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## Post-Sentencing Appellate Waivers

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## POST-SENTENCING APPELLATE WAIVERS

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Kevin Bennardo\*

*A sentencing appellate waiver is a criminal defendant's promise not to appeal her sentence. These provisions routinely appear in federal defendants' plea agreements. With a few narrow exceptions, a knowing and voluntary sentencing appellate waiver bars a defendant from appealing all issues within the waiver's scope. Using models of judicial behavior and empirical studies, this Article argues that the inclusion of sentencing appellate waivers in plea agreements creates bargaining inefficiencies and removes important incentives from the sentencing process. As a solution, the Article proposes that sentencing appellate waivers should take the form of separate post-sentencing agreements.*

### INTRODUCTION

Since their popular inception approximately twenty years ago, sentencing appellate waivers have become more prevalent than ever in the federal courts. These waivers, executed as part of a defendant's plea agreement, relinquish the defendant's right to appeal her yet-to-be-imposed sentence. This Article argues that the timing of these waivers is problematic. By pre-dating sentencing by months, these waivers are inefficient and skew the incentives of the stakeholders in the sentencing process in troubling ways: the parties cannot accurately value their rights during the bargaining process; district courts know the sentence is virtually unreviewable and therefore lack incentives to observe proper sentencing practices; and the government cannot impose meaningful consequences on a breaching defendant, thereby reducing the likelihood that defendants will adhere to their waiver agreements.

Postponing sentencing appellate waiver agreements until after sentencing would rectify these ills and conserve appellate resources. Under this proposed system, the defendant and the government could negotiate over a separate post-sentencing appellate waiver in exchange for a sentence reduction subject to the approval of the district court.

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Part I of this Article sets forth the mechanics of the current system of plea agreement sentencing appellate waivers. Part II recounts the numerous criticisms of the current appellate waiver system and the federal courts of appeals' refutation of these critiques. Part III uses models of judicial decision-making to hypothesize the likely effect of sentencing appellate waivers on the sentencing process. That Part concludes that a district court's knowledge that a sentencing appellate waiver exists influences sentencing procedures and outcomes. Part IV establishes the mechanics of the proposed post-sentencing appellate waiver system, describes its advantages compared to the current system, and responds to anticipated criticisms. Instead of permitting "a lawless district court"<sup>1</sup> to deviate from proper sentencing practices, the proposed post-sentencing appellate waiver system incentivizes lawfulness while vindicating the parties' freedom to engage in self-interested bargaining.

### I. MECHANICS OF SENTENCING APPELLATE WAIVERS

Appellate waiver provisions rose to popularity in the 1990s<sup>2</sup> and are today common components of plea agreements in many federal districts.<sup>3</sup> The garden-variety appellate waiver is a provision in a defendant's plea agreement that waives the defendant's right to appeal her conviction, her sentence, or both.<sup>4</sup> The parties are free to customize these waivers on a case-by-case basis, and, as a result, the waivers vary widely in scope from broad blanket waivers of "all"

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1. Memorandum from Acting Ass't Att'y Gen. John C. Keeney for all United States Attorneys (Oct. 4, 1995), reprinted in 10 FED. SENT'G REP. 209, 210 (1998).

2. Noted reasons for the rise of appellate waivers include (1) the high number of sentencing appeals in the wake of the Sentencing Reform Act of 1984, (2) the federal appellate courts' positive reception of appellate waivers, and (3) the above-cited Keeney memorandum advising federal prosecutors to consider including appellate waivers in plea agreements. Catharine M. Goodwin, *Summary: 1996 Committee on Criminal Law Memo on Waivers of Appeal and Advise ment of the Rights to Appeal*, 10 FED. SENT'G REP. 212, 212 (1998); see also Memorandum from Acting Ass't Att'y Gen. John C. Keeney for all United States Attorneys, *supra* note 1, at 210 (urging that "the use of these waivers in appropriate cases can be helpful in reducing the burden of appellate and collateral litigation involving sentencing issues.").

3. An empirical study of 971 federal plea agreements in 2003 found that almost two-thirds contained an appellate waiver provision. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005); see also Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 211 (1995) (labeling appellate waivers "a dominant feature of the plea bargaining landscape").

4. An empirical study found that a little less than two-thirds of appellate waivers include the right to appeal both the sentence and conviction, while a little more than one third barred review of the sentence only. King & O'Neill, *supra* note 3, at 242-43. Pressure to waive appellate rights is reportedly most intense in the area of sentencing appeals. See Calhoun, *supra* note 3, at 135.

appellate rights to individually-tailored waivers in which the defendant retains the right to appeal specified aspects of the sentence under particular conditions.<sup>5</sup>

The plea-bargaining and guilty-plea processes predate the sentencing hearing by weeks if not months. At the plea hearing, also known as the “Rule 11 hearing,” the parties are required to disclose to the district court that a plea agreement exists.<sup>6</sup> Federal plea agreements may take one of three forms: (1) binding on the government to dismiss or forego charges, (2) binding on the government to recommend (or not oppose) a particular sentence or calculation under the U.S. Sentencing Guidelines, and (3) binding on the court to impose a particular sentence or reach a particular calculation under the U.S. Sentencing Guidelines.<sup>7</sup> Under the first type, the district court is free to accept or reject the plea agreement, and the defendant can withdraw her guilty plea if the government does not uphold its end of the bargain.<sup>8</sup> Under the second type, the defendant is again free to withdraw the plea if the

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5. Roger W. Haines, Jr., *Waiver of the Right to Appeal Under the Federal Sentencing Guidelines*, 3 FED. SENT'G REP. 227, 229 (1991) (describing various limitations the parties could elect to put on the waiver, such as “retaining the right to appeal if the court departs upward, or if the court refuses to give credit for acceptance of responsibility”); Kevin Bennardo, *A Frank Look at Appellate Waiver in the Seventh Circuit*, 36 S. ILL. U. L.J. 531, 531–32, 532 n.4 (2012) (listing examples of restrictive waivers); see Goodwin, *supra* note 2, at 212–13 (providing examples of “relatively narrow” waivers, “such as where a defendant waives the right to appeal only if he or she receives a sentence within the range which both parties agree is appropriate”); see also King & O’Neill, *supra* note 3, at 244 (finding that only twenty-one percent of appellate waivers place no limitations on the waiver, while the most common limitations are the retention of the right to appeal an upward departure from the Guidelines range (36.5% of waivers), a sentence above the statutory maximum (28.9%), ineffective assistance of counsel (28.6%), and a sentence above a specified range (22.8%)). Companion provisions to an appellate waiver may include waivers of the defendant’s right to collaterally attack her conviction or sentence through habeas corpus or the right to move for a later reduction of sentence pursuant to 18 U.S.C. § 3582(c) (2012). In the same study noted above, almost eighty percent of the defendants who had waived the right to appeal had also waived collateral review. King & O’Neill, *supra* note 3, at 242–43. The federal appellate courts have similarly held collateral attack waivers enforceable. See, e.g., *DeRoo v. United States*, 223 F.3d 919, 923 (8th Cir. 2000) (“As a general rule, we see no reason to distinguish the enforceability of a waiver of direct-appeal rights from a waiver of collateral-attack rights in the plea agreement context.”). A pleading defendant may also waive the right to seek relief through a section 3582(c) motion, which seeks a reduction of sentence based on the reduction of a sentencing range under the U.S. Sentencing Guidelines Manual. See *United States v. Gordon*, 480 F.3d 1205, 1208 (10th Cir. 2007) (plea agreement contained an explicit waiver of right to move for a sentence reduction under section 3582(c)); cf. *United States v. Monroe*, 580 F.3d 552, 558–59 (7th Cir. 2009) (without a specific provision addressing section 3582(c), appellate and collateral attack waivers did not bar motion under section 3582(c)); *United States v. Chavez-Salais*, 337 F.3d 1170, 1173 (10th Cir. 2003).

6. FED. R. CRIM. P. 11(c)(2).

7. See FED. R. CRIM. P. 11(c)(1).

8. FED. R. CRIM. P. 11(c)(1)(A), (3)(A), (4), (5).

government breaches by failing to make the agreed-upon recommendation. The court is, however, free to ignore the recommendation, and the defendant may not withdraw her guilty plea merely because the court imposed a harsher punishment than was recommended.<sup>9</sup> Under the third type, known as a “C” plea because of its home in subpart C of Rule 11, the district court is bound to adhere to the parties’ recommendation if it accepts the plea agreement.<sup>10</sup> The defendant is free to withdraw her plea if the district court rejects the plea agreement.<sup>11</sup>

At the plea hearing, the district court must ensure that the defendant understands the host of rights that she is foregoing by pleading guilty, a process known as the plea colloquy.<sup>12</sup> If the plea agreement contains an appellate waiver provision, the district court must specifically question the defendant about the appellate waiver during the plea colloquy.<sup>13</sup> Only upon finding that the defendant is entering her guilty plea knowingly and voluntarily may the district court accept the defendant’s guilty plea.<sup>14</sup>

District courts are not bound to accept any plea agreements. Thus, district court judges are free to categorically reject plea agreements that contain appellate waiver provisions.<sup>15</sup> Moreover, district courts may reject appellate waiver provisions in specific cases if either the defendant fails to understand the significance of the

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9. FED. R. CRIM. P. 11(c)(1)(B), (3)(B).

10. FED. R. CRIM. P. 11(c)(1)(C), (3)(A), (4).

11. FED. R. CRIM. P. 11(c)(5), (d)(2).

12. FED. R. CRIM. P. 11(b)(1).

13. FED. R. CRIM. P. 11(b)(1)(N).

14. FED. R. CRIM. P. 11(b)(2). The court must also determine the existence of a factual basis for the guilty plea, but that determination need only precede the entry of judgment. FED. R. CRIM. P. 11(b)(3).

15. See Douglas A. Berman, *Windows into Sentencing Policy and Practice: The Crack/Cocaine Ratio and Appeal Waivers*, 10 FED. SENT’G REP. 179, 181 (1998); see also FED. R. CRIM. P. 11(c) (granting district courts the authority to reject plea agreements). Judges Greene and Friedman of the District Court for the District of Columbia categorically refused to accept plea agreements containing waivers of the right to appeal unknown and yet-to-be-imposed sentences. See, e.g., *United States v. Johnson*, 992 F. Supp. 437, 438–40 (D.D.C. 1997); *United States v. Raynor*, 989 F. Supp. 43, 48–49 (D.D.C. 1997). In the District of Massachusetts, Judge Gertner found appellate waivers unacceptably violative of public policy. *United States v. Perez*, 46 F. Supp. 2d 59, 64–72 (D. Mass. 1999). Although the Fifth Circuit held appellate waivers enforceable, it explicitly noted that “there may be sound policy reasons for refusing to accept such waivers, and that district courts might disagree with the policy choice made by the court in this case to accept a plea agreement appeal waiver.” *United States v. Melancon*, 972 F.2d 566, 568 (5th Cir. 1992).

provision<sup>16</sup> or the district court believes that the provision does not serve the interests of justice.<sup>17</sup>

After a defendant enters a guilty plea, a probation officer creates a presentence investigation report.<sup>18</sup> This report contains a calculation of the defendant's advisory sentencing range from the U.S. Sentencing Guidelines Manual.<sup>19</sup> The defendant can object to information contained in the presentence investigation report, including the probation officer's Guidelines calculation.<sup>20</sup> At the sentencing hearing, the district court must resolve any disputes regarding the presentence investigation report<sup>21</sup> and calculate the defendant's advisory Guidelines range of imprisonment on the record.<sup>22</sup> The court may receive evidence and witness testimony at the sentencing hearing,<sup>23</sup> and the resulting factual determinations may bear heavily on the Guidelines calculation.<sup>24</sup> Although the district court is not bound to impose a sentence within the Guidelines range,<sup>25</sup> a sentence within the Guidelines range receives a presumption of reasonableness on appeal in the majority of circuits.<sup>26</sup> The district court often enters judgment on the same day as sentencing. A defendant has fourteen days following the entry of judgment to file a notice of appeal.<sup>27</sup>

The federal courts of appeals have uniformly held that appellate waiver provisions are enforceable,<sup>28</sup> including waiver of the right to

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16. *See, e.g.*, *United States v. Soon Dong Han*, 181 F. Supp. 2d 1039, 1045 (N.D. Cal. 2002) (finding the specific defendant's waiver was not knowing and voluntary).

17. *See, e.g.*, *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*5–6 (D. Colo. June 28, 2012) (rejecting plea agreement because the court found that the defendant's circumstances did not justify the appellate waiver provision contained therein).

18. FED. R. CRIM. P. 32(c), (d).

19. *See* FED. R. CRIM. P. 32(d)(1).

20. *See* FED. R. CRIM. P. 32(f).

21. FED. R. CRIM. P. 32(i)(3).

22. 18 U.S.C. § 3553(a)(4) (2012); *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[A] district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”).

23. FED. R. CRIM. P. 32(i)(2).

24. Many Guidelines calculations turn on factual findings, such as the degree of bodily injury the victim suffered, the dollar amount of the victim's loss, or whether a firearm was discharged, brandished, possessed, or otherwise used in the course of the offense. *E.g.*, U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(b)(2), (3), (7) (2013) (robbery offense guideline).

25. The Guidelines were downgraded to “advisory” status in *United States v. Booker*, 543 U.S. 220, 245 (2005).

26. *See United States v. Carty*, 520 F.3d 984, 993–94 & n.9 (9th Cir. 2008) (listing cases of other circuits but declining to adopt such a presumption of reasonableness); *see also Rita v. United States*, 551 U.S. 338, 347 (2007) (permitting the federal courts of appeal to apply a presumption of reasonableness to a sentence within a properly-calculated Guidelines range).

27. FED. R. APP. P. 4(b)(1)(A).

28. *See, e.g.*, *United States v. Guillen*, 561 F.3d 527, 529–31 (D.C. Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1318, 1324–28 (10th Cir. 2004) (en banc) (per curiam); *United States v. Andis*, 333 F.3d 886, 889–92 (8th Cir. 2003) (en banc); *United States v.*

appeal sentencing error.<sup>29</sup> Because an appellate waiver only precludes a defendant from appealing issues that fall within the scope of the waiver,<sup>30</sup> a defendant does not violate an appellate waiver agreement until she files an opening brief raising a waived issue as the basis for her appeal. Although the mechanics vary by circuit, a common system of appellate waiver enforcement requires a government motion to dismiss the defendant's appeal once the defendant-appellant files her opening brief.<sup>31</sup> After permitting the defendant-appellant to respond to the motion, the appellate court will generally rule on the motion to dismiss before requiring the government to file a response to the defendant's appellate brief.<sup>32</sup>

Appellate waivers are generally enforced as long as the appealed issue is within the scope of the waiver and the defendant entered

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Teeter, 257 F.3d 14, 21–23 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 560–62 (3d Cir. 2001); *United States v. Schmidt*, 47 F.3d 188, 190–92 (7th Cir. 1995); *United States v. Ashe*, 47 F.3d 770, 775–76 (6th Cir. 1995); *United States v. Yemitan*, 70 F.3d 746, 747–48 (2d Cir. 1995); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51, 52–53 (4th Cir. 1990); *United States v. Navarro-Botello*, 912 F.2d 318, 321–22 (9th Cir. 1990).

