COURT: All right. Now, you are not required to plead guilty, is that clear?

THE DEFENDANT: Yes.

THE COURT: And if you plead not guilty the Government has to prove you guilty beyond a reasonable doubt, which is a heavy burden, is that clear?

THE DEFENDANT: yes.

THE COURT: All right. And you understand then by pleading guilty you will be admitting the violation?

THE DEFENDANT: Yes.

THE COURT: All right. And you obviously

understand now that you were on supervised release at the time, so that has got obviously implication for what the Court does with respect to your supervised release and the earlier felon in possession issue, do you understand?

THE DEFENDANT: Yes, Sir.

THE COURT: All right. Now, you give up certain rights when you plead. You have a right to a trial by jury where 12 people would be selected randomly from the voter lists of the State. Your attorney could ask questions to insure that they would be fair and impartial. Each of those 12 would have to be convinced of your guilty beyond a reasonable doubt before you could be found guilty. Or you could elect to have a trial before a judge. The judge would still have to, on his own or her own, decide whether or not you are guilty beyond a reasonable doubt before you could be found guilty.

You would have a right to a speedy trial. You would have the right to the assistance of an attorney throughout. If you could not provide one, cost one for yourself, it would be provided for you at Government cost.

You would be presumed innocent unless and until proven guilty. You would have a right to remain silent. You could not be compelled to testify in the case and the Prosecutor could not comment on that fact to the judge or jury, but if you did testify you could be subject to

impeachment as any witness would be.

You would have the right to confront and cross-examine the Government's witnesses and you could call your own witnesses. Is that clear?

THE DEFENDANT: Yes.

THE COURT: All right. These are all rights you give up when you plead, is that also clear?

THE DEFENDANT: Yes.

THE COURT: All right. And Mr. Arora, any basis to challenge the legality of the Government's acts, any searches, seizures, statements taken and the like that would be -- that would be challengeable?

MR. ARORA: No, thank you, Your Honor.

THE COURT: All right. You should understand, as well Mr. Simmons, that by pleading guilty you may suffer additional legal consequences beyond imprisonment, periods of supervised release and fine, you may be unable to get or keep certain licenses or jobs, to get or keep certain public benefits such as public housing or educational assistance loans, you may in the future receive a harsher sentence by reason of the fact that you are being found guilty here. There is clearly a forfeiture issue here with regard to the weapons. You may be unable to vote or possess a firearm. Is that clear?

THE DEFENDANT: Yeah.

THE COURT: You are a U.S. citizen?

THE DEFENDANT: Yes.

THE COURT: You understand then by pleading guilty there will be no further trial of any kind and so you are giving up your right to a trial?

THE DEFENDANT: Yes.

THE COURT: All right. Now, the plea agreement does address your rights of appeal in this case, if any, and they are very limited. They appear at -- Paragraph 11 at page six. Basically you are giving up your right to appeal except for example that a sentence in connection with Count 1, the current -- possession charge exceeds a level of -- offense level of 17 or to the extent that the consecutive sentence with regard to the violation would exceed a range of 12 to 18 months imprisonment, understood?

THE DEFENDANT: Yes.

THE COURT: And then the -- let me just see if I got this correct -- the Government reserves the right to appeal any sentence which would be indicated by an offense level of less than 13 and a consecutive sentence of less than 12 to 18 months, understood?

THE DEFENDANT: Yes.

THE COURT: And of course, if the Court imposes an illegal sentence beyond what the Statute provides, you can always appeal that, understood?

THE DEFENDANT: Yes.

THE COURT: Other than that you are giving up your right to appeal, is that clear?

THE DEFENDANT: Yes.

THE COURT: And are you doing that voluntarily?

THE DEFENDANT: Yes, Sir.

THE COURT: All right. Now, I am going to ask Ms. Johnston for the Government to recite what the basic facts are in this case were the matter to go to trial. Listen carefully again. You are under oath. You must answer truthfully when I ask you if these are accurate facts or you are subject to separate prosecution for perjury or false statement. Ms. Johnston.

MS. JOHNSTON: Your Honor, the parties have agreed to the following statement of facts, they also agree that these facts do not encompass all of the evidence which would have been provided had the matter proceeded to trial.

On Jun 9th, 2015, Prince George's County, Maryland, Police Department, officers located two motor vehicles in the Upper Marlboro area of Prince George's County that had been stolen the previous night during a commercial burglary in Baltimore, Maryland.

One of these vehicles, a black 2000 Ford Mustang, with Maryland license plate number 7BP0480 was observed to be parked in the parking lot of a shopping plaza in the 5700

block of Crane Highway, Upper Marlboro, Maryland.

The Defendant, Derrick Wenzel Simmons, and Clyde William Peterson, were inside the stolen Ford Mustang. Simmons and Peterson were subsequently arrested by police. Simmons knowingly possessed an Israel Weapons Industries, 40 caliber metal, Desert Eagle, semi-automatic pistol, serial number 38320011 loaded with 11 cartridges of 40 caliber Smith and Wesson -- 11 cartridges of 40 caliber Smith and Wesson ammunition which was recovered by police during the arrest.

Police also recovered a Smith and Wesson 357 Magnum caliber model 27I-2 revolver, serial number N166136, located with six cartridges of 357 Magnum caliber CCI ammunition during the arrest.

Prior to June 9th of 2015, Simmons had been convicted of a crime punishable by more than one year of imprisonment, which prohibited him from legally possessing the above described firearms. The load Israel weapons Industry 40 caliber model Desert Eagle semi-automatic pistol possessed by Simmons was a firearm as defined in 18 USC 921. And was manufactured outside the State of Maryland and traveled interstate commerce before being recovered in Maryland on June 9th, 2015.

Furthermore, this firearm had been reported stolen from its owner in Pender County, North Carolina on

June 15th of 2010.

THE COURT: All right. Mr. Simmons, you heard that recitation, is it accurate?

THE DEFENDANT: Yes.

THE COURT: All right. Now, apart from what is promised to you in the plea agreement, has anybody made any promises to you about this case in any fashion?

THE DEFENDANT: No, Sir.

THE COURT: Not about the outcome, not about the sentence I am going to impose, if any?

THE DEFENDANT: No, Sir.

THE COURT: All right. Are you entering the plea agreement voluntarily?

THE DEFENDANT: Yes.

THE COURT: Did anyone threaten or coerce you to make your plea -- enter the plea agreement?

THE DEFENDANT: No.

THE COURT: Are you pleading guilty voluntarily?

THE DEFENDANT: Yes.

THE COURT: Did anyone threaten or coerce you to make you plead guilty?

THE DEFENDANT: No.

THE COURT: Are you pleading guilty because you are guilty? And for no other reason?

THE DEFENDANT: Yes.

THE COURT: Is there anything that you do not fully understand about these proceedings?

THE DEFENDANT: No.

THE COURT: You need to talk to your lawyer at this point?

THE DEFENDANT: No.

THE COURT: Are you satisfied with his services?

THE DEFENDANT: Yes.

THE COURT: All right. Taking into account everything said do you still choose to plead guilty to this charge?

THE DEFENDANT: Yes.

(It is the policy of this court that every guilty pleas and sentencing hearing include a bench conference concerning whether the defendant is or is not cooperating.)

THE COURT: The Court finds the Defendant's plea has been made knowingly and voluntarily and that there are sufficient facts to find him guilty as charged. The Court finds further that pursuant to sentencing Guideline 6(b)(1) point (2)(a), that the plea conforms to the purposes of sentencing and the policies of the sentencing Guidelines. And adequately reflects the actual seriousness of the actual offense behavior.

The Court accepts the plea. Enters a finding of guilty and will embody the plea agreement in its judgment at

sentence.

Sentencing dates, as I understand, agreed upon is September 1 at 9:30 a.m., correct?

MS. JOHNSTON: Yes, Your Honor.

MR. ARORA: Yes, Your Honor.

THE COURT: All right. Is there any more to be said this point?

MS. JOHNSTON: No, Your Honor.

MR. ARORA: No, thank you, Your Honor.

THE COURT: All right. Thank you.

THE CLERK: All rise.

THE COURT: Thank you. We are in recess.

(Whereupon, at 2:45 p.m., the proceedings were concluded.)

C E R T I F I C A T E

I certify that the foregoing is correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

Karen Morganelli 10-19-2016

Karen Morganelli Date
Certified Transcriber
Certificate No.: CET**D-577

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA APPELLEE,	*	
v.		Record No. 16-4583
DERRICK WENZEL SIMMONS	*	
APPELLANT,		

* * * * * * * * *

OPPOSITION TO UNTIED STATES OF AMERICA'S MOTION TO DISMISS

Appellant Derrick Wenzel Simmons, by and through his attorney Jonathan Gladstone, Esq., hereby submits his opposition to the government's motion to dismiss, and in support of such opposition avers.

1. The plea agreement does contain an appeal waiver, and Appellant maintains that his appeal and all issues raised therein are outside the scope of said waiver.

2. The appeal waiver discusses the guidelines levels advocated by the parties. The government calculated the offense level to be 17 while the defense asserted it was 13. The parties agreed, and later the court agreed, that Appellant's criminal history category was IV.

