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## Waive Goodbye to Appellate Review of Plea Bargaining: Specific Performance of Appellate Waiver Provisions Should Be Limited to Extraordinary Circumstances

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# Waive Goodbye to Appellate Review of Plea Bargaining

## SPECIFIC PERFORMANCE OF APPELLATE WAIVER PROVISIONS SHOULD BE LIMITED TO EXTRAORDINARY CIRCUMSTANCES

### INTRODUCTION

Imagine that you have been arrested by federal law enforcement officers and charged with felony criminal offenses—perhaps drug crimes and related conspiracy charges. Assume these crimes carry lengthy sentences of incarceration, even life imprisonment. Pending trial, you remain at a federal detention center because you cannot afford bail. An Assistant U.S. Attorney arranges a proffer meeting with you and your court-appointed attorney. If you agree to plead guilty to at least one of the crimes charged, cooperate with the government, and provide information that leads to the arrest and successful prosecution of others, the government will suggest a more lenient sentence to the court. You understand that you will be forfeiting a jury trial and its accompanying rights, but there is one other important caveat: you must also waive your right to appeal. Your attorney explains that this means you cannot challenge any aspect of your plea bargain or sentence, except as explicitly provided for in the agreement. In effect, with the exception of a few enumerated circumstances,<sup>1</sup> the deal is final. Maybe this makes you nervous—after all, errors might occur during the computation of your sentence—but the prosecution is adamant about the inclusion of the appellate waiver provision. You cannot risk a trial, a conviction, and a harsher sentence, so you accept.

Fast forward a few months to sentencing: you have held up your end of the deal, and the prosecution is satisfied with your cooperation. As promised, the government suggests a more lenient sentence to the court. In calculating your sentence, however, the court arrives at a longer term of imprisonment than you anticipated. You are certain that this sentence deprives you of

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<sup>1</sup> See *infra* notes 126-34 and accompanying text.

the full benefit of your bargain, so you appeal, despite your promise not to do so. The appellate court determines that your valid waiver of your appeal rights bars the action, and therefore, the court cannot reach the merits of your argument. Instead of dismissing your appeal—as is the general practice—the court remands your case for resentencing, which would allow the government to seek a *higher* sentence. Such was the case for Christopher Erwin, a man who pleaded guilty to conspiracy to distribute and possession with intent to distribute oxycodone, and waived his right to appeal. But when the sentencing judge computed his sentence differently than Erwin expected,<sup>2</sup> he appealed. The Third Circuit held that his appeal was barred by a valid waiver, and therefore when Erwin was resentenced, the government could withdraw its motion for a more lenient sentence.<sup>3</sup> This case has opened the door for a similar fate to befall other criminal defendants who enter into plea agreements with appellate waiver provisions.<sup>4</sup>

Federal prosecutors have regularly included appellate waiver provisions in written plea agreements since 1990, when the Fourth Circuit first upheld their use in *United States v. Wiggins*.<sup>5</sup> In that case, the court noted that a defendant may waive numerous constitutional rights—the right to a jury trial, the right to confront witnesses, and the privilege against self-incrimination—when negotiating a voluntary plea agreement.<sup>6</sup> From this well-settled rule, the court extrapolated that a defendant may also waive, in a valid plea agreement, the statutory right to appeal.<sup>7</sup> The court ultimately held that “a defendant who pleads guilty, and expressly waives the statutory right to raise objections

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<sup>2</sup> See *infra* notes 139-50 and accompanying text.

<sup>3</sup> The U.S. Court of Appeals for the Third Circuit decided *United States v. Erwin* on August 26, 2014. *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014), *cert denied*, 136 S. Ct. 400 (2015).

<sup>4</sup> The court considered “the novel question of what *remedy* is available to the Government when a criminal defendant who knowingly and voluntarily executed a waiver of right to appeal—and received valuable promises from the Government in return—violates his plea agreement by filing an appeal.” *Id.* at 223 (emphasis added). The Third Circuit concluded that the defendant’s appeal was “within the scope of his appellate waiver,” but instead of following the normal course of action—dismissing the appeal—the court took the unprecedented step of holding that specific performance was the appropriate remedy for the defendant’s breach of the plea agreement. *Id.* The court remanded the case for de novo resentencing. *Id.*

