No. 10-5793

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

LEONARD FOX,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE

BRIEF FOR THE UNITED STATES AS APPELLEE

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STATEMENT REGARDING ORAL ARGUMENT

The United States agrees with defendant that oral argument is not necessary in this case.

STATEMENT OF JURISDICTION

The district court had jurisdiction under 18 U.S.C. 3231. The district court entered judgment on June 25, 2010 (R. 102, Redacted Judgment),[1] and defendant

[1] "R. __" refers to docket entries in the district court record.

filed a timely notice of appeal on June 30, 2010 (R. 104, Notice of Appeal). This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in denying defendant's motion to withdraw his guilty plea.

2. Whether the government violated the terms of the plea agreement.

3. Whether defendant's sentence is reviewable, and, if so, whether it is reasonable.

STATEMENT OF THE CASE

On September 24, 2008, a federal grand jury returned an indictment charging the defendant, Leonard Fox, with three counts. (R. 17, Redacted Indictment). Each count charged violations of 18 U.S.C. 2, 1591(a), and 1591(b)(1) relating to one of three girls under the age of 18 who engaged in commercial sex acts at Fox's behest and for his financial benefit. (See R. 17, Redacted Indictment).

Pursuant to a plea agreement, Fox pled guilty to Count Two of the indictment, which included charges relating to a minor referred to as "C.S." He later filed a motion to withdraw his guilty plea. (R. 71, Motion to Withdraw Guilty Plea; R. 81, Amended Motion To Withdraw Guilty Plea). Following an evidentiary hearing, the district court denied this request. (R. 82, Order Denying

Withdrawal of Plea). The court subsequently sentenced Fox to 300 months' imprisonment and a ten-year term of supervised release. (R. 102, Redacted Judgment). Counts One and Three were dismissed pursuant to the plea agreement. (See R. 34, Plea Agreement; R. 102, Redacted Judgment).

STATEMENT OF FACTS

Fox employed a number of girls – including some under the age of 18 – as prostitutes. (R. 77, Feb. 23 Tr., pp. 17-18). He admitted during the change-of-plea hearing with respect to Count Two that, from June 2008 through September 2008, he "recruit[ed] and entice[d]" C.S., a minor, "to engage in commercial sex acts" while knowing that she was a minor. (R. 77, Feb. 23 Tr., p. 19).

C.S. stated that another girl from her high school introduced her to Fox, who then recruited her to work as a prostitute. (R. 77, Feb. 23 Tr., p. 18). According to C.S., Fox would use a cell phone to set up appointments. (R. 77, Feb. 23 Tr., p. 18). He then would take her to apartment buildings in the Memphis, Tennessee area where she would perform sexual services in exchange for money. (R. 77, Feb. 23 Tr., p. 18). Fox would provide her with condoms and would track the number of sex acts provided by the girls based on the number of condoms used. (R. 77,

Feb. 23 Tr., p. 18). All of the money resulting from these commercial sex acts would be returned to Fox. (R. 77, Feb. 23 Tr., p. 18).[2]

SUMMARY OF ARGUMENT

On appeal, Fox asserts that (1) the district court abused its discretion by denying his request to withdraw his guilty plea almost a year after it was entered; (2) the government breached the plea agreement by explaining to the district court the rationale behind the government's lenient sentencing recommendation; and (3) his sentence is unreasonable because the district court gave too much weight to the advisory guideline range. All of defendant's arguments fail. This Court therefore should affirm the judgment below.

1. The district court did not abuse its discretion in denying Fox's attempt to withdraw his guilty plea. Following a hearing at which both defendant and his former attorney testified, the district court applied well-established criteria from this Court for analyzing such requests and concluded that all seven of the relevant factors cut against defendant – including the fact that significant time had passed since the guilty plea, Fox did not assert his innocence, and allowing him to withdraw the plea would "highly prejudice[]" (R. 82, Order Denying Withdrawal

[2] The foregoing comes from the government's recitation of the facts at the change-of-plea hearing. Fox agreed on the record that this recitation was "substantially true and correct." (R. 77, Feb. 23 Tr., p. 19).

of Plea, p. 7) the government. Accordingly, the district court's denial of this request can in no way be said to have been an abuse of discretion.