3. Using those figures, Appellant was urging a guidelines sentence of 27-30 months, while the government's calculation resulted in a guidelines

sentence of 37-46 months. By the terms of the plea agreement's appeal waiver, therefore, the government could appeal the sentence if Appellant were sentenced to less than 27 months, while Appellant reserved the right to appeal the sentence if the sentence was more than 46 months, which was the case.

4. The appeal waiver granted Appellant the right to appeal his sentence, as he is doing, but not his conviction, which he is not doing. As the Government noted in its motion, the trial court made it clear to Appellant that he could not withdraw his plea if he didn't like the guidelines calculation, but that is not what Appellant is doing.

5. The waiver clearly granted Appellant the right to appeal the sentence, but the government now says there was a meeting of the minds that he could not dispute the guidelines calculation. There appears to be nothing in the appeal waiver which limits which issues within the sentencing determination Appellant could raise.

6. The waiver clearly permitted Appellant to challenge his sentence if it went above the agreed length, and there is nothing which restricts what issues he can raise in pursuing his appeal. "We review the issue of whether a defendant effectively waived his right to appeal de novo, and will enforce the waiver if it is valid and the issue appealed is within the scope of the waiver." US v. Davis, 689 F.3d 349, 354-55 (4th Cir., 2012)

7. The waiver provision is a bit of a hybrid, starting with a broad and

sweeping boilerplate waiver of rights, followed by a clause restorating appeal rights in certain situations. In its motion, the Government provided a narrow quote from the first clause of the agreement that Appellant gave up "the right to appeal any issues that relate to the establishment of the advisory guidelines range." What the government did not acknowledge was that phrase was lifted from the general waiver of right to appeal which was largely restored in the next clause.

> The Defendant and this Office knowingly waive all right, pursuant to 18 U.S.C. 93742 or otherwise, to appeal whatever sentence is imposed (including the right to appeal any issues that relate to the establishment of the advisory guidelines range, the determination of the defendant's criminal history, the weighing of the sentencing factors, and the decision whether to impose and the calculation of any term of imprisonment, fine, order of forfeiture, order of restitution, and term or condition of supervised release), except as follows: (I) the Defendant reserves the right to appeal any term of imprisonment to the extent that it exceeds a sentence based upon an offense level of 17 as to Count One and a consecutive sentence within the range of 12-18 months imprisonment in Case No. PJM-09-0004; (ii) and this

> Office reserves the right to appeal any term of imprisonment to the extent that it is below a sentence based upon an offense level of 13 as to Count One and a consecutive sentence within the range of 12-18 months imprisonment in Case No. PJM-09-0004 (JA 14)

8. The parenthetical section cited by the government also prevented challenging "the weighing of the sentencing factors", yet the government apparently acknowledges that he can do that by not including that argument in the instant motion.

9. Central to a challenge of a sentence is the correct calculation of the guidelines. "(A) district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall v. United States, 552 U.S. 38, 49, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007)

10. The sentence being challenged is an above-guidelines sentence, but the calculation of the correct guidelines is still essential to its analysis. If this court were to find the guidelines calculation to be incorrect, it could affirm the sentence only after finding the effect of the miscalculation to be "harmless." United States v. Gomez-Jimenez, 750 F.3d 370, (4th Cir.), as corrected (Apr. 29, 2014)

11. The government is asking the court to consider the boilerplate first phrase of the appeal waiver and disregard the broad exception allowing him "to appeal any term of imprisonment" contained in the second phrase. There is no

dispute but that the sentence imposed triggered that exception, and that exception contains no limitations on what arguments regarding his sentence Appellant might raise.

Wherefore, the undersigned requests that this Court,

A. Deny the motion to dismiss; and,

B. For such other relief as justice may require.

Respectfully submitted,

Law Offices of Jonathan Gladstone
700 Melvin Ave., Ste 6
Annapolis MD 21401

By _/s/ Jonathan Gladstone_
Jonathan Gladstone

(410)974-6903

Certificate of Service

I hereby certify that on December 14, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users, Deborah A. Johnston, Esq. 6500 Cherrywood Ln., Ste 200, Greenbelt MD and Derrick Simmons, , FCI Hazelton 26908-016, PO Box 5000, Bruceton Mills, WV 26525 by first class mail.

_/s/ Jonathan Gladstone
Jonathan Gladstone, Esq.

RECORD NO. 16-4583

In The
United States Court of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

DERRICK WENZEL SIMMONS, a/k/a Derrick W. Simmons,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MARYLAND AT GREENBELT

REPLY BRIEF OF APPELLANT

Jonathan A. Gladstone
LAW OFFICES OF JONATHAN GLADSTONE
700 Melvin Avenue, Suite 6
Annapolis, Maryland 21401
(410) 974-6903

Counsel for Appellant

THE LEX GROUP ♦ 1108 East Main Street ♦ Suite 1400 ♦ Richmond, VA 23219
(804) 644-4419 ♦ (800) 856-4419 ♦ Fax: (804) 644-3660 ♦ www.thelexgroup.com

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905 F.2d 51 (4th Cir. 1990) 5

GUIDELINE

U.S.S.G. § 2K2.1(b) 2

Recent developments in this case have introduced a new issue in this appeal as a result of the court's granting of the government's motion to strike aspects of appeal. The court's agreement that the scope of Appellant's appeal waiver limited how he could attack a sentence which he clearly could attack raises the questions of if he was aware of this limitation and whether, therefore, his plea was voluntary.

Therefore, Appellant raises the following question in response to these post-brief developments.

ISSUE PRESENTED

> Whether an interpretation of a limited appeal waiver which permitted Appellant to appeal his sentence if it exceeded a specified length renders that appeal waiver and the plea involuntary when that interpretation foreclosed Appellant from challenging the basis of the sentence.

I. SUMMARY OF ARGUMENT

Appellant clearly entered his plea with an appeal waiver which permitted him to appeal should his sentence exceed a specified length, which it did. At no time did he acknowledge or agree that his right to raise issues regarding the underpinnings of that sentence would be limited or foreclosed.

A. Standard of Review – Typically, the court reviews the voluntariness of a guilty plea *de novo*. U.S. v. General, 278 F.3d 389, 393 (2002) The General court did indicate that a "plain error" standard would be employed in situations in which the issue could have and should have been raised at the district court. But this issue did not even exist, from Appellant's perspective, until this appeal was well

underway and this court concluded that the waiver was broader than Appellant agreed to and understood.

II. ARGUMENT

This case was rather simple and straightforward, with disputed issues revolving around sentencing issues rather than the underlying allegations.

In the plea agreement, it was clear that there were few disputes in determining the appropriated guidelines. One dispute which clearly remained and was acknowledged in the plea agreement was the applicability of U.S.S.G. 2K2.1(b)[1]

The parties acknowledged that this four-level enhancement was disputed, and the court's resolution of its applicability would have an effect on the guidelines calculation. The parties further agreed that Appellant would have the right to appeal if the court were to impose a sentence in excess of what the guidelines would have called for at offense level 17.

---

[1]U.S.S.G. 2K2.1(b) Specific Offense Characteristics...

(6) If the defendant--

(A) Possessed any firearm or ammunition while leaving or attempting to leave the United States, or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be transported out of the United States; or

(B) Used or possessed any firearm or ammunition in connection with another felony offense; or possessed or transferred any firearm or ammunition with knowledge, intent, or reason to believe that it would be used or possessed in connection with another felony offense, increase by 4 levels. If the resulting offense level is less than level 18, increase to level 18.

The court ultimately found the offense level to be 17 after concluding that the aforementioned guideline was applicable. The Court went on to sentence Appellant to a term far in excess of the advisory guidelines calculation.

The plea agreement contained a fairly standard appeal waiver provision, but grafted on it it was a limiting clause which restored to Appellant to right to appeal should a triggering sentence be imposed. That trigger was pulled.

That limiting clause reads as follows; "the Defendant reserves the right to appeal any term of imprisonment to the extent that it exceeds a sentence based upon an offense level of 17 as to Count One and a consecutive sentence within the range of 12-18 months imprisonment in Case No. PJM-09-0004" JA 14.

The scope of this waiver was briefly addressed at Appellant's plea session[2] The discussion of the plea waiver went as follows.

THE COURT: All right. Now, the plea agreement does address your rights of appeal in this case, if any, and they are very limited. They appear at -- Paragraph 11 at page six. Basically you are giving up your right to appeal except for example that a sentence in connection with Count 1, the current -- possession charge exceeds a level of – offense level of 17 or to the extent that the consecutive

[2] Not having anticipated this argument, the transcript of the plea was not included in the Joint Appendix. However, the government included that transcript as an exhibit to its motion to dismiss. Appellant will refer to the page numbers in that transcript.

sentence with regard to the violation would exceed a range of 12 to 18 months imprisonment, understood?

THE DEFENDANT: Yes.

THE COURT: And then the -- let me just see if I got this correct -- the Government reserves the right to appeal any sentence which would be indicated by an offense level of less than 13 and a consecutive sentence of less than 12 to 18 months, understood?

THE DEFENDANT: Yes.

THE COURT: And of course, if the Court imposes an illegal sentence beyond what the Statute provides, you can always appeal that, understood?

THE DEFENDANT: Yes.