<sup>5</sup> *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 53 (“If defendants can waive fundamental constitutional rights[,] . . . surely they are not precluded from waiving procedural rights granted by statute.” (quoting *United States v. Clark*, 865 F.2d 1433, 1437 (4th Cir. 1989))); 18 U.S.C. § 3742 (2012) (granting defendants the right to “file a notice of appeal in the district court for review of an otherwise final sentence”).

to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement.”<sup>8</sup>

Since *Wiggins*, appellate waivers have become entrenched in federal criminal practice. Critics have argued that waivers are “unethical and . . . further stack[] the deck in favor of the government by putting defendants at a disadvantage.”<sup>9</sup> In essence, these waivers effectively preclude judicial review of plea bargains, which dispose of most criminal cases.<sup>10</sup>

Federal prosecutors, on the other hand, defend these waivers as promoting judicial economy and preventing frivolous appeals.<sup>11</sup> By confining the scope of a defendant’s right to appeal, the case is disposed of with a greater air of finality, allowing the government to focus its efforts on other open cases. Although the federal government continues to sanction appellate waiver provisions generally, the U.S. Attorney General has issued a new departmental policy regarding waivers of claims of ineffectiveness of counsel on appeal.<sup>12</sup> On October 14, 2014, Deputy Attorney General James M. Cole distributed a memorandum to all federal prosecutors, advising that they should no longer include provisions in plea agreements that ask criminal defendants to waive claims of ineffectiveness of counsel, regardless of when the claims are raised.<sup>13</sup> Although this new policy preserves a defendant’s right to appeal a conviction if his trial counsel (or appellate counsel in some cases) is ineffective, prosecutors remain “free to request waivers of appeal and of post-conviction remedies to the full extent permitted by law as a component of plea discussions and agreements.”<sup>14</sup> Thus, criminal defendants will

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<sup>8</sup> *Wiggins*, 905 F.2d at 53.

<sup>9</sup> Evan Perez, *Justice Dept. Bars Waivers That Prevent Appeal*, CNN (Oct. 14, 2014, 1:42 PM), <http://www.cnn.com/2014/10/14/us/justice-department-legal-advice/> [<http://perma.cc/9FBU-AXTG>].

<sup>10</sup> *Id.*; see Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 161 (1995) (“The right to appeal in criminal cases has been variously described as ‘a fundamental element of procedural fairness’ and the ‘final guarantor of the fairness of the criminal process.’ . . . At the core of how we perceive our criminal justice system is a basic distrust of the awesome power of the state and its ability to infringe upon individual rights. The potential for such an abuse of power by either the prosecutor or the trial judge traditionally has been viewed as requiring the availability of some form of corrective process such as the right to appeal.” (footnotes omitted) (quoting ABA COMM. ON STANDARDS OF JUDICIAL ADMIN., STANDARDS RELATING TO APPELLATE COURTS 14 (1977)); David Rossman, “Were There No Appeal”: *The History of Review in American Criminal Courts*, 81 CRIM. L. & CRIMINOLOGY 518, 518 (1990)).

<sup>11</sup> Perez, *supra* note 9.

<sup>12</sup> Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice to All Federal Prosecutors (Oct. 14, 2014), <http://sentencing.typepad.com/files/doj-policy-on-waivers-of-claims-of-iac.pdf> [<http://perma.cc/QD89-GSUT>].

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

still likely be routinely asked to forfeit their right to appeal when executing a written plea agreement.<sup>15</sup>

It is well established that plea agreements—including those with appellate waiver provisions—are analyzed under the standards of contract law.<sup>16</sup> When the government breaches a plea agreement, federal courts have considered specific performance<sup>17</sup> to be an appropriate remedy.<sup>18</sup> Some courts have also enforced plea agreements where the defendant was the breaching party,<sup>19</sup> although not when the defendant's breach consisted of appealing despite a waiver provision in the defendant's plea agreement. Generally, appellate courts “retain jurisdiction over an appeal by a defendant who has signed an appellate-waiver”; a court will not, however, reach the merits of such a case if a defendant “knowingly and voluntarily waived her right to appeal.”<sup>20</sup> If the appellate court deems the waiver valid, the appeal is dismissed.<sup>21</sup>

This note considers the applicability of the specific performance remedy for a defendant's breach of an unconditional plea agreement, where the breach consists only of filing an appeal theoretically precluded by a waiver provision. This note explores constitutional principles, contractual principles, and public policy implications in arguing that the Court of Appeals for the Third Circuit has abandoned its role as an arbiter of justice and fairness in order to conserve judicial and prosecutorial resources. Specifically, court-sanctioned threats of withdrawn leniency, an

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<sup>15</sup> Principally, this will prevent defendants from raising claims of error regarding their sentence.