2. Fox's claim, raised for the first time on appeal, that the government breached the plea agreement also fails. Contrary to Fox's assertion, the government had no obligation to argue on behalf of its sentencing recommendation. And, far from amounting to a breach, its explanation of the rationale for its recommendation arguably was the strongest basis for imposing a lenient sentence. It also appears to have been consistent with defense counsel's expectations, as (1) the attorney representing Fox at sentencing did not object to the government's offering of its rationale, and (2) testimony by Fox's former attorney indicated a belief that Fox would receive a below-guidelines sentence based on the very explanation Fox now cites as a breach of the agreement.

3. If this Court agrees with the government that (1) the district court did not abuse its discretion in denying Fox's attempt to withdraw his plea agreement, and (2) the government did not breach the plea agreement, then it should refuse to consider Fox's challenge to his sentence, as the plea agreement contains a valid waiver of Fox's right to appeal his sentence. If this Court concludes that it can review Fox's challenge to his sentence, it should reject that challenge, as Fox's claim that the district court gave too much weight to the advisory sentencing guidelines is without merit.

ARGUMENT

I

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING DEFENDANT'S MOTION TO WITHDRAW HIS GUILTY PLEA

A. Standard Of Review

This Court "review[s] the district court's denial of a motion to withdraw a guilty plea for abuse of discretion." *United States* v. *Dixon*, 479 F.3d 431, 436 (6th Cir. 2007). "It is the defendant's burden to demonstrate that proper grounds exist for the granting of such a motion." *Ibid.*

Withdrawal of guilty pleas prior to sentencing is governed by Federal Rule of Criminal Procedure 11(d). Under that rule, "a defendant must 'show a fair and just reason for requesting the withdrawal.'" *Dixon*, 479 F.3d at 436 (quoting Fed. R. Crim. P. 11(d)(2)(B)). "The purpose of Rule 11(d) is to allow a 'hastily entered plea made with unsure heart and confused mind to be undone, not to allow a defendant to make a tactical decision to enter a plea, wait several weeks, and then obtain a withdrawal if he believes that he made a bad choice in pleading guilty.'" *Ibid.* (quoting *United States* v. *Alexander*, 948 F.2d 1002, 1004 (6th Cir. 1991), cert. denied, 502 U.S. 1117 (1992)).

This Court employs "a multi-factor balancing test * * * to guide district courts in deciding whether to grant a motion to withdraw a guilty plea." *United*

States v. *Haygood*, 549 F.3d 1049, 1052 (6th Cir. 2008). Those factors are as follows:

> (1) the amount of time that elapsed between the plea and the motion to withdraw it; (2) the presence (or absence) of a valid reason for the failure to move for withdrawal earlier in the proceedings; (3) whether the defendant has asserted or maintained his innocence; (4) the circumstances underlying the entry of the guilty plea; (5) the defendant's nature and background; (6) the degree to which the defendant has had prior experience with the criminal justice system; and (7) potential prejudice to the government if the motion to withdraw is granted.

Ibid. (quoting *United States* v. *Bashara*, 27 F.3d 1174, 1181 (6th Cir. 1994)).[3] "No one factor controls; the list is general and nonexclusive." *Ibid.* (citation omitted). "The relevance of each factor will vary according to the 'circumstances surrounding the original entrance of the plea as well as the motion to withdraw.'" *Ibid.* (quoting *United States* v. *Triplett*, 828 F.2d 1195, 1197 (6th Cir. 1987)).

