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David E. Carney

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WAIVER OF THE RIGHT TO APPEAL SENTENCING IN PLEA AGREEMENTS WITH THE FEDERAL GOVERNMENT

During the summer of 1997, the Department of Justice issued a directive requiring all future federal plea agreements to include language providing that a defendant waive her statutory right to appeal the sentence imposed by a judge¹ guaranteed by the Sentencing Reform Act of 1984 (the "Act").² Various agreements in several federal jurisdictions previously had used similar waiver language on an ad hoc basis.³ Twice during the summer of 1997, the issue arose in the U.S. District Court for the District of Columbia.⁴ Although several circuits have deemed the waiver acceptable,⁵ Judges Paul L. Friedman and Harold H. Greene ruled in separate hearings that the U.S. Attorney's office could not include such a condition in any plea agreement.⁶ Though the U.S. Attorney's office subsequently withdrew the language and proceeded contrary to the Department of Justice

1. See *United States v. Raynor*, 989 F. Supp. 43, 44-45 (D.D.C. 1997) (citing U.S. Dep't of Justice, Memorandum to all U.S. Attorneys from John C. Keeney, Acting Assistant Attorney General at 3 (Oct. 4, 1995) [hereinafter Keeney Memorandum]).

2. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-742 (1994) and 28 U.S.C. §§ 991-98 (1994)).

3. These jurisdictions include, but are not limited to, the Fourth, Fifth, Seventh, and Ninth Circuits. See, e.g., *United States v. Feichtinger*, 105 F.3d 1188 (7th Cir.), cert. denied, 117 S. Ct. 2467 (1997); *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990).

4. See *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997) (holding that a waiver made prior to sentencing cannot be made knowingly); *Raynor*, 989 F. Supp. at 43-44 (finding that a waiver of the right to appeal, made prior to sentencing, is invalid because it is a waiver of an undefined right). The author of this Note was a summer clerk for Judge Paul L. Friedman of the U.S. District Court for the District of Columbia when this issue arose.

5. See *Feichtinger*, 105 F.3d at 1190; *Melancon*, 972 F.2d at 567-68; *Navarro-Botello*, 912 F.2d at 320-21; *Wiggins*, 905 F.2d at 52-53.

6. See *Johnson*, 992 F. Supp. at 438-39 (refusing to ratify a waiver of the right to appeal found in a plea agreement); *Raynor*, 989 F. Supp. at 43 (same); Transcript of Plea Before the Honorable Paul L. Friedman United States District Judge at 7-22, *Raynor* (No. CR 97-0186) [hereinafter *Raynor* Transcript].

directive,⁷ many other jurisdictions not bound by the District of Columbia ruling continue to use waiver language as a precondition to any plea agreement.

This Note discusses the validity of plea agreement provisions that require the defendant to waive the right to appeal sentencing as a condition to making a plea agreement. The first section offers a brief historical review of the right to appeal sentencing, the Department of Justice directive, the Judicial Conference's consideration of the topic, and the specific history of the current controversy over waiver provisions. The second section examines legal issues, as reflected in cases and statutes. The third section investigates public policy considerations favoring and opposing enforcement of the waiver. In the fourth section, this Note presents another scholarly treatment of this issue, and concludes that the proposed alternative is deficient. The fifth section presents another alternative that relies upon Federal Rule of Criminal Procedure 11(e)(1)(C). This Note's proposed alternative complies with the legal and public policy considerations that forced a rejection of both the Department of Justice directive and the previous scholarly treatment of the issue. Finally, this Note concludes that the government should use Rule 11(e)(1)(C) to effectuate a plea in which a defendant sacrifices her right to appeal, rather than requiring each plea agreement to include a waiver of such right.

HISTORY OF THE RIGHT TO APPEAL SENTENCING AND OF THE PRESENT CONTROVERSY

Prior to November 1, 1987,⁸ federal judges had nearly complete discretion in the imposition of sentences.⁹ The criminal defendant did not possess the right to appeal sentencing except

7. See *Raynor* Transcript, *supra* note 6, at 3-4. The author was present at the hearing in which Harris Epps of the U.S. Attorney's office withdrew the offending language.

8. This marked the effective date of a portion of the Sentencing Reform Act of 1984. See 18 U.S.C. § 3557 (1994).

9. See *United States v. Tucker*, 404 U.S. 443, 446-47 (1972) (recognizing that a trial judge has wide discretion in sentencing); see also *Gore v. United States*, 357 U.S. 386, 393 (1958) (finding that the Supreme Court has no power to change sentencing absent legislation).

through a habeas corpus action or in other limited circumstances.¹⁰ Habeas actions, however, were, and still are, limited procedurally, essentially to prevent defendants from having multiple opportunities to appeal.¹¹ The government also possessed limited appellate rights regarding sentencing.¹²

Members of Congress found this state of affairs unacceptable because it provided unfettered and unjustifiable judicial discretion.¹³ Congress therefore sought to heighten the accountability of federal trial judges and to generate uniformity within the criminal justice system by creating a check on judges' sentencing powers.¹⁴ Members who believed that a lack of uniformity often led to disparate treatment of particular defendants also were concerned about the rights of the accused.¹⁵ To remedy these shortcomings, Congress drafted and passed the Sentencing Reform Act of 1984.¹⁶

10. See 28 U.S.C. § 2255 (1994). The Eighth Amendment provides protection from unfair or improper sentencing. See *Solem v. Helm*, 463 U.S. 277, 284-90 (1983).

11. See 28 U.S.C. § 2255.

12. See *United States v. Spilotro*, 884 F.2d 1003, 1005-06 (7th Cir. 1989) (holding that the government could not appeal a sentence because Congress provided it with no such remedy in either 18 U.S.C. § 3731 (1994) or 28 U.S.C. § 1291 (1994), but that the government could appeal under 18 U.S.C. § 3576 (1994), which applies only to certain dangerous offenders).

13. See William W. Wilkins, Jr., *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FOREST L. REV. 181, 181 (1988) (providing an overview of important policy decisions forming the Federal Sentencing Commission's initial guidelines).

14. See 28 U.S.C. §§ 991(b)(1)(B), 994(f) (1994); *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996); S. REP. NO. 98-225, at 150-51 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3333-34; see also UNITED STATES SENTENCING COMM'N, GUIDELINES MANUAL § 1A1-2 (Nov. 1995) (outlining the statutory mission of the Sentencing Reform Act of 1984) [hereinafter SENTENCING GUIDELINES MANUAL].

15. See Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223, 225-81 (1993) (presenting an exhaustive discussion of the legislative history of the Sentencing Reform Act and its antecedents); Steven E. Zipperstein, *Certain Uncertainty: Appellate Review and the Sentencing Guidelines*, 66 S. CAL. L. REV. 621, 625-26 (1992) (arguing that one of the congressional purposes for the sentencing guidelines is to ensure uniformity in sentencing).

In a 1978 study, the Department of Justice concluded that "sentencing policy varies across jurisdiction." L. PAUL SUTTON, U.S. DEPT OF JUSTICE, FEDERAL SENTENCING PATTERNS: A STUDY OF GEOGRAPHIC VARIATIONS 32 (1978).

16. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-

Congress designed the Sentencing Reform Act to make sentences uniform and to afford all defendants the right to appeal a sentence.¹⁷ Appellate review ensures uniformity because appellate judges do not substitute their discretion for that of a trial judge. Instead, appellate judges ascertain whether the trial court properly applied the guidelines¹⁸ and whether the record justifies any departure from the sentence imposed by the trial court.¹⁹ The Act does not indicate whether the defendant has the power to waive this appellate right.

Since the enactment of the Sentencing Reform Act, federal prosecutors have incorporated waiver language about sentencing in plea agreements on an ad hoc basis.²⁰ Prior to the Justice

3742 (1994) and 28 U.S.C. §§ 991-998 (1994)). For an exhortation of the principles of review advanced by the American Bar Association in the 1970s, see STANDARDS RELATING TO THE ADMINISTRATION OF CRIMINAL JUSTICE Standard 20-1.2 (2d ed. Tentative Draft 1978). The ABA recites and comments upon the traditional purposes of appellate review of sentences:

The general objectives of sentence review are:

- (i) to correct the sentence which is excessive in length, having regard to the nature of the offense, the character of the offender, and the protection of the public interest;
- (ii) to promote respect for law by correcting abuses of the sentencing power and by increasing fairness in the sentencing process;
- ...
- (iv) to promote the development and application of criteria for sentencing which are both rational and just.

Id.