<sup>16</sup> *United States v. Castro*, 704 F.3d 125, 135 (3d Cir. 2013); *United States v. Williams*, 510 F.3d 416 (3d Cir. 2007); *United States v. Nolan-Cooper*, 155 F.3d 221, 236 (3d Cir. 1998); see Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1910 (1992) (“Plea bargains are, as the name suggests, *bargains*; it seems natural to argue that they should be regulated and evaluated accordingly.”).

<sup>17</sup> “In essence, the remedy of specific performance enforces the execution of a contract according to its terms . . . .” *Specific Performance*, BLACK’S LAW DICTIONARY (10th ed. 2014) (quoting G.W. KEETON, AN INTRODUCTION TO EQUITY 304 (5th ed. 1961)).

<sup>18</sup> See *United States v. Erwin*, 765 F.3d 219, 231 (3d Cir. 2014); *United States v. Nolan-Cooper*, 155 F.3d 221, 241 (3d Cir. 1998) (“When the government breaches a plea agreement, the general rule is to remand the case to the district court for a determination whether to grant specific performance or to allow withdrawal of the plea.”) (remanding for a full resentencing to remedy the government’s breach of the plea agreement); *Kingsley v. United States*, 968 F.2d 109, 113-14 (1st Cir. 1992) (ordering specific performance where the government breached its promise not to oppose the defendant’s placement in a low-security federal camp facility).

<sup>19</sup> See *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987) (finding that defendant’s breach of plea agreement by refusing to testify at codefendant’s retrial removed the double jeopardy bar to prosecution of defendant on original charges where plea agreement provided that parties would be returned to the status quo ante if defendant refused to testify).

<sup>20</sup> *United States v. Gonzalez-Melchor*, 648 F.3d 959, 962 (9th Cir. 2011) (quoting *United States v. Jacobo Castillo*, 496 F.3d 947, 957 (9th Cir. 2007)).

<sup>21</sup> See *United States v. Stabile*, 633 F.3d 219, 248 (3d Cir. 2011) (because the defendant’s appellate waiver was valid and enforceable, the court dismissed the sentencing appeal).

enhanced sentence, further criminal charges, or a return to the status quo ante<sup>22</sup> may insulate, preclude the review of, and perpetuate injustice or illegality in the plea bargaining process. Criminal defendants with arguably meritorious claims of error on appeal should not have to forego an appeal for fear that the court will not only disagree with them, but will also subject them to enhanced sentences or further charges. Considering the panoply of rights criminal defendants already waive in order to plead guilty, it is essential that defendants at least retain the right to the review of the voluntariness of their decision to waive the right to appeal.

Part I of this note discusses the plea bargaining process itself, the right to appeal and the waiver thereof, the relevant contractual principles that govern the interpretation of plea agreements, and the remedies available upon a breach of a plea agreement. Part II discusses *United States v. Erwin*, focusing on the Third Circuit's holding that specific performance is available as a remedy for the government when a criminal defendant breaches a plea agreement by appealing despite waiving the right to do so.<sup>23</sup> Part III evaluates and critiques the Third Circuit's holding in *Erwin* and suggests alternative remedies. Providing the government with the extraordinary remedy of specific performance will effectively preclude review of plea agreements and the validity of appellate waivers, even in the absence of a cross-appeal or a government motion to enforce the appeal waiver. The government should be prohibited from moving for specific performance if it does not first move to dismiss the appeal based on a valid waiver. The cross-appeal rule dictates that the government may only raise an issue when it has been aggrieved by a final judgment. This note concludes that in *Erwin*, the government was not aggrieved by a final judgment and therefore should not have been able to seek specific performance. The Third Circuit's erroneous approach in *Erwin* should not govern how future courts address breaches of appellate waiver provisions; rather, courts should only order the specific enforcement of such provisions in extraordinary circumstances.

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<sup>22</sup> This would essentially wipe the slate clean—any and all promises tendered by either the prosecution or the defendant would no longer be enforceable. The government would be free to proceed as if the plea agreement had never been reached and, if it desired, could prosecute the defendant accordingly.

<sup>23</sup> *Erwin*, 765 F.3d 219. At this time, it does not appear that any other circuit has followed suit, nor has the Supreme Court accepted the invitation to review the Third Circuit's new approach. *Id.*, cert. denied, 136 S. Ct. 400 (2015).

