

FILED

December 12, 2006

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-50109
USDC No. 5:04-CR-181-2

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAINIGAL MOORE,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas

O R D E R:

Jainigal Moore pleaded guilty to one count of aiding and abetting the possession with intent to distribute 500 grams or more of a mixture and substance containing a detectable amount of cocaine. Moore's plea agreement contained a waiver-of-appeal provision. Appointed counsel for Moore has requested leave to withdraw and has filed a brief as required by Anders v. California, 386 U.S. 738 (1967). If, on appeal, the Government does not seek to enforce an appeal waiver, the waiver is not binding. United States v. Story, 439 F.3d 226, 231 (5th Cir. 2006). However, in this case the Government has not had an opportunity to address Moore's appellate waiver.

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"[I]t is defense counsel's obligation to ascertain and certify that the Government would rely on the defendant's appellate waiver before moving to withdraw." United States v. Acquaye, ___ F.3d ___, 2006 WL 1549951 at *2 (5th Cir. June 8, 2006). Accordingly, the motion to withdraw is DENIED without prejudice to its renewal. Moore's counsel is directed to file a new Anders brief stating the Government's position with respect to the waiver or a brief on the merits of this appeal within 30 days of the date of this order. See id.

/s/ W. Eugene Davis
W. EUGENE DAVIS
UNITED STATES CIRCUIT JUDGE