THE COURT: Other than that you are giving up your right to appeal, is that clear?

THE DEFENDANT: Yes.

THE COURT: And are you doing that voluntarily?

THE DEFENDANT: Yes, Sir.

Transcript of plea at 26-27.

The colloquy did not stray from the written agreement, so both made it clear that Appellant could appeal if his sentence exceeded a certain length. The issue of

the disputed guidelines was clear to all parties as well as the fact that Appellant claimed it did not apply.

So the question becomes whether Appellant agreed to the plea waiver with the understanding that his remaining right to appeal excluded the right to challenge the guidelines calculation which formed the underpinnings of the sentence.

While it was true that sentence imposed by the Court was outside the guidelines range, the accuracy of the guidelines calculation is still crucial. While courts are not bound by the guidelines, they are still required to make an accurate calculation before taking the next step of calculating the appropriate sentence. "(A) district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range." Gall v. United States, 552 U.S. 38, 49, 128 S. Ct. 586, 596, 169 L. Ed. 2d 445 (2007).

The question is whether it can be shown that Appellant knew his was giving up the right to challenge the guidelines determination.

"Recognizing that "'defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial,'" this court has upheld the validity of a defendant's waiver of the statutory right to appeal a sentence when the waiver was knowingly and voluntarily made. United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990) (quoting United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989)). We have also held that a waiver is not knowingly or voluntarily made

if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the *full significance* of the waiver." U.S. v. Marin, 961 F.2d 493, 496 (4th Cir. 1992) See also U.S. v. Johnson, 410 F.3d 137 (4th Cir. 2005) (emphasis supplied).

Only a lawyer could look at that appeal waiver and understand that, while it gave a right to appeal, it also stripped the Appellant of the right to argue the issue that was central in seeking the exception to the appeal waiver.

Certainly the undersigned, who was not Appellant's trial court counsel, did not feel constrained from attacking the guidelines calculation.

As Appellee's brief makes painfully clear, stripping from Appellant the ability to make the guidelines argument leaves very little to work with. There is nothing in the record to support the conclusion that he agreed to this.

For the reasons cited above, Appellant asks this court to determine that the plea in this case was not voluntary, and remand for further proceedings.

Respectfully Submitted,

/s/ Jonathan Gladstone
Jonathan A. Gladstone
ATTORNEY AT LAW
700 Melvin Avenue, Suite 6
Annapolis, Maryland 21401
(410) 974-6903

Counsel for Appellant Derek Simmons

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because:

   [X] this brief contains [*1,341*] words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), *or*

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2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

   [X] this brief has been prepared in a proportionally spaced typeface using [*Microsoft Word 2007*] in [*14pt Times New Roman*]; *or*

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Dated: May 22, 2017

/s/ Jonathan Gladstone
Counsel for Appellant

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 22nd day of May, 2017, I caused this Reply Brief of Appellant to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Deborah A. Johnson
William Moomau
OFFICE OF THE U.S. ATTORNEY
6500 Cherrywood Lane, Suite 200
Greenbelt, Maryland 20770
(301) 344-4032

Counsel for Appellee

I further certify that on this 22nd day of May, 2017, I caused the required copy of the Reply Brief of Appellant to be hand filed with the Clerk of the Court.

/s/ Jonathan Gladstone
Counsel for Appellant

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
v.	)	**CASE NO. 16-4583**
	)	
DERRICK WENZEL SIMMONS	)	

GOVERNMENT'S MOTION TO STRIKE
DEFENDANT'S REPLY BRIEF OR, IN THE ALTERNATIVE,
FOR LEAVE TO FILE SURREPLY

The United States of America, by its undersigned attorneys, hereby moves the Court to strike the defendant's reply brief (ECF No. 30) or, in the alternative, grant leave to file a surreply, for the following reasons:

1. On July 6, 2016, a federal grand jury charged the defendant, Derrick Wenzel Simmons, in a single count indictment with possession of a firearm after conviction of a crime punishable by more than one year in prison, in violation of 18 U.S.C. § 922(g). JA 7.

2. On June 3, 2016, pursuant to a plea agreement, the defendant appeared in court and entered a guilty plea to the single count in the indictment and a violation of supervised release petition pending in *United States v. Simmons*, Crim. No. PJM-09-004. JA 5, 9-10. On September 1, 2016, the district court sentenced Simmons to 108 months of imprisonment for the violation of 18 U.S.C.

§ 922(g) and a 12-month consecutive sentence for the defendant's violation of his supervised release in PJM-09-004. JA 56-57. The court entered judgment on September 9, 2016. JA 5, 69-74.

3. On November 28, 2016, the defendant filed a brief in this Court, in which he raised two issues: (1) "whether applying a four level increase in the guidelines for possessing a firearm in connection with another felony was proper," and (2) "whether the above guideline sentence imposed was reasonable." Def. Br. at 5.

4. On December 5, 2016, the government filed a motion to dismiss the defendant's appeal in part, asserting that the defendant knowingly and voluntarily waived his appellate rights, including his right to appeal the advisory United States Sentencing Guidelines calculation, and reserved only the right to appeal a sentence above the Guideline range for an offense level of 17. ECF No. 18. As such, the government moved to dismiss the defendant's appeal except for his appeal of the reasonableness of the above-Guidelines sentence. *Id.* That same date, this Court issued a notice directing the defendant to respond to the government's motion to dismiss. ECF No. 19.

5. On December 14, 2016, the defendant filed a response to the government's motion to dismiss. ECF No. 21. In its response, the defendant

asserted that "[t]he waiver clearly permitted Appellant to challenge his sentence if it went above the agreed length, and there is nothing which restricts what issues he can raise in pursuing his appeal." *Id.* at 2. At no point did the defendant argue that, if the waiver did indeed include any challenge to the guidelines calculations, the defendant did not knowingly and voluntarily waive that right or plead guilty.

6. On April 27, 2017, this Court granted the government's motion to dismiss in part. ECF No. 25. In its Order, the Court noted that "Simmons does not dispute that his appellate waiver was entered knowingly and voluntarily." *Id.* at 1. The Court further found that the defendant's challenge to the Guidelines calculations "falls within the scope of his appellate waiver." *Id.* at 1-2.

7. On May 11, 2017, the government timely filed its response in opposition to the defendant's opening brief. ECF No. 28. In its response, the government noted that the defendant's argument related to the Guidelines calculation was dismissed, and addressed the procedural and substantive reasonableness of the defendant's sentence. *Id.*

8. On May 22, 2017, the defendant filed its reply brief, ECF No. 30, which is the submission that is the subject of the instant motion to strike. In his reply brief, the defendant raises for the first time "whether an interpretation of a limited appeal waiver which permitted Appellant to appeal his sentence if it

exceeded a specific length renders that appeal waiver and the plea involuntary when that interpretation foreclosed Appellant from challenging the basis of the sentence." *Id.* at 1. Because the defendant's reply brief raises arguments not contained in his opening brief (or in his response to the defendant's motion to dismiss), the defendant has waived his argument challenging the voluntariness of his plea, and thus his brief must be stricken and the arguments raised therein should not be considered by this Court. *See United States v. Bowles*, 602 F.3d 581, 583 n.* (4th Cir. 2010) (holding that the defendant's argument that his plea was not voluntary or competent was raised for the first time in supplemental briefing was waived) (citation omitted); *United States v. Jones*, 308 F.3d 425, 427 n.1 (4th Cir. 2002) (holding that an argument not raised in the opening brief is waived); *Carter v. Lee*, 283 F.3d 240, 252 n.11 (4th Cir. 2002) ("In his Reply Brief, Carter makes the related claim that his decision to testify was 'involuntary.' In this connection, we observe that this Court normally views contentions not raised in an opening brief to be waived.")

9. Moreover, the defendant's assertion that the Court's granting of the government's motion to dismiss "introduced a new issue in this appeal," Def. Reply Br. at 1, is unavailing. The defendant had ample opportunity to raise the issue regarding the voluntariness of his plea in its response to the defendant's

motion to dismiss, which the defendant did not do. Indeed, this Court explicitly found in its order granting the government's motion to dismiss that the defendant "does not dispute that his appellate waiver was entered knowingly and voluntarily." ECF No. 25 at 1. The defendant has thus waived the argument in his reply brief regarding the voluntariness of his plea by failing to raise the issue in his opening brief and again in his response to the government's motion to dismiss, though such arguments were readily available to the defendant (especially by the motion to dismiss stage of this litigation). *See United States v. Leeson*, 453 F.3d 631, 638 n.4 (4th Cir. 2006) (finding that an argument raised for the first time in a supplemental letter was waived because the argument was "readily available" at the time the defendant filed his opening brief).

WHEREFORE, the Court should strike the defendants reply brief or, in the alternative, grant the government leave to file a surreply to address the issues raised for the first time in the defendant's reply brief.

Respectfully submitted,

Stephen M. Schenning
Acting United States Attorney

By: _____/s/_____
Kelly O. Hayes
Assistant United States Attorney

CERTIFICATE OF SERVICE

This is to certify that on this 31st day of May 2017 a copy of the foregoing Motion to Strike was filed via CM/ECF, and was thereby served upon all counsel of record.