17. See 28 U.S.C. §§ 991(b)(1)(B), 994(f) (establishing the purposes of the Sentencing Commission and the right to appeal sentencing); *Williams v. United States*, 503 U.S. 193, 195 (1992) ("The Sentencing Reform Act of 1984 . . . created the United States Sentencing Commission and empowered it to promulgate guidelines establishing sentencing ranges . . ."); *Ready*, 82 F.3d at 556 (stating that the purpose of the Commission's guidelines is uniformity in sentencing); S. REP. NO. 98-225, at 150-51 (1984), reprinted in 1984 U.S.C.C.A.N. at 3334; SENTENCING GUIDELINES MANUAL, *supra* note 14, at 2.

18. See *Williams*, 503 U.S. at 198-99 (noting that appeals are allowed when the sentence imposed violated the law or was an incorrect application of the guidelines).

19. See Donald A. Purdy, Jr. & Michael Goldsmith, *Better Do Your Homework: Plea Bargaining Under the New Federal Sentencing Guidelines*, CRIM. JUST., Spring 1988, at 2, 4 (advising defense counsel to review the guidelines for new avenues of relief).

20. For instance, in Judge Friedman's courtroom during the summer of 1997, some plea agreements contained the waiver while others did not. The waiver was present in a multi-defendant case in which Judge Friedman rejected the plea agreements. See *Raynor Transcript*, *supra* note 6, at 3-4. In other cases, waiver language did not

Department's 1997 directive, no federal waiver policy had been promulgated, yet numerous plea agreements containing the waiver language had been executed.²¹ Appellate courts have had the opportunity to review many of these agreements and generally have held them to be enforceable.²²

Not until the summer of 1997 did the government adopt a uniform federal policy.²³ To hamstring "lawless district court[s],"²⁴ the Department of Justice handed down a directive that prosecutors include the waiver language in all federal plea agreements.²⁵ The waiver language in one plea agreement reads:

[Defendant] voluntarily and knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction, or the manner in which that sentence was determined . . . or on any ground whatever. [The defendant] also voluntarily and knowingly waives [his] right to challenge the sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under Title 28, United States Code, Section 2255. [The defendant] further acknowledges and agrees that this agreement does not limit the government's right to appeal a sentence, as set forth in Title 18, United States Code, Section 3742(b).²⁶

A defendant who accepts this language explicitly forfeits her right to appeal a sentence that is in excess of the Sentencing

exist and the Judge had no objection to taking the pleas.

21. See, e.g., *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir.), cert. denied, 117 S. Ct. 2467 (1997); *United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52-53 (4th Cir. 1990).

22. See *Feichtinger*, 105 F.3d at 1190; *Melancon*, 972 F.2d at 567-68; *Navarro-Botello*, 912 F.2d at 320-21; *Wiggins*, 905 F.2d at 52-53.

23. See *United States v. Raynor*, 989 F. Supp. 43, 44-45 (D.D.C. 1997) (quoting Keeney Memorandum, *supra* note 1, at 3).

24. *Id.* (quoting Keeney Memorandum, *supra* note 1, at 3).

25. See *id.* (citing Keeney Memorandum, *supra* note 1, at 3).

26. *United States v. Johnson*, 992 F. Supp. 437, 438 (D.D.C. 1997) (quoting plea agreement). Other plea agreements have contained variations on this language. For instance, another agreement stipulated that the defendant "waive[s] the right to appeal the sentence imposed in this case on any ground, including the right of appeal conferred by Title 18, United States Code, section 3742." *Melancon*, 972 F.2d at 567 (quoting the plea colloquy engaged in by the trial court) (emphasis added).

Guidelines but is below the statutory maximum, her right to appeal a calculation error in the computation of criminal history points and offense level, and her right to attack her conviction on collateral grounds, such as cruel and unusual punishment or disparate treatment.²⁷ In short, the defendant loses the right to appeal on "any ground whatever."²⁸

In addition to the language advanced by the Department of Justice, the U.S. Judicial Conference is contemplating changing the Federal Rules of Criminal Procedure to permit such a plea.²⁹ That the Judicial Conference is considering making these changes seems to indicate that such a waiver currently is not valid. Rule 11 of the Federal Rules of Criminal Procedure requires judges to ensure that criminal defendants who have entered into plea agreements have entered into the agreements voluntarily and knowingly.³⁰ Two judges on the U.S. District Court for the District of Columbia have held that a plea with a waiver of the sort discussed in this Note was invalid in that it violated the requirements of Rule 11 and was contrary to sentencing guideline and contractual principles, standing fast against the tide washing over other circuits.³¹

Post-conviction waiver of the right to appeal sentencing, though a related topic, is not discussed in this Note.³² The waiver

27. See *Raynor*, 989 F. Supp. at 43.

28. *Johnson*, 992 F. Supp. at 438 (quoting plea agreement).

29. See *Raynor* Transcript, *supra* note 6, at 21.

30. "The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is voluntary and not the result of force or threats or of promises apart from a plea agreement." FED. R. CRIM. P. 11(d).

31. See *Johnson*, 992 F. Supp. at 438 (Greene, J.); *Raynor* Transcript, *supra* note 6, at 14-16 (Friedman, J.). The United States Court of Appeals for the District of Columbia Circuit has not ruled on this issue, though many other circuits have held such agreements to be enforceable. See, e.g., *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 191 (7th Cir. 1995).

32. Discussion of this topic has been presented elsewhere. See Gregory M. Dyer & Brendan Judge, *Criminal Defendants' Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 667-69 (1990) (claiming that arguments against waivers are magnified at the sentencing stage).

This Note also does not discuss the general validity of plea agreements and various other appeal waivers. Commentators have substantially criticized the plea agreement system in general, see generally Robert E. Scott & William J. Stuntz, *Plea*

at the time of sentencing does not seem as problematic as the waiver at the time of the plea agreement and Rule 11 colloquy because such agreements more likely than not would include mutually agreed upon sentencing terms under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure.³³

LEGAL CONSIDERATIONS SURROUNDING WAIVER OF THE RIGHT TO APPEAL SENTENCING IN A PLEA AGREEMENT

Competing legal considerations form the bedrock for the positions of those favoring enforcement of waivers of sentencing appeals and those opposing enforcement. This section presents the arguments for both sides, offers assessments of the arguments, and concludes that the legal considerations of those opposed to mandatory waiver outweigh those of the supporters.

Favoring Waiver

Those who support waiver of the right to appeal sentencing, like those who favor the Department of Justice's plan, make two main legal arguments. First, they argue that the waiver is analogous to other rights waived. Second, they contend that plea agreements are similar to contracts and that parties can negotiate in a market transaction to obtain terms that are mutually satisfactory, even mutually beneficial.

Proponents of waiver start with the straightforward proposition that one may waive any right: "Any right, even a constitutional right, may be surrendered in a plea agreement if that waiver was made knowingly and voluntarily."³⁴ In *United States*

Bargaining as Contract, 101 YALE L.J. 1909, 1909 n.4 (1992) (discussing some of the most prolific critics of plea agreements), and appeal waivers in plea agreements in particular, see Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 146-200 (1995) (positing that waivers chill a defendant's right to appeal). There is no need to reiterate these concerns in this Note, which operates on the assumed validity of the plea-agreement process.

33. The fifth section of this Note discusses Rule 11(e)(1)(C). Plea agreements made in accord with the terms of Rule 11 do not suffer the same deficiencies of the Department of Justice's plan. See *infra* notes 135-54 and accompanying text.

34. *United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995) (citing *Town of Newton v. Rumery*, 480 U.S. 386, 393 (1987)).

v. Mezzanatto,³⁵ the Supreme Court held that defendants could waive their rights under Federal Rule of Evidence (FRE) 410.³⁶ FRE 410 provides that statements made during plea negotiations may not be used against a defendant if the case were to go to trial,³⁷ but contains no express language about waiver.³⁸ In *Mezzanatto*, the defendant was charged with possession of methamphetamine with intent to distribute.³⁹ The government conditioned the plea agreement on Mezzanatto's truthfulness and ensured his cooperation by requiring him to waive his rights under FRE 410—as a condition of commencing negotiations—such that the government could use any lie to impeach Mezzanatto should the plea agreement fail.⁴⁰ Mezzanatto failed to be truthful on at least two issues, causing the prosecutor to cease plea negotiations.⁴¹ Mezzanatto's case went to trial, at which time he denied involvement in methamphetamine trafficking.⁴² The prosecutor used the prior inconsistent statements to impeach Mezzanatto and the court ultimately convicted him.⁴³

The Court concluded that the waiver of a defendant's FRE 410 protection is well within the bounds of traditional waiver jurisprudence.⁴⁴ The Court analogized this waiver to the waiver of one's right against double jeopardy, right to a jury trial, right against self-incrimination, and right of confrontation.⁴⁵ Proponents of waiver argue that no inherent or functional difference exists between waiver of the right to appeal sentencing and those rights discussed in *Mezzanatto*.