## I. THE DISPOSITION OF CRIMINAL CASES

### A. *Constitutional Guarantees*

Those accused of crimes are guaranteed certain fundamental rights, many of which are enumerated in the U.S. Constitution. Defendants may either avail themselves of these rights, or bargain them away during the plea negotiation process. Thus, it is important to understand precisely the nature and value of the following guarantees the defendant forfeits in order to plead guilty.

The Fifth Amendment provides, in pertinent part, that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.”<sup>24</sup> The Double Jeopardy Clause of the Fifth Amendment protects against not only multiple prosecutions for the same offense, but also against multiple punishments for the same offense.<sup>25</sup> The prohibition on compelled self-incrimination reflects the accused’s “free choice to admit, to deny, or to refuse to answer.”<sup>26</sup> This right recognizes a fundamental tenet of the American criminal justice system: it is adversarial, not inquisitorial.<sup>27</sup> Thus, government officials are “constitutionally compelled to establish guilt by evidence independently and freely secured”; they may not coerce a suspect to incriminate himself.<sup>28</sup> Last is the Due Process Clause. The Supreme Court has elaborated that a person is entitled to “reasonable notice of a charge against him, and an opportunity to be heard,” requiring, at a minimum, the “right to examine witnesses . . . and to be represented by counsel.”<sup>29</sup>

The Sixth Amendment further protects criminal defendants, guaranteeing them fundamental trial rights. It assures that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury,” to be confronted by adverse witnesses, and to the assistance of counsel.<sup>30</sup> The Speedy Trial Clause is designed to prevent unreasonable delay between formal accusation and trial. A speedy trial decreases the

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<sup>24</sup> U.S. CONST. amend. V.

<sup>25</sup> *United States v. Wilson*, 420 U.S. 332, 343 (1975).

<sup>26</sup> *Malloy v. Hogan*, 378 U.S. 1, 7 (1964) (quoting *Lisenba v. California*, 314 U.S. 219, 241 (1941)).

<sup>27</sup> *Id.* at 7.

<sup>28</sup> *Id.* at 8.

<sup>29</sup> *Washington v. Texas*, 388 U.S. 14, 18 (1967) (quoting *In re Oliver*, 333 U.S. 257, 273 (1948)).

<sup>30</sup> U.S. CONST. amend. VI.

likelihood of anxiety, lengthy pretrial incarceration, and deterioration of the defendant's case due to "dimming memories and loss of exculpatory" or other favorable evidence.<sup>31</sup> The most serious form of prejudice is the last; a defendant's ability to adequately present a defense is at the core of a fair justice system.<sup>32</sup> The Sixth Amendment also recognizes, and the Supreme Court requires, a public and open trial "free of prejudice, passion, excitement, and tyrannical power."<sup>33</sup> In fact, the "very purpose of a court system [is] . . . to adjudicate controversies . . . in the calmness and solemnity of the courtroom according to legal procedures."<sup>34</sup>

The Sixth Amendment's Confrontation Clause pertains to trials themselves; the text applies to "'witnesses' against the accused—in other words, those who 'bear testimony.'"<sup>35</sup> The Confrontation Clause ultimately seeks to ensure the reliability of evidence by exposing witness testimony to "the crucible of cross-examination."<sup>36</sup> Although "the Sixth Amendment does not by its terms grant to a criminal defendant the right to secure the attendance and testimony of any and all witnesses[,] it guarantees him 'compulsory *process* for obtaining witnesses in his favor.'"<sup>37</sup> The Supreme Court has emphasized that this right "is in plain terms the right to present a defense": the right to provide the jury with the defendant's own account of the facts so that the jury may ultimately "decide where the truth lies."<sup>38</sup>

The final guarantee provided by the Sixth Amendment is the right to the assistance of counsel. It has been regarded as one of the most significant rights in the criminal defendant's arsenal.<sup>39</sup> The Supreme Court has held that the "right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel."<sup>40</sup> Only where a defendant knowingly, intelligently, and voluntarily waives the assistance of counsel can a court refuse to allow or furnish an

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<sup>31</sup> *Doggett v. United States*, 505 U.S. 647, 654 (1992).

<sup>32</sup> *Id.*

<sup>33</sup> *Sheppard v. Maxwell*, 384 U.S. 333, 350 (1966) (quoting *Chambers v. Florida*, 309 U.S. 227, 236-37 (1940)).