29. See Calhoun, *supra* note 3, at 143 (describing the federal courts' approach to sentencing appellate waivers as "very expansive").

30. Matters that fall outside of the scope of an appellate waiver are not waived. See, e.g., *United States v. Corso*, 549 F.3d 921, 927 (3d Cir. 2008). Courts construe appellate waivers narrowly and resolve any ambiguities "in favor of a defendant's appellate rights." *Andis*, 333 F.3d at 890 (8th Cir. 2003); see also *Khattak*, 273 F.3d at 562 ("[W]aivers of appeals should be strictly construed."); *Hahn*, 359 F.3d at 1325; *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996). But see *United States v. Quintero*, 618 F.3d 746, 750 (7th Cir. 2010) ("[W]e will enforce a waiver only if the disputed appeal falls within the *general ambit* of the waiver.") (emphasis added).

31. For example, the Sixth Circuit "strongly encourage[s] the government to promptly file a motion to dismiss the defendant's appeal where the defendant waived his appellate rights as part of a plea agreement." *United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005). Other circuits have established similar procedures. See, e.g., *Hahn*, 359 F.3d at 1328 (evaluating appellate waiver enforcement before the filing of substantive briefs); *United States v. Marin*, 961 F.2d 493, 494 (4th Cir. 1992) (granting the government's motion to dismiss the appeal on the basis of an appellate waiver).

32. Rather than entering an order of dismissal, some appellate courts take the more questionable step of affirming the district court's judgment when enforcing an appellate waiver. E.g., *Khattak*, 273 F.3d at 563 (enforcing appellate waiver and affirming on basis of lack of jurisdiction); *Navarro-Botello*, 912 F.2d at 319.

The *sua sponte* enforcement of appellate waivers on the court's own initiative is a similarly questionable practice because appellate waivers are not properly regarded as jurisdictional. But see *Schmidt*, 47 F.3d at 190 (dismissing appeal on the basis of appellate waiver even though the government did not seek enforcement of the waiver). Some courts improperly consider appellate waivers as jurisdictional. E.g., *Khattak*, 273 F.3d at 563 (stating that enforcement of defendant's appellate waiver deprived the court of "jurisdiction to consider the merits of his appeal"). But see *Schmidt*, 47 F.3d at 194 (Ripple, J., dissenting) ("It is not our task to insist on a bargain that the government, the only party which might benefit from it, does not want to enforce."); *Nunez v. United States*, 546 F.3d 450, 452 (7th Cir. 2008) ("[T]he United States, as the waiver's beneficiary, may freely give up its protection."); *Hahn*, 359 F.3d at 1320–24 (asserting jurisdiction despite a valid appellate waiver).

into the waiver knowingly and voluntarily. The federal appellate courts have, however, carved out narrow exceptions to the operation of appellate waivers. Notwithstanding a valid appellate waiver, the appellate courts will entertain an appeal on the grounds that the defendant was sentenced in excess of the statutory maximum<sup>33</sup> or based on an impermissible factor, such as race.<sup>34</sup> Additionally, some circuits will refuse to enforce an appellate waiver if enforcing the waiver would constitute a “miscarriage of justice.”<sup>35</sup> The Fourth Circuit declined to enforce an otherwise valid appellate waiver

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33. See, e.g., *United States v. Gibson*, 356 F.3d 761, 765 (7th Cir. 2004); *Teeter*, 257 F.3d at 25 n.10; *Marin*, 961 F.2d at 496. Further, a sentence below the statutory minimum can provide for an appeal despite a valid appellate waiver. Cf. *United States v. Cieslowski*, 410 F.3d 353, 363 (7th Cir. 2005) (noting that an agreed-upon sentence “must comply with the maximum (and minimum, if there is one) provided by the statute of conviction”); *Andis*, 333 F.3d at 891–92 (describing illegal sentences as those that fall outside the statutory limits).

34. See, e.g., *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); see also Goodwin, *supra* note 2, at 212 (“[C]ertain issues are never waived, such as sentences which are plainly illegal because they . . . [are] based on a factor such as race, gender or religion.”) (internal footnotes omitted).

35. *Teeter*, 257 F.3d at 25–26 (stating that what constitutes a miscarriage of justice “is more a concept than a constant” and identifying non-exclusive factors: “the clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.”); *Khattak*, 273 F.3d at 563 (adopting the *Teeter* factors); cf. *Andis*, 333 F.3d at 891 (cautioning that the miscarriage of justice exception is a “narrow one” and listing non-exhaustive examples such as a sentence that exceeds the statutory maximum or fails to comply with the plea agreement); *Hahn*, 359 F.3d at 1327 (limiting the miscarriage of justice exception to: (1) a sentence imposed on account of an impermissible factor such as race, (2) ineffective assistance of counsel in connection with the negotiation of the waiver, (3) a sentence that exceeds the statutory maximum, or (4) a waiver that is otherwise unlawful such that the error seriously affects the fairness, integrity, or public reputation of judicial proceedings).

Courts and scholars have critiqued the miscarriage of justice exception for its vagueness and inconsistent administration. See *Andis*, 333 F.3d at 895–96 (Arnold, J., concurring) (stating that the difficulty of applying the vague miscarriage of justice exception on a case by case basis creates inefficiencies that undermine the purpose of appellate waivers); *Hahn*, 359 F.3d at 1344 n.9 (Murphy, J., dissenting) (criticizing the miscarriage of justice exception because its vagueness encourages defendants with appellate waivers to appeal and discourages the government from entering into appellate waiver agreements); Kristine Malmgren Yeater, Note, *Third Circuit Appellate Waivers: The Mysterious Miscarriage of Justice Standard*, 1 DUQ. CRIM. L.J. 94, 94, 103 (2010) (criticizing the Third Circuit’s application of the miscarriage of justice exception as ill-defined and inconsistent); Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 728 (2005) (labeling the miscarriage of justice exception “unworkable, unpredictable, and unfair to defendants and prosecutors”). One troubling formulation is the D.C. Circuit’s statement that a miscarriage of justice occurs “[i]f, for example, the district court utterly fails to advert to the factors in 18 U.S.C. § 3553(a).” *Guillen*, 561 F.3d at 531. This broad formulation devalues appellate waivers. Defendants often allege that the district court failed to adhere to the statutory sentencing factors of subsection 3553(a). Resolution of this issue would require the appellate court to fully consider the sentencing record to determine whether a miscarriage of justice occurred, thereby nullifying the resource-saving benefit of the appellate waiver.

where the defendant claimed a denial of the right to assistance of counsel at sentencing.<sup>36</sup> Other circuits have not been so charitable and have routinely found that appellate waivers bar a later claim of ineffective assistance of counsel at sentencing.<sup>37</sup> Appellate claims of other constitutional violations—such as violation of the Eighth Amendment’s prohibition against cruel and unusual punishment or the Fifth Amendment’s double jeopardy clause—are not recognized as exceptions to appellate waivers.<sup>38</sup>

The defendant can always appeal issues concerning the validity of the plea agreement or of the waiver itself because such issues relate to the knowing and voluntary nature of the agreement.<sup>39</sup> For example, the waiver agreement cannot relinquish a claim that the plea agreement itself was the product of ineffective assistance of counsel because, if the claim is successful, the plea agreement—including the waiver—is itself invalid.<sup>40</sup> Likewise, an appellate waiver does not preclude a claim that the sentence imposed violated the terms of the plea agreement<sup>41</sup> or that the government breached its obligations under the plea agreement.<sup>42</sup> These matters are not exceptions to the waiver but rather are considerations bearing on a waiver’s effectiveness. Thus, unless an exception or a

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36. *United States v. Attar*, 38 F.3d 727, 732–33 (4th Cir. 1994) (holding that an appellate waiver did not preclude challenge to the sentence where the district court permitted the defense attorney to withdraw at the beginning of the sentencing hearing and defendant proceeded *pro se*).

37. *See, e.g., United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002) (“[A]n ineffective assistance of counsel argument survives a waiver of appeal only when the claimed assistance directly affected the validity of that waiver or the plea itself.”); *Mason v. United States*, 211 F.3d 1065, 1069 (7th Cir. 2000); *United States v. Djelevic*, 161 F.3d 104, 107 (2d Cir. 1998) (*per curiam*) (“emphatically reject[ing]” the defendant’s contention that claims of ineffective assistance of counsel relating to sentencing cannot be waived).

38. *United States v. Davey*, 550 F.3d 653, 658 (7th Cir. 2008) (“We see no reservation in that waiver for constitutional arguments.”); *see also King & O’Neill, supra* note 3, at 249 & n.131 (finding cases in ten circuits enforcing appellate waivers against defendants’ claims that their sentences violated their Fifth and Sixth Amendment rights).

39. *See Calhoun, supra* note 3, at 140–41; Kevin Bennardo, *supra* note 5, at 534–35, 535 n.14 (listing Seventh Circuit cases).

40. *See, e.g., Guillen*, 561 F.3d at 530 (“[B]ecause the defendant’s attorney failed to ensure the defendant understood the consequences of his waiver, the waiver was not knowing, intelligent, and voluntary.”).

41. *See, e.g., United States v. Teeter*, 257 F.3d 14, 25 n.10 (1st Cir. 2001); *United States v. Michelsen*, 141 F.3d 867, 872 & n.3 (8th Cir. 1998); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990).

42. *See, e.g., United States v. Gonzalez*, 16 F.3d 985, 990 (9th Cir. 1993) (“By opposing the acceptance of responsibility adjustment, the government by its breach of the agreement released [the defendant] from his promise in paragraph 11 not to appeal.”); *United States v. Schwartz*, 511 F.3d 403, 405 (3d Cir. 2008). *But see Bennardo, supra* note 5, at 541–44 (noting inconsistent precedent in the Seventh Circuit regarding the effect of the government’s breach of the plea agreement on a defendant’s appellate waiver).

meritorious claim of invalidity exists, a knowing and voluntary appellate waiver will bar the appellate court from considering any claims within its scope.<sup>43</sup>

## II. PREVIOUS CRITIQUES AND JUSTIFICATIONS OF SENTENCING APPELLATE WAIVERS

In upholding the enforceability of appellate waivers, numerous courts have pointed to the statutory origin of criminal defendants' appellate rights.<sup>44</sup> Criminal defendants possessed no right to appeal in the federal system until the end of the nineteenth century.<sup>45</sup> The right to meaningful appellate review of sentencing extends back only as far as the Sentencing Reform Act of 1984.<sup>46</sup> According to these courts, if a defendant can waive constitutional rights such as the right to a jury trial, she can surely waive a statutory right such as the right to appeal. This syllogism is demonstrably flawed: an individual's ability to waive a right does not depend on whether the right's origins are constitutional or statutory.<sup>47</sup> Effective waivers of

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43. Although the government is capable of waiving its appellate rights along with the defendant, no mutuality of waiver is generally required. See King & O'Neill, *supra* note 3, at 255–56 (reporting that both the defendant and the government waive appeal in only 12.5% of appellate waiver cases). *But see* United States v. Guevara, 941 F.2d 1299, 1299–1300 (4th Cir. 1991) (interpreting a defendant's appellate waiver to implicitly bar the government from appealing).

Scholars have criticized non-mutual appellate waivers. See D. Randall Johnson, *Giving Trial Judges the Final Word: Waiving the Right to Appeal Sentences Imposed Under the Sentencing Reform Act*, 71 NEB. L. REV. 694, 723–24 (1992) (advocating that appellate waivers should be explicitly mutual to be enforceable). A significant drawback of requiring mutuality of appellate waivers is that it forces the defendant to accept the government's appellate waiver as part (or all) of the consideration received in exchange for the defendant's appellate waiver. The defendant may value some other concession by the government more highly, and imposing a mutuality requirement on appellate waivers would diminish the value of a defendant's right to appeal as a bargaining chip.

44. See, e.g., *Teeter*, 257 F.3d at 22 (“Since the Supreme Court repeatedly has ruled that a defendant may waive constitutional rights as part of a plea agreement, it follows logically that a defendant ought to be able to waive rights that are purely creatures of statute.”) (internal citation omitted); United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992) (finding that because a defendant may waive constitutional rights in a plea bargain, “[i]t follows that a defendant may also waive statutory rights, including the right to appeal.”); United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990) (“[I]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.”) (internal quotation marks and citation omitted).

45. See *Carroll v. United States*, 354 U.S. 394, 400 & n.9 (1957) (providing a historical account of the right to appeal in federal criminal cases).

46. See Johnson, *supra* note 43, at 695 n.1.

47. *Melancon*, 972 F.2d at 570 (Parker, J., concurring) (deriding this “faulty syllogism”); United States v. Perez, 46 F. Supp. 2d 59, 65–67 (D. Mass. 1999) (“[S]ince not all rights are

statutory rights must be knowing and voluntary, cannot violate public policy, and must comply with due process. The federal appellate courts have rejected challenges to appellate waivers on all three of these grounds. These challenges, as well as the accepted rebuttals to these challenges, are set forth below.

### A. *Knowing and Voluntary Waiver*

The federal appellate courts have held that criminal defendants can knowingly and voluntarily waive their prospective sentencing appellate rights.<sup>48</sup> In the wake of these rulings, modern defendants are left to argue on a case-by-case basis that their individual appellate waivers were uninformed or coerced.

#### 1. Per Se Challenges to Knowledge and Voluntariness

Some courts and commentators have maintained that a waiver of a defendant's right to appeal her sentence is inherently uninformed because the sentence has yet to be imposed or calculated.<sup>49</sup> A central part of this argument is that a knowing waiver must be

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waivable, the syllogism falls short in failing to distinguish, in some principled and contextually sensitive way, between those waivers which are acceptable, and those which are not."); *see also* Johnson, *supra* note 43, at 706 (noting, in due process analysis, that the statutory nature of the right to appeal "has, at most, marginal relevance to whether or not a per se rule of involuntariness is justified with respect to waiver of that right."); Gregory M. Dyer & Brendan Judge, Note, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 661–63 (1990).