35. 513 U.S. 196 (1995).

36. *See id.* at 196.

37. *See* FED. R. EVID. 410. FRE 410 includes two narrow exceptions—when a statement from the negotiations has been introduced, presumably by the defendant, other statements may be considered as fairness requires, and when a perjury or false statement charge arises out of negotiations that have taken place “under oath, on the record and in the presence of counsel.” *Id.*

38. *See id.*

39. *See Mezzanatto*, 513 U.S. at 196.

40. *See id.* at 199.

41. *See id.*

42. *See id.*

43. *See id.*

44. *See id.*

45. *See id.* at 200-03.

Mezzanatto bears particular importance because there is no waiver language in FRE 410,⁴⁶ much like the lack of waiver language in the Sentencing Reform Act.⁴⁷ The Supreme Court reasoned that congressional silence creates a presumption favoring waiver.⁴⁸

Courts have dismissed the fear that a waiver of the right to appeal cannot be informed: "[T]he uncertainty of Appellant's sentence does not render his waiver uninformed."⁴⁹ Essentially, a waiver of the right to appeal sentencing was made knowingly if the defendant recognized that he had a "right to appeal his sentence and that he was giving up that right."⁵⁰ When one forgoes the right to a jury trial, one does not know the verdict. This uncertainty in forsaking a trial is similar to the uncertainty accompanying a waiver of the right to appeal sentencing pursuant to plea agreement.

The second legal argument made by proponents of the waiver of the right to appeal sentencing is that a plea agreement is a contract and "classical contract theory supports the freedom to bargain over criminal punishment."⁵¹ Prosecutors have the right to seek the maximum punishment and defendants have the right to force prosecutors to meet the burden of proof beyond a reasonable doubt.⁵² Each party has an interest that the other party's right not be exercised. Prosecutors do not wish to expend the time, the money, and the effort necessary to garner a criminal conviction with a maximum penalty. Defendants do not wish to subject themselves to the potential for maximum punishment. Both parties want to limit what the other party can do, therefore

46. See FED. R. EVID. 410.

47. 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, 700 (1992).

48. See *Mezzanatto*, 513 U.S. at 203-04 ("[W]e will not interpret Congress' silence as an implicit rejection of waivability.").

49. *United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992) (citing *United States v. Rutan*, 956 F.2d 827, 830 (8th Cir. 1992); *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990)). For a discussion of the knowledge requirement of a valid waiver, see *infra* text accompanying notes 63-73.

50. *Rutan*, 956 F.2d at 830.

51. *Scott & Stuntz*, *supra* note 32, at 1910.

52. See *id.* at 1915.

the situation is ripe for an agreement that satisfies both parties, or at a minimum, is the least detrimental to both parties.⁵³

Waiver proponents argue that market forces dictate that parties would not enter contracts and accept terms unless the agreement was beneficial to both sides.⁵⁴ In the quid pro quo of plea agreements, defendants often trade their rights for prosecutorial promises of lesser charges or more lenient sentencing recommendations.⁵⁵ The right to appeal sentencing is simply another example of a right that can be exchanged for mutual benefit.

Sometimes, however, contracts do not result in mutual benefit. Contracting involves risks—usually calculated risks—but risks nonetheless. When neither party can control the risks and the risks come to fruition with negative consequences for one or all parties, the contract generally is enforced regardless.⁵⁶

53. See *id.*

54. See *id.* at 1914-15.

55. In *Town of Newton v. Rumery*, 480 U.S. 386 (1986), Bernard Rumery exchanged his right to sue the Town of Newton under 42 U.S.C. § 1983 (1994) for the prosecutor's promise to dismiss the criminal charges against him. See *Rumery*, 480 U.S. at 394-95. The Court held that the judicial system should not prevent Rumery from making a decision that he perceived as beneficial to his interests because he had no "public duty" to advance the public policy interest in enforcing appropriate police conduct through section 1983 litigation. See *id.* at 395-97.

56. Possible grounds for voiding a contract include impossibility, impracticability, or frustration. For all of these grounds, there is a question of the basic assumptions of the agreement. For example, under the frustration doctrine, if, after a contract is made, a party's principal purpose were substantially frustrated through no fault of her own by an event or a nonoccurrence that was not a basic assumption of the contract, that party no longer has to perform her remaining duties. See RESTATEMENT (SECOND) OF CONTRACTS § 265 (1981).

The question then becomes whether the basic assumption in a plea agreement is that the judge possesses the ultimate responsibility for sentencing, in which case prosecutorial agreements do not hold absolutely, or whether the fundamental assumption is that the criminal defendant will not be punished in excess of the terms of the plea agreement. This question is answered simply by recognizing that the judge holds final sentencing power, except in the limited case set forth in Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. See *infra* text accompanying notes 135-43. It is unlikely that a criminal defendant could successfully mount an impossibility, impracticability, or frustration claim to void a plea agreement. But see Scott & Stuntz, *supra* note 32, at 1918 (laying forth the argument made by some scholars that a plea agreement may be unenforceable due to contractual deficiency).

Opposing Waiver

Five legal arguments suggest that the waiver of the right to appeal is invalid on its face. First, a waiver must, by definition, be made knowingly, and therefore cannot occur when certain legal ramifications of the waiver remain indeterminate.⁵⁷ Second, Congress designed the Sentencing Reform Act to create appellate review that would ensure uniformity.⁵⁸ The waiver undercuts the uniformity that the law demands. Third, the waiver condition functions as an adhesion contract.⁵⁹ The government possesses all of the power,⁶⁰ reflected by the fact that the government requires the inclusion of waiver language in plea agreements, and that the waiver provision is unilateral and nonnegotiable. Related to this argument is that a waiver is only valid if it were voluntary. Fourth, the waiver paragraph cannot constitute a binding contract because it is not an accurate statement of the law.⁶¹ Finally, the waiver of habeas corpus review prevents a check on the constitutionality of conditions of confinement.⁶²

Knowledge Requirement

For a waiver to be valid, it must meet certain minimum requirements. The Supreme Court expressed the elements of waiver as "an intentional relinquishment or abandonment of a known right or privilege."⁶³ A valid waiver, then, "presupposes an actual and demonstrable knowledge of the contours of the right which is being waived."⁶⁴ The waiver of the right to appeal

57. See *infra* text accompanying notes 63-73.

58. See *infra* text accompanying notes 74-81.

59. See *infra* text accompanying notes 82-84.

60. Though this claim is certainly an exaggeration, the unequal bargaining positions are readily apparent.

61. See *infra* text accompanying notes 85-92.

62. See *infra* text accompanying notes 93-94.

63. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); see also *McCarthy v. United States*, 394 U.S. 459, 466 (1969) (quoting *Zerbst* and holding that a Rule 11 waiver may be valid only if there were "an intentional relinquishment or abandonment of a known right or privilege").

64. Calhoun, *supra* note 32, at 203 (citing, as an example, *Jones v. Brown*, 89 Cal. Rptr. 651 (Ct. App. 1970)).

sentencing certainly raises the issue of whether the defendant had knowledge of the implication of his waiver.

The actual sentence and the presentence report that factors into that sentence cannot be known at the time of plea bargain, and therefore an agreement that waives the defendant's right to appeal often is uninformed and premature. Judge Friedman characterized this argument in categorical terms: "It's this Court's position that a defendant can *never* knowingly and intelligently waive the right to appeal a sentence that has not yet been imposed."⁶⁵

If one were to compare the rights waived in a plea agreement to other rights, one could see a distinct difference. In a typical waiver, "the act of waiving the right occurs at the moment the waiver is executed. For example: one waives the right to silence, and then speaks; one waives the right to have a jury determine one's guilt, and then admits his or her guilt to the judge."⁶⁶ The close temporal nexus of events supports the inference that a defendant who waived such a right has done so knowingly.

Admittedly, there may be some uncertainty. "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*."⁶⁷ Professor Robert Calhoun argues, "[I]f there is any one theme unifying the Court's guilty plea advisement cases . . . it is that in order to enter a constitutionally valid plea, the defendant must know precisely what is being given up as a consequence of the plea."⁶⁸ When a defendant waives her right to appeal, a separate legal event is involved: "*This right 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."⁶⁹ Nothing can be imparted from attorney to client or

65. *Raynor* Transcript, *supra* note 6, at 7 (emphasis added); see *United States v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring specially); *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) (rejecting right to waive appeal of sentencing pursuant to plea agreement).

66. *Melancon*, 972 F.2d at 571 (Parker, J., concurring specially).

67. *Id.* at 572.

68. Calhoun, *supra* note 32, at 203.

69. *Melancon*, 972 F.2d at 572 (Parker, J., concurring specially).

from court to defendant that would indicate the nature and scope of the waiver about to be made. For this reason, the *Mezzanatto* analysis is inapposite.