B. The District Court's Ruling

In response to defendant's motion to withdraw his guilty plea, the district court conducted an evidentiary hearing at which both defendant and the attorney who represented him at the time of his guilty plea testified. (See R. 115, April 5 Tr., pp. 14-98). Following the hearing, the district court entered a written order

[3] As noted in *Haygood*, see 549 F.3d at 1052, *Bashara* was later superseded on other grounds. See *United States* v. *Caseslorente*, 220 F.3d 727, 734 (6th Cir. 2000).

denying the motion. (R. 82, Order Denying Withdrawal of Plea). In its order, the district court applied the multi-factor balancing test described above and concluded that all seven factors weighed against defendant's request to withdraw his guilty plea. (R. 82, Order Denying Withdrawal of Plea, pp. 3-7).

First, with regard to time elapsed, the district court noted that almost a year passed between the entry of the guilty plea and the first motion to withdraw it. (R. 82, Order Denying Withdrawal of Plea, p. 4). It further noted that this Court has affirmed denials of motions to withdraw guilty pleas that involved much shorter delays. (R. 82, Order Denying Withdrawal of Plea, p. 4). Accordingly, the court concluded that this factor "weighs strongly against the Defendant." (R. 82, Order Denying Withdrawal of Plea, p. 4).

Second, the court concluded that "Defendant has not established a valid reason for the three hundred and sixty-four (364) day delay in moving to withdraw his guilty plea. In fact, the Defendant has proffered no reason at all for this delay." (R. 82, Order Denying Withdrawal of Plea, p. 4).

Third, with regard to innocence, the district court noted that this factor "also weighs against the Defendant because he has not maintained his innocence." (R. 82, Order Denying Withdrawal of Plea, p. 4). "Instead, he admitted under oath at his plea hearing that he was guilty of the alleged offense, and he did not assert his innocence at the hearing on the instant Motion." (R. 82, Order Denying

Withdrawal of Plea, p. 4). He also "told the probation officer 'I apologize for what I've done. I accept full responsibility for what I pled guilty to in count two. I'll never do it again.'" (R. 82, Order Denying Withdrawal of Plea, p. 4).

Fourth, the district court concluded that the circumstances underlying defendant's guilty plea also weigh against him. (R. 82, Order Denying Withdrawal of Plea, pp. 5-6). Specifically, the court noted that defendant confirmed during the change-of-plea hearing that (1) "he had ample opportunity to confer with this attorney," (2) "he was satisfied with his attorney," (3) "he understood the potential sentence and various aspects of sentencing," (4) "he was not pressured into signing the agreement, despite his current contention that [his attorney] threatened him into doing so," (5) "he understood the terms and conditions of the plea agreement," (6) "he understood that his potential sentence in this matter was not less than ten (10) years and not more than life imprisonment," and (7) "he understood that by entering the plea he was waiving his right to appeal his sentence." (R. 82, Order Denying Withdrawal of Plea, pp. 5-6) (footnotes omitted).

In addition, the district court noted that, "despite Defendant's contentions to the contrary, [his attorney at the time of the guilty plea] testified at the hearing on the instant Motion that he did not threaten the Defendant in any manner." (R. 82, Order Denying Withdrawal of Plea, p. 6). In addition, the attorney "testified that the Defendant never gave any serious indication that he intended to proceed to

trial," that he was instead "focused on the potential sentence he might receive if he pleaded guilty," and that defendant's own testimony in connection with his effort to withdraw his plea supported this conclusion. (R. 82, Order Denying Withdrawal of Plea, p. 6).

With regard to the fifth and sixth factors – which relate to a defendant's background and familiarity with the criminal-justice system – the district court noted that defendant completed high school, as well as some college. (R. 82, Order Denying Withdrawal of Plea, p. 6). The court also noted that defendant "has an extensive criminal history," having "had numerous run ins with the law since he was eighteen (18) years old." (R. 82, Order Denying Withdrawal of Plea, pp. 6-7). Accordingly, the court concluded that these factors also "weigh against the Defendant." (R. 82, Order Denying Withdrawal of Plea, p. 7).