Some individual rights are inherently unwaivable despite their non-constitutional provenance. *See, e.g.*, *United States v. Olano*, 507 U.S. 725, 742 (1993) (Kennedy, J., concurring) (suggesting that a defendant is unable to waive the operation of the federal rule provision that disallows the presence of alternate jurors in the jury room during deliberations); *United States v. Greatwalker*, 285 F.3d 727, 730 (8th Cir. 2002) (holding that parties cannot waive statutory limits on sentencing "[e]ven when a defendant, prosecutor, and court agree").

48. *See, e.g.*, *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc) (per curiam); *United States v. Woolley*, 123 F.3d 627, 632 (7th Cir. 1997); *Melancon*, 972 F.2d at 567; *see also* Ginger K. Gooch, Note, *The Message to Criminal Defendants—Waive at Your Own Risk: The Eighth Circuit Enforces Waivers of Appellate Rights*, 64 MO. L. REV. 459, 464 & n.37 (1999).

49. *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) ("Such a waiver is by definition uninformed and unintelligent and cannot be voluntary and knowing."); *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997); *Melancon*, 972 F.2d at 571 (Parker, J., concurring); Calhoun, *supra* note 3, at 205 ("There is simply no way the accused can be viewed as knowing what he is giving up as a part of his waiver because it has not been determined at the time the plea is entered . . . waivers of this sort simply cannot withstand scrutiny."); Lynn Fant & Ronit Walker, *Reflections on a Hobson's Choice: Appellate Waivers and Sentencing Guidelines*, 11 FED. SENT'G REP. 60, 61 (1998).

grounded in a high level of outcome certainty. For example, a defendant who pleads guilty and waives her right to a jury trial is certain that she will be convicted of a particular count.<sup>50</sup> A defendant entering into a sentencing appellate waiver is situated differently: “she is freed of none of the uncertainties that surround the sentencing process in exchange for giving up the right to later challenge a possibly erroneous application or interpretation of the Sentencing Guidelines or a sentencing statute.”<sup>51</sup>

As a proposed remedy, commentators have suggested that courts should only regard sentencing appellate waivers as “knowing” when the defendant’s guilty plea is conditioned on the imposition of a specific sentence and when the defendant actually receives that sentence.<sup>52</sup> Under the federal rules, “C” pleas permit the parties to submit a plea agreement to the district court with a binding sentencing recommendation that requires the court either to accept the agreement along with the sentencing recommendation or to refuse it completely.<sup>53</sup> According to some appellate waiver critics, precise foreknowledge of the impending sentence negates the otherwise unknowing nature of the sentencing appellate waiver.<sup>54</sup> Others have suggested that binding a district court to an exact sentence is not necessary, but rather that defendant’s appellate waiver

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50. See *Melancon*, 972 F.2d at 572 (Parker, J., concurring) (“While one cannot fully know the consequences of confessing or pleading guilty, one does know what is being yielded up at the time he or she yields it.”).

51. *Raynor*, 989 F. Supp. at 44; see also *Melancon*, 972 F.2d at 572 (Parker, J., concurring) (“This right [to appeal sentencing error] cannot come into existence until after the judge pronounces sentence; it is only then that the defendant knows what errors the district court has made—i.e., what errors exist to be appealed, or waived.”).

52. *Raynor*, 989 F. Supp. at 47–48; Jesse Davis, Note, *Texas Law Rides to the Rescue: A Lone Star Solution for Dubious Federal Presentence Appeal Waivers*, 63 BAYLOR L. REV. 250, 267 (2011); Calhoun, *supra* note 3, at 206 (“When the defendant gets precisely what is bargained for it offends our basic notions of fairness to allow that same defendant to try to improve upon the deal by means of an appeal.”); Comment, *Second Circuit Upholds Plea Provision that Waives Appeal Without Fixed Sentence Range*, 111 HARV. L. REV. 1116, 1119 (1998); David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1044–45 (1999).

53. FED. R. CRIM. P. 11(c)(1)(C). These so-called “C” pleas are discussed more in depth at text accompanying note 10, *supra*. Empirical research has shown that plea agreements containing appellate waiver provisions are more likely to limit the court’s sentencing options in some way. See King & O’Neill, *supra* note 3, at 239–42; see also *id.* at 251 n.135 (describing one federal public defender’s policy of only entering into a plea agreement containing an appellate waiver provision if it was a Rule 11(c)(1)(C) plea).

54. See, e.g., *Raynor*, 989 F. Supp. at 47–48; Davis, *supra* note 52, at 267; Carney, *supra* note 52, at 1044–45.

is sufficiently knowing as long as the defendant is permitted to appeal a sentence outside of some predetermined range, such as a maximum cap on the term of incarceration.<sup>55</sup>

Courts have rejected this argument, holding that a defendant can knowingly waive her right to appeal her sentence despite the fact that the sentencing hearing has not yet occurred.<sup>56</sup> Although a defendant is ignorant of the outcome of the sentencing hearing at the time of the waiver, she is aware of the nature of the right she is waiving.<sup>57</sup> The waiver inquiry focuses on the defendant's understanding of the appellate right that she is waiving, not her knowledge of the sentencing proceeding's outcome.<sup>58</sup> Thus, courts enforce sentencing appellate waivers as long as the defendant understands the nature of the waiver.<sup>59</sup>

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55. For example, Judge Charles Roberts Breyer has proposed limiting appellate waivers in scope to permit the defendant to appeal a sentence above a specified upper limit. *United States v. Soon Dong Han*, 181 F. Supp. 2d 1039, 1044–45 (N.D. Cal. 2002). It is unclear how limited of a ceiling is necessary to satisfy this recommendation because appellate waivers are already not enforceable against claims that the punishment exceeded the statutory maximum. *See supra* note 33. For one commentator's view, see Calhoun, *supra* note 3, at 209–11. Even assuming that commentators could agree upon a precise enough ceiling on a defendant's imprisonment to render the appellate waiver knowing with respect to the term of incarceration, it remains unclear whether similar issues of lack of knowledge would arise with respect to the noncustodial portion of the sentence, such as the terms of the defendant's supervised release.

56. *See United States v. Hahn*, 359 F.3d 1315, 1326–27 (10th Cir. 2004) (en banc) (per curiam); *United States v. Teeter*, 257 F.3d 14, 21–23 (1st Cir. 2001); *Melancon*, 972 F.2d at 567–68; *United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990); *see also* Calhoun, *supra* note 3, at 202 n.461 (listing cases).

57. *See Haines, Jr.*, *supra* note 5, at 229 (comparing the waiver of the right to appeal a future sentence to the decision to plead guilty under the previously indeterminate sentencing regime); *see also United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009) (“An anticipatory waiver—that is, one made before the defendant knows what the sentence will be—is nonetheless a knowing waiver if the defendant is aware of and understands the risks involved in his decision.”); *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001) (“Waivers of the legal consequences of unknown future events are commonplace.”); *Melancon*, 972 F.2d at 567–68; *United States v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992); *Navarro-Botello*, 912 F.2d at 320.

58. The choice to plead guilty always involves a calculated risk; appellate waivers are but one dimension of this calculation:

By signing a waiver, defendants gamble that the deals they have negotiated are better than the dispositions they might ultimately receive if they preserved their right to review. Some win this bet, others do not. . . . We simply do not know what proportion of defendants end up worse off because of their waivers.

King & O'Neill, *supra* note 3, at 250.

59. A 1999 amendment to the Federal Rules of Criminal Procedure that required district courts to discuss any applicable appellate waiver with the defendant during the plea colloquy bolstered this interpretation. *See* FED. R. CRIM. P. 11(b)(1)(N). Although the rules advisory committee explicitly stated that it took “no position on the underlying validity” of appellate waivers, FED. R. CRIM. P. 11 advisory committee's notes (referring to the 1999

Others argue that appellate waivers are inherently involuntary or coercive because of the unequal balance of power between the government and the defendant in a criminal prosecution.<sup>60</sup> Rather than viewing appellate waivers as additional bargaining chips in the defendant's arsenal,<sup>61</sup> these commentators complain that the government extracts appellate waivers as the proverbial ante to participate in plea negotiations and that it offers no consideration in exchange for the waivers.<sup>62</sup> Some have gone so far as to label appellate waivers "one-sided contract[s] of adhesion."<sup>63</sup>

The Supreme Court has repeatedly rejected arguments based on the coerciveness of the plea-bargaining process.<sup>64</sup> Because defendants have no right to a plea agreement, the government is free to

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Amendments), the rule amendment solidified appellate waivers as an established component of plea agreements and plea colloquies.

60. See Calhoun, *supra* note 3, at 153–59 (calling for a reevaluation of the constitutionality of plea agreements in general and of the Supreme Court's "central assumption that the defendant and the prosecutor are coequal adversaries in the plea bargaining context" in particular).

Notably, as a basis for revisiting the fairness of the plea-bargaining process, Professor Calhoun identifies the sharply increased penalty ranges the federal determinate sentencing system created and the concomitant increase in the power of the government in defining the sentence at the charging stage. *Id.* at 154–56, 158; see also *United States v. Raynor*, 989 F. Supp. 43, 45 (D.D.C. 1997); *United States v. Johnson*, 992 F. Supp. 437, 439–40 (D.D.C. 1997) (calling the government's bargaining power "utterly superior" to that of criminal defendants "because the precise charge or charges to be brought—and thus the ultimate sentence to be imposed under the guidelines scheme—is up to the prosecution."). Others have likewise argued that the sentencing reforms of the 1980s, including mandatory sentencing guidelines, increased the power of the government at the expense of defendants' ability to voluntarily decline to plea bargain. See Fant & Walker, *supra* note 49, at 61. However, since then, that pressure has abated, at least somewhat, because the Guidelines were downgraded from mandatory to advisory status. See *United States v. Booker*, 543 U.S. 220 (2005).

61. Some courts view enforcing appellate waivers as adding to the reserve of "goods" that a willing defendant may use to entice the government to enter into a favorable plea bargain. See, e.g., *Guillen*, 561 F.3d at 530; *Teeter*, 257 F.3d at 22; *United States v. Yemitan*, 70 F.3d 746, 748 (2d Cir. 1995); see also notes 89–90, *infra*.

62. See Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 182 (2005) ("[T]here is reason to question how much real trading occurs."); Fant & Walker, *supra* note 49, at 60 ("[M]any United States Attorney's Offices require defendants to waive the right to appeal as part of a plea agreement."); Calhoun, *supra* note 3, at 167 ("[A]ppeal waivers look . . . more like the price of admission to engage in the plea bargaining process at all.").

63. *Raynor*, 989 F. Supp. at 49; see also *Johnson*, 992 F. Supp. at 439.

64. See, e.g., *Brady v. United States*, 397 U.S. 742 (1970) (finding a guilty plea to be voluntary even though it was calculated to minimize the likelihood of receiving the death penalty); see also *Johnson*, *supra* note 43, at 707 ("There simply is no reason to believe the Court is inclined to revisit the issue anytime soon."); *Mabry v. Johnson*, 467 U.S. 504, 508 (1984) (stating that plea bargains are "no less voluntary than any other bargained-for exchange" despite the defendant's interest in minimizing punishment); Calhoun, *supra* note 3, at 152 (identifying the "core assumption" in the Supreme Court's plea-bargaining jurisprudence as "a negotiating process characterized by arms-length transactions between parties who enjoy 'relatively equal bargaining power.'") (internal citation omitted).

make a plea agreement contingent on an appellate waiver.<sup>65</sup> Moreover, empirical research has shown that, on the whole, plea agreements that contain appellate waiver agreements confer some extra benefits on the defendant when compared to plea agreements in which the defendant does not waive the right to appeal.<sup>66</sup> Although the decision to waive the right to appeal future unknown errors is understandably a difficult one for defendants, courts have found that it does not rise to the level of coerciveness necessary to overcome a defendant's will and overbear her volition.<sup>67</sup> Thus, *per se* challenges to the enforceability of sentencing appellate waivers are unlikely to gain much traction in the federal courts.

## 2. Case-by-Case Analysis of Knowledge and Voluntariness

Finding nothing inherently unknowable or involuntary in the appellate waiver process, federal courts test the knowing and voluntary nature of individual appellate waivers on a case-by-case basis. The defendant bears the burden of demonstrating that she did not knowingly and voluntarily waive her appellate rights.<sup>68</sup> A district court's adherence or non-adherence to the federal rule requiring the discussion of appellate waiver provisions during the

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65. Although criminal defendants and the government often see utility in plea agreements, neither is obligated to bargain. Indeed, "a common response" of criminal defendants to the introduction of appellate waiver agreements was an "open plea"—a guilty plea without the benefit of any agreement with the government. King & O'Neill, *supra* note 3, at 233 n.87; *see also id.* at 250 n.133 (recounting one federal prosecutor's view that the overall plea agreement inures to the benefit of the defendant in the end and "that's why they sign the agreement at all.").

66. King & O'Neill, *supra* note 3, at 232–38 (2005). Appreciable differences were observed in the rate of downward departures and the application of the safety valve in plea agreements containing appellate waivers versus those that did not. *Id.* at 236–38.

More than one of every five waiver cases received a downward departure other than substantial assistance, compared to one of every ten nonwaiver cases in our sample [of 971 cases]. And nearly one in five waiver cases received a safety valve adjustment, compared to less than one in eight nonwaiver cases.

*Id.* at 238. *But see id.* at 244–45 (noting that defendants in some districts do not appear to receive independent consideration in exchange for appellate waivers).

67. *See United States v. Navarro-Botello*, 912 F.2d 318, 320–21 (9th Cir. 1990) ("Just because the choice looks different to [the defendant] with the benefit of hindsight, does not make the choice involuntary."); *see also Haines, Jr.*, *supra* note 5, at 229 (finding the decision to accept a waiver to be "no more the product of 'coercion' than the standard plea bargain.") (internal citation omitted).