/s/
Kelly O. Hayes
Assistant United States Attorney

CERTIFICATE OF COMPLIANCE

This Motion was drafted in Times New Roman, 14-point font, numbers 1,004 words in its body, and is therefore in compliance with the Federal Rules of Appellate Procedure.

/s/
Kelly O. Hayes
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA APPELLEE,	*	
	*	
v.		Record No. 16-4583
DERRICK WENZEL SIMMONS	*	
APPELLANT,		

* * * * * * * * *

OPPOSITION TO UNTIED STATES OF AMERICA'S MOTION TO STRIKE

Appellant Derrick Wenzel Simmons, by and through his attorney Jonathan Gladstone, Esq., hereby submits his opposition to the government's motion to strike, and in support of such opposition avers.

1. The plea agreement does contain an appeal waiver, and Appellant maintains that his appeal and all issues raised therein are outside the scope of said waiver.

2. Appellant acknowledged the voluntariness of his plea right up to the point that the Court concluded that it meant something other than he thought.

3. That didn't happen until the court granted the government's motion to dismiss, stripping him of the right to argue what he thought to be crucial issues reserved in his right to appeal.

4. Because that didn't happen until after Appellant had filed his opening

brief, there was no way he could have raised it any earlier. In his mind, he was exercising the rights granted in the plea agreement. This issue simply didn't exist.

5. In general practice, an Appellant cannot raise new issues in a reply brief which weren't raised earlier. But courts acknowledge situation in which such practice is permitted when those issues could not have been reasonably raised earlier.

"This court has held that "an issue first argued in a reply brief is not properly before a court of appeals." Cavallo v. Star Enter., 100 F.3d 1150, 1152 n. 2 (4th Cir.1996). There is some authority, however, for the proposition that special circumstances may justify deviation from this rule. See, e.g., United States v. Valdez, 195 F.3d 544, 546 n. 3 (9th Cir.1999) (observing that court may exercise discretion to consider argument raised in reply brief when issue is purely legal or review would prevent manifest injustice); United States v. Darden, 70 F.3d 1507, 1549 n. 18 (8th Cir.1995) (stating that court would not consider issues raised in reply brief "[a]bsent some reason" why the claims were not raised earlier); cf. United States v. All Assets & Equip. of West Side Bldg. Corp., 58 F.3d 1181, 1191 (7th Cir.1995) (holding that issue was not waived when raised at first opportunity); cf. also Griffith v. Kentucky, 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987) (holding that new rules of criminal procedure are retroactively available to cases pending on direct review). U.S. v. Lewis, 235 F.3d 215, 218 (C.A.4,2000)

6. Here we have a situation in which an exception clause is grafted on to a fairly standard appeal waiver clause. Appellant, and the undersigned in viewing the waiver, reasoned that the first clause was rendered moot when events specified in the second clause triggered its application. The appeal waiver began with an unequivocal waiver of the right to appeal the conviction itself, and that is not at issue. It is the second subsection, dealing with the appeal rights regarding sentencing, which creates the current controversy.

7. The waiver clearly granted Appellant the right to appeal the sentence, but the government now says there was a meeting of the minds that he could not dispute the guidelines calculation. There appears to be nothing in the appeal waiver which limits which issues within the sentencing determination Appellant could raise.

8. A review of the plea agreement and the plea colloquy itself provides no indication that Appellant knew he was giving up the right to challenge a major sentencing determination as he preserved his right to appeal the sentence itself. That he knew that he was reserving the right to appeal but agreeing that he could only pursue it with one hand tied behind his back makes no sense and finds no support in the record.

9. By grafting the exception onto a standard appeal waiver, a measure of ambiguity was introduced into the proceedings. Appellant takes the position that, when the second provision applies, the first is not at all applicable. The

government apparently takes the position that the first clause continues to be viable to some measure. But even this claim is confusing, in that the government has challenged Appellant's right to appeal "any issues that relate to the establishment of the advisory guidelines range," but not his right to challenge "the weighing of the sentencing factors, and the decision whether to impose and the calculation of any term of imprisonment," both issues covered by the first clause of the sentence waiver subsection.

10. As is clear, it was the government which drafted the plea agreement, and so it must bear the responsibility for any ambiguity. This court, applying principles of contract law as well as fundamental fairness, have placed an additional burden on the government in situations such as this.

"(B)oth constitutional and supervisory concerns require holding the Government to a greater degree of responsibility than the defendant (or possibly than would be either of the parties to commercial contracts) for imprecisions or ambiguities in plea agreements. See, e.g., United States v. Bowler, 585 F.2d 851, 854 (7th Cir.1978) (plea agreement not appropriate context for "rigidly literal" construction of language); Palermo v. Warden, 545 F.2d 286, 295 (2d Cir.1976) (government invocation of restrictive contract principles "disingenuous"); United States v. Crusco, 536 F.2d 21, 26 (3d Cir.1976) (government's "strict and narrow interpretation of its commitment ... untenable"); Correale v. United States, 479 F.2d 944, 947 (1st Cir.1973) (government held to "meticulous standards of both

promise and performance"). This is particularly appropriate where, as will usually be the case, the Government has proffered the terms or prepared a written agreement-for the same reasons that dictate that approach in interpreting private contracts. See generally Restatement (Second) of Contracts § 206 (1981)." U.S. v. Harvey, 791 F.2d 294, 300–01 (4th Cir.,1986) see also U.S. v. Jordan, 509 F.3d 191 (4th Cir.,2007) and U.S. v. White, 628 Fed.Appx. 848 (4th Cir., 2015)

11. If Appellant cannot challenge the underpinnings of his sentence while challenging his sentence, he is not getting the benefit of the bargain from his standpoint. There was no meeting of the minds that he would be so hobbled in his reserved right to appeal.

12. Appellant does acknowledge that the need to raise this issue in the reply brief did deprive the government of an opportunity to respond. Therefore, if the government wants an opportunity to demonstrate how Appellant knowingly and intelligently forfeited his ability to raise issues in his preserved right to appeal his sentence, Appellant will not object to that opportunity being provided.

Wherefore, the undersigned requests that this Court,

A. Deny the motion to strike; and,

B. For such other relief as justice may require.

Respectfully submitted,

Law Offices of Jonathan Gladstone
700 Melvin Ave., Ste 6
Annapolis MD 21401

By _/s/ Jonathan Gladstone_
Jonathan Gladstone

(410)974-6903

Certificate of Service

I hereby certify that on June 12, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users, Deborah A. Johnston, Esq. 6500 Cherrywood Ln., Ste 200, Greenbelt MD and Derrick Simmons, , FCI Hazelton 26908-016, PO Box 5000, Bruceton Mills, WV 26525 by first class mail.

_/s/ Jonathan Gladstone
Jonathan Gladstone, Esq.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
SOUTHERN DIVISION

UNITED STATES OF AMERICA — Criminal No. PJM-09-0004
PJM-15-03762

v. — Greenbelt, Maryland

DERRICK W. SIMMONS, — September 1, 2016

Defendant. — 10:00 a.m.

----------/

TRANSCRIPT OF SENTENCING
BEFORE THE HONORABLE PETER J. MESSITTE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government:
United States Attorney's Office
By: DEBORAH JOHNSTON, ESQUIRE
6406 Ivy Lane
Suite 800
Greenbelt, Maryland 20770

For the Defendant:
Price Benowitz LLP
By: KUSH ARORA, ESQUIRE
406 Fifth Street, NW
Suite 200
Washington, D.C. 20001

Court Reporter
Lisa K. Bankins RMR FCRR
United States District Court
6500 Cherrywood Lane
Greenbelt, Maryland 20770

Proceedings recorded by mechanical stenography, transcript produced by notereading.

P R O C E E D I N G S

THE CLERK: The matter now pending before this Court is Criminal Action Numbers PJM-09-004 and PJM-15-00376. United States of America versus Derrick W. Simmons. The now comes before this Court for a sentencing hearing.

THE COURT: Counsel, please identify yourselves for the government and defendant.

MS. JOHNSTON: Good morning, Your Honor. Deborah Johnston on behalf of the government.

MR. ARORA: Good morning, Your Honor. Kush Arora for Mr. Simmons.

THE COURT: All right. One is the violation of supervised release. The other is the separate criminal offense that we're involved in. Perhaps we ought to start with the supervised release. I understand what the numbers are there and then perhaps we can go to the other matter as well. Any problem with that?

MR. ARORA: No, Your Honor.

MS. JOHNSTON: No, Your Honor.

THE COURT: All right. Let me make sure I have the original case here. Is this the 24 to 30-month range? I'm not sure I have that one in correct sequence here. Are there two violation worksheets that were submitted or one, Ms. Jauma?

MS. JAUMA: Your Honor, I did not supervise the defendant. So I am not sure.

THE COURT: I have a violation worksheet. It shows in this docket there are two separate worksheets. No. I guess they're the same. Let's just see. Well, what is the government's position with regard to the guideline range for the supervised release violation?

MS. JOHNSTON: Your Honor, we stipulated in the --

THE COURT: Pull the mic close to you if you would, Ms. Johnston.

MS. JOHNSTON: I'm sorry, Your Honor. Your Honor, we stipulated in the plea agreement that the range for the violation of supervised release was 12 to 18 months.