Finally, with regard to the eighth factor, the district court found that "the Government would be highly prejudiced" by a ruling allowing the withdrawal of defendant's guilty plea. (R. 82, Order Denying Withdrawal of Plea, p. 7). Specifically, the court concluded that, because the government had lost contact with the victims and was unaware of their locations, "the Government would be highly prejudiced due to the lack of critical witnesses, i.e. the victims, in this matter." (R. 82, Order Denying Withdrawal of Plea, p. 7). Accordingly, the court

found that "this factor also weighs against the Defendant." (R. 82, Order Denying Withdrawal of Plea, p. 7).

C. The District Court's Decision Is Not An Abuse Of Discretion

The district court's ruling – which followed an evidentiary hearing, and which meticulously and correctly addressed in writing all of the factors this Court has identified as relevant to such a determination – did not constitute an abuse of discretion. Indeed, even if this Court disagreed with the district court's analysis of any one particular factor, that should not be a sufficient basis for finding that it abused its discretion. See *United States* v. *Goddard*, No. 09-5120, 2011 U.S. App. LEXIS 4956, at *11 (6th Cir. Mar. 11, 2011) (noting that two of the factors "unquestionably" favored the defendant, but nevertheless concluding that the district court acted within its discretion in refusing to allow the defendant to withdraw his guilty plea).[4]

At bottom, Fox's appellate arguments rest on two implicit assumptions: (1) that he was persuaded to make a bad deal; and (2) that, because the district court did not sentence him to 120 months' imprisonment as recommended by the

[4] The cited opinion was filed March 11, 2011. A prior *Goddard* opinion filed February 10, 2011, is available at 632 F.3d 255. It appears that the March 11 opinion is an amended version of the February 10 opinion. But, as of the date of filing, this was not entirely clear on Westlaw, and the government was only able to locate the March 11 opinion on Lexis.

government, he somehow did not receive the benefit of his bargain. Both are demonstrably false premises.

First, as Fox's defense lawyer testified at the hearing on the motion to withdraw the guilty plea, Fox never indicated a desire to take this matter to trial. (See R. 82, Order Denying Withdrawal of Plea, p. 6; R. 115, April 5 Tr., pp. 65, 97).

This is not surprising. As his attorney testified, "[t]he facts were horrible. The circumstances were absent any kind of mitigation or any ability to explain. There was absolutely no theory under which any viable theme of a defense of the case could be fashioned." (R. 115, April 5 Tr., p. 90). Accordingly, defense counsel tried to limit Fox's sentencing exposure, meaning that he sought to "mak[e] the best effort at assuring [Fox did not] get a life sentence or something close to it." (R. 115, April 5 Tr., p. 90). In this, Fox's former counsel achieved some measure of success, as Fox did not receive a sentence of life in prison.

Second, Fox received value from his plea agreement because the sentence imposed also was 60 months below the low end of the advisory guideline range. Had it not been bound by the plea agreement, the government almost certainly would have argued for a guideline sentence of 360 months to life. (Cf. R. 115, April 5 Tr., p. 81) (testimony by Fox's former counsel that the government informed him that, if the matter went to trial, "the government's position would be

that a life sentence is appropriate"). If that argument were not successful, the government might also have seriously considered appealing any below-guidelines sentence imposed by the district court. Because it was bound by the plea agreement, however, the government neither advocated a guideline sentence nor appealed the sentence imposed. Thus, Fox received a significant benefit as a result of his bargain – *i.e.*, a sentence 60 months below the low end of the guidelines that the government has not challenged on appeal.