68. *See United States v. Hahn*, 359 F.3d 1315, 1329 (10th Cir. 2004) (en banc) (per curiam).

plea colloquy<sup>69</sup> does not conclusively demonstrate whether the defendant knowingly entered into the appellate waiver. A district court's proper questioning of the defendant during the plea colloquy only creates a presumption that the appellate waiver was knowing and voluntary; a defendant could demonstrate otherwise by introducing other particularized evidence.<sup>70</sup> Conversely, even if the district court failed to mention the appellate waiver during the plea colloquy, courts of appeals will enforce the appellate waiver as long as other indicia demonstrate that the defendant understood the waiver and freely assented to it.<sup>71</sup>

Relatedly, a district court's instruction at the conclusion of the sentencing hearing that the defendant has fourteen days to note an appeal does not render an appellate waiver unenforceable. Such a statement is undeniably true—some issues, including all issues outside of the scope of the appellate waiver, remain appealable despite the presence of an appellate waiver.<sup>72</sup> Moreover, such a belated statement made weeks after the acceptance of the plea has no effect on whether the defendant knew and understood the appellate waiver at the time of the agreement.<sup>73</sup>

When individual defendants successfully demonstrate that they did not understand the appellate waiver provision to which they agreed, courts naturally decline to enforce the waivers. Still, appellate courts have not taken a uniform approach to dealing with uninformed or involuntary appellate waivers. While some courts invalidate the entire plea agreement and send the parties back to

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69. FED. R. CRIM. P. 11(b)(1)(N).

70. See *United States v. White*, 366 F.3d 291, 295–96 (4th Cir. 2004) (although a defendant's statements during a Rule 11 colloquy “ ‘carry a strong presumption of verity,’ ” they are not categorically immune from later challenge (quoting *Blackledge v. Allison*, 431 U.S. 63, 74 (1977))).

71. See *United States v. Loutos*, 383 F.3d 615, 619 (7th Cir. 2004) (finding that defendant, who was an attorney, made a knowing waiver of his right to appeal despite failure of the district court to mention it in the plea colloquy); *United States v. Teeter*, 257 F.3d 14, 24 (1st Cir. 2001).

72. See *supra* notes 33–36 and accompanying text.

73. See, e.g., *United States v. Azure*, 571 F.3d 769, 774 (8th Cir. 2009); *United States v. Fisher*, 232 F.3d 301, 304–05 (2d Cir. 2000) (“If enforceable when entered, the waiver does not lose its effectiveness because the district judge gives the defendant post-sentence advice inconsistent with the waiver. No justifiable reliance has been placed on such advice.”) (internal footnote omitted). *But see* *United States v. Felix*, 561 F.3d 1036, 1040–41 (9th Cir. 2009) (holding that the district court's advisement of the right to appeal during sentencing hearing can limit the scope of an appellate waiver if the government does not object) (citing *United States v. Buchanan*, 59 F.3d 914, 917–18 (9th Cir. 1995)).

square one,<sup>74</sup> other courts simply sever the appellate waiver from the plea agreement and forge ahead with the merits of the appeal.<sup>75</sup>

### B. Public Policy Considerations

Numerous public policy considerations exist both for and against sentencing appellate waivers. In general terms, the policy rationales in favor of appellate waivers are finality, efficiency, and freedom of bargaining. Critics of appellate waivers generally point to the potential for uncorrected sentencing errors and negative impacts on the perceived integrity of the criminal justice system. As of now, the federal appellate courts have not found that the negative policy consequences of sentencing appellate waivers merit their invalidation.

#### 1. Finality and Efficiency

Some courts and commentators claim that enforcing sentencing appellate waivers furthers the related public policies of finality and efficiency.<sup>76</sup> Sentencing appellate waivers promote the finality of sentences in the sense that a valid appellate waiver makes it almost impossible to disturb these judgments. By increasing finality and curtailing the appellate process, appellate waivers reduce the workload of the appellate courts, prosecutors, and state-funded defense attorneys.<sup>77</sup> This reduced workload permits reallocation of governmental and judicial resources to other areas, such as additional prosecutions. These additional prosecutions reduce crime, promote justice, and generally benefit the public.

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74. See, e.g., *United States v. Ogden*, 102 F.3d 887, 888 (7th Cir. 1996); *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995) (“Waivers of appeal must stand or fall with the agreements of which they are a part.”). *But see* *Bennardo*, *supra* note 5, at 541 (noting inconsistency in Seventh Circuit jurisprudence on this issue).

75. See, e.g., *Teeter*, 257 F.3d at 27 (“[T]he proper remedy, given the circumstances, is to sever the waiver of appellate rights from the remainder of the plea agreement, allowing the other provisions to remain in force.”); *United States v. Bushert*, 997 F.2d 1343, 1353 (11th Cir. 1993) (“By imposing the severance remedy, [the defendant] will get the benefit of the deal he thought he struck.”).

76. See, e.g., *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990) (describing finality as “perhaps the most important” benefit of plea bargaining); see also *Teeter*, 257 F.3d at 22 & n.5; *Calhoun*, *supra* note 3, at 137–38.

77. See *Teeter*, 257 F.3d at 22; *Navarro-Botello*, 912 F.2d at 322; *Goodwin*, *supra* note 2, at 212 (noting that appellate waiver supporters “contend that waivers help to decrease the enormous amount of guideline sentencing litigation”); *Haines, Jr.*, *supra* note 5, at 229 (“If waivers of appeal were forbidden, courts would continue to bear the burden of many marginal appeals that hinder and devalue the appellate process.”).

Not all commentators believe this brand of finality is positive.<sup>78</sup> Although appellate waivers bolster the finality of judgments, that finality comes at the expense of the error-correcting function of the appellate process.<sup>79</sup> Finality of erroneous judgments and sentences is a negative. Moreover, some have questioned whether appellate waivers actually conserve significant resources given the costs of enforcement.<sup>80</sup>

When a defendant requests an appeal despite a valid appellate waiver, defense counsel often files an *Anders* brief.<sup>81</sup> In an *Anders* brief, defense counsel references “anything in the record that might arguably support the appeal,” but states that the attorney could not find any non-frivolous issues for appeal.<sup>82</sup> The defendant is then permitted to file a supplemental brief raising additional grounds for appeal or expounding upon the arguments raised in the *Anders* brief.<sup>83</sup> When deciding an *Anders* appeal, the appellate court is duty-bound to independently review the entire trial record to determine whether the appeal is “wholly frivolous.”<sup>84</sup> If a valid appellate waiver is present in an *Anders* appeal, the appellate court may dismiss the issues the appellate waiver covers, but the court must still independently review the trial record to ascertain whether the defendant possesses any non-frivolous appellate arguments that are unwaivable or fall outside of the scope of the waiver.<sup>85</sup> Thus, the

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78. See Chanenson, *supra* note 62, at 183 (“[J]udicial resource questions should largely be beside the point.”); see also *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012) (“Prioritizing efficiency at the expense of the individual exercise of constitutional rights applies to the guilty and the innocent alike, and sacrificing constitutional rights on the altar of efficiency is of dubious legality.”).

79. See Johnson, *supra* note 43, at 710 (“While the wholesale enforcement of appeal-of-sentence waivers would achieve sentence finality, it would do so only at unwarranted expense to sentencing accuracy.”).

80. See *United States v. Perez*, 46 F. Supp. 2d 59, 71 (D. Mass. 1999) (“[I]t is not at all clear that there is a tide of appeals from pleas that needs to be stemmed.”); *United States v. Melancon*, 972 F.2d 566, 579 (5th Cir. 1992) (Parker, J., concurring) (predicting that it is “wishful thinking at best and self-delusion at least” to think that appellate waivers will stem the tide of sentencing appeals); see also Johnson, *supra* note 43, at 711 (estimating that the “processing of sentence appeals is generally less costly than the processing of other types of appeals” and cautioning that the burden imposed by processing frivolous sentencing appeals “should not be overstated”).

81. Also called a “no-merit” brief, the *Anders* brief takes its name from *Anders v. California*, 386 U.S. 738 (1967).

82. See *Anders*, 386 U.S. at 744.

83. *Id.*

84. *Id.*

85. See, e.g., *United States v. Widdows*, 477 F. App’x 143 (4th Cir. 2012) (per curiam) (dismissing majority of *Anders* appeal as precluded by appellate waiver but reviewing record and affirming as to unwaivable issues).

enforcement of a valid appellate waiver often consumes a considerable amount of appellate resources, especially where *Anders* appeals are involved.<sup>86</sup>

## 2. Freedom of Bargaining

Public policy favors permitting the government and the defendant to each enter into an enforceable bargain that they believe will further their self-interest.<sup>87</sup> Diffuse public interests should rarely outweigh a criminal defendant's freedom to bargain in the way that she believes best protects her liberty interests.<sup>88</sup> Any restriction on the enforceability of appellate waivers reduces the number of bargaining chips available to criminal defendants,<sup>89</sup> undermines their ability to safeguard their own interests, and ultimately makes successful bargaining less likely.<sup>90</sup>

An individual may always waive or forfeit appeal simply by declining to file a notice of appeal,<sup>91</sup> voluntarily dismissing an appeal

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86. Cf. King & O'Neill, *supra* note 3, at 227 (finding a probable connection between the proliferation of appellate waivers and a decline in the rate of appellate filings). *But see id.* at 228 & n.78 (noting other factors likely contributed to the decline).

87. Johnson, *supra* note 43, at 712.

88. Cf. *Town of Newton v. Rumery*, 480 U.S. 386, 395 (1987) (enforcing an agreement releasing the right to file a civil action against the town in exchange for the dismissal of criminal charges). *But see United States v. Ready*, 82 F.3d 551, 555–56 (2d Cir. 1996) (finding that waivers of appellate rights implicate “institutional and societal values” that transcend individuals’ bargaining interests).

89. See, e.g., *United States v. Andis*, 333 F.3d 886, 895 (8th Cir. 2003) (Arnold, J., concurring) (“One of the few things that a criminal defendant has to trade with his or her accuser is the right to appeal, and so the court, far from improving the lot of criminal defendants with its interventionist rule, actually deprives them of their property and the wherewithal with which to bargain.”); *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001); *United States v. Behrman*, 235 F.3d 1049, 1051 (7th Cir. 2000); see also *United States v. Mezzanatto*, 513 U.S. 196, 208 (1995) (“A defendant can ‘maximize’ what he has to ‘sell’ only if he is permitted to offer what the prosecutor is most interested in buying.”); Calhoun, *supra* note 3, at 138.

90. See *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009); *Andis*, 333 F.3d at 895 (Arnold, J., concurring); *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001); Teeter, *supra* note 35, at 749; see also *Mezzanatto*, 513 U.S. at 209 (noting that limitations on what may be plea bargained may have the effect of curtailing plea bargaining); Calhoun, *supra* note 3, at 138.

91. See *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995) (“Our legal system makes no appeal the default position.”); see also *Yakus v. United States*, 321 U.S. 414, 444 (1944) (noting that “a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right.”).

once filed,<sup>92</sup> dying,<sup>93</sup> going on the lam,<sup>94</sup> or failing to call the trial court's attention to the alleged error.<sup>95</sup> A necessary ingredient in the appellate process is a willing and diligent defendant. If an individual defendant decides not to file a timely appeal and freely waives her appellate rights, it is counterintuitive that society would bar the defendant from extracting a price for that same waiver.

### 3. Sentencing Disparity

A major goal of the Sentencing Reform Act of 1984 (SRA) was to reduce the imposition of dissimilar sentences on similarly-situated defendants.<sup>96</sup> Reformers saw incongruent sentences based on individual judges' preferences as a major problem of the pre-SRA era.<sup>97</sup> To reduce sentencing disparity, the SRA created federal sentencing guidelines, which were initially mandatory but were later downgraded to advisory,<sup>98</sup> and meaningful appellate review of sentences.<sup>99</sup> Numerous courts and commentators have argued that the enforcement of sentencing appellate waivers undermines the SRA's goal of consistency by allowing erroneous sentences to go uncorrected and inhibiting the articulation of a common law of sentencing.<sup>100</sup>

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92. See, e.g., *Johnson v. United States*, 838 F.2d 201 (7th Cir. 1988) (appellant's voluntary dismissal of appeal surrendered all future claims that could have been raised on appeal).

93. The death of an appealing criminal defendant typically results in either dismissal of the appeal or setting aside the conviction. WAYNE R. LAFAVE, JEROLD H. ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* § 27.5(a) (2d ed. 1999).

94. Under the fugitive disentitlement doctrine, "an appellate court may dismiss the appeal of a defendant who is a fugitive from justice during the pendency of his appeal." *Ortega-Rodriguez v. United States*, 507 U.S. 234, 239 (1993); see also LAFAVE, ISRAEL & KING, *supra* note 93, § 27.5(c); Martha B. Stolley, Note, *Sword or Shield: Due Process and the Fugitive Disentitlement Doctrine*, 87 J. CRIM. L. & CRIMINOLOGY 751 (1997).

95. LAFAVE, ISRAEL & KING, *supra* note 93, § 27.5(c). But see *id.* at § 27.5(d) (discussing appellate courts' authority "to reverse on the basis of plain error even though the error was not properly raised and preserved at the trial level").

96. See Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 4-5, 7 (1988); KATE STITH & JOSE A. CABRANES, *FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS* 51 (1998) (identifying the primary objective of the SRA as the elimination of "unwarranted disparity" in federal sentencing) (internal quotation marks omitted).

97. See, e.g., MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 5 (1973) ("As to the penalty that may be imposed, our laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a 'government of laws, not of men.'").

98. See *United States v. Booker*, 543 U.S. 220, 245 (2005); see also STITH & CABRANES, *supra* note 96, at 38-77 (chronicling the advent of the U.S. Sentencing Commission and the promulgation of the Guidelines); Breyer, *supra* note 96, at 5-8.

99. 18 U.S.C. § 3742 (2012).

100. In the words of Judge Paul L. Friedman:

By making sentences virtually unreviewable, the widespread use of enforceable sentencing appellate waivers results in a functional return to the pre-SRA system.<sup>101</sup> The appellate system exists “to correct errors; to develop legal principles; and to tie geographically dispersed lower courts into a unified, authoritative legal system.”<sup>102</sup> Once a broad appellate waiver is executed, a sentencing court can impose virtually any sentence within the statutory limits without the fear of appellate intermeddling. Circumventing appellate review increases the risk that district courts will break with national trends in sentencing, ignore the recommendations of the Guidelines, and impose sentences that are out of alignment with other sentences in comparable prosecutions. Without the specter of an appellate court vacating the sentence as unreasonable, the district court commands almost free rein over the sentence.<sup>103</sup> Such lack of oversight results in a greater likelihood of idiosyncratic sentences.<sup>104</sup>

Absence of appellate review also results in a dearth of precedential case law.<sup>105</sup> Thus, district courts that seek to impose within-Guidelines sentences or otherwise follow the dictates of the sentencing statutes have fewer common law guideposts to follow. With fewer guideposts, well-meaning district courts are more likely to inadvertently deviate from acceptable sentencing practices and outcomes. Coupled with the potential inability of the appellate court to correct an error because of an appellate waiver, the lack of

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What the government seeks to do through the appeal waiver provision is inconsistent with the goals and intent of Congress and the goals and intent of the Sentencing Commission. It will insulate from appellate review erroneous factual findings, interpretations and applications of the Guidelines by trial judges and thus, ultimately, it will undermine uniformity.