THE COURT: I'm sorry. This is all very murky. I'm not getting you clearly. Pull your mic close to you if you would?

MS. JOHNSTON: Yes, Your Honor.

THE COURT: Ella, I'm going to have to ask somebody to come up and check on the volume here.

MS. JOHNSTON: I'll move over here. Your Honor, is that better?

THE COURT: We're getting all sorts of echos.

MS. JOHNSTON: Echo. Yes. We stipulated in the

plea agreement to a sentencing guideline range of 12 to 18 months to be served consecutive to any sentence.

THE COURT: All right. Well, then let's go back to the plea agreement on that. Where is it in the plea agreement, Ms. Johnston?

MS. JOHNSTON: Your Honor, it's on page 5 of the plea agreement. Paragraph G.

THE COURT: All right. Mr. Arora, you agree then that the range for the supervised release under the guidelines is 12 to 18 months?

MR. ARORA: Yes, Your Honor.

THE COURT: All right. Then it would be consecutive to any other term. All right. Now let's go to the guideline range on the underlying criminal conviction. There I have about -- I guess that's where I'm confused. The violation sheet I have is not consistent with the plea agreement. Where is the worksheet with regard to the underlying offense? What I've been given here is a violation worksheet for the new criminal charges.

Ms. Jauma, do you know? I mean I'm trying to be clear on what probation has given me relative to the underlying offense so I can do the statement of reasons. Do you know or don't know?

MS. JAUMA: I really don't, Your Honor. I'm not

familiar with --

THE COURT: Is that covered in the plea agreement, Ms. Johnson?

MS. JOHNSTON: The guideline range for the current offense which is the basis for the violation of probation is set forth in the presentence report, Your Honor.

THE COURT: In a what?

MS. JOHNSTON: In the presentence report.

THE COURT: Okay. I'm sorry. You are not coming through on my speaker. I'm getting echos and not words.

MS. JOHNSTON: I'm sorry, Your Honor.

THE COURT: Just step to the microphone there so I can hear you.

MS. JOHNSTON: Your Honor, in terms of the offense that's the basis for the violation of probation, that guideline range is in the presentence report which is I believe 37 to 46 months. If you get to that page of the presentence report.

THE COURT: Well, I thought we just stipulated that it was less than that.

MS. JOHNSTON: The violation of supervised release that was stipulated was 12 to 18 months.

THE COURT: Right. Now you're speaking about

the underlying offense itself?

MS. JOHNSTON: Yes. I thought the Court asked about the underlying offense.

THE COURT: I did. And that's what I want to be clear on. Where does it appear? It's in the recommendation portion of the PSR.

MS. JOHNSTON: It is in the presentence report in the recommendation section. But also on page -- let me get to the right page. On page 16 of the presentence report.

THE COURT: All right. And that would be 37 to 46 months?

MS. JOHNSTON: That is correct, Your Honor. That's the guideline range.

THE COURT: Well, but that's assuming no contested provision.

MS. JOHNSTON: And we have a contested provision.

THE COURT: All right.

MS. JOHNSTON: So that is the current range as contemplated by the presentence report.

THE COURT: All right. Well, a finding on that then, for present purposes, it appears to be 37 to 46 months, one to three years supervised release and then a fine of $5,000 to $50,000 dollars.

All right. Mr. Arora, give me the numbered paragraph of the PSR that you're challenging.

MR. ARORA: Your Honor, the challenge from the defense side would be to I believe it's on page 4 of the PSR --

THE COURT: Ella, can you have them come up and check the audio?

THE CLERK: Your Honor, she just left. She was waiting for Ms. Johnston --

THE COURT: All right. I'm getting all sorts of echo here from both sides.

MR. ARORA: Your Honor, would Your Honor prefer for me to stand --

THE COURT: It's better if you go to the middle mic. I'm getting a little better reception there.

MR. ARORA: Certainly, Your Honor. To respond to the Court's question, the contested provision is on page 4 of the PSR, paragraph 13 --

THE COURT: All right.

MR. ARORA: -- which would be the four-level increase for possession of a handgun in the commission of a felony --

THE COURT: All right. And do you want to be heard on that or do you want the government to go forward on that first? It's probably the government's

responsibility to indicate why you are including it and then you can respond.

MR. ARORA: And that would be fine.

THE COURT: All right. Ms. Johnson, let me hear your argument on behalf of the government.

MS. JOHNSTON: Thank you, Your Honor. We presented our argument in our sentencing memorandum --

THE COURT: Right.

MS. JOHNSTON: -- and support the probation officer's finding. In this instance, the defendant possessed the gun in the vehicle that had been stolen just hours before he had been stopped in that vehicle. So he was in possession of a stolen vehicle. It is an ongoing offense and under Maryland law, that's a felony, unauthorized use of a vehicle. So he was in possession of that firearm in conjunction with that theft of the vehicle because he had the vehicle in his possession. So that is our first argument. And certainly one that is apparently demonstrated by the facts as well as by the affidavit that we attached to our sentencing memo of Sergeant Watts.

In addition to that, we presented evidence through Sergeant Watts that based on his training and experience, he reached a conclusion that Mr. Simmons and Mr. Peterson was there in that shopping center during the early morning hours to engage in a bank robbery of the

bank that was located closeby. They were parked on the side of the bank.

THE COURT: Well, I thought he testified that or his affidavit said he saw a handgun in the hand of the --

MS. JOHNSTON: The police officer, not the affiant. But the police officer that responded saw the gun in Mr. Simmons' hand and he was in a vehicle that had just been stolen. So I think that those facts in and of themselves establish what's required certainly by a preponderance of the evidence that the gun was possessed in furtherance of his possession of the stolen vehicle, his unauthorized use of the stolen vehicle which would be a felony offense under Maryland law. So that would be our basis for the Court to impose that four levels.

THE COURT: All right. Mr. Arora?

MR. ARORA: Thank you, Your Honor. I've had an opportunity to review the details that the government has provided in terms of the evidence in this case and I think that some of the arguments that the government has made here today as well as in the response to our sentencing memorandum as to this four-level increase make a lot of assumptions that are not necessarily supported by any of the facts that they have provided.

Starting with the question of this vehicle being stolen and Mr. Simmons essentially participating in any

unauthorized use of that vehicle with this gun in his possession, there is no evidence in this case to support that Mr. Simmons had anything to do with the original theft of the vehicle or any evidence that he had any idea that --

THE COURT: Well, he was found in the vehicle within a short space of time --

MR. ARORA: Certainly.

THE COURT: -- after it was stolen. Why isn't that alone of interest?

MR. ARORA: Your Honor, usually when we are looking at cases where there is a short amount of time between one incident and the other is certainly a factor that the Court is permitted to consider. That is going to be the possession of recently stolen items. But I think the standard initially in Maryland courts for that particular law is did they know or should they have known that the vehicle was stolen at the time. Some of the factors we look into, for example, would be if the keys were in the ignition or if the ignition was punched. In this case there's no evidence to any effect that says that the keys were not properly in the ignition or that the vehicle was not properly started, that there was any tampering that was done --

THE COURT: Or was it removed from one locale to

another? Stolen from point A and located at point B.

MR. ARORA: It may have been, Your Honor. There's no evidence to support the fact that Mr. Simmons at any point was driving the vehicle from one point to the other. For all we know based on the evidence that was provided by the government, he entered that vehicle shortly before the officers arrived, never moved it from one point to the other.

(There was a pause in the proceedings while the I.T. employee provided technical support to the audio system.)

MR. ARORA: I think the Court had stopped with asking a question about whether or not the vehicle and him being in the vehicle itself a short time after would be in and of itself enough to support this four-level increase. And again what I had assured the Court, it's my understanding of the Maryland rules and the case law, when somebody is in recent possession of a stolen item or a stolen car or something like that, then the in possession of it is not in and of itself --

THE COURT: Let me shortcut this a bit. What evidence is there apart from the presence of the defendant in the vehicle and the theft?

MS. JOHNSTON: Your Honor, only that they tracked that vehicle stopped from where it was first

located. They tracked it down to -- the only evidence is the defendant in possession of the gun sitting in the front seat with somebody else in the second seat with that loaded handgun in his hand in a vehicle that had been stolen several hours earlier up in Baltimore that had been tracked from the scene of the burglary down to the location where it was located by the officers in Prince George's County.

THE COURT: How was it tracked?

MS. JOHNSTON: By the GPS tracker that the company had installed on the vehicle. They turned it on and notified the police of the location. That it was tracked to one location in Upper Marlboro and then followed to this location. So that would be the evidence and it's a preponderance that he was in possession of that vehicle at that time.

THE COURT: All right. Very well. Go ahead, Mr. Arora.