Simply put, defendant's motion to withdraw represented nothing more than a form of buyer's remorse over the deal he struck with the government. This Court previously has noted that withdrawal generally is not appropriate under such circumstances. See *Haygood*, 549 F.3d at 1052-1053 ("Plea withdrawals should generally not be allowed where a defendant has made 'a tactical decision to enter a plea, wait[ed] several weeks, and then . . . believes he made a bad choice in pleading guilty.'") (quoting *Alexander*, 948 F.2d at 1004). It should follow that principle here.

II

THE GOVERNMENT DID NOT VIOLATE THE PLEA AGREEMENT

A. Standard Of Review

Whether a plea agreement has been breached is a question generally reviewed de novo. See *United States* v. *Swanberg*, 370 F.3d 622, 627 (6th Cir.

2004). However, where, as here, the defendant failed to object to the purported breach, this Court reviews for plain error. See *ibid.* "When reviewing a claim under a plain error standard, this Court may only reverse if it is found that (1) there is an error; (2) that is plain; (3) which affected the defendant's substantial rights; and (4) that seriously affected the fairness, integrity or public reputation of the judicial proceedings." *Ibid.* (quoting *United States* v. *Barnes*, 278 F.3d 644, 646 (6th Cir. 2002)).

B. The Government Did Not Violate The Plea Agreement

As this Court has held, "[p]lea agreements are contractual in nature. In interpreting and enforcing them, we are to use traditional principles of contract law." *Smith* v. *Stegall*, 385 F.3d 993, 999 (6th Cir. 2004) (quoting *United States* v. *Robison*, 924 F.2d 612, 613 (6th Cir. 1991)), cert. denied, 544 U.S. 1052 (2005). "One fundamental principle of contract interpretation is that 'primary importance should be placed upon the words of the contract. Unless expressed in some way in the writing, the actual intent of the parties is ineffective, except when it can be made the basis for reformation of the writing.'" *Ibid.* (quoting 11 Williston on Contracts § 31:4 (4th ed. 2000)). "Consistent with the principle articulated by Williston, this court has held that the state will be held to the literal terms of the plea agreement." *Ibid.* (citing *United States* v. *Mandell*, 905 F.2d 970, 973 (6th Cir. 1990)).

Here, the plea agreement provides in pertinent part:

> The United States agrees to recommend that the court impose a term of 120 months imprisonment. The defendant understands that any recommendations made by the United States are not binding on the court and should the court not accept the recommendation or request the defendant nevertheless has no right to withdraw the plea.

(R. 34, Plea Agreement, pp. 1-2). The government fully complied with this requirement when it recommended that the court sentence defendant to the statutory minimum of ten years' imprisonment. (R. 115, June 23 Tr., pp. 18-19). Indeed, rather than objecting to the government's statement, the attorney representing Fox at sentencing subsequently noted the government's compliance with its obligation. (R. 115, June 23 Tr., p. 20) ("The government agreed to recommend, which [the Assistant United States Attorney] has done today, to recommend a ten-year sentence.").

Defendant now claims that the government breached the agreement by (1) asking for a lifetime term of supervised release (Br. 21); and (2) failing "to make a sincere effort to convince the sentencing judge that [imposition of the statutory minimum sentence of 120 months] was fair and should, indeed, be imposed." (Br. 20).[5] Both arguments fail.

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[5] Defendant's arguments are based primarily on the following statement by the government's counsel:

(continued…)

First, the plea agreement does not address the question of supervised release. The government made no promises with respect to this issue. Accordingly, there can be no finding of a breach based on the government's decision to seek a lifetime

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(…continued)

> [P]ursuant to the plea agreement, at the time of the plea agreement, the United States agreed to make a non-behinding [sic] recommendation per the statutory minimum, which is ten years. The United States is going to stand by its word and make that recommendation. The logic behind that at the time was we had some very young children who came from very dysfunctional homes that, after being rescued, there were all sorts of issues in their treatment, and a trial was not going to do them – it was going to do them harm, based on all the information we had, as far as their treatment and social workers and all that. And they were very at-risk children. Simply having them to relive all this could undo a lot of their therapy. That was the thinking in the government. That's why we are recommending the statutory minimum based on that.
>
> And we would ask for a term of supervised release for life. The conduct in this case, the fact that it's repeated a second time, we have the Fayette County incident, and the fact that his criminal history score is above the maximum, the highest range. I believe it is an 18 now or whatever. It is still on a level six. We think lifetime supervised release. And also the psychological report bothered me quite a bit. So we are asking for the lifetime supervised release.