United States v. Raynor, 989 F. Supp. 43, 48 (D.D.C. 1997); *see also* United States v. Melancon, 972 F.2d 566, 574 (5th Cir. 1992) (Parker, J., concurring); United States v. Bolinger, 940 F.2d 478, 483 (9th Cir. 1991) (Nelson, J., dissenting); United States v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997); Douglas A. Berman, *The fate and future of appeal waivers?*, SENTENCING LAW AND POLICY BLOG (Mar. 4, 2005, 12:05 PM), [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/03/the\\_fate\\_and\\_fu.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/03/the_fate_and_fu.html); Goodwin, *supra* note 2, at 212; Calhoun, *supra* note 3, at 201, 206; Chanenson, *supra* note 62, at 182–84; Comment, *supra* note 52, at 1120.

101. *See* United States v. Perez, 46 F. Supp. 2d 59, 68 (D. Mass. 1999); *see Melancon*, 972 F.2d at 574 (Parker, J., concurring).

102. Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 69 (1985).

103. *See* United States v. Vanderwerff, No. 12-cr-00069, 2012 WL 2514933, at \*5 (D. Colo. June 28, 2012).

104. *But see* Johnson, *supra* note 43, at 718 (arguing that appellate “intermeddling” can create sentencing irrationality and disparity).

105. *See* Perez, 46 F. Supp. 2d at 68 (“[A]llowing appeals waivers would have a cost in terms of the development of appellate law necessary to clarify how the guidelines should be applied.”); Dyer & Judge, *supra* note 47, at 663; Comment, *supra* note 52, at 1121; Chanenson, *supra* note 62, at 183; *see also* Johnson, *supra* note 43, at 712.

appellate sentencing case law compounds the likelihood of non-uniform sentences.

Appellate waiver supporters argue that developing the common law is not an established public policy, but rather “seems directly in conflict with doctrines of judicial restraint that suggest that courts should avoid crafting public policy unless forced to do so.”<sup>106</sup> Others have noted that adequate sentencing common law is developed through the significant number of cases without appellate waivers, including all of the prosecutions that go to trial.<sup>107</sup> Additionally, the U.S. Sentencing Commission’s constant oversight of the Guidelines diminishes the need for judicial review of all sentences.<sup>108</sup> Empirical research demonstrates that an early concern that the widespread use of non-mutual appellate waivers would lead to a disproportionate number of government-initiated sentencing appeals<sup>109</sup> has not come to fruition because defendants continue to initiate a significant number of sentencing appeals.<sup>110</sup> Additionally, as noted above, defendants have always possessed the ability to forgo appeal, which similarly compromises society’s interests in error correction and the reduction of disparate sentences.<sup>111</sup>

#### 4. Integrity of the Criminal Justice System

Judges and commentators have voiced concerns that prosecutors, defense attorneys, and district court judges are self-interested in obtaining a defendant’s appellate waiver because the waiver insulates their actions from later review.<sup>112</sup> When it comes to judges, some worry that this insulation erodes judicial integrity.<sup>113</sup> When it comes to defense attorneys, some claim that the lawyer’s personal interest in the execution of an appellate or collateral attack waiver rises to the level of a conflict of interest that compromises the attorney’s ability to competently represent the defendant.<sup>114</sup>

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106. Teeter, *supra* note 35, at 741 & n.97.

107. Haines, Jr., *supra* note 5, at 229.

108. *Id.*

109. *See, e.g., Perez*, 46 F. Supp. 2d at 69 (voicing concern that widespread use of appellate waivers would lead to “skewed case law” based on the disproportionate number of appeals by the government); *United States v. Raynor*, 989 F. Supp. 43, 46 (D.D.C. 1997).

110. *See King & O’Neill, supra* note 3, at 256.

111. *See supra* Part II.B.2.

112. *See Calhoun, supra* note 3, at 138–39 & nn.58–59 (listing cases); *King & O’Neill, supra* note 3, at 223 (citing letter from National Association of Criminal Defense Lawyers).

113. *See Dyer & Judge, supra* note 47, at 663–65.

114. *King & O’Neill, supra* note 3, at 245–47 (labeling appellate waiver provisions “an obvious conflict of interest”).

These concerns certainly have some validity. An aversion to reversal or a desire to reduce the likelihood of continued proceedings after remand may motivate a judge to accept a plea agreement containing an appellate waiver. Concern over questionable practices in the prosecution may motivate a prosecutor to offer a plea bargain at a significant discount as long as the defendant agrees to an appellate waiver. Finally, a desire to avoid a later charge of ineffective assistance of counsel may motivate a defense attorney to counsel her client to accept a plea agreement containing appellate and collateral attack waivers. These concerns, however, have not rendered appellate waivers unenforceable.

Despite an otherwise enforceable waiver, defendants may attack the plea agreement or the waiver itself with a claim of ineffective assistance of counsel in acceptance of the plea agreement or the waiver.<sup>115</sup> In most circuits, however, a defendant who has waived appeal and collateral review may not raise any ineffective assistance claims based on her attorney's actions after the execution of the waiver (such as during sentencing).<sup>116</sup> Some commentators take solace in the plea colloquy to ensure that defendants enter into such waivers knowingly and with an opportunity to discuss the waiver provision with both the court and counsel.<sup>117</sup> With full knowledge of the ramifications of their waivers, defendants ostensibly agree to waive their rights to challenge errors and ineffectiveness only when the plea agreement makes it worthwhile to do so. Thus, federal courts continue to enforce sentencing appellate waivers despite concerns of abuse by the bench and the bar.

### C. An Impermissible Chill and Unconstitutional Condition

Constitutional due process prohibits a court from putting a price on a defendant's right to appeal or otherwise chilling it.<sup>118</sup> The Constitution does not require an avenue for criminal appeals;<sup>119</sup>

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115. See *id.* at 247 n.122; see also *supra* text accompanying note 40.

116. See, e.g., *Nunez v. United States*, 495 F.3d 544, 548 (7th Cir. 2007), *vacated* 554 U.S. 911 (2008) (“[I]neffective assistance *after* the plea . . . cannot retroactively make the plea invalid.”). *But see* *United States v. Attar*, 38 F.3d 727, 732–33 (4th Cir. 1994) (holding that appellate waiver did not preclude challenge that the sentencing hearing and presentation of motion to withdraw plea were conducted in violation of the Sixth Amendment where the district court permitted the defense attorney to withdraw at the beginning of the sentencing hearing and defendant proceeded *pro se*). See also *supra* notes 36–37 and accompanying text.

117. Teeter, *supra* note 35, at 741.

118. See, e.g., *Chaffin v. Stynchcombe*, 412 U.S. 17, 24 n.11 (1973); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); see also *Calhoun*, *supra* note 3, at 146; *Dyer & Judge*, *supra* note 47, at 655.

119. *Jones v. Barnes*, 463 U.S. 745, 751 (1983).

“[o]nce a system of appellate courts is put into place, however, a criminal defendant’s ability to appeal may not be unduly burdened.”<sup>120</sup> Demonstrating a sufficient chill, nevertheless, presents a significant hurdle for criminal defendants. The Supreme Court has declined to find that offers of benefits by the government, up to and including avoiding the death penalty, impermissibly chilled other rights.<sup>121</sup> Offers to drop charges or otherwise minimize a defendant’s punishment in exchange for the waiver of a defendant’s appellate rights do not impermissibly chill the exercise of those rights any more than the same sorts of offers in a greater plea agreement chill a defendant’s exercise of her right to a jury trial.<sup>122</sup> Thus, courts have roundly rejected the impermissible chill argument when raised against plea bargaining in general<sup>123</sup> and against appellate waivers specifically.<sup>124</sup> An individual defendant would have an easier time showing that her particular circumstance was so devoid of options that the government’s offer rendered her appellate waiver involuntary.<sup>125</sup> Thus, arguments involving the impermissible chilling effects of appellate waivers are rarely raised and unlikely to succeed.

### III. AN INCENTIVE AND EFFICIENCY-BASED CRITIQUE OF SENTENCING APPELLATE WAIVERS

The current plea agreement sentencing appellate waiver system suffers from three major drawbacks because these waivers (1) remove much of the incentive for district courts to adhere to established procedural and substantive sentencing law, (2) create

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120. *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996); *see also* *United States v. Melancon*, 972 F.2d 566, 577 (5th Cir. 1992) (Parker, J., concurring) (“Even if the Due Process and Equal Protection Clauses of the Constitution do not require the government to create a statutory system of appellate rights, these constitutional clauses do require the government, once it has decided voluntarily to create such a system (as it has), to allow unfettered and equal access to it.”) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

121. *See* *Brady v. United States*, 397 U.S. 742, 755 (1970) (“[A] plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty”).

122. *See* *Teeter*, *supra* note 35, at 740; *see also* *Calhoun*, *supra* note 3, at 153.

123. *See* *Calhoun*, *supra* note 3, at 153.

124. *See* *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *Calhoun*, *supra* note 3, at 149 (concluding that the evolution of Supreme Court precedent no longer supports invalidation of appellate waivers on this basis). *But see* *United States v. Perez*, 46 F. Supp. 2d 59, 67–68 (D. Mass. 1999) (finding that appellate waivers are an undue burden on the right to appeal in violation of due process); *Dyer & Judge*, *supra* note 47, at 655 (arguing that appellate waivers create an unreasonable deterrent to a defendant’s exercise of her statutory right to appeal in violation of due process).

125. *See supra* Part II.A.2.

inefficiencies in the bargaining process, and (3) lack the “bite” necessary to deter defendants from breaching the agreement. These first two concerns are not wholly divorced from previous criticisms already described. Removing incentives from the district courts is an extension of the argument that sentencing appellate waivers undermine the Sentencing Reform Act and the discussion of the inefficiencies of the bargaining structure builds upon previous criticisms that appellate waivers impair plea bargaining.

*A. Hypothesizing Judicial Response to Appellate Waivers*

Anecdotes abound of district court judges who appear to alter their behavior at sentencing hearings based on the existence of an appellate waiver.<sup>126</sup> Some judges appear to give short shrift to explaining the basis of their sentences.<sup>127</sup> Others perhaps arrive at different sentencing outcomes. But anecdotes, however interesting, prove little. This Article therefore employs existing models of judicial behavior and the available data to support the hypothesis that the absence of appellate review affects sentencing behavior. This analysis assumes that district court judges are rational (although not hyper-rational) actors,<sup>128</sup> who seek to maximize utility. However, federal district court judges number in the hundreds<sup>129</sup> with as many individual definitions of utility. Some value being a “good” judge, others prioritize avoiding reversal, others seek promotions, and others maximize their leisure. No single formula can describe all judges, but both behavioral models and empirical data support the conclusion that the absence of appellate review affects the sentencing behavior of the “ordinary” district court judge.

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126. See, e.g., King & O’Neill, *supra* note 3, at 247–48 & n.123.

127. The transcript of one sentencing hearing abruptly ends after the district court judge pronounces the sentence without any supporting explanation and confirms with the assistant U.S. attorney that the plea agreement includes an appellate waiver. *United States v. Powell*, No. 7:09-CR-114-1-BO (E.D.N.C. Feb. 25, 2010).

128. The fact that humans are not hyper-rational does not void rational-choice theory. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 1.4 (8th ed. 2011); see also Richard A. Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 *STAN. L. REV.* 1551, 1552–54 (1998).

129. In fiscal year 2013, there were 677 authorized judgeships in the federal district courts. See *United States Courts*, U.S. District Courts (last visited Dec. 5, 2014), <http://www.uscourts.gov/Statistics/JudicialBusiness/2013/us-district-courts.aspx>.

### 1. Dalton's Trial Judges Archetypes

Nearly thirty years ago, Professor Harlon Dalton described three archetypes of trial judges: bench warmers, bench climbers, and bench builders.<sup>130</sup> The bench warmer is a team player—she is unlikely to take chances or stretch precedents, is “willing to pull her weight, so long as others pull theirs,” and “is, if anything, a little too appreciative” of her judicial position, as she did not actually expect to obtain it.<sup>131</sup> The bench climber seeks to advance through the judicial ranks. To rise through the ranks, she seeks “to make few mistakes while doing a few things really well.”<sup>132</sup> Finally, in contrast, the bench builder takes her position in the trial court very seriously because that is where justice is achieved (if at all). She trusts her own rulings, “does not regard precedent as particularly instructive,” and “views appellate review as a necessary evil”—necessary to rectify the mistakes of colleagues but a roadblock that she must sidestep to achieve justice.<sup>133</sup>

Professor Dalton used these archetypes to argue that appeal as of right is not necessary for a variety of civil cases. The bench warmer, although not the most capable of judges, would never actively attempt to disobey the teachings of the appellate court. She is unlikely to employ the precedents creatively and will likely attempt to insulate her decisions from reversal.<sup>134</sup> The bench warmer, though, would act no differently under a system that permitted appeal as of right versus one that permitted discretionary appeals. Her goal is to apply the precedents, move the cases, and avoid the humiliation of reversal.

Similarly, the bench climber seeks to minimize reversal, second-guessing, or negative treatment in the press.<sup>135</sup> Unlike the bench warmer, however, she may attempt to anticipate shifts in the higher court's thinking rather than just apply precedent. If she senses that a precedent will be overruled, she may challenge the unpopular precedent to demonstrate that she was out in front of the shift. To attract the attention of the court above (which she would like to join), she may craft especially well-written or “splash[y]” opinions.<sup>136</sup>

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130. Dalton, *supra* note 102, at 87.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *See id.* at 88.