MR. ARORA: Again, Your Honor, and I think the Court probably has a good understanding again based on what we submitted in writing as well as what we argued here what the defense's position is. I can only say that in the preponderance of the evidence when we are talking about a situation like this in a civil capacity where somebody might have borrowed another person's vehicle

without their permission or something like that, there would have to be some intent on their part that the government would have to prove or the other party --

THE COURT: Well, is there any dispute that the vehicle was stolen? I mean --

MR. ARORA: There's no dispute as to that, Your Honor. I think that the government will be able to demonstrate that if they were to bring that particular charge as well. The question again is what was his mental state at that time and what they're able to prove about what his understanding was. And again the standard on recently stolen items is knew or should have known that the items were stolen. And only the most telling piece of evidence in a situation like this would be is the ignition punched or is it not punched. And in a situation where the keys are hanging out of the vehicle, somebody who comes into the vehicle at some point afterwards wouldn't have any reason necessarily to believe that that vehicle was stolen if they didn't have anything to do with the original theft of it at another location. What we know of the government's case is that there were co-defendants involved here. There was somebody else that was on the scene as well. So to necessarily be able to attribute this to my client just based on assumptions or the only evidence being that we have a stolen vehicle as a part of

this dialogue, so to speak, or this narrative, so to speak, shouldn't rise to this four-level offense increase that the government is seeking.

THE COURT: All right. Now again to be clear though the government made this argument. I'm not sure whether you want to respond to it. There was a suggestion that perhaps a robbery of a bank was underway and here was the gun in the hands of the defendant. I'm not sure whether you are saying that's something the Court should really consider as in relation to a crime.

MS. JOHNSTON: Your Honor, that would be an alternative argument --

THE COURT: I'm not really sure though how you could -- I mean it may well have been afoot, but getting beyond a 50-50 proposition on that, that's a bit difficult.

MS. JOHNSTON: If we had enough information to prove that conspiracy, we would have charged him with that. So I don't believe we have sufficient evidence to establish a conspiracy to commit bank robbery at this juncture.

THE COURT: You are going to have to speak from the middle mic here.

MS. JOHNSTON: As I was saying, quite frankly, that's what the officers believed based on their training

and experience and all the circumstances.

THE COURT: All right.

MS. JOHNSTON: But we didn't charge a conspiracy to commit a bank robbery because of the higher standard involved. But in this instance, we're not talking about somebody just being found in the stolen vehicle. This is an individual in the driver's seat of a vehicle that he doesn't own, that he has a gun in his hand and that the vehicle had just been stolen several hours earlier. So I think there's ample evidence to support the --

THE COURT: What time of day were they apprehended in Maryland?

MS. JOHNSTON: I believe it was about 10:30.

THE COURT: 10:30 in the morning?

MS. JOHNSTON: In the morning. Yes.

THE COURT: And when was the vehicle reported stolen?

MS. JOHNSTON: About 7:30 or 8:00 in the morning.

THE COURT: Well, just about three hours?

MS. JOHNSTON: It had been stolen during the night. The window had been broken out of the storeroom -- the showroom of the business and somebody had come in. I believe it was around 7 or 7:30 that the owner had gotten notice and discovered it.

MR. ARORA: Your Honor, if I may just briefly respond to what the government --

THE COURT: Okay.

MR. ARORA: Only that again there's -- with respect to the amount of time that has passed, my understanding of what was presented to you was in sort of our discovery, informal discovery from the government was when you use the term "just stolen," the question of just stolen is sort of ambiguous here because what I understand happened here is the owners of the vehicle or the rightful users of the vehicle noticed that it was missing at 7:00 in the morning. They weren't actually party to the sound of the window breaking or knowing that this just had immediately happened. For all we know it happened at 10 p.m. the night before when they went off to bed or left that particular edifice and then recognized it in the morning and that's when it was reported. So this could have been 12 hours. It could have been 10 hours. It could have been two hours. We don't know the answer to that question based on what's presented.

THE COURT: But with regard to the -- you will concede I gather, Mr. Arora, that when encountering the police in the morning when the defendant was apprehended, he was in possession of the gun.

MR. ARORA: Yes, Your Honor.

THE COURT: And there is testimony that he had a gun in hand.

MR. ARORA: Yes, Your Honor. And that is the substance of the plea for the new offense that he's entered.

THE COURT: Well, also -- right. Very well. Okay. All right. Anything further on that point with regard to the four-level enhancement?

MR. ARORA: No. Thank you.

THE COURT: All right. The defendant has raised a challenge to paragraph 13 of the presentence report which adds four points to his offense level because of his use of a firearm in relation to an offense which would be under that guideline which is 2K2.1(b)(6)(b), the basis for the four-level enhancement and the question is the sufficiency of the evidence based on a preponderance standard for that inclusion to have been made.

The evidence working backwards for a moment is that the defendant was encountered on the morning of his apprehension in a vehicle that clearly had been stolen sometime before and he was seen to have a weapon according to one statement in his hand, but clearly in his possession at the time. And I think as well there was an indication that it was a loaded weapon as well. So the issue really is on that basis is there more that would

justify the conclusion by the Court that a weapon was used in connection with a crime.

The government's position, of course, is that in connection with this unauthorized use of a motor vehicle or theft of a motor vehicle, that the gun could be inferred to have been used in that relation. And what you have here is the defendant in the vehicle some hours post the clear theft or unauthorized use of the motor vehicle with a weapon in one case according to one person in hand but certainly in his possession. Is it a fair inference based on the preponderance standard to conclude that the defendant did have -- use a weapon or have it in his possession for purposes of an ongoing offense and the Court concludes that that evidence is insufficient for the Court to make that conclusion. This doesn't have to be a reasonable doubt standard. But on balance, that's certainly a sensible conclusion that the defendant who had the weapon in a stolen vehicle a matter of hours whether it's three, four or six after the theft of the vehicle could be concluded to have used the weapon in connection with the theft for unauthorized use. And, of course, the unauthorized use being continuing violation in any case.

Therefore, I think the inclusion of the four-level enhancement of paragraph 13 is appropriate and I would accept this inclusion. I will reject the

defendant's challenge. Now I don't think that then changes the total offense level otherwise. Am I correct?

MR. ARORA: That is correct, Your Honor.

THE COURT: All right. So we would then end up with -- and let me make the notation on the statement of reasons here. I want to be clear. This is in 15-036. The Court would then adopt the presentence investigation report without change and the total offense level then according to the PSR for the underlying offense is 17, Criminal History Category is 4. The guideline range for custody is 37 to 46 months. The supervised release range is one to three years and the fine range is 5,000 to 50,000.

So what we have now then on the underlying offense is a range of 37 to 46 months and then with regard to the supervised release consecutive time, 12 to 18 months.

All right. I'll hear the government on its position.

MS. JOHNSTON: Your Honor, in this case I'm doing something that I think I've had occasion to do since the guidelines have become not mandatory and that is to ask this Court to impose an upward variance sentence of 120 months which is the maximum sentence under 922(g). And I ask the Court for that sentence for a number of

reasons. Perhaps the most significant reason is given the defendant's criminal history. This is the defendant's third conviction for possession of a firearm by a convicted felon. And what is even more alarming is that the first felony conviction happened when he was at age 31 in the District of Columbia. He received a 57-month sentence. He was released in September of 2007. Roughly 15 months later on December 23rd of 2008, he was arrested here in Maryland again in possession of a firearm while still on supervised release for the first offense. On that occasion he made it about 14 months before he was again arrested with a gun in his possession. In that instance, he received a sentence, was incarcerated and was released on August 21st of 2014.

Our offense occurred on July 11th of 2015. So he wasn't even out on supervised release a year before he is found again with a gun, a loaded gun in the company of another individual who also had a loaded gun in one of two stolen vehicles. These vehicles were stolen from a business involved in renting cars located up in Baltimore. The business had been broken into the night before. The defendant was apprehended. Keys for the vehicles were taken. Two vehicles were removed from the premises. Those two vehicles were tracked by GPS trackers down in Prince George's County, Maryland. One vehicle was parked

approximately a mile from the location where the defendant was apprehended. The defendant was in the driver's seat of the vehicle. At the time he was apprehended, he had a loaded gun in his hand.

He had a passenger who was in the back of the vehicle who also had a loaded weapon who also had a material that could be worn as a mask, was wearing a heavier-type jacket during June which was also unusual. They were parked on the side of a bank building that was open for business on that day.

And as Detective Watts said in his affidavit, all of these factors are indicative of individuals who are preparing to engage in a robbery of a bank or a commercial establishment. One gentleman goes into the bank. He comes out. The other gentleman was prepared in the driver's seat as the getaway driver. They drive a short distance. They had on layers of clothing so they could remove one layer. And then they get into the other stolen vehicle and drive that further away from the scene to make good their getaway. So they had all of the indicia of individuals about to engage in further criminal activity.

And it's just as logical that's why they would be sitting in the parking lot of a bank with a car parked towards the entrance, two of them just sitting in that vehicle which is where they were when the officers

approached, both armed with firearms.

So we believe that those circumstances of the crime make it different than your run-of-the-mill. This is not an individual who a gun was recovered in his house. This is an individual who had a loaded gun in a vehicle that had been stolen under circumstances that would indicate they were -- who were up to or planning to engage in further criminal activity.

So when you couple those facts with the defendant's characteristics being his prior criminal history, in particular he had a prior robbery with a deadly weapon and a robbery which was not included in the calculation of his criminal history. He got no points awarded for those two events. He is an individual who has some education and some skill and has no current drug problem. He had an ability to support himself through employment and no current drug problem based upon his responses in the presentence report. And then we put on top of that the fact that this is his third conviction for being a felon in possession of a handgun and the second one when he was on supervised release.

