

April 27, 2010

UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

Elisabeth A. Shumaker  
Clerk of Court

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UNITED STATES OF AMERICA,

Plaintiff- Appellee,

v.

DAVID NEAL CLARY,

Defendant- Appellant.

No. 09-7099  
(D.C. No. 6:08-CR-00081-JHP-1)  
(E.D. Okla.)

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**ORDER AND JUDGMENT\***

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Before **LUCERO, MURPHY, and HARTZ**, Circuit Judges.

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Pursuant to a plea agreement, David Neal Clary pleaded guilty to being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). The government has moved to enforce the plea agreement’s appeal waiver. *See United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam). In response, Mr. Clary does not oppose the motion because he

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\* This panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

“concedes that, under the standard announced in . . . *Hahn* . . . , the plea agreement, with its waiver of his right to appeal, is enforceable.” Aplt. Resp. at 1. Although we are not required to address a *Hahn* factor that the defendant does not contest, *see United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005), we have independently confirmed that this appeal is within the scope of Mr. Clary’s appellate waiver, that Mr. Clary knowingly and voluntarily waived his appellate rights, and that enforcing the waiver would not result in a miscarriage of justice. *See Hahn*, 359 F.3d at 1325. To the extent that Mr. Clary wishes to challenge counsel’s effectiveness, such issues generally should be raised in a motion under 28 U.S.C. § 2255. *See Porter*, 405 F.3d at 1144.

The motion to enforce the plea agreement is GRANTED and this appeal is DISMISSED.

ENTERED FOR THE COURT  
PER CURIAM