(R. 115, June 23 Tr., pp. 18-19).

term of supervised release.[6] See *United States* v. *Danou*, 260 F. App'x 864, 868 (6th Cir. 2008) ("We will hold the Government to the promises it made, but we will not hold the Government to the promises it *did not* make.") (unpublished) (citing *United States* v. *Barrett*, 890 F.2d 855, 863-864 (6th Cir. 1989)).[7]

Second, the plea agreement required only that the government make a sentencing recommendation of 120 months, which the government clearly did. The agreement did not require the government to argue on behalf of that recommendation. In the absence of any such language in the plea agreement, the government was not required to do so. See *United States* v. *Benchimol*, 471 U.S. 453 (1985) (per curiam).

In *Benchimol*, the Ninth Circuit concluded that the government "made no effort to explain its reasons for agreeing to recommend a lenient sentence but rather left an impression with the court of less-than-enthusiastic support for leniency." *Benchimol*, 471 U.S. at 455 (quoting 738 F.2d 1001, 1002 (9th Cir. 1984)). The court of appeals held that, "when the government undertakes to recommend a sentence pursuant to a plea bargain, it has the duty to state its

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[6] The district court rejected the government's request and imposed only a ten-year term of supervised release. (R. 102, Redacted Judgment).

[7] *Barrett* has been superseded by statute on other grounds. See *United States* v. *Williams*, 940 F.2d 176, 181 (6th Cir.), cert. denied, 502 U.S. 1016 (1991); see also *United States* v. *Fuentes-Majano*, No. 08-6189, 2011 WL 294083, at * 3 (6th Cir. Feb. 1, 2011) (unpublished).

recommendation clearly to the sentencing judge and to express the justification for it." *Id.* at 454 (quoting 738 F.2d at 1002).

The Supreme Court, by per curiam opinion, summarily reversed the Ninth Circuit's ruling. In so doing, the Court specifically rejected the notion – also advanced by Fox in this case – that the government has an implied obligation to support a lenient sentencing recommendation:

> It may well be that the Government in a particular case might commit itself to "enthusiastically" make a particular recommendation to the court, and it may be that the Government in a particular case might agree to explain to the court the reasons for the Government's making a particular recommendation. But respondent does not contend, nor did the Court of Appeals find, that the Government had in fact undertaken to do either of these things here. The Court of Appeals simply held that as a matter of law such an undertaking was to be implied from the Government's agreement to recommend a particular sentence. But our view of Rule 11(e) is that it speaks in terms of what the parties in fact agree to, and does not suggest that such implied-in-law terms as were read into this agreement by the Court of Appeals have any place under the Rule.

Benchimol, 471 U.S. at 455.[8] Here, as in *Benchimol*, the plea agreement does not obligate the government to argue on behalf of the recommendation. Accordingly, defendant's argument fails.

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[8] The *Benchimol* Court refers to Rule 11(e). Rule 11 has been amended a number of times since *Benchimol*, see Fed. R. Crim. P. 11, Advisory Committee Notes to 1985, 1987, 1989, 1999, 2002, and 2007 Amendments. This includes at

(continued…)

The two First Circuit cases upon which Fox relies are not to the contrary. In *United States* v. *Saxena*, 229 F.3d 1 (1st Cir. 2000), which Fox cites for the proposition that the government's "obligation requires more than lip service on a prosecutor's part," 229 F.3d at 6; (Br. 19), the court of appeals ultimately concluded that the government did *not* breach the agreement. *Saxena*, 229 F.3d at 7-8. *United States* v. *Canada*, 960 F.2d 263 (1st Cir. 1992), in which the court of appeals held that the government did not fulfill its obligations under the plea agreement, is easily distinguished. The government had agreed to recommend 36 months' imprisonment, but failed to do so. *Id.* at 268. That clearly distinguishes it from this case, where the government fulfilled its obligation by recommending a 10-year sentence.