Clearly, this individual hasn't learned. He hasn't learned a lesson when he was sentenced to 57 months back in the early 2000's. Nor did he learn a lesson when he was sentenced on a more recent case for which he

violated supervised release here in Maryland.

So a significant sentence has not deterred him. In order to protect the community from further criminal acts by this defendant, it is necessary that he be deterred by an imposition of his sentence and a significant sentence. And it is the government's position that a sentence of ten years satisfies the requirements of 3553(a). It will deter this defendant's conduct. We know from his history that a shorter sentence would not have deterred his criminal conduct. Hopefully, the maximum sentence would do that. Three, it will give him an opportunity for some more rehabilitation and it will deter other individuals and will also avoid unwarranted disparity among sentences because he is being sentenced because he is a third time offender for this kind of offense over a relatively short period of time.

THE COURT: Let me be clear. You are talking about ten years which would also include the supervised release?

MS. JOHNSTON: That would be fine, Your Honor.

THE COURT: Because he's actually got ten years as the maximum for the --

MS. JOHNSTON: For the gun.

THE COURT: For the gun. There's also a potential two years for the supervised release.

MS. JOHNSTON: The Court could impose an additional one year consecutive for the violation of supervised release. It is --

THE COURT: Well, I think that's mandatory, isn't it?

MS. JOHNSTON: You have to impose a sentence mandatory. So whether the Court imposes nine years and one year on the violation of supervised release, we do believe that a ten-year sentence is appropriate. I haven't seen an individual, quite frankly, Your Honor, who has this kind of record with repeated 922(g) violations where he's committed one, gotten a significant sentence, gets out on supervised release, 14 months later commits another 922(g). It makes you wonder how many other guns he possessed that he didn't get caught with because it seems that the police have a way of catching up with him in those other cases. And then after he does another substantial period of supervised release, less than ten months later, here he is again, in a car not only with this loaded gun, but with another gentleman who also has a loaded gun. So I believe that those circumstances in and of themselves justify the variance sentence. And we think that a sentence of ten years, I understand that it does -- my recommendation would encompass the violation of supervised release. I think that is an appropriate

sentence. It is reasonable, not greater than necessary to meet the requirements of 3553.

THE COURT: All right.

MR. ARORA: May I, Your Honor? Thank you. Your Honor, it's certainly no easy task to argue with the government about Mr. Simmons' record. And I had an opportunity to study it in detail over the last year or so that I've been representing him on these charges. And obviously, there is nobody who is more embarrassed about that record or about his conduct over the last several years than Mr. Simmons. You know, when I speak to him about those kinds of things, he has a great deal of remorse about them and even though the conduct keeps happening, he finds himself here before Your Honor today.

I think that this situation does present itself with some different facts and circumstances than the other circumstances that he has found himself in before which would not necessarily justify going outside of the sentencing guidelines the way the government is requesting you to do.

I can say to the Court that Mr. Simmons as you now have learned or understand from the presentencing report is a 43-year-old man, a high school graduate. He does have several special skills, have been employed in a number of different, very frankly, gainfully employment

positions throughout his life that have been interrupted by periods of incarceration.

His mother as well as his two children, a 17-year old and a 15-year old are present in court today here to support him. His mother wants to address the Court at the appropriate time if Your Honor believes that it's appropriate.

I can say, Your Honor, that the reason that these circumstances are a bit different than the ones before is not necessarily based on the conduct that Mr. Simmons participated in, but what happened as a result of his conduct. I don't know if the Court was privy to this information. I don't believe it was part of the fact scenario that was presented with the plea that was submitted. But essentially, once officers had identified that Mr. Simmons was in possession of a handgun, there was a shooting that took place. Mr. Simmons didn't fire a gun. He was fired at a number of times by investigating officers that were on the scene. As a result of that and part of the reason that this case, frankly, took so long to get into a courtroom and a plea and for sentencing was because Mr. Simmons had to undergo a number of very, very painful surgeries. Surgeries for his spine, his leg, his hand. Frankly, the man that I saw originally when I met with him last summer was in bad shape, a person that I

didn't actually expect would necessarily make it this far, make it a year later to appear before the Court. His prognosis was not good. It appeared that they were going to be again a number of surgeries, a great deal of rehabilitation. And what he'll tell you is that by the grace of God and by the support of his family, essentially he came out of that, frankly, a very changed person and when he's given an opportunity to address the Court, I know he is going to share some of those experiences with you.

So what's different about this situation and the situation that he's found himself in prior to this is really the fact that he believes that he came back from a brink of death and he's come back from that point for a reason, whether it is to at some point come out of this situation and return to his family and be a provider to his children, whether it is to come out of this situation and be able to provide for his mother who is obviously going to be older after the Court imposes sentence and he's released. Those are all aspects of his life that he is now focusing on.

I know that we had submitted some exhibits to the Court that talk about some of the different programs he's engaged in while he's been incarcerated over the last 14 months or so. I believe since June 11 of 2015. Those

would include writing an essay for Black History Month and coming in second place in competition within the correctional facility itself, participating in a fathering program, participating in a life skills program, participating in a yoga program. Perhaps most importantly and I think this was verified by the presentence investigation as well, he's also been attending therapy on a regular basis. This is therapy that's dealing with impulse control, manic episodes that he suffers from. Really the first time that he's been offered the opportunity to identify any mental health issues that he might suffer from and how those might impact his decision making when he was released and when he continued to find himself in these situations.

I know that originally he was meeting with that therapist two times per week and that has now come down to once per month and I think that is based on the resources that are available to the jail at this time. But he is given opportunities to participate in homework assignments through that therapist and he did bring those assignments back completed, give whatever they discussed some thought over the period of time that -- the period between their meetings so that that therapy can be ongoing and that he works on it as a regular basis.

Your Honor, lastly, I'll just say that obviously

the guidelines are in place for a reason. I know that the government has alluded to the fact that there were prior offenses for which he was given zero points and I think that that's because of a certain period of time has elapsed. There is a timeframe within which certain things are applicable and certain things are not. And the Court has a responsibility and I know the Court understands its responsibility very well to give a sentence that's appropriate for punishment to address issues of recidivism and be fair and reasonable in this circumstance that we find ourselves in.

I know that our memorandum originally requested a time-served sentence. After reviewing the government's response and talking over some of the details of the evidence with my client, I know that that may not be necessarily appropriate given the circumstances of this case.

We do ask Your Honor now to consider a sentence that's within the guidelines range. Obviously, we understand that there will be a consecutive sentence after that giving him an opportunity to continue on supervised release with the Court, recognizing again the very serious medical issues that he suffered as a result of this event and really how that has changed his outlook on the rest of his life.

THE COURT: All right, sir. Mr. Simmons, you have a chance to address the Court.

MR. ARORA: Your Honor, before Mr. Simmons --

THE COURT: Sorry. You want to hear from his mother first?

MR. ARORA: Very briefly.

THE COURT: That's fine.

MR. ARORA: Thank you.

THE COURT: Please come up to the stand if you would. You don't need to take the witness stand. Come up to the podium and tell me your name.

MS. DONNELLY: Good morning, Your Honor. My name is Sheila Donnelly. I'm the mother of Derrick Simmons.

THE COURT: All right. What did you want to tell me?

MS. DONNELLY: I want to say that I know this is a grave situation. But I would really appreciate your compassion and your leniency in the matter. My son has exhibited some behaviors that I'm not even -- you know, that I'm surprised at myself. But he's still my son and he has two children that really need him and if there's any way that they could be together, I would appreciate it.

MR. ARORA: Your Honor, would you like

Mr. Simmons to address the Court from here?

THE COURT: He can do it sitting or standing. It may be better to go to the middle mic. I am really having trouble with the mic over there. All right, sir. Mr. Simmons?

THE DEFENDANT: Good morning, Your Honor. First, I would like to thank my family for their continued love and support. As you know, this isn't my first time being here. So for them to continue to support me is truly a blessing.

The reason I'm here again is I gave up hope in myself. I stopped believing in how blessed I am and I got so low that I made a terrible decision that almost cost me my life. By the grace of God, I didn't lose my life and while I was sitting in the hospital, I realized that this is not the legacy I want to leave. I don't want my children to have to say I never really got to know my dad because he was always in prison before he died and my fiancee having to plan my funeral instead of our wedding. I'm going to change the story of my life and I understand that I can't do it alone because I make the worst decisions. So I start to take steps to get a better understanding of what caused me to make such poor decisions by getting some professional help. But as far as this situation, I take full responsibility for it.

I'm truly sorry for all the trouble I caused. A terrible decision that almost cost me my life and has placed me back in front of a judge and that's my own fault. So I can't ask for a second chance at leniency. But I do ask for your mercy because I've reached my lowest point and I'm determined to turn my life around.

I read an article in a magazine about a pro-athlete who was considered a troubled young man and he made a statement about how his missteps changed his whole direction in life because they're not the mistakes of someone with an evil heart, but they're impulse control problems. That really resonated with me because I can definitely relate. But I can't keep using that as an excuse. I will do better. Thank you, Your Honor.

THE COURT: All right, sir. Have a seat if you would.