The uncertainty accompanying the defendant's waiver can yield very negative results, as witnessed in *United States v. Feichtinger*.⁷⁰ Frank Feichtinger entered into a plea agreement containing a waiver similar to the kind presently at issue.⁷¹ Feichtinger later disputed the trial court's calculation of the sentence.⁷² On appeal, the Seventh Circuit held that "an improper application of the guidelines is not a reason to invalidate a knowing and voluntary waiver of appeal rights."⁷³ Defendants who waive appellate rights in the Seventh Circuit, therefore, are subject to the whim and caprice of sentencing judges and the accuracy of unknown presentence report calculations.

This argument is the natural extension of the contract analysis adopted by those favoring the inclusion of a waiver of the right to appeal sentencing in all federal plea agreements. Parties may agree to whatever terms they desire. A defendant would not ratify a plea term unless she accepted that term. Defendants, though, generally enter plea agreements for leniency purposes and certainly would not enter them with the expectation of an erroneously calculated sentence and an excessive penalty.

Mezzanatto is inapposite because the parallel does not exist between a waiver of FRE 410 and a waiver of the right to appeal sentencing. *Mezzanatto* assumes a certain level of knowledge that may well exist in a waiver of FRE 410, but which cannot exist in the waiver of the right to appeal sentencing. Two metaphors may prove helpful. Waiver of FRE 410 is like flipping a coin—it will always land either heads up or tails up. A defendant either strikes a deal or does not. If a deal were struck after a FRE 410 waiver, the statements made during negotiations would not be used. To the contrary, if a deal were not struck,

70. 105 F.3d 1188 (7th Cir.), *cert. denied*, 117 S. Ct. 2467 (1997) (holding that improper application of the sentencing guidelines does not invalidate a defendant's waiver of the right to appeal).

71. *See id.* at 1190.

72. *See id.*

73. *Id.*

the statements could be used. Waiver of the right to appeal sentencing, however, is substantially different. Though one may know all of the numbers between one and forty, one cannot know, in a real sense, what six numbers will be selected in an upcoming lottery drawing. Waiver of the right to appeal sentencing is more like a lottery than it is like flipping a coin.

Appellate Review and Sentence Uniformity

The Sentencing Reform Act first codified the right to appeal sentences.⁷⁴ Congress intended the statutory language to confer power upon the appellate courts to rein in sentences that were out of line.⁷⁵ The Department of Justice's endeavors to restrict appellate review of sentences weaken this check.

Through the Sentencing Reform Act, Congress intentionally removed the power of district court judges to be the final step in the penal process.⁷⁶ The Department of Justice's plan returns to the courts the power that Congress had legislated away. Sentence-appeal waivers "sanction[] district court usurpation of the discretionary sentencing authority Congress expressly took away from the federal trial courts in 1984."⁷⁷ When the executive branch tries to circumvent the legislative branch, it is the judiciary's job to ensure that the executive branch is acting within its power.⁷⁸

Concurring specially in *United States v. Melancon*, Judge Parker offered a variation on this rationale as to why the right to appeal sentencing is not waivable. Appeals of sentences are not an individual right, but a limitation of judicial authority.⁷⁹ An individual therefore cannot waive appellate review.⁸⁰ One

74. See 18 U.S.C. § 3742 (1994).

75. See generally Barry L. Johnson, *Discretion and the Rule of Law in Federal Guidelines Sentencing: Developing Departure Jurisprudence in the Wake of Koon v. United States*, 58 OHIO ST. L.J. 1697, 1697-716 (1998) (discussing appellate review as intended by Congress under the Sentencing Reform Act).

76. See SENTENCING GUIDELINES MANUAL, *supra* note 14, at 1.

77. *United States v. Melancon*, 972 F.2d 566, 574 (5th Cir. 1992) (Parker, J., concurring specially).

78. See *United States v. Raynor*, 989 F. Supp. 43, 45 (D.D.C. 1997).

79. See *Melancon*, 972 F.2d at 573 (Parker, J., concurring specially).

80. This is analogous to nonwaivability of the subject matter jurisdiction require-

can compare this construction of the right to appeal sentencing with the right to be present at all phases of a trial, another nonwaivable right.⁸¹

Waiver as an Adhesion Contract

The right-to-appeal-sentencing waiver creates a condition that transforms an acceptable contract into an adhesion contract that should be void on general contract principles. An adhesion contract is a

[s]tandardized contract form offered to consumers of goods and services on essentially "take it or leave it" basis without affording consumer realistic opportunity to bargain and under such conditions that consumer cannot obtain desired product or services except by acquiescing in form contract. Distinctive feature of adhesion contract is that weaker party has no realistic choice as to its terms. Recognizing that these contracts are not the result of traditionally "bargained" contracts, the trend is to relieve parties from onerous conditions imposed by such contracts. However, not every such contract is unconscionable.⁸²

In the plea agreement context, the government mandates that the waiver be a part of the agreement or no agreement is had.⁸³ It is not a bargaining chip in a poker game, but the ante required even to sit at the table. The government has substantial power and defendants have significantly less power.⁸⁴ The

ment in federal court. *See* FED. R. CIV. P. 12(h)(3); *see also, e.g.*, *Depex Reina 9 Partnership v. Texas Int'l Petroleum Corp.*, 897 F.2d 461 (10th Cir. 1990) (dismissing case on grounds of inadequate subject matter jurisdiction after numerous other proceedings in the case).

81. *See* Proffitt v. Wainwright, 685 F.2d 1227, 1257, 1258 n.43 (11th Cir. 1982) (discussing nonwaivability in capital cases, and noting that the Federal Rules of Criminal Procedure do not limit nonwaivability to capital cases). *See generally* FED. R. CRIM. P. 43 (establishing the requirement that the defendant has the right to be present throughout the trial process with limited exceptions).

82. BLACK'S LAW DICTIONARY 40 (6th ed. 1990) (citations omitted).

83. *See* United States v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997); *Raynor* Transcript, *supra* note 6, at 1-6.

84. "[T]here is no equality in the position of the parties to this agreement." *Raynor* Transcript, *supra* note 6, at 10; *see also* *Johnson*, 992 F. Supp. at 439 (stating that the plea agreement was similar to an adhesion contract).

government has further leverage because it can delay sentences in plea agreements that require cooperation as a condition.

The waiver of the right to appeal sentencing operates as Damocles's Sword over the head of a defendant. The satisfaction of striking a favorable agreement that includes a waiver is, like the sword, suspended by a fine thread. The thread represents the correct application of the sentencing guidelines by the judge and an accurate presentence report. Any incorrect application or inaccurate report may snap the thread, inflicting a mortal wound on the defendant—a nonreviewable sentence.

Inaccurate Statement of the Law

The paragraph in the plea agreement indicating a mandatory waiver of the right to appeal sentencing⁸⁵ is not an accurate statement of the law.⁸⁶ The government admits as much.⁸⁷ If a court were to accept the agreement blindly, it could not be certain that the government or the defense counsel had informed the defendant adequately as to the scope of the waiver. The defendant's attorney might not be advising him properly, therefore the legal effect of the waiver provision in federal plea agreements must be questioned.

The waiver provision omits a range of grounds on which a defendant may appeal regardless of the waiver.⁸⁸ For instance, some courts have held the waiver ineffective if sentencing were

85. See *supra* text accompanying notes 26-28.

86. See *Raynor* Transcript, *supra* note 6, at 14-15.

87. Although the paragraph indicates a complete waiver of appellate rights, an internal Department of Justice memorandum reads:

A sentencing appeal waiver provision does not waive all claims on appeal. The courts of appeals have held that certain constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement. For example, a defendant's claim that he was denied the effective assistance of counsel at sentencing . . . that he was sentenced on the basis of race . . . or that his sentence exceeded the statutory maximum . . . will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.

United States v. Raynor, 989 F. Supp. 43, 46 (quoting Keeney Memorandum, *supra* note 1, at 2).

88. See *id.*

the result of racial bias.⁸⁹ This exception, however, appears nowhere in the agreement and the prosecution might never inform the defendant of its existence. In *Raynor*, the government did issue a separate letter to each defense counsel to apprise them of the limited exceptions to the waiver.⁹⁰ This is problematic, though, because the plea agreement is an integrated agreement, meaning that only the terms of the plea are binding and that no other forms of agreement bind the parties.⁹¹ Defendants have only ten days to determine whether any of the potentially undisclosed exceptions apply to them.⁹² Additionally, it is possible that an appellate court would not agree with the prosecutor's estimation of what an exception to the agreement might be.