136. *See id.*

Appellate review has the greatest effect on the bench builder.<sup>137</sup> Finding appellate review of her own work a nuisance, the bench builder goes to great lengths to insulate her decisions from reversal. She knows the just outcome and does not want her work undone by the appellate court. Thus, she may hide the ball or otherwise distort her true reasoning to avoid reversal and preserve what she views as a just outcome.<sup>138</sup>

Dalton questioned whether the threat of appellate review actually induces trial judges to self-correct and reach more just results.<sup>139</sup> Reversals may not motivate some judges if the percentage of reversals is small and, in those judges' eyes, arbitrary. Appellate review only motivates some judges to better insulate their opinions from reversal, but not to alter their outcomes. Other judges are unmoved by the prospect of reversal because they simply lack the aptitude to accurately forecast how the appellate court would have them rule.<sup>140</sup>

None of these three judicial archetypes would substantially alter their modus operandi under a system that provides an appeal of right versus a discretionary appeal. Appellate review is not guaranteed even in an appeal of right system, because the losing party may simply elect not to appeal. Rather, it is the *threat* of appeal that motivates trial judges to act the way they do, and a system of discretionary appeals does not significantly dissipate that threat. The question appellate waivers pose is what effect an *assurance of no appellate review* has on the cast of judicial archetypes. The bench warmer may get a little sloppy. Although she seeks to accurately apply precedents, much of her motivation stems from her desire to avoid reversals. Her other main interest is to pull her weight as part of the trial court team and move the cases. Although she would not purposefully ignore the precedents, removing the possibility of reversal starkly diminishes her incentive to rigorously attempt to research and understand the law. Appellate waiver grants the bench warmer the license to expeditiously move cases without fear of reversal. This recipe is ripe to produce oversights.

Appellate waiver similarly disincentivizes the bench climber by removing the case from the appellate conversation. Assured that the appellate court will not review her rulings, she lacks an outlet to engage and impress the appellate court. She will devote her time

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137. *Id.*

138. *Id.* at 88–89.

139. *Id.* at 92.

140. *Id.* at 92 & n.101.

and effort to decisions that are likely to be reviewed at the expense of those that assuredly will not move on to a higher court.

On the other hand, producing just outcomes is the primary incentive of the bench builder, not upward ambitions or fear of reversal. Appellate waiver will rarely affect the bench builder's outcomes; it may, however, affect the presentation. Instead of crafting well-insulated opinions in order to evade meaningful appellate review, appellate waiver frees the bench builder to plainly state her true rationale without fear of appellate intermeddling and, in certain cases, to brazenly flaunt appellate teachings in areas of disagreement.

Thus, foreknowledge that its decisions will be insulated from appellate review reduces a trial court's motivation to closely adhere to the law of the circuit, whether from lack of effort spent on researching the law, from a decreased aspiration to get it right, or from seizing an opportunity to achieve the judge's view of justice even if that view runs counter to appellate precedent. Appellate waivers decrease the likelihood that trial judges will systematically exercise fidelity to appellate teachings by informing the trial judge at the outset that her sentencing decisions are virtually unreviewable. In short, appellate waivers incentivize lawless sentencing in the district courts.

## 2. Posner's Judge as "Labor-Market Participant"

Judge Richard Posner describes judges through a comprehensive labor-market participant model.<sup>141</sup> This model "find[s] that judges are not moral or intellectual giants (alas), prophets, oracles, mouthpieces, or calculating machines. They are all-too-human workers, responding as other workers do to the conditions of the labor market in which they work."<sup>142</sup> Judges desire the same basic goods as other workers, and their behavior is designed to maximize the attainment of these desires.<sup>143</sup>

Prospective federal judges are sellers in the labor market, and the President, with the approval of the Senate, is the buyer. The

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141. This model of decision-making integrates nine incomplete theories of judicial behavior: the attitudinal, strategic, sociological, psychological, economic, organizational, pragmatic, phenomenological, and legalist theories. RICHARD A. POSNER, *HOW JUDGES THINK* 19-56 (2008); *see also* LEE EPSTEIN, WILLIAM M. LANDES & RICHARD A. POSNER, *THE BEHAVIOR OF FEDERAL JUDGES: A THEORETICAL AND EMPIRICAL STUDY OF RATIONAL CHOICE* 30-47 (2013).

142. POSNER, *supra* note 141, at 7.

143. *Id.* at 11; *see generally* Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 *SUP. CT. ECON. R.* 1 (1993); RICHARD A. POSNER, *OVERCOMING LAW* 109-44 (1995).

buyer seeks to appoint “good” judges, but also judges ideologically tilted in favor of the Administration’s political goals.<sup>144</sup> Once appointed, though, federal judges are well insulated from both the carrots and the sticks that motivate most workers.<sup>145</sup> Judges have few avenues for promotion<sup>146</sup> and no monetary rewards for “superior” work.<sup>147</sup> Likewise, judges have life tenure, and the prospect of impeachment is so small that it has little effect on judicial behavior.<sup>148</sup>

Judges desire a salary, but are not primarily motivated by salary because they could presumably find more lucrative employment elsewhere.<sup>149</sup> Many enjoy the respect federal judges receive and the opportunity to exert power over others. Most federal judges “derive more utility from leisure and public recognition, relative to income, and are more risk averse, than the average practicing lawyer.”<sup>150</sup> Judges also, on the whole, appear to derive intrinsic satisfaction from being a “good” judge.<sup>151</sup> Otherwise federal judges would simply avoid hard work, given the few true external constraints on their behavior, and would retire with full pay at the earliest possible moment.<sup>152</sup> Of course, judges may be working for some other goal such as celebrity or power, but Posner estimates that the attainment of those goals does not necessarily depend on hard work.<sup>153</sup>

In short, judges value income and leisure but do not seek to maximize either to the exclusion of all else. Most judges want to do a “good” job, and some aspire to promotion or celebrity. Judicial competence varies, and less able judges face a more difficult road to

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144. POSNER, *supra* note 141, at 57–58.

145. *Id.* at 37, 58.

146. *But see id.* at 142 (conceding that the odds of promotion for judges within the pool of viably promotable judges may be “short enough . . . to induce a judge to do whatever he could to rise within the pool”); EPSTEIN, LANDES & POSNER, *supra* note 141, at 35–36, 337–83 (finding inconclusive evidence that some judges alter their behavior in order to increase their chances of promotion).

147. EPSTEIN, LANDES & POSNER, *supra* note 141, at 33.

148. *See id.*; *see also* Posner, *supra* note 143, at 4–5 (“A federal judge can be lazy, lack judicial temperament, mistreat his staff, berate without reason the lawyers who appear before him, be reprimanded for ethical lapses . . . and misbehave in other ways that might get even a tenured civil servant or university professor fired; he will retain his office.”).

149. *See* EPSTEIN, LANDES & POSNER, *supra* note 141, at 30–31.

150. *See* POSNER, *supra* note 141, at 59–60; *see also* EPSTEIN, LANDES & POSNER, *supra* note 141, at 36.

151. POSNER, *supra* note 141, at 174; POSNER, *supra* note 143, at 131, 133 (“The pleasure of judging is bound up with compliance with certain self-limiting rules that define the ‘game’ of judging.”); *see also* RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 335–36 (1996).

152. *See* POSNER, *supra* note 141, at 60–61 & n.7.

153. *Id.* at 62; POSNER, *supra* note 143, at 118 (“[P]restige inheres in the whole judiciary. Free-rider problems make it unlikely that any one judge will exert himself strenuously to raise the prestige of all.”).

achieving distinction and promotion.<sup>154</sup> Diminished opportunities for promotion or recognition may cause less able judges to substitute leisure for work and delegate a substantial amount to law clerks.<sup>155</sup> More able judges can be expected to work harder because they face fewer barriers to distinction and promotion.<sup>156</sup>

Regardless of ability, reversal is a disutility for judges.<sup>157</sup> Reversal is a form of criticism and results in more work and less leisure.<sup>158</sup> Indeed, “when the heavier constraints of termination or demotion are inoperative with respect to an employee, the lighter constraint of criticism can weigh heavily.”<sup>159</sup> Judges, therefore, may consciously or unconsciously alter their behavior to avoid reversal even if that behavior does not align with the judge’s reading of the precedents or sense of justice.<sup>160</sup> In lawless areas, where district courts have little fear of appellate reversal (such as criminal sentencing before the Sentencing Reform Act), individual judges’ preferences and preconceptions are more likely to play a role in decision-making because these preferences are not tempered by reversal aversion.<sup>161</sup> Anything from personal background and traits to previous employment and experiences can shape such preferences and preconceptions.<sup>162</sup> A similar reliance on individual judges’ histories and biases emerge when formalist judges are faced with a lack of guidance from the “orthodox materials of decisions.”<sup>163</sup> Relatively minor influences are more likely to affect decision-making when workers’ overall incentives and constraints decrease.<sup>164</sup> In the

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154. See POSNER, *supra* note 141, at 65.

155. *Id.* at 65; see also EPSTEIN, LANDES & POSNER, *supra* note 141, at 36–37.

156. POSNER, *supra* note 141, at 65.

157. See *id.* at 70, 141; POSNER, *supra* note 143, at 118–19. For studies supporting the existence of reversal aversion, see EPSTEIN, LANDES & POSNER, *supra* note 141, at 83–85, 215. See also discussion *infra* Part III.A.3.

158. See EPSTEIN, LANDES & POSNER, *supra* note 141, at 48–49.

159. *Id.* at 35. *But see id.* at 83 (noting that judges who do not respect their judicial superiors “might consider reversal a badge of honor and revel in their defiance of superior judicial authority”).

160. POSNER, *supra* note 141, at 70–71.

161. *Id.* at 71–72.

162. *Id.* at 72–75; see also RICHARD A. POSNER, REFLECTIONS ON JUDGING 129–30, 306 (2013).

163. To “fill the void,” judges’ decisions may be influenced by “life experience, personal-identity characteristics such as race and sex, temperament, ideology (often influenced by personal-identity characteristics, religion, and party loyalties), ideas of sound public policy whether or not ideologically inflected, considerations of administrability and workload, moral beliefs, collegial pressures, public opinion, family background, reading, sentiment and aversions, [or] even indifference.” *Id.* at 115.

164. POSNER, *supra* note 141, at 76; see also EPSTEIN, LANDES & POSNER, *supra* note 141, at 30–47.

case of district court judges, the removal of the possibility of reversal increases the likelihood that the judge will act based on personal preferences.

Aside from reversal aversion, backlog pressure from growing dockets also motivates judges.<sup>165</sup> Judges must, at some point, prioritize efficiency over perfection, especially at the district court level.<sup>166</sup>

Judge Posner labels judges' failure to "converge on sentencing" a "serious problem" and identifies a need for judicial education in "a coherent, evidence-based theory of criminal punishment."<sup>167</sup> By enhancing the finality of the district court's rulings, appellate waivers alleviate both the threat of reversal and docket pressures. Removing the constraint of reversal, appellate waivers increase the likelihood that personal preferences will play a greater role in sentencing. In this way, appellate waivers return district courts to the pre-SRA era of effectively unreviewable sentencing discretion.<sup>168</sup> As discussed above, this period was marked by the perception that similarly-situated defendants received unacceptably disparate sentences.<sup>169</sup> Thus, structuring sentencing appellate waivers so that district courts know up front that their sentencing rulings are unreviewable increases the likelihood that personal biases will play a greater role in the sentencing process and decreases the likelihood that different judges will arrive at similar sentencing outcomes.

### 3. Empirical Research on Judicial Sentencing Behavior

Max Schanzenbach's empirical research supports the hypothesis that appellate review and the political composition of the reviewing court affect the sentencing behavior of district court judges. A study

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165. POSNER, *supra* note 141, at 141.

166. According to Judge Friendly, "[t]he district courts know what their business is—disposing of cases by trial or settlement with fairness and with the optimum blend of prompt decision and rightness of result; they also have the responsibility of demonstrating the quality of federal justice to ordinary citizens—parties, witnesses and jurors." Henry J. Friendly, *The "Law of the Circuit" and All That*, 46 ST. JOHN'S L. REV. 406, 406–07 (1972) (internal footnote omitted); *see also id.* at 407 n.6 (opining that the "greatest district judges [are not] those who stew for months and then write a long opinion on a novel point of law concerning which they are almost certain not to have the last word"); POSNER, *supra* note 151, at 336–37 (quoting Judge Friendly); POSNER, *supra* note 162, at 288.

167. POSNER, *supra* note 162, at 314; *see also generally* Mary Kreiner Ramirez, *Into the Twilight Zone: Informing Judicial Discretion in Federal Sentencing*, 57 DRAKE L. REV. 591 (2009) (urging the use of cultural-competence and social-cognition training to reduce the influence of implicit biases and associations in federal sentencing).

168. *See supra* Part II.B.3.

169. *See supra* note 97 and accompanying text.

by Schanzenbach and Emerson Tiller analyzed variations in district court sentencing behavior based on whether the district court was politically aligned with the court of appeals.<sup>170</sup> The Schanzenbach-Tiller study found that Democrat-appointed district court judges gave shorter sentences for street crimes than Republican-appointed district court judges.<sup>171</sup> District court judges of both parties used fact-based, offense-level adjustments, which are deferentially reviewed, to bring the Guidelines sentence in closer alignment with their sentencing preferences.<sup>172</sup> However, Democrat-appointed district court judges were more likely to use Guidelines departures, which are subject to stricter appellate review, to further shorten the sentence in circuits with majority Democrat-appointed circuit court judges than in circuits with majority Republican-appointed circuit court judges.<sup>173</sup> The political orientation of the circuit court did not meaningfully affect the Republican-appointed district court judges' frequency of upward departures.<sup>174</sup> The authors deemed the lack of increased frequency of upward departures by Republican-appointed district court judges in aligned circuits unsurprising because upward departures are quite rare, Guidelines sentences for street-level crimes are already quite harsh, longer sentences can be achieved by manipulating adjustments, and defendants almost always appeal upward departures, which, therefore, make them unattractive to district court judges.<sup>175</sup>

A second Schanzenbach-Tiller study using the actual identities of sentencing judges confirmed the results of the earlier study.<sup>176</sup> The first study used a larger sample size, but only approximated the political alignment of the district court based on the political composition of the judges in the district.<sup>177</sup> Using a smaller sample,

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170. Max M. Schanzenbach & Emerson H. Tiller, *Strategic Judging Under the U.S. Sentencing Guidelines: Positive Political Theory and Evidence*, 23 J.L. ECON. & ORG. 24 (2007).

171. *Id.* at 43.

172. *Id.*

173. *Id.* at 47–52. A later study similarly found that an increase in Republican-appointed judges on the court of appeals results in longer sentences and reduces the frequency of below Guidelines sentences. EPSTEIN, LANDES & POSNER, *supra* note 141, at 246, 253; *see also* Joshua B. Fischman & Max M. Schanzenbach, *Do Standards of Review Matter? The Case of Federal Criminal Sentencing*, 40 J. LEGAL STUD. 405, 422–24 (2011) (“Moving from a circuit with 25 percent Democrats to a circuit with 75 percent Democrats . . . increases departures by about 6 percentage points.”).