As relevant here, the panels in both First Circuit cases recognized that, under *Benchimol*, the government is not required to argue enthusiastically in support of its recommendation. See *Saxena*, 229 F.3d at 6 (citing *Benchimol*, 471 U.S. at 455-456) (noting that "[t]here are * * * limits to what a defendant reasonably may expect"); *Canada*, 960 F.2d 270 (citing *Benchimol*, 471 U.S. at 455-456) (noting

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(…continued)
least one reorganization. See Advisory Committee Notes to 2002 Amendments. Nevertheless, this Court recently cited *Benchimol* for the proposition that "[t]he government is not required to support enthusiastically an agreed-upon recommendation." *United States* v. *Mason*, No. 09-1287, 2010 WL 5135372, at *7 (6th Cir. Dec. 15, 2010) (unpublished).

that "a prosecutor normally need not present promised recommendations to the court with any particular degree of enthusiasm").

Moreover, even if such an obligation were found to exist, Fox has not established a breach by the government. Indeed, his argument is logically inconsistent; he faults the government for offering the reasoning behind its decision to make the recommendation, while also claiming that the government should have argued more strenuously in support of the recommendation. Yet he never explains what else, if anything, the government could have said to the district court in support of the recommendation.

It bears noting that the government was recommending that the district court sentence a defendant with a substantial criminal history to a statutory minimum term of imprisonment (120 months) that amounted to only one-third of the low end of the applicable guideline range (360 months to life). From the government's perspective, the fact that Fox pled guilty and spared vulnerable witnesses from having to testify at trial *was* the most compelling justification for this sentencing recommendation. The government certainly did not make such a recommendation based on the personal mitigating factors Fox cited to the district court (see Br. 23) (summarizing mitigating factors presented at sentencing), and was under no obligation to adopt his argument with respect to those factors. Tellingly, Fox's brief, which criticizes the government's approach, does not suggest what else the

government could or should have said consistent with its obligation of candor toward the court that would have resulted in a different – let alone better – outcome for defendant.

Finally, Fox's belated claim that the government breached the plea agreement rings particularly hollow when viewed in light of his former attorney's testimony at the April 5, 2010, hearing regarding Fox's attempt to withdraw his guilty plea. His former attorney stated that he was "relatively confident" that the sentence ultimately imposed in this case would be below the low end of the guidelines. (R. 115, April 5 Tr., p. 76). The reason for counsel's confidence appears to have been as follows:

> [T]here was demonstrable demonstration of a sound policy reason for making this plea agreement, and that is the avoidance of the need for these three, if that's the number, two or three underage girls to be brought into a courtroom to recount these events in some detail, to face cross-examination and to do all that in public in front of the jury, that seemed to me – to avoid that seemed to be a sound policy reason which the court would – in my judgment, I had reasonable confidence would find that to be an appropriate policy reason and to follow the ten years.

(R. 115, April 5 Tr., p. 77).

Thus, the counsel representing Fox at the time of his plea clearly anticipated that the policy basis underlying the government's recommendation would be provided to the court at some point in the sentencing process. When viewed in

light of the fact that the subsequent attorney representing Fox at sentencing did not object to the government's explanation of its rationale, Fox's after-the-fact claim of breach is wholly unconvincing.