Habeas Corpus

Waiver of habeas corpus prohibits defendants from raising arguments regarding unconstitutional imprisonment.⁹³ Habeas corpus is one of the litany of waived appellate rights in the Department of Justice directive. Under 28 U.S.C. § 2255:

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court

89. See, e.g., *United States v. Jacobson*, 15 F.3d 19, 22-23 (2d Cir. 1994).

90. See *Raynor* Transcript, *supra* note 6, at 15.

91. See *id.* at 15-16. The parol evidence rule would apply in this context. The parol evidence rule states that

when the parties to a contract embody their agreement in writing and intend the writing to be the final expression of their agreement, the terms of the writing may not be varied or contradicted by evidence of any prior written or oral agreement in the absence of fraud, duress, or mutual mistake.

BLACK'S LAW DICTIONARY 1116 (6th ed. 1990).

92. See FED. R. APP. P. 4(b).

93. See generally JAMES S. LIEBMAN & RANDY HERTZ, 1 FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.3, at 16-17 (2d ed. 1994) (describing the tenets and history of the writ of habeas corpus).

which imposed the sentence to vacate, set aside or correct the sentence.⁹⁴

A plea agreement including a waiver provision expressly precludes collateral attacks under this doctrine.

No legal or policy argument supports the proposition that a defendant suffering cruel and unusual punishment should have a previous waiver of habeas corpus entered against her. A defendant never expects that the treatment she would receive at the hands of the penal system would be unconstitutional and yet unchallengeable in court.

PUBLIC POLICY CONSIDERATIONS SURROUNDING WAIVER OF THE RIGHT TO APPEAL SENTENCING IN A PLEA AGREEMENT

Although the legal arguments opposing use or enforcement of the waiver of the right to appeal sentencing are persuasive, the public policy arguments favoring and opposing waiver also are worth considering. The arguments favoring waiver are based on concerns for judicial efficiency, closure, and uniformity of waiver enforcement. Error correction, uniformity in sentencing, judicial efficiency, and insulation of the prosecutor's office, meanwhile, counsel against the waiver on public policy grounds.

Favoring Waiver

The arguments in favor of a mandatory waiver of the right to appeal in federal plea agreements highlight a judicial system taxed by voluminous criminal and civil dockets, and place a premium on measures that promote judicial economy.⁹⁵ With the

94. 28 U.S.C. § 2255 (1994).

95. See, e.g., *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8 (1992) (basing the decision to excuse the petitioner's failure to develop his case on "concerns of . . . judicial economy"); *Thomas v. Arn*, 474 U.S. 140, 147 (1985) (including judicial economy as a factor in determining the reasonableness of the state's procedural rules); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326-33 (1979) (justifying the Court's use of collateral estoppel on judicial economy grounds). Judicial economy as a public policy goal is, however, constrained by other principles and is inapplicable under certain constitutional rights regimes. See *Riley v. National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988) ("[T]he First Amendment does not permit the State [through the courts] to sacrifice speech for efficiency.").

backlog of cases in the federal court system, cases take months and even years to go to trial.⁹⁶ Some might argue that the entire system would come to a screeching halt but for plea agreements. Plea agreements resolve more than eighty percent of federal criminal cases.⁹⁷ These agreements save the courts untold hours of work, and waivers of appellate rights would further reduce the load on an already taxed judiciary.

Legislatures and government agencies have undertaken to eliminate what they perceive to be frivolous claims.⁹⁸ An easy way by which to reduce such claims is to limit appeals by parties who have entered guilty pleas. Appeals by those who admitted their guilt are particularly aggravating because they are made by persons whose guilt is not in question. Additionally, eliminating collateral attacks by convicts who have pled guilty would reduce greatly the tens of thousands of lawsuits filed by convicts each year.⁹⁹ By carving out this section of appeals and collateral attacks from the scope of allowable appeals, the government hopes to alleviate the burden placed upon the appellate courts.¹⁰⁰ By substantially reducing the total number of criminal cases that could result in appeals, the government frees the appellate courts to focus on more pressing matters.

Moreover, those who are in favor of a waiver provision believe that as a general rule, it is good policy for criminals, prosecutors, victims, and society at large to know that criminal matters are progressing rapidly to conclusion.¹⁰¹ Lack of closure may

96. See, e.g., Tamara Lytle, *Florida May Get More Judges to Ease Load*, ORLANDO SENTINEL, Mar. 4, 1998, at A24, available in 1998 WL 5333648; Sarah Pekkanen & Nicole L. Gill, *Judicial Vacancies Force Delays, Create Case Backlog*, DETROIT NEWS, Feb. 8, 1998, at A5, available in 1998 WL 3814035.

97. See U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS—1990, at 502 tbl. 5.25 (Kathleen Maguire & Timothy J. Flanagan eds., 1990).

98. See Claire Papanastasiou, *The Behind-Bars Bar*, MASS. LAW. WKLY., Feb. 17, 1997, at B1.

99. See Tom Zoellner, *Inmate Lawsuits Clutter Courts; Prisoners Get Nowhere With Most Suits*, SALT LAKE TRIB., Nov. 6, 1997, at A1, available in 1997 WL 15234839.

100. See *United States v. Raynor*, 989 F. Supp. 43, 44-45 (D.D.C. 1997) (quoting Keeney Memorandum, *supra* note 1, at 1) (indicating that the government desired to "reduc[e] the burden of appellate and collateral litigation involving sentencing issues").

101. At least two courts have cited this policy as a reason for upholding the waiver of the right to appeal sentencing in plea agreements. See *United States v. Rutan*,

have psychic costs on the parties involved in a given criminal matter. For instance, a victim may not be able to "get past" a crime perpetrated against him if the possibility of appellate review were to loom in the future. Elimination of appellate review thus brings closure to criminal cases with a greater rapidity than previously attained.

A further argument in support of the waiver is that unless the government uniformly enforces waiver agreements, the waiver becomes useless because it will not serve public policy goals. A case-by-case consideration of the waiver would encourage convicts to file appeals with the hope that they might be successful. Permitting convicts to assert rights they have waived by ignoring the binding effect of terms previously agreed to undercuts the legitimacy of the entire plea agreement system. Such a case-by-case review would encourage convicts to challenge any and all waivers, even ones previously held enforceable.

Opposing Waiver

One of the primary arguments made by those who oppose a mandatory waiver is that the criminal justice system, a system of rules intended to be applied evenly, is operated by humans. Humans are prone to make errors. It is therefore good public policy to maintain a system that involves frequent checks to verify that no errors have occurred. The need for a system of checks is especially prescient when individuals subject to the criminal law, but not steeped in a legal education, confront the criminal justice system. They cannot know all that goes into their defense, therefore defendants need a system that protects them from injustice.¹⁰²

Consider a hypothetical.¹⁰³ Several months after conviction and sentencing, a convict learns, through a great deal of media coverage, that his attorney has since been disbarred for ineffec-

956 F.2d 827, 829 (8th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 322 (9th Cir. 1990).

102. See generally Calhoun, *supra* note 32, at 178-79 (discussing the importance of a system of checks in the criminal justice system).

103. In his discussion of waiver, Judge Friedman offered a hypothetical much like the present example. See *Raynor* Transcript, *supra* note 6, at 15.

tive assistance of counsel because his drug abuse impaired his ability to offer an adequate defense. It becomes clear that the attorney used drugs during the representation of the convict. As a result of impaired judgment, the attorney recommended that the client accept the plea agreement containing the waiver language. The client now has no recourse. It goes against public policy to punish those, like this hypothetical defendant, who may have little control over situations that expose them to greater risk.

The system of checks, however, cannot be limitless. To have limitless appeals would severely overburden the criminal justice system. Other mechanisms to limit appeals, particularly frivolous appeals, do exist. The U.S. Code lists the few grounds on which a defendant may appeal sentencing.¹⁰⁴ For example, habeas corpus appeals are limited such that a convict may appeal only once.¹⁰⁵ Lastly, it would not be very taxing to have standardized forms at the prosecutor's office to handle run-of-the-mill appeals. Each appeal would get its due consideration, which for some would warrant appellate action. For most others, however, such consideration would warrant summary dismissal.

When Congress passed the Sentencing Reform Act, it asserted that uniformity in sentencing was a substantial public policy goal.¹⁰⁶ It sought to achieve that goal by creating sentencing guidelines and providing convicts the right to appeal sentencing.¹⁰⁷ Those who disfavor waiver of the right to appeal sentencing assert that this policy goal is hamstrung when the executive branch hands down a directive that severely limits the rights of criminal defendants to appeal their sentences.

Another argument disfavoring the waiver is that it actually undercuts judicial economy because new appeals simply will assert that the waiver was not valid. Appellants will attempt to satisfy the threshold requirements and to demonstrate illegality of sentencing on one of the other narrow grounds for appeal. If the threshold requirement were met, review would occur as if waiver were never to have happened.