174. Schanzenbach & Tiller, *supra* note 170, at 49.

175. *Id.*

176. *See* Max M. Schanzenbach & Emerson H. Tiller, *Reviewing the Sentencing Guidelines: Judicial Politics, Empirical Evidence, and Reform*, 75 U. CHI. L. REV. 715, 723, 724 (2008).

177. The Sentencing Commission does not publicly release the identity of the sentencing judge in its statistics. *See id.* at 728–29, 740–43.

the second study matched sentencing decisions to individual district court judges. Using this “judge-level data,” Schanzenbach and Tiller found that Democrat-appointed judges imposed approximately ten percent shorter sentences than Republican-appointed judges for “serious offenses.”<sup>178</sup> However, Democratic appointees were more likely to employ departures in circuits where the majority of appellate judges were themselves Democratic appointees.<sup>179</sup> They were also more likely to employ fact-based offense level adjustments, which are reviewed under a less searching standard of review, in circuits where the majority of appellate judges were Republican appointees.<sup>180</sup> This evidence suggests that district court judges strategically alter their calculations to avoid reversal. This behavior strongly demonstrates that reversal acts as a sentencing constraint.

A later study by Joshua Fischman and Schanzenbach found that “district judges are meaningfully constrained by the prospect of appellate reversal” when sentencing.<sup>181</sup> The Fischman-Schanzenbach study analyzed the differential between sentences imposed by Democrat-appointed district court judges and those imposed by Republican-appointed district court judges across time periods in which appellate courts applied different levels of scrutiny to sentencing decisions.<sup>182</sup> The study found that interparty sentencing disparity was significant only during periods of deferential review.<sup>183</sup> District court judges’ sensitivity to the changing standards of review for sentencing decisions suggests “that these judges are strategically modifying their behavior in response to the likelihood of reversal.”<sup>184</sup> In other words, district court judges are averse to reversal and modify their behavior—including the severity of an offender’s sentence—to minimize the risk of reversal. The study found, however, that district court judges who were appointed before the implementation of the Guidelines in 1987 did not modify their behavior as a consequence of changing standards of review.<sup>185</sup> The study hypothesized that these judges were likely less averse to reversal because they did not respect the Guidelines and, therefore, faced lower legitimacy costs when appellate courts reversed their

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178. *Id.* at 734.

179. *Id.* at 735.

180. *Id.* at 736.

181. Fischman & Schanzenbach, *supra* note 173, at 405.

182. The party of the appointing president is significantly correlated with sentencing preferences; district court judges appointed by Democratic presidents favor shorter sentences than district court judges appointed by Republican presidents. *See id.* at 406, 422.

183. *Id.* at 424.

184. *Id.* at 407.

185. *See id.* at 426.

sentencing decisions.<sup>186</sup> The study concluded that although “aversion to reversal acts as a constraint on the behavior of district judges, its impact may be heterogeneous and depend upon the perceived legitimacy of the guidelines.”<sup>187</sup>

These studies confirm that district court judges who respect the legitimacy of the Guidelines are averse to reversal of their sentencing decisions and modify their behavior accordingly.<sup>188</sup> Stephanos Bibas, Schanzenbach, and Tiller identified the threat of reversal as a “key component” of the Guidelines system that “constrains sentencing courts *ex ante*.”<sup>189</sup> In order to temper the effect of judges’ ideological beliefs on sentencing, the authors proposed a system in which a diversity of political viewpoints is institutionalized into the appellate review of sentences.<sup>190</sup> The essay specifically identified the proliferation of appellate waivers as a barrier to policing district courts’ sentencing practices because broad waivers “signal to sentencing judges that they can sentence without regard to sentencing law or policy.”<sup>191</sup>

Although no one has precisely measured the effect of appellate waivers on sentencing behavior, these studies confirm that removing the realistic possibility of reversal almost certainly affects sentencing practices. District court judges have sentencing preferences, strategically manipulate Guidelines calculations to further those preferences, and labor under an aversion to reversal. These findings support the hypothesis that district court judges, when

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186. *Id.* at 418, 431.

187. *Id.* at 431.

188. See Christina L. Boyd & James F. Spriggs II, *An Examination of Strategic Anticipation of Appellate Court Preferences by Federal District Court Judges*, 29 WASH. U. J.L. & POL’Y 37, 51–53 (2009). One study appears to undermine claims that reversal aversion shapes judicial behavior. See Donald R. Songer, Martha Humphries Ginn & Tammy A. Sarver, *Do Judges Follow the Law When There Is No Fear of Reversal?*, 24 JUST. SYS. J. 137 (2003). This study, however, analyzed federal *appellate* court decisions in diversity tort actions (which are categorically unlikely to be reviewed by the Supreme Court) and found that law and precedent constrained the appellate courts’ decisions despite the low likelihood of reversal. Federal appellate courts—which operate in three judge panels—have institutional constraints that engender adherence to precedent that are absent at the district court level. In effect, “somebody” is always watching appellate decision makers. See VIRGINIA A. HETTINGER, STEPHANIE A. LINDQUIST & WENDY L. MARTINEK, *JUDGING ON A COLLEGIAL COURT: INFLUENCES ON FEDERAL APPELLATE DECISION MAKING* (2006) (claiming that the likelihood of arbitrary or extreme decisions is reduced at the appellate level by the moderating influence of alternative points of view); see also FRANK M. COFFIN, *THE WAYS OF A JUDGE: REFLECTIONS FROM THE FEDERAL APPELLATE BENCH* 58–59 (1980). The moderating influence of judicial panels is not present at the district court level. See POSNER, *supra* note 151, at 340 (noting that the isolation of district court judges creates the temptation for lawlessness and tyranny).

189. Stephanos Bibas, Max M. Schanzenbach & Emerson H. Tiller, *Policing Politics at Sentencing*, 103 NW. U. L. REV. 1371, 1371 (2009).

190. *Id.* at 1391–94; see also Schanzenbach & Tiller, *supra* note 176, at 743–47.

191. Bibas, Schanzenbach & Tiller, *supra* note 189, at 1395.

faced with the prospect of virtually no chance of appellate review, are more likely to impose sentences on the basis of personal preferences to the detriment of uniformity in sentencing.

*B. Pre-Plea Bargaining for Sentencing Appellate Waivers is Inefficient*

Both the government and the defendant lack valuable information at the plea-bargaining stage. Neither knows whether the district court will adhere to the statutory procedure for imposing the sentence, and neither knows the outcome of the sentencing hearing. Thus, the defendant cannot accurately gauge her contentment with the sentence. Likewise, the government cannot accurately gauge the likelihood that the defendant will appeal the sentence, the likelihood such an appeal would succeed, or the resources that an appeal would consume. If the defendant has only frivolous grounds for appeal, both parties may set a low price on the defendant's appellate waiver. If the defendant has potentially meritorious grounds for appeal, both parties will likely value the defendant's appellate waiver more dearly. At the time of the plea agreement, however, the parties lack critical information about the procedure and substantive outcome of the defendant's sentencing hearing.

Uncertainty impedes using cost-benefit analysis to efficiently bargain unless both parties view the relevant probabilities similarly.<sup>192</sup> If the parties can accurately predict the likelihood of some future event, then they can set the price of the good based on the likelihood of its occurrence. If both parties know that there is a fifty percent probability that a painting is a worthless forgery and a fifty percent probability that the painting is a masterpiece worth \$10,000, the parties can apply a discount based on the likelihood that the work is a forgery and strike a deal to sell the painting for \$5,000. Conversely, a deal may be impossible if the parties estimate the probabilities differently. If the seller believes that there is only a twenty percent chance that the painting is a forgery, and the buyer believes that there is a fifty percent chance that the painting is a forgery, the parties will not be able to reach an agreement. The seller will insist on at least \$8,000 for the painting, but the buyer will not pay more than \$5,000. Moreover, even if both parties place the

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192. POSNER, *supra* note 128, § 1.1; *see also* Frank H. Easterbrook, *What's So Special About Judges?*, 61 U. COLO. L. REV. 773, 780 (1990) ("Cases can be settled when parties agree on the likely outcome. When there are no rules of law, when the judge must apply his own weights to inconsistent factors, agreement is less likely."); Teeter, *supra* note 35, at 746 ("Uncertainty is the enemy of the plea bargaining system.").

likelihood that the painting is a forgery at fifty percent, they still may not agree on a price depending on their relative aversions to risk. Most people are risk averse and, as buyers, would rather keep \$5,000 than gamble it on an equal probability of ending up with either \$10,000 or nothing.<sup>193</sup>

For the defendant, the downside of judicial error at sentencing is quite high. An error that increases the defendant's sentence results in a very real cost. An individual defendant has relatively little experience in federal sentencing and likely no experience with the particular sentencing judge.<sup>194</sup> Thus, the defendant has little information about the likelihood for sentencing error and associates a high cost with such error. A high level of uncertainty about a high stakes outcome will lead a cautious defendant to place a higher price on her appellate rights than is warranted.

The government likely has a long history of observing the sentencing behavior of an individual judge. Assuming that the judge is not especially prone to sentencing error or abuse, the government will predict that the defendant is unlikely to have a meritorious basis for a sentencing appeal. Therefore, from the government's perspective, appellate rights are not especially valuable, and most defendants should barter them cheaply and almost as a matter of course.

Because of the inherent uncertainty in the value of future appellate rights, bargaining over sentencing appellate waivers at the pre-plea stage results in inefficient or aborted appellate waiver bargains.<sup>195</sup> During plea bargaining, the parties are merely guessing at the probable value of the defendant's appellate rights given the scant information available. Moreover, the plea agreement does not increase certainty in any particular outcome—the plea agreement only ensures conviction, not the amount of punishment.<sup>196</sup> Drawing a parallel to civil litigation, it would be as if the parties settled the liability aspect of a lawsuit, but left the issue of damages to the court's unreviewable discretion. Uncertainty is greatly diminished after the sentencing hearing, however, and both parties should be able to fairly accurately value the defendant's appellate rights at

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193. See POSNER, *supra* note 128, § 1.2; see also Oren Gazal-Ayal & Avishalom Tor, *The Innocence Effect*, 62 DUKE L.J. 339, 374–75 (2012).

194. Even if the defendant's attorney has a wealth of sentencing experience before the judge, the defendant is likely to discount such secondhand information.

195. The inability to reach an appellate waiver agreement may inhibit the parties from striking a plea bargain at all.

196. "C" pleas, discussed *supra* note 10 and accompanying text, are an exception. In these pleas the parties bargain for a particular sentencing outcome that is binding on the court if the court accepts the plea agreement. FED. R. CRIM. P. 11(c)(1)(C).

that time. Thus, negotiations should be quick and efficient, whether or not the parties reach an appellate waiver agreement, based on knowledge of the actual procedure and outcome of the sentencing hearing.

*C. Lack of Meaningful Enforcement Fails to Disincentivize Breach*

Another significant drawback of folding sentencing appellate waivers into the larger plea agreement is the difficulty in imposing consequences for the breach of the appellate waiver. A defendant who appeals in violation of her appellate waiver faces the prospect that the appellate court will dismiss her appeal. Dismissal places the defendant in a position no worse than if she had abided by her appellate waiver agreement and withheld filing a notice of appeal; the defendant has lost nothing. In the meantime, judicial and government resources are expended in docketing the appeal, moving to dismiss the appeal, and ruling on the motion to dismiss. Even if dismissed, an appeal in violation of an appellate waiver destroys many of the resource-saving benefits that motivate the government to enter into appellate waivers. Additionally, future defendants' appellate waivers lose value every time a defendant appeals in violation of her appellate waiver as the government loses faith that defendants will abide by their agreements. To deter defendants from appealing in violation of their appellate waiver agreements, some sanction is necessary beyond mere dismissal of the appeal.

Some appellate opinions have invited the government to rescind the plea agreement upon finding that a defendant violated the appellate waiver provision.<sup>197</sup> Rescinding the plea agreement allows the government to reinstate dismissed charges, but also requires it to start the prosecution over at square one. That result is unpalatable to many prosecutors, who would rather let sunk costs stay sunk and move forward with new prosecutions. Thus, defendants face no

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197. Judge Easterbrook has authored opinions that, on several occasions, have invited the government to reinstate dismissed charges in response to a defendant's breach of an appellate waiver provision. *See, e.g.*, *United States v. Whitlow*, 287 F.3d 638, 640–41 (7th Cir. 2002); *United States v. Hare*, 269 F.3d 859, 862–63 (7th Cir. 2001). But Judge Easterbrook's invitations have drawn criticism. *See Whitlow*, 287 F.3d at 642–43 (Diane P. Wood, J., concurring); *see also* Bennardo, *supra* note 5, at 544–45. The First Circuit has likewise stated that by appealing in violation of an appellate waiver provision, "defendants will risk giving the government an option to disclaim a plea agreement, if it wishes to do so." *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001); *see also* *United States v. Erwin*, 765 F.3d 219, 228–32 (3d Cir. 2014) (remanding for resentencing in case where the government alleged that the defendant's violation of the appellate waiver in his plea agreement alleviated it of its obligation to move for a downward departure for substantial assistance under an intertwined cooperation agreement).

realistic downside to breaching appellate waiver provisions, and the government and judiciary must expend significant resources to dispose of breaching defendants' appeals.

#### IV. A PROPOSED POST-SENTENCING APPELLATE WAIVER SYSTEM

Sentencing appellate waivers do not need to be abolished or made contingent on the sentencing court imposing a particular sentence. Procedural reform, however, would improve the system. A post-sentencing appellate waiver system where the defendant and the government enter into a sentencing appellate waiver agreement only *after* the imposition of the sentence would rectify many of the problems that beleaguer current sentencing appellate waivers:<sup>198</sup> concerns about the defendant's voluntariness and knowledge when deciding whether to waive her appeal, fear of lawless district court judges ignoring proper sentencing practices, and the lack of meaningful incentives to deter defendants from breaching their appellate waivers. Although post-sentencing appellate waivers will consume additional trial-level resources, the proposed system will save appellate-level resources and increase efficiency in the broader plea-bargaining process.