I gather just to be clear there are no pending charges in the State of Maryland with regard to the unauthorized use or theft?

MS. JOHNSTON: There are none, Your Honor. There are none. They dismissed the charges in Prince George's County in deference to our prosecution here. I am not aware of any charges pending in Baltimore. I'm sure they're going to wait and see what happens here in relation to the burglary and theft charges.

THE COURT: Mr. Simmons, I want to say a word about the sentencing guidelines first in your case. For your benefit, for the benefit of your family, the idea is to try and treat similarly-situated offenders similarly so that one court doesn't impose a sentence which is quite high and another quite low for essentially the same kind of offense by the same kind of person, that is someone with a particular criminal background. The guidelines function fairly well. But they are not mandatory to the judge to impose them. The judge can take into account any number of factors.

Now with regard to the guidelines in your case with regard to the new offense that you pled guilty to, they recommended a 37 to 46-month term given your criminal history. And then, of course, there was the violation of supervised release in the prior offense as to which you were given I think 57 months originally that you served and that would be added -- whatever time I gave for the violation of the supervised release condition would be consecutive to whatever time you get in connection with the new offense. So the guidelines at this point sort of puts you somewhere as high as 46 months with regard to the new offense and up to at least 18 months with regard to the supervised release which would be consecutive.

The guidelines as I say are not mandatory.

They're meant to try and put people into situations so that equal justice is dispensed with regard to them. But the guidelines do provide certain aspects where the criminal history, for example, doesn't quite capture who we're talking about. And there are other aspects of the behavior of the defendant in the case that merit a separate consideration.

For example, under Sentencing Guideline 4A1.3, it's provided that if reliable information indicates that a defendant's criminal history substantially understates the seriousness of his criminal history or the likelihood that the defendant will commit other crimes, then the court may be justified in going above the guidelines. So that's one consideration. There are other aspects that it may be relevant in your case. The fact of the matter is that your signature device here appears to be a weapon. This is what, the third time that you are found with a weapon in short order to do things. And there's another guideline provision, 5K2.6, that provides that if a weapon is used to possess the commission of the offense, the Court may increase the sentence above the guideline range depending on the dangerousness of the weapon and so on and the nature in which it was used. Well, it's in the essence of this offense is, of course, the guideline is a weapon. But for you, it's a weapon, a weapon and a

weapon. It's always there. And that's what we know about what you've been doing over the years.

There is yet another consideration in this case and that is that with regard to uncharged or dismissed conduct. For example, under 5K2.21 of the guidelines, it says a court may depart upward to reflect the actual seriousness of the offense based on conduct underlying a charge dismissed as part of a plea agreement or underlying a potential charge not pursued in this case as part of the plea agreement or that did not enter into the determination of the applicable guideline range.

Now I am satisfied that you were both involved in the theft and unauthorized use of the vehicle on the day in question. You were certainly up to no good on the day that you were taken in hand. That's not charged conduct. But here it is. It's all part of who you are. All of those factors will justify upward departures in this case. So that's what you need to understand. Even under the guidelines which are not mandatory, there is a way in which the court, consistent with the guidelines, can make a decision.

So now I look at the guidelines and talk about the nature and circumstances of the offense. Now clearly on the day in question you were apprehended with a loaded weapon. Why you would have done that obviously is a basis

for some conjecture. But clearly, it appears that you were about to do no good with the weapon that you had in hand. That's a concern. And of course, with the nature and circumstance of the offense, is it serious? Of course, it is. This is not shoplifting. This is somebody who is really considerably up to bad business.

And then I have to look at your characteristics in particular. You are not a young man. You are not a spring chicken. You have done a lot of very anti-social things and that's putting it I think euphemistically. I mean I think you really have done a lot of bad things. You have used weapons and you've threatened people. You know, what was interesting in your remarks, you're sorry about what you did as far as your family was concerned, your mother and your children and so on and yourself. I didn't hear about all the people that you terrorized over the years. And when I look back at your criminal history, about what you have done to victims, leave aside society as a whole, it's pretty awful. I didn't hear any apologies or remorse for what you did to them. That's what -- I have to speak to them when I sentence you today. So you as most defendants always have a feeling of concern for family who do stand beside you despite all the bad things you've done. But that really isn't much of a factor from my standpoint. The one who brought it on was

you, not me. You're the one who may cause your children not to see you for an extended period of time, not because the court did it. But because you have acted in such a way that the community just won't stand for it. That's where we are in a situation like this.

So when I look at your nature and characteristics, I don't know whether you have mental health issues or not and we will certainly allow for some of that to be taken into account while you're in custody and during your period of supervised release that will follow. But the community just can't afford to let you be out there and maybe and likely do again what you've been doing all along. You're not 20. You're not 25. You've been there. You have been around a lot of times. Hard to know how any of this, your love for your family or whatever justifies what you've done. You have effectively terrorized the community. You're not shooting people up and down the streets. But you're doing the kind of thing which unnerves a lot of people. So that's your characteristics which is the second factor that I take into account.

And there are other factors. Do I need to promote respect for law? Do I need to tell other people out there who are infatuated with guns, hey, you can't do this? Felons, who have loaded guns that you can't have

this? The reason why there's a law against felons having guns because felons use them. That's why you can't do it. That's what keeps the public uneasy. So I need to promote respect for law. I need to deter others from doing what you did. But most of all, I need to deter you. You're the one I'm most concerned about here. I don't know what you're capable of doing. It's easy to stand up in front of a judge and I know you have done that before and I was one of them and, you know, life was going to change and it didn't and here you are again and not as a young man. Will you change? Maybe. Is it likely? I don't know. Would it be good if you did? Sure. But right now, the evidence isn't there. It isn't there.

So your words of remorse, you know, right now it may be genuine as to your family, as to the rest of the community. I don't know and I'm not -- I know that I can't take chances with you. So all those are there. There's a punishment component, though always not important. It's just deterring you. And to the extent that you need some, some attention to some of -- while there may be some personality issues or life issues, we will try and take care of that. But I do think on balance that it is appropriate to sentence you in the new case, 15-03762, what would be 108 months of custody which is nine years with credit for time served, 14 months, and put

you on supervised release for a period of three years following. But before I recite what the conditions of your supervised release are, I want to be clear that in the companion supervised release case, which is PJM-09-004, I'm going to sentence you to 12 months consecutive to the 108 months that I just gave you. So that the total time that you will have is 120 months as is sought by the government, which actually is ten years within the maximum for just the most recent offense alone. Ten years total is what you will be sentenced to.

Now with regard to the new offense, you will be on supervised release for a period of three years following. You will commit no crimes, federal, state of local. Now here is the one I am putting capital letters and underlying. You will possess no firearm or dangerous weapon. Look what happened to you this time. Not only did you possess a firearm, but you were charged with a new offense. You got time and you got additional time for violating the condition that I imposed on you, which I'm doing right now. I'm imposing this condition on you. And if you come back, you will no doubt be charged again, but you certainly will get time for the supervised release. So that is the term, three years. And you will -- and I gather -- I don't know whether that presumably is over and above whatever the immediate term is.

MS. JOHNSTON: Your Honor, I think that the best way to handle this is, quite frankly, in the violation of supervised release case, Case Number 9-004, that the Court just impose the 12-month sentence with no additional supervised release.

THE COURT: That's what I've done. The supervised release is being imposed in the new case and there's no further supervised release in the -- no supervised -- in connection with the supervised release case. But the conditions of supervised release in the new case go beyond and I will provide that in that situation that no supervised release term that you satisfactorily participate in a mental health treatment program that your probation officer approves. It may include evaluation, counseling and testing as deemed appropriate by your probation officer.

There is now -- now I'm back in the new case, 15-0376, there is a special assessment due and payable in the amount of $100 at this time and it will be no fine imposed in connection with that case. And as the government has indicated, there's no more supervised release in 09-004 with the one year consecutive that you'll serve. That will be the end of that. Although effectively, you will have three years when you are released from custody.

Actually, that's an interesting question. If he gets a year consecutive to the other sentence, when does his probation kick in? Does it kick in while he's doing the year or is the year done up front? Anyway, whatever the result is, someone will be here to look at that when the time comes.

Is there any other issue with regard to this matter from the government, Ms. Johnston?

MS. JOHNSTON: I don't believe so, Your Honor.

THE COURT: Mr. Arora?

MR. ARORA: No, Your Honor.

THE COURT: All right. We'll stand in recess. Thank you very much.

(Proceedings concluded.)

CERTIFICATE OF REPORTER

I, Lisa K. Bankins, an Official Court Reporter for the United States District Court for the District of Maryland, do hereby certify that I reported, by machine shorthand, in my official capacity, the proceedings had and testimony adduced upon the sentencing in the case of the United States of America versus Derrick W. Simmons, Criminal Action Number PJM-09-0004 and PJM-15-03762, in said court on the 1st day of September, 2016.

I further certify that the foregoing 41 pages constitute the official transcript of said proceedings, as taken from my machine shorthand notes, together with the backup tape of said proceedings to the best of my ability.

In witness whereof, I have hereto subscribed my name, this 4th day of October, 2016.

Lisa K. Bankins

Lisa K. Bankins
Official Court Reporter