104. See 18 U.S.C. § 3742 (1994).

105. See 28 U.S.C. § 2255 (1994).

106. See SENTENCING GUIDELINES MANUAL, *supra* note 14, at 2.

107. See *id.*

Further, the waiver insulates the prosecutor's office from judicial review. The judiciary is supposed to act as a check on the executive branch. The executive branch ought not be able to overcome that safeguard by fiat; therefore, prosecutors should not be able to insulate themselves from review.¹⁰⁸

ONE PROPOSED TREATMENT OF THE WAIVER

Legal and public policy considerations highlight the shortcomings of the Department of Justice directive. There are several possible methods available to remedy the deficiencies of the current waiver provision. Professor D. Randall Johnson is one of few scholars to present an in depth treatment of this issue and, for this reason, his is the only alternative proposal addressed in this Note. Professor Johnson rejects the "indiscriminate" enforcement of plea agreement waivers of the right to appeal sentencing.¹⁰⁹

To resolve the conundrum of competing legal and public policy issues, he proffers that limited enforcement of appeal-of-sentence waivers is the best approach.¹¹⁰

Voluntary, deliberate, and informed appeal-of-sentence waivers should be enforced except when enforcement will preclude review of claims that (1) sentence was imposed in violation of the underlying substantive criminal statute, (2) in imposing sentence the trial judge considered factors that trial judges are prohibited by law from considering, and (3) in imposing sentence the trial judge committed "plain error" in violation of the Sentencing Reform Act. In addition, an appeal-of-sentence waiver should not be enforced unless the waiver is mutual, *i.e.*, both parties—the defendant and government alike—have expressly agreed to waive their right to appeal sentence.¹¹¹

Professor Johnson asserts that there is no policy justification for the waiver when the underlying sentencing statute has been

108. See *People v. Stevenson*, 231 N.W.2d 476 (Mich. App. 1975) ("[P]ublic policy forbids the prosecutor from insulating himself from review by either implicitly or explicitly bargaining away a defendant's right to appeal . . .").

109. See Johnson, *supra* note 47, at 717.

110. See *id.* at 717-19.

111. *Id.* at 719-20.

misapplied, for instance, when a court has dispensed an erroneous sentence.¹¹² Due process problems also arise because such errors usually are not contemplated by the parties when entering an agreement.¹¹³

Although persuasive, at least one court has held that an error by a judge is not reviewable when the defendant has waived her right to appeal sentencing.¹¹⁴ "[A]n improper application of the guidelines is not a reason to invalidate a knowing and voluntary waiver of appeal rights."¹¹⁵ The Seventh Circuit appeared to accept the contract analysis of waiver, determining that, in plea agreements, parties have contracted and are bound by that contract.¹¹⁶

When illegitimate factors influence a judge's determination of sentence, a waiver in a plea agreement is not enforceable.¹¹⁷ A defendant's signing of a waiver should not influence a judge's sentencing determination, and should not work to insulate the judge from disparate treatment review.¹¹⁸ Appellate review of illegitimate sentencing certainly is the most praiseworthy form of sentence review. This opportunity for review, however, undercuts the public policy benefits of judicial economy. Creation of this exception increases the number of appeals because defendants who feel that the judge may have discriminated against them can raise this issue on appeal. To address this type of disparate treatment appeal, the courts must devise some form of legal framework, perhaps analogous to that established in *McDonnell Douglas Corp. v. Green*.¹¹⁹ Every appeal of sentence

112. *See id.* at 722.

113. *See id.* at 720.

114. *See United States v. Feichtinger*, 105 F.3d 1188 (7th Cir.), *cert. denied*, 117 S. Ct. 2467 (1997).

115. *Id.* at 1190.

116. *See id.*

117. *See id.*; *see also United States v. Jacobson*, 15 F.3d 19, 23 (2d Cir. 1994) (holding that the trial judge impermissibly used naturalized status as a factor in sentencing and that the defendant therefore did not waive his right to appeal).

118. Convicts can use habeas corpus actions to challenge disparate impact and disparate treatment by judges in sentencing and other matters. *See, e.g., McCleskey v. Kemp*, 481 U.S. 279, 291-99 (1987) (discussing habeas action equal protection claim of disparate impact in capital punishment); *Andrews v. Shulsen*, 600 F. Supp. 408, 429 (D. Utah 1984) (discussing habeas review of Utah court's disparate treatment regarding procedural issue).

119. 411 U.S. 792 (1973). In *McDonnell Douglas*, the Supreme Court indicated that

would then include an attempt to reach the threshold of consideration. Such a situation would increase, rather than decrease, the burdens on the appellate courts.

Professor Johnson's third point is a plain error exception.¹²⁰ He suggests a case-by-case review to determine whether a sentence was harsher or more lenient than authorized by the sentencing guidelines.¹²¹ Borderline cases would require deference to trial judges.¹²² Professor Johnson explains that this concept is vague, but compares it to Judge Learned Hand's analysis of venue in civil cases.¹²³

Unfortunately, such an exception does not decrease the number of appeals reaching the courts. Appellate courts cannot review trial court sentences *sua sponte*, therefore defendants will still need to file appeals to demonstrate to the appellate courts that trial courts committed plain error. Here, an appellant would assert (1) that the lower court misapplied the sentencing guidelines and hence her sentence falls in the area between the maximum of the guidelines and the maximum of the statute, or (2) that some other aspect of the plea agreement suffered from

the plaintiff in a Title VII action bears the initial burden of production to establish a *prima facie* case of discrimination. *See id.* at 802. To accomplish the *prima facie* showing, a plaintiff must demonstrate

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. Once a plaintiff proves her *prima facie* case, the burden of production switches to the defendant, who then has the opportunity to demonstrate that a legitimate reason existed for the employment decision. *See id.* The plaintiff then has the responsibility of demonstrating that the articulated reason is pretext for the actual discriminatory reason. *See id.* at 804. The Court has clarified and modified the *McDonnell Douglas* framework in subsequent decisions, such as *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993), thereby developing an elaborate framework for disparate treatment analysis. Devising a framework for disparate treatment in sentencing after plea agreements would involve intricacies much like those that arise in employment discrimination cases.

120. *See Johnson, supra* note 47, at 722.

121. *See id.*

122. *See id.*

123. *See id.*

plain error. Regardless of which argument a defendant advances, the courts and prosecutors inevitably will spend vast amounts of time addressing these appeals.¹²⁴

Lastly, Professor Johnson discusses the need for mutuality in unilateral conditions.¹²⁵ He believes an agreement should not bind either party unless both sides expressly agree to be bound.¹²⁶ For support of this principle, he relies upon *United States v. Guevara*.¹²⁷ *Guevara* held that a waiver should not be enforced against a defendant unless it also binds the government.¹²⁸ In other words, there is an implicit waiver by the government in cases where only the defendant is required to waive certain rights and privileges explicitly.

It is unclear whether mutuality cures previous defects. Assuming it does not, what benefits do both parties derive from mutuality? Mutuality saves the government money that it might spend on appeals of overly lenient sentences. Public policy dictates that the government would want to correct sentences that are too lenient.¹²⁹ For this very reason, the government includes express language asserting that it does not waive its right to appeal. Mutuality allows a defendant the possibility of escaping with a sentence that is too lenient, but fails to address the problem of consistency. The mere contrapositive of the problem about which Professor Johnson and this Note complain is no solution to the problem.

Regardless of the weight of the above arguments, Johnson accepts as a given that a waiver of the right to appeal sentencing can be informed.¹³⁰ Such is not the case. As previously dis-

124. Professor Johnson does not make the plain-error doctrine any more appealing by comparing it to venue. See *id.* Venue disputes can be very time consuming and expensive. See generally Brian V. Breheny & Elizabeth M. Kelly, Note, *Maintaining Impartiality: Does Media Coverage of Trials Need to be Curtailed?*, 10 ST. JOHN'S J. LEGAL COMMENT. 371, 402 n.115 (1995) (noting that change of venue is an expensive procedure).

125. See Johnson, *supra* note 47, at 723.

126. See *id.*

127. 949 F.2d 706 (4th Cir. 1991).

128. See *id.* at 707.

129. See Johnson, *supra* note 47, at 723.

130. See *id.* at 722.

cussed, a defendant cannot know about that which has yet to be determined.¹³¹

Professor Johnson also assumes the waiver is voluntary.¹³² The voluntary nature of a waiver agreement is questionable. The Department of Justice's policy is that waiver language is to be an absolute condition precedent to the entry of a plea agreement.¹³³

It is not a condition over which criminal defendants can bargain. As the waiver part of the agreement mirrors an adhesion contract, no reason exists to conclude that attaching four caveats could remedy the larger problems with the mandatory waiver of the defendant's right to appeal sentencing.