##### A. *The Mechanics of a Post-Sentencing Appellate Waiver System*

After the sentencing hearing, the district court enters its judgment into the record.<sup>199</sup> The judgment is often entered on the same day as the sentencing hearing. Federal criminal defendants then have fourteen days to file a notice of appeal.<sup>200</sup> In a system that provides for post-sentencing appellate waivers, the defendant and the government could use this fourteen-day appeal period to agree to an appellate waiver. The government's consideration would likely take the form of some reduction in punishment, such as less time in prison, a smaller fine, a reduction of supervised release, or less onerous conditions of supervision. If the parties reach an agreement, the government would move the district court for a

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198. The defendant would remain free to waive her right to appeal her *conviction* in the plea agreement. Because the guilty plea is contemporaneous with the conviction, a plea agreement that waives appeal of errors attendant to the conviction does not present the same sorts of problems as a prospective waiver of the right to appeal errors in a future sentencing hearing.

199. FED. R. CRIM. P. 32(k)(1).

200. FED. R. APP. P. 4(b)(1)(A). This appeal period is not jurisdictional. *See, e.g.*, *Virgin Islands v. Martinez*, 620 F.3d 321, 327 & n.3 (3d Cir. 2010).

reduction of the sentence within the appeal period.<sup>201</sup> This motion could be styled as a “Motion to Reduce Sentence for Acceptance of Punishment.”

Filing the motion would toll the appeal period. The district court would conduct a hearing to ensure that the defendant knowingly and voluntarily entered into the appellate waiver agreement. The district court would be free to accept or reject the appellate waiver agreement. If it accepted the agreement, the district court would grant the motion to reduce the sentence and amend the judgment.<sup>202</sup> If, on the other hand, the district court rejected the appellate waiver agreement and denied the motion, the tolling of the original appeal period would be lifted. The parties could attempt to negotiate another appellate waiver agreement, or the defendant could file (or not file) a notice of appeal.

Adopting this post-judgment appellate waiver mechanism would require a new or amended rule of criminal procedure. The procedural rule would fit well as an amendment to Federal Rule of Criminal Procedure 35, alongside other methods for correcting or reducing a previously-imposed sentence.<sup>203</sup> Such a rule would not be without precedent; the federal rules currently provide mechanisms for various post-judgment motions, including motions for a new trial,<sup>204</sup> for a correction of a clear technical or arithmetic error,<sup>205</sup> or for a reduction of sentence for substantial assistance to the government.<sup>206</sup>

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201. The entry of judgment does not divest the district court of jurisdiction to hear such a motion. *Cf.* FED. R. CRIM. P. 35(b) (allowing a government motion to reduce sentence for substantial assistance within one year of sentencing or even later in certain instances).

202. The process to amend the judgment would work much in the same way that district courts currently reduce sentences in response to post-sentencing motions based on the defendant’s substantial assistance to the government. *Cf.* FED. R. CRIM. P. 35(b). In the proposed system, the amended judgment would begin the fourteen-day appeal period anew. Even with a valid appellate waiver in place, the defendant would be free to appeal issues that fall outside the scope of the waiver or are unwaivable.

203. Placement within Rule 35 would also alleviate the need for new statutory authorization. *See* 18 U.S.C. § 3582(c)(1)(B) (2012) (authorizing courts to modify an imposed term of imprisonment as permitted by Federal Rule of Criminal Procedure 35).

204. *See* FED. R. CRIM. P. 33.

205. *See* FED. R. CRIM. P. 35(a); *see also* 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE & PROCEDURE § 613 (4th ed. 2011); *United States v. Morillo*, 8 F.3d 864, 868 n.5 (1st Cir. 1993).

206. *See* FED. R. CRIM. P. 35(b).

*B. Consequences of a Post-Sentencing Appellate Waiver System*

## 1. Advantages Relative to the Current System

Postponing appellate waiver bargaining until after the sentencing hearing offers significant advantages over the current system. These benefits address concerns regarding the knowledge and voluntariness of the waivers and the efficiency- and incentive-based concerns detailed in the previous Sections.

First, post-sentencing appellate waivers erase any doubt regarding the defendant's ability to enter into a knowing and voluntary waiver. Although individual defendants may still raise challenges to the knowing and voluntary nature of post-sentencing appellate waivers, such waivers could not be found per se unknowing or involuntary. After the hearing, the defendant is fully informed about the sentence's terms and the procedure the court employed in imposing that sentence. Thus, the defendant can estimate her likelihood for success on appeal and intelligently choose whether to bargain with her right to appeal. By moving the appellate waiver negotiation after the sentencing hearing, the defendant is no longer bargaining away the right to appeal the unknown errors of a future proceeding.

Second, and relatedly, both parties are able to more accurately value the defendant's appellate rights after the sentencing hearing. With a complete picture of the sentencing outcome and process, both parties can assess the likely appellate outcome, and the government can weigh the anticipated expenditure of resources in defending the sentence against an appeal. Because both of the parties' assessments would be better informed, their valuations of the defendant's appellate rights are more likely to converge. Additionally, because more accurate information would be available, the appellate waiver bargain is more likely to accurately reflect the true value of the defendant's appellate rights. Defendants with potentially meritorious appellate claims are less likely to undervalue those claims and defendants with only frivolous claims are less likely to overvalue those claims. The government is also more likely to offer a reciprocal benefit commensurate with the actual merit of the individual defendant's potential appellate claims.

Third, separating the appellate waiver agreement from the larger plea bargain ensures that the defendant receives some additional consideration in exchange for her promise not to appeal. The defendant will not waive her appellate right for nothing. Thus, it is fair to conclude that whatever consideration she accepts in exchange for her right to appeal her sentence is adequate. Separating

the appellate waiver from the plea agreement ensures that the defendant receives some additional incremental consideration for her promise not to appeal, even though the sum total of the government's concessions may be identical to those if the sentencing appellate waiver had been included in the plea agreement because the government may offer less at the plea-bargaining stage.

Fourth, separating the sentencing appellate waiver from the larger plea agreement permits the defendant to reject the appellate waiver without rejecting the plea agreement.<sup>207</sup> Vice versa, the defendant can enter into a sentencing appellate waiver agreement even if the parties had no plea agreement or the defendant was found guilty at trial. Appellate waivers do not naturally belong in plea agreements. Plea agreements focus on the defendant's admission of guilt. Sentencing appellate waivers concern the defendant's acceptance of the district court's sentence. The absence of one should not impede the existence of the other.

Fifth, delaying sentencing appellate waiver agreements until after the sentencing hearing will remove the incentive distortion created by plea-agreement sentencing appellate waivers. Because neither the parties nor the district court will know whether an appellate waiver will occur until after the sentencing hearing, all parties will have an incentive to conduct the hearing properly. Because every potential sentencing error may translate into additional concessions by the prosecutor to secure a post-sentencing appellate waiver, the prosecutor has an added incentive to ensure that the district court conducts the hearing according to proper procedure. Incentivizing stricter adherence to the procedural and substantive reasonableness requirements of federal sentencing will further reduce disparities in sentences among similarly situated defendants.

Sixth, defendants will be less likely to violate the waiver by appealing. By executing the waiver during the appeal period, defendants will be less likely to second-guess their waiver decisions.<sup>208</sup> Rather than waiving the right to appeal some unknown future sentence months in advance, defendants would decide whether to execute post-sentencing appellate waivers during the

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207. Federal prosecutors in some districts require defendants to waive their right to appeal their sentence as a provision of the plea agreement. In those districts, some defendants reject the plea agreement and opt to plea open or go to trial in order to protect their right to appeal their sentence. See King & O'Neill, *supra* note 3, at 251–52. Separating the sentencing appellate waiver from the greater plea bargain would allow the parties to enter into a plea bargain even if they did not later enter into a sentencing appellate waiver agreement.

208. See Haines, Jr., *supra* note 5, at 228 (suggesting that a lengthy “cooling off” period after striking a plea bargain gives “the defendant time to experience ‘buyer’s remorse’ and repudiate the plea agreement.”).

fourteen-day appeal period immediately following the district court's judgment. Defendants are less likely to suffer from buyer's remorse in the two weeks after entering into an appellate waiver with full knowledge of their sentence than under the current system, in which defendants must decide whether to waive their right to appeal months in advance of the sentencing hearing.

Additionally, defendants would be less likely to appeal in violation of the waiver because separating the appellate waiver from the plea agreement allows for actual enforcement of the appellate waiver beyond dismissal of the appeal. Defendants currently suffer no penalty, and therefore no disincentive, for breaching their appellate waiver agreements beyond dismissal of their appeal. Because post-sentencing appellate waiver agreements would be independent of plea agreements, the government could penalize a defendant for breaching the appellate waiver agreement while maintaining the plea agreement's integrity. If a defendant violated her post-sentencing appellate waiver agreement, the government could move for the district court to rescind the benefit conferred upon the defendant. Thus, a breaching defendant would lose the benefit of the appellate waiver bargain while keeping the guilty plea intact. By imposing real consequences for the violation of an appellate waiver, post-sentencing appellate waiver agreements will deter breaches.

## 2. Responses to Anticipated Criticisms

Two anticipated criticisms of a post-sentencing appellate waiver system are the expenditure of additional resources necessary to administer such a system and the concern that the imposition of a lesser punishment is not merited in exchange for a defendant's forbearance of her right to appeal her sentence. The first criticism is a true drawback of the post-sentencing waiver system, but the relative benefits of the proposal outweigh it. The second criticism is ill-founded.

First, critics might argue that post-sentencing appellate waivers will likely require the expenditure of more resources than the current system. Under the current system, the government and the defendant engage in one round of plea negotiations. The post-sentencing appellate waiver system creates the potential for a second round of negotiations. Assuming that an appellate waiver agreement is struck, the district court must hold essentially a second Rule 11 hearing to review the appellate waiver agreement and ensure

that the defendant entered into the agreement knowingly and voluntarily. The addition of these steps is not insignificant in terms of resource consumption.

As discussed above, however, post-sentencing appellate waivers will lead to efficiency gains in other parts of the criminal justice system. Fewer defendants will be likely to violate post-sentencing appellate waiver agreements because breaching the agreement will carry real consequences. This reduction in appeals that are destined for dismissal will save appellate-level judicial, prosecutorial, and governmental defense resources.<sup>209</sup> Federal defenders will be spared the need to file opening briefs only to later respond to motions to dismiss on the basis of appellate waivers. Prosecutors will be spared the burden of moving to dismiss on the basis of appellate waivers. Federal appellate courts will be spared the burden of ruling on motions to dismiss based on appellate waivers and scouring the record as the result of frivolous *Anders* appeals.<sup>210</sup> These resource savings are likely to be substantial, albeit centered in the appellate sphere.<sup>211</sup> Post-sentencing appellate waivers will undeniably add work at the district court level.

Conservation of resources, however, cannot be the overriding goal of the criminal justice system. Otherwise, we could forgo trials and appeals in the name of resource conservation. Conserving resources is only a worthy pursuit when the system that conserves resources leads to the same results as the more costly one.<sup>212</sup> Just results trump resource conservation. The expenditure of additional resources required by post-sentencing appellate waivers is justified because it achieves more just results.

A second possible criticism of the proposed system is that it explicitly trades defendants' appellate rights for punishment reductions. A newly-sentenced defendant may find that even a modest-but-certain sentence reduction is an irresistible carrot and trade away her appellate rights, especially if she has only borderline appellate issues. Other defendants who never harbored an intention

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209. The government funds many defendants' attorneys in the form of federal public defenders or attorneys appointed pursuant to the Criminal Justice Act. *See* 18 U.S.C. § 3006A (2012).

210. *See supra* notes 81–85 and accompanying text.

211. It is difficult to predict whether the proposed system would lead to the execution of more or fewer appellate waiver agreements. Defendants may feel more comfortable waiving their appellate rights after the sentencing hearing because they are content with the outcome. On the other hand, defendants who are unhappy with the sentencing outcome may decline to waive appellate rights. The government may decline to enter into appellate waiver agreements where the defendant lacks any meritorious appellate argument.

212. For example, motions for summary judgment should only be granted when the moving party would have prevailed at trial.

to appeal may threaten appeal just to extract even the most modest benefit from the prosecution.

The above scenarios do not give rise to legitimate concerns. Defendants purportedly receive benefits in exchange for their appellate waivers under the current system,<sup>213</sup> so severing the appellate waiver agreement and making the consideration explicit should not raise any new eyebrows. Moreover, defendants have every right to rationally weigh the relative attractiveness of bargaining their appellate rights even for modest punishment reductions. To many, a modest-but-certain sentence reduction may be more enticing than a speculative appeal. Defendants are capable of making these determinations, and the system should permit them to do so. After all, they must live with the consequences.

All else being equal, defendants who agree not to appeal (and then abide by that promise) should receive less punishment than defendants who press frivolous claims through every available level of the court system. Similar to defendants who receive lower sentence calculations for pleading guilty and “accepting responsibility,”<sup>214</sup> defendants who “accept punishment” by waiving their appellate rights *deserve* less punishment than defendants who fight their punishment tooth and nail. Defendants who accept their punishment are likely easier to rehabilitate. To the extent that acceptance of punishment and responsibility correlates with a lesser likelihood of future dangerousness, society has less of an interest in incapacitating or specifically deterring non-appealing defendants.<sup>215</sup> Strict retributivists may be unsatisfied with a determination that non-appealing defendants receive a smaller desert, but the concept should be no less palatable than reducing the punishment of a defendant who pleads guilty and receives a sentence reduction for acceptance of responsibility.

#### CONCLUSION

Sentencing appellate waivers are not inherently problematic. Rather, it is the timing of the waivers that creates problems. The parties cannot efficiently bargain over a plea-agreement provision that they cannot accurately value, and they cannot accurately value

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213. See King & O’Neill, *supra* note 3, at 232–35.

214. See, e.g., U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2013).

215. But see King & O’Neill, *supra* note 3, at 260 (opining that defendants who agree to appellate waivers are “no less culpable or easier to rehabilitate” and “may simply be opportunists” seeking less punishment). The same claim could be made of defendants who elect to plead guilty in exchange for a punishment reduction.

a defendant's promise not to appeal her sentence until after the sentence has been imposed. Although this valuation problem does not rise to the level of an unknowing or involuntary waiver, it does leave some plea agreements unconsummated and others lopsided.

Postponing the sentencing appellate waiver agreement until after the sentencing hearing will restore the threat of potential reversal to the sentencing process, thereby better incentivizing district court judges to adhere to proper sentencing procedures. Defendants will also be less likely to breach separate sentencing appellate waiver agreements for fear of losing the incremental benefit received in exchange for their promise not to appeal. In short, postponing the appellate waiver agreement until after the sentencing hearing will lead to better bargaining, better sentencing, and better adherence to the terms of appellate waiver agreements.