<sup>34</sup> *Id.* at 350-51 (quoting *Cox v. Louisiana*, 379 U.S. 559, 583 (1965) (Black, J., dissenting)).

<sup>35</sup> *Crawford v. Washington*, 541 U.S. 36, 51 (2004) (quoting 2 N. WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828)).

<sup>36</sup> *Id.* at 61.

<sup>37</sup> *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982) (emphasis added) (quoting U.S. CONST. amend. VI).

<sup>38</sup> *Washington v. Texas*, 388 U.S. 14, 19 (1967).

<sup>39</sup> See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

<sup>40</sup> *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938) (quoting *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932)).



attorney for the defendant.<sup>41</sup> Absent the rare case where a defendant, of his own volition, proceeds pro se, the Court has recognized that the average defendant, a lay person, faces a serious disadvantage: the prosecution is “presented by experienced and learned counsel,” whereas the defendant may lack “both the skill and knowledge adequately to prepare his defence, even though he have a perfect one.”<sup>42</sup>

Lastly, though not explicitly stated in the Constitution, a bedrock of the American criminal justice system has always been the presumption of innocence.<sup>43</sup> Therefore, a person accused of a crime is entitled to the protection of this presumption until the government proves the person’s guilt beyond a reasonable doubt.<sup>44</sup> Notwithstanding this plethora of constitutional safeguards, criminal defendants may choose to forego some, or all, of these rights in order to bargain with the government.

### *B. The Rise and Predominance of Plea Bargains*<sup>45</sup>

Although jury trials are championed in American jurisprudence, defendants may forego a trial in favor of entering a plea of guilty or nolo contendere.<sup>46</sup> In fact, over 95% of all criminal cases in state courts are resolved by a guilty plea,<sup>47</sup> and up to 97% of federal criminal cases are disposed of by plea bargains.<sup>48</sup>

<sup>41</sup> *Id.* at 465; see *Faretta v. California*, 422 U.S. 806, 820-21 (1975) (holding that a defendant may represent himself).

<sup>42</sup> *Johnson*, 304 U.S. at 463.

<sup>43</sup> See, e.g., *Coffin v. United States*, 156 U.S. 432, 453 (1895); *Paul v. Davis*, 424 U.S. 693 (1976); *In re Winship*, 397 U.S. 358 (1970).

<sup>44</sup> *Coffin*, 156 U.S. at 452 (proof beyond a reasonable doubt essentially amounts to the guarantee that the government has rebutted the presumption of innocence).

<sup>45</sup> The term plea bargain has been defined as “any agreement between the prosecutor and the defendant whereby a defendant agrees to perform some act or service in exchange for more lenient treatment by the prosecutor.” Michael D. Cicchini, *Broken Government Promises: A Contract-Based Approach to Enforcing Plea Bargains*, 38 N.M. L. REV. 159, 160 (2008) (quoting *State v. Thompson*, 426 A.2d 14, 15 n.1 (Md. Ct. Spec. App. 1981)).

<sup>46</sup> See FED. R. CRIM. P. 11; see also Jacqueline E. Ross, *The Entrenched Position of Plea Bargaining in United States Legal Practice*, 54 AM. J. COMP. L. 717, 718 (2006) (“Both the states and the federal government permit defendants to forego adjudication by entering pleas of guilty, or nolo contendere.”). A plea of nolo contendere (“I do not wish to contend”) allows a defendant to neither contest nor admit guilt. *Nolo Contendere*, BLACK’S LAW DICTIONARY (10th ed. 2014); see *Plea*, BLACK’S LAW DICTIONARY (10th ed. 2014). A nolo contendere plea is often used where criminal defendants may also face civil liability for the same underlying act or omission.

<sup>47</sup> Ross, *supra* note 46, at 717.

<sup>48</sup> *United States v. Booker*, 543 U.S. 220, 289 (2005) (Stevens, J., dissenting in part). For further discussion of the prevalence of plea bargaining in the federal criminal justice system, see Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 88-91 (2005), and Hon. Patrick E. Higginbotham, *Mahon Lecture*, 12 TEX. WESLEYAN L. REV. 501, 503 n.12 (2006).