Professor Johnson's endorsement of a system that selectively enforces plea agreements fails to achieve the public policy benefits associated with plea agreements.¹³⁴ Professor Johnson's proposal, stressing a case-by-case approach, eliminates the public policy benefits of judicial efficiency.

Professor Johnson's alternative, then, fails to meet the legal concerns raised in the second section of this Note and undercuts the public policy benefits set forth in the third section. Given the deficiencies of Professor Johnson's alternative and the problems with the indiscriminate enforcement of the waiver that he astutely highlights, this Note presents another option.

RECOMMENDATION

Although the Department of Justice plan has admirable goals, the reality of the directive is that its costs outweigh its benefits. Professor Johnson's alternative strives to ameliorate the costs, but falls short because it reduces the potential benefits. This Note recommends that to achieve the public policy benefits without suffering the legal pitfalls, the waiver of the right to appeal sentencing should never be enforced in plea agreements that leave sentencing completely indeterminate until a later date.

131. See *supra* notes 63-73 and accompanying text.

132. See Johnson, *supra* note 47, at 706.

133. See Raynor Transcript, *supra* note 6, at 1-6.

134. See *supra* notes 95-101 and accompanying text.

Instead, if the government were to choose to seek a sentence with limited appellate review, it should turn to Federal Rule of Criminal Procedure 11(e)(1)(C), a universal rule that the government could use in all criminal plea agreements.¹³⁵

Under Rule 11, counsel for the government and for the defendant may "agree that a specific sentence is the appropriate disposition in the case."¹³⁶ When the court reviews such an agreement, it may accept, reject, or defer the agreement.¹³⁷ If the court were to accept the plea agreement, it would reduce the plea agreement and the sentence to a formal judgment.¹³⁸ If the court were to reject the plea agreement, it would have to afford the defendant the opportunity to withdraw the plea agreement and inform the defendant of the potentially adverse consequences of a failure to withdraw.¹³⁹ The defendant and the government then have the opportunity to recast the plea agreement in terms acceptable to the court.

Congress has legislated limitations on the right to appeal sentencing in plea agreements adopted in accordance with Rule 11(e)(1)(C).¹⁴⁰ These statutory limitations are unlike the limitations imposed by the Department of Justice directive, in that they are not defective in relation to law or public policy considerations.

Title 18, United States Code, section 3742(c) provides:

In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

- (1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence imposed is greater than the sentence set forth in such agreement; and
- (2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.¹⁴¹

135. See FED. R. CRIM. P. 11(e)(1)(C).

136. *Id.*

137. See FED. R. CRIM. P. 11(e)(2).

138. See FED. R. CRIM. P. 11(e)(3).

139. See FED. R. CRIM. P. 11(e)(4).

140. See 18 U.S.C. § 3742(c) (1994).

141. *Id.*

Paragraphs (1) and (2) of this section give the defendant the right to appeal such an agreement if the sentence imposed were a violation of law¹⁴² or a misapplication of the sentencing guidelines.¹⁴³ A judge's options are limited by the nature of a Rule 11(e)(1)(C) plea agreement, therefore, an appeal under paragraphs (1) or (2) is unlikely.

Rule 11 and the Legal Considerations

Under an agreement executed pursuant to Rule 11, a defendant waives a right that is more certain than the waiver in the Department of Justice plan. The criminal defendant knows the length of the sentence to which she is agreeing and, once the agreement is accepted, she knows that the judge may not deviate from the terms of the agreement. The increased knowledge allows the defendant to assess accurately the nature of the right she is relinquishing upon entry into the plea agreement. Sentencing ceases to be a remote concept and is a separate legal occurrence in only the most formalistic sense.

The Department of Justice directive raises a substantial fear that habeas corpus and other collateral attacks on sentencing will be limited. Rule 11 preserves the defendant's right to wage a collateral attack when a violation of law in sentencing occurs, for instance, an Eighth Amendment violation.

Rule 11 agreements are, by definition, mutually binding.¹⁴⁴ Both the lack of mutuality and the implication of mutuality are therefore removed from consideration. The concerns raised in *Guevara* regarding parties who did not adopt mutually binding terms ceases to be a problem.¹⁴⁵ The government is no longer in a position counter to its contracted position in the plea agreement. Under a contract analysis, it is untenable to impute a term into one party's obligations when, as part of an integrated agreement, that party expressly rejected such a term.¹⁴⁶ The gov-

142. See *id.* § 3742(a)(1), (c)(1).

143. See *id.* § 3742(a)(2), (c)(1).

144. See *id.* § 3742(c)(1)-(2).

145. See *United States v. Guevara*, 949 F.2d 706, 707 (4th Cir. 1991).

146. See RESTATEMENT (SECOND) OF CONTRACTS §§ 209-16 (1981).

ernment also is insulated from a sentence that it believes is too lenient. Rule 11 agreements require that both parties expressly commit to limiting the right to appeal.

Rule 11 and Public Policy

This Note has reviewed several issues of public policy, including judicial economy and closure of criminal matters.¹⁴⁷ The Rule 11 plea agreement successfully addresses these two considerations, along with all of the other policy issues—uniformity of waiver enforcement, error correction, uniformity in sentencing, and preventing the insulation of the prosecutor's office.

Judicial efficiency is a laudable public policy goal as well as a constitutional requirement,¹⁴⁸ regardless of one's predilections about the waiver of the right to appeal sentencing as set forth above.¹⁴⁹ The appeal-of-sentence waiver focuses on judicial economy at the appellate level. Assuming, arguendo, that appeals from sentences set pursuant to plea agreements consume an unnecessarily large amount of resources, limiting the right to appeal would reduce the appellate docket. Rule 11 plea agreements contain limited appellate rights.¹⁵⁰ If appeals of such sentences were not to occupy substantial court time, Rule 11 would not create an increase in the amount of appellate work because of the limits within the Rule.

147. These policy considerations have driven at least one state to limit appeals of convictions and sentences subsequent to plea agreements:

The amendments to [Arizona] Rules 17.1, 17.2 and 27.8, unlike those to Rule 32, were not motivated solely by the need to make changes in court rules to conform to the directive in the Victims' Bill of Rights that there be a "... prompt and final conclusion of the case after the conviction and sentence." While influenced to some extent by victims' rights considerations, the changes were the result of a joint effort undertaken by the Arizona Attorney General and the Arizona Court of Appeals. Their goal was to free themselves from the burden of a staggering appellate caseload whose numbers had become swollen, in recent years, by appeals from plea agreements which were required, by law, to be considered.

Charles R. Krull, *Criminal Justice in America—Part One: Eliminating Appeals from Guilty Pleas*, ARIZ. ATT., Oct. 1992, at 34-35 (citations omitted).

148. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .").

149. See *supra* text accompanying notes 34-94.

150. See *supra* text accompanying notes 140-43.

Although plea agreements expedite the closure of a given criminal matter, the presence of broad sentence appeal rights creates an air of indeterminacy. To lessen this sense of indeterminacy, appellate rights must be curtailed in a constitutional manner. Rule 11 accomplishes this goal by increasing the amount of knowledge and voluntariness possessed by criminal defendants who enter into these agreements.

Proponents desire indiscriminate enforcement of the waiver to give meaning to the agreements so as to achieve the other public policy considerations.¹⁵¹ For a number of reasons, indiscriminate enforcement is impossible;¹⁵² however, with Rule 11 plea agreements, enforcement can be, and is, maximized through narrow appellate rights. Unless a convicted criminal meets the statutory threshold for an appeal, she may not challenge the length of the sentence. Unlike the Department of Justice waiver, the Rule 11 waiver has no caveats that the government may neglect to share with the convicted criminal.

Rather than remedying errors, Rule 11 plea agreements prevent errors from occurring. By devising a sentence below the statutory maximum and within the sentencing guidelines with consent of both parties, both the prosecution and the defendant receive notice of the sentence and have an opportunity to negotiate for a sentence to their liking. Rule 11 plea agreements must meet the requirements of the present sentencing guidelines, which force plea agreements to meet the congressionally mandated policy of sentence uniformity. The policy of uniformity, then, is achieved to the same degree as it would be when a trial judge sets a post-conviction sentence according to the sentencing guidelines.

Finally, the Rule 11 plea agreement allays a concern of opponents of the waiver that prosecutors' offices would be able to insulate themselves from review by appellate courts.¹⁵³ Rule 11 plea agreements must be within sentencing guidelines and

151. See Johnson, *supra* note 47, at 709-10 (discussing *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990), and *United States v. Wiggins*, 905 F.2d 51 (4th Cir. 1990), and the public policy benefits from "wholesale enforcement").