III

IF REVIEWABLE, DEFENDANT'S SENTENCE IS REASONABLE

If this Court concludes – as the government argues above – that (1) the district court did not abuse its discretion in denying Fox's motion to withdraw his guilty plea; and (2) the government did not breach the plea agreement, then it should not consider defendant's challenge to his sentence. In the plea agreement, defendant waived his right to challenge any sentence that is below the statutory maximum, absent ineffective assistance of counsel or prosecutorial misconduct. (R. 34, Plea Agreement, pp. 2-3). Thus, if this Court sides with the government on the first two issues raised in this appeal, then it should enforce the waiver and refuse to consider defendant's challenge to his sentence.

A. Standard Of Review

This Court "review[s] a sentence imposed by the district court for reasonableness." *United States* v. *Holcomb*, 625 F.3d 287, 291 (6th Cir. 2010) (citing *Gall* v. *United States*, 552 U.S. 38, 46 (2007)). "The question of whether a sentence is reasonable is determined using the abuse-of-discretion standard of review." *Ibid.* (quoting *United States* v. *Webb*, 616 F.3d 605, 609 (6th Cir. 2010)).

"Review for reasonableness has both procedural and substantive components." *Ibid.* (quoting *Webb*, 616 F.3d at 609).

B. Defendant's Sentence Is Reasonable

Fox argues that his "sentence was unreasonable because the trial court gave an unreasonable amount of weight to the advisory sentencing guidelines range." (Br. 23). As this Court has noted, "the case law offers little guidance as to what an 'unreasonable amount of weight' would be" with regard to a Section 3553(a) factor. *United States* v. *Thomas*, 395 F. App'x 168, 174 (6th Cir. 2010) (unpublished). "If a district court entirely discounted all but one 3553(a) factor, then that court would presumably be giving an unreasonable amount of weight to that factor." *Ibid.* "Where, in contrast, a district court explicitly or implicitly considers and weighs all pertinent factors, a defendant clearly bears a much greater burden in arguing that the court has given an 'unreasonable amount of weight' to any particular one." *Ibid.*

Moreover, any such argument is particularly difficult to assert when the factor allegedly given too much weight is the guideline range itself. See *Thomas*, 395 F. App'x at 174 ("Among the sentencing factors the district court must consider * * * the Guidelines hold a special place: as the Supreme Court emphasized in *Gall*, 'a district court should begin all sentencing proceedings by

correctly calculating the applicable Guidelines range . . . . [t]he Guidelines should be the starting point and the initial benchmark.'") (quoting *Gall*, 552 U.S. at 49).

Fox cites no case law in support of his argument. Nor does he identify any particular statements by the district court that would support this assertion. Rather, Fox simply asserts that "[t]he only explanation for the drastic difference between what was asked for by both the government and the defense and the sentence imposed was that the trial court gave unreasonable weight to the guidelines range over all of the other factors involved in the case." (Br. 23-24). Where, as here, the district court considered the Section 3553(a)(2) factors (see R. 115, June 23 Tr., pp. 33, 45), this is an insufficient basis for a claim of unreasonableness.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE does not exceed the type-volume limitation imposed by Federal Rule of Appellate Procedure 32(a)(7)(B). The brief was prepared using Microsoft Word 2007 and contains no more than 4,952 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

I further certify that the electronic version of this brief, prepared for submission via ECF, has been scanned with the most recent version of Trend Micro Office Scan (version 8.0) and is virus-free.

s/ Dirk C. Phillips
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Date: March 29, 2011

CERTIFICATE OF SERVICE

I hereby certify that on March 29, 2011, the foregoing BRIEF FOR THE UNITED STATES AS APPELLEE was 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 user:

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ADDENDUM

DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

17	Redacted Indictment
34	Plea Agreement
71	Pro Se Motion To Withdraw Guilty Plea
77	February 23, 2009, Transcript
81	Amended Pro Se Motion To Withdraw Guilty Plea
82	Order Denying Withdrawal of Plea
102	Redacted Judgment
104	Notice of Appeal
115	April 5, 2010, Transcript June 23, 2010, Transcript