IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 24-5231

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

RANDALL T. DENNIS,

Defendant-Appellant

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

UNITED STATES' REPLY TO DEFENDANT-APPELLANT'S RESPONSE IN OPPOSITION TO MOTION TO DISMISS APPEAL

INTRODUCTION

Defendant Randall Dennis asks this Court to disregard his appeal waiver, relying on unsound arguments that would allow nearly any defendant to avoid the consequences of a plea agreement. Indeed, Dennis concedes the relevant facts in his opposition—admitting that in district court, he acknowledged that (1) "he reviewed everything and [made] an informed decision regarding his choice to plead guilty," (2) "he reviewed the plea agreement with his lawyer," and (3) that the court explained to him that he "waives the right to appeal the guilty plea,

conviction, and sentence." Response in Opposition (Opp.) 3-4 (citations omitted). That is all the Court needs to conclude that he knowingly and voluntarily waived his right to appeal.

ARGUMENT

None of Dennis's arguments justify disregarding his appeal waiver.

A. Dennis benefited from the plea agreement.

Dennis first argues that the plea agreement is "illusory" because he did not benefit from it. Opp. 7-8. Not so. Most notably, the plea agreement called for a three-level reduction of the Guidelines calculation for his acceptance of responsibility and timely plea. *See* Plea Agreement, R. 10, Page ID## 24-25. Additionally, if Dennis had not pleaded guilty, he could have been charged with additional offenses related to his admission that he falsified a report and lied to investigators (*see id.* at Page ID# 24)—charges that were filed against one of his co-defendants who did not plead guilty. *See United States v. Nantell*, No. 23-cr-12 (E.D. Ky.), Indictment, R. 1, Page ID## 3-4. Indeed, this co-defendant—who did not strike the inmate—received an even higher sentence (84 months) than Dennis (60 months) after being found guilty at trial for failing to intervene, falsifying a report, and lying to investigators. *Nantell* Judgment, R. 56, Page ID## 274-275. But in any event, the Court's role is not to judge "[t]he wisdom of the bargain

struck," but "to enforce the terms of agreements freely and knowingly entered into." *United States v. Grundy*, 844 F.3d 613, 617 (6th Cir. 2016).

B. The plea agreement does not represent a miscarriage of justice.

Dennis also argues that enforcing the plea agreement would amount to a "miscarriage of justice" (Opp. 8-11), but he does not allege the types of extreme circumstances that this Court observed might warrant disregarding an appellate waiver. *See United States v. Mathews*, 534 F. App'x 418, 424 (6th Cir. 2013). Indeed, Dennis received a *below-Guidelines* sentence, which is presumptively reasonable. *See United States v. Greco*, 734 F.3d 441, 450 (6th Cir. 2013). To be sure, Dennis's sentence was higher than some of his co-defendants, but Dennis was also a trusted member of the facility's internal affairs unit who gratuitously initiated an attack on a defenseless prisoner.

C. Any allegations about ineffective assistance of counsel are premature.

This Court need not and should not evaluate Dennis's claims about whether ineffective assistance of counsel caused him to accept the plea agreement (Opp. 11-18), at least not in this direct appeal. The plea agreement specifies that ineffective assistance of counsel may be raised *only* in a collateral attack, which follows this Court's usual practice. *See* Plea Agreement, R. 10, Page ID# 26; *United States v. Wagner*, 382 F.3d 598, 615 (6th Cir. 2004) ("A direct appeal is not generally the best forum for an ineffective assistance of counsel claim."). Put

simply, this direct appeal is not the time to evaluate the many contradictions between Dennis's statements to the district court and his new arguments on appeal.

D. The district court did not nullify the appeal waiver.

Lastly, Dennis argues that the appeal waiver is no longer enforceable because at sentencing the district court provided him with the standard notice about the right to appeal. *See* Opp. 18-19; Fed. R. Crim. P. 32(j)(1)(B) ("After sentencing—regardless of the defendant's plea—the court must advise the defendant of any right to appeal the sentence."). But the district court prefaced this notice by reminding Dennis that he had waived his right to appeal. *See* Sentencing Tr., R. 32, Page ID# 205. So there was no reason for the United States to object.

In any event, this Court has held that a plea agreement's appeal waiver remains enforceable even when a sentencing court tells the defendant that he retains a right to appeal. *See United States v. Fleming*, 239 F.3d 761, 765 (6th Cir. 2001). In *Fleming*, this Court expressly rejected the Ninth Circuit's contrary rule that Dennis relies on (Opp. 18). *Ibid.* (joining "the chorus of criticism" of the Ninth Circuit's rule). As this Court explained, "any pronouncement from the bench that seeks unilaterally to amend a plea agreement exceeds the court's authority under the Criminal Rules and is without effect." *Ibid.*

CONCLUSION

This Court should dismiss the appeal.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This reply complies with the type-volume limit of Federal Rule of Appellate Procedure 27(d)(2)(C) because it contains 785 words. This reply also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365.

s/ Brant S. Levine
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Date: June 11, 2024

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2024, I electronically filed the above reply with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. I certify that participants here who are registered CM/ECF users will receive service by the appellate CM/ECF system.

s/ Brant S. Levine
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