152. See *supra* text accompanying notes 102-07.

153. See *supra* text accompanying note 108.

should be accepted by judges taking the pleas.¹⁵⁴ These two elements reduce the possibility of prosecutorial misconduct.

Rule 11 advances the public policy considerations of both the proponents and the opponents of the waiver. Because it achieves such success on the public policy front, Rule 11 plea agreements are preferable, on public policy grounds, to plea agreements under the Department of Justice plan.

Rule 11 and Professor Johnson's Proposal Compared

This Note critiqued each element of Professor Johnson's proposal directly, and examined his two assumptions—that such a waiver could be knowing and voluntary.¹⁵⁵ For the recommendation advanced above to be a worthwhile alternative, it must surmount the criticisms leveled at Professor Johnson's proposal.

First, this Note critiqued Professor Johnson's argument by stating that even though one would believe errors in calculation to be appealable, courts have held that a waiver of the right to appeal sentences includes a waiver of the right to appeal incorrectly calculated sentences.¹⁵⁶ The proposal advocated by this Note avoids this problem in two ways. First, because the parties consent to the length of the penalty, an appeal for an excessively lengthy sentence is unlikely and unnecessary.¹⁵⁷ Second, the right to appeal a sentence in excess of that in the Rule 11 plea agreement is guaranteed by statute.¹⁵⁸ Professor Johnson's suggestion that a concern for sentencing error justifies the waiver has been rejected by at least one court,¹⁵⁹ and does not manifest itself in this Note's proposal that the government enter Rule 11 plea agreements rather than use waiver language.

154. See SENTENCING GUIDELINES MANUAL, *supra* note 14, at § 6B1.2 & commentary. Plea agreements can depart downward from the sentencing guidelines, but must be justified under the departure rules. See *id.*

155. See *supra* text accompanying notes 130-33.

156. See *supra* text accompanying notes 70-73, 114-15.

157. Certainly, if a judge were to impose a sentence in excess of that agreed to by the defendant and the government without following the procedural safeguards in Rule 11(e)(3)-(4), both the defendant and the government would be entitled to appeal. See 18 U.S.C. § 3742(c)(1)-(2) (1994).

158. See *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir.), *cert. denied*, 117 S. Ct. 2467 (1997).

159. See *id.*

Second, although disparate treatment is always a possibility, especially in open plea agreements with waiver language, disparate treatment or other violations of the law are less likely to occur in a Rule 11 plea agreement. The plea agreement and the criminal sentence are substantially insulated from judicial illegality because the parties mutually consent and the court acts merely to ratify the plea agreement. The court can only ratify or reject, therefore it does not have the opportunity to inject its own personal biases into the criminal penalty.¹⁶⁰

Third, plain error does not create a problem under this proposal because error would not exist. The parties must consent to the length of the penalty set forth in the plea agreement. Parties would not consent to terms in excess of or less than those set forth in the sentencing guidelines because such would create the statutory right to appeal. The defendant does not want the government to appeal a sentence that might be too lenient. The government does not want the defendant to appeal a sentence that might be too excessive. Both parties will therefore settle on a penalty within the guideline range, eliminating the possibility of plain error.

Fourth, Rule 11 plea agreements satisfy Professor Johnson's desire for mutuality. These agreements are, by their very nature, mutual. Unlike implied mutuality, which disregards the wishes of one party, Rule 11 plea agreements require express mutuality. As such, a court could not impute terms into the agreement.

The concern over whether the defendant's waiver is knowing and voluntary has been addressed previously.¹⁶¹ To reiterate, a Rule 11 plea agreement meets the requirement of knowledge because a defendant is well aware of the sentence that is to be imposed. Title 18, United States Code, section 3742 expressly

160. Although it is possible that a court could manifest its bias by selectively rejecting Rule 11(e)(1)(C) pleas, it is unlikely. The procedural safeguards would increase the court's opportunity cost in setting sentences should the court wish to reject the plea agreement as consented to by the parties. Additionally, courts are reluctant to second-guess the government in its assessment of the proper penalty for crimes charged. *See, e.g., United States v. Rosa*, 17 F.3d 1531, 1551 (2d Cir.), *cert. denied*, 513 U.S. 879 (1994).

161. *See supra* text accompanying notes 63-73.

delineates the three grounds on which a defendant may appeal a final sentence.¹⁶² Two of those grounds—violation of the law and incorrect application of the sentencing guidelines—are disfavored because consent alters the judge's role to that of ratifier. The last ground for appeal—that a sentence exceeds the agreed-to terms—provides a necessary check on the judge. Rule 11 ameliorates the potential uncertainty problems, therefore, the defendant's waiver under Rule 11 is made knowingly.

Rule 11 plea agreements, like plea agreements generally, are by their very nature voluntary. The government cannot force a defendant to enter a Rule 11(e)(1)(C) plea.¹⁶³ Rule 11 presents the defendant with several plea options.¹⁶⁴ This situation differs substantially from the language that the Department of Justice promulgated in 1997 requiring incorporation of the waiver into all federal plea agreements.

In sum, Rule 11(e)(1)(C) plea agreements do not suffer from the same deficiencies as Professor Johnson's proposal of limited enforcement of waiver-of-sentence-appeal plea agreements.¹⁶⁵ The range of cases in which there is an agreement and a subsequent appeal is likely to be more narrow under Rule 11 than under the Department of Justice plan or Professor Johnson's proposal.¹⁶⁶

162. See 18 U.S.C. § 3742 (1994).

163. See FED. R. CRIM. P. 11(d).

164. See FED. R. CRIM. P. 11(a)(2).

165. See *supra* text accompanying notes 109-33.

166. This analysis, of course, disregards those plea agreements already reached that include mandatory waiver language. There are three options in dealing with these extant agreements. First, the agreements could be enforced in those jurisdictions that permit enforcement and held invalid in those jurisdictions that find the language offensive to law and public policy, necessitating a new plea agreement. Second, all of the agreements could be held invalid, necessitating a renegotiation by the parties. Third, all of the agreements' terms, save for the waiver, could be enforced.

The first option—validity for some, invalidity for others—is decidedly unsatisfactory. It fails to recognize the legal considerations that would make waiver offensive in any jurisdiction and undercuts the public policy goals of uniformity and certainty.

The second option—invalidity for all—potentially would crush the federal prosecutorial system with paperwork and negotiations. Such an option proves unsatisfactory because of the high costs associated with renegotiating all of the voided plea agreements. Additionally, significant problems arise when one considers that all those whose pleas were declared invalid would be released from incarceration. The costs and risks would be staggering.

CONCLUSION

In conclusion, the Department of Justice plan to incorporate a waiver of the right to appeal sentencing in all future federal plea agreements fails to meet legal and public policy considerations. The waiver cannot be valid because defendants cannot knowingly make such a waiver. Congress designed the right to appeal sentencing to ensure uniformity in sentencing. The right to appeal thus functions as a source of judicial authority over the sentencing court and not as an individual right. The waiver does not achieve the public policy goals of economy, closure, and uniformity of enforcement because the waiver merely creates a two-tiered appeal in which defendants attack the validity of the waiver—as a threshold question—before addressing their underlying substantive appellate arguments.

Professor Johnson's suggestion of limited enforcement of the waiver fails to recognize the basic problems of the lack of knowledge and voluntariness. Additionally, it undercuts all of the public policy goals advocated because the exceptions created generate additional litigation on the appellate level.

This Note's proposal that the federal government use Rule 11(e)(1)(C) plea agreements when it wishes to effectuate a plea in which a defendant sacrifices some of her rights to appeal meets the challenges posed on legal and public policy levels. The criminal sentence is determined in the plea agreement, therefore the defendant has the requisite amount of information to make a knowing and voluntary choice. Such plea agreements also achieve the public policy benefits of judicial economy and closure.

The third option—enforcement of all terms except the waiver—would reduce the substantial costs associated with the second option, increase the uniformity lacking in the first option, and pay heed to the legal considerations ignored in the first option. There is a precedent for this third option. *See United States v. Bushert*, 997 F.2d 1343, 1350-54 (11th Cir. 1993). In *Bushert*, the court held that the "remedy for an unknowing and involuntary waiver is essentially severance," that is, the waiver "is severed or disregarded . . . while the remainder of the plea agreement is enforced as written and the appeal goes forward." *Id.* at 1353. Although the Eleventh Circuit in *Bushert* discussed a particular instance in which the waiver was unknowing and involuntary, the argument in this Note is that all such waivers are unknowing and involuntary.

The government should, therefore, forgo the waiver of the right to appeal sentencing as part of a plea agreement and enter, instead, into plea agreements under Rule 11(e)(1)(C).

David E. Carney