Federal Rule of Criminal Procedure 11 governs the process of entering a plea.<sup>49</sup> It sets out stringent guidelines a court must follow before accepting a plea of guilty or nolo contendere. The court must address the defendant personally in open court and inform the defendant of, and determine that the defendant understands, a litany of rights.<sup>50</sup> First and foremost, the defendant must be advised that he or she has the right to plead not guilty and persist in such a plea.<sup>51</sup> The defendant must be made aware of the rights he or she would be guaranteed at trial: the right to representation by counsel (appointed by the court if necessary), the right to a trial by jury, the right to “confront and cross-examine adverse witnesses,” the right to testify and present evidence (as well as the competing right not to be compelled to be a witness against himself or herself), and the right to compel the appearance of witnesses.<sup>52</sup>

The court must also include in its colloquy with the defendant that the defendant waives the aforementioned trial rights, the nature of any charge to which the defendant is pleading, any maximum possible penalties the defendant may face—fine, imprisonment and post release supervision—as well as any mandatory minimum penalties, applicable forfeiture, and the court’s ability to order restitution or “obligation to impose a special assessment.”<sup>53</sup> The court must ensure that the defendant is aware of the method by which the court will compute the defendant’s sentence.<sup>54</sup> It is also incumbent upon the court to inform the defendant of any provisions in the plea agreement in which the defendant waives the right to appeal or “collaterally attack the sentence.”<sup>55</sup> Finally, a defendant who is not a U.S. citizen must understand that if convicted, the defendant may face a host of immigration consequences.<sup>56</sup>

The court is also required to ensure that a plea is voluntary and determine the factual basis for the plea.<sup>57</sup> A defendant may withdraw a guilty plea “(1) before the court accepts the plea, for

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<sup>49</sup> FED. R. CRIM. P. 11.

<sup>50</sup> FED. R. CRIM. P. 11(b)(1).

<sup>51</sup> FED. R. CRIM. P. 11(b)(1)(B).

<sup>52</sup> FED. R. CRIM. P. 11(b)(1)(C)-(E).

<sup>53</sup> FED. R. CRIM. P. 11(b)(1)(F)-(L).

<sup>54</sup> FED. R. CRIM. P. 11(b)(1)(M) (stating that the court is obligated to “calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a)”).

<sup>55</sup> FED. R. CRIM. P. 11(b)(1)(N).

<sup>56</sup> FED. R. CRIM. P. 11(b)(1)(O) (stating that a defendant may “be removed from the United States, denied citizenship, and denied admission to the United States in the future”).

<sup>57</sup> FED. R. CRIM. P. 11(b)(2)-(3).

any reason or no reason; or (2) after the court accepts the plea, but before it imposes sentence” if the court rejects the plea or the defendant shows just cause.<sup>58</sup> After the court has imposed a sentence, the defendant may not withdraw a plea of guilty; it can only be set aside on direct appeal or collateral attack.<sup>59</sup>

The Supreme Court outlined the potential benefits of the guilty plea and often concomitant plea bargain in *Blackledge v. Allison*.<sup>60</sup> The Court noted that the defendant “avoids extended pretrial incarceration and the anxieties and uncertainties of a trial, he gains a speedy disposition of his case, the chance to acknowledge his guilt, and a prompt start in realizing whatever potential there may be for rehabilitation.”<sup>61</sup> Furthermore, it promotes judicial economy and conservation of prosecutorial resources.<sup>62</sup> Finally, the general public need not be further subjected to the risk of offenders “who are at large on bail while awaiting completion of criminal proceedings.”<sup>63</sup>

The Supreme Court has not, however, focused solely on the benefits of the plea bargaining process. In *Brady v. United States*, where the Supreme Court held that a guilty plea must be knowing and voluntary, the Court cautioned that “a guilty plea is a grave and solemn act to be accepted only with care and discernment.”<sup>64</sup> The Court further emphasized that “[c]entral to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment.”<sup>65</sup> Thus, where a criminal defendant is forced to stand as a witness against himself, though normally shielded by the Fifth Amendment from being compelled to do precisely that, there must be a “minimum requirement that his plea be the voluntary expression of his own choice.”<sup>66</sup> A defendant’s plea is not only an admission of past conduct, but it is his or her “consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge.”<sup>67</sup> Despite this rhetoric, guilty pleas are usually

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<sup>58</sup> FED. R. CRIM. P. 11(d).

<sup>59</sup> FED. R. CRIM. P. 11(e).

<sup>60</sup> *Blackledge v. Allison*, 431 U.S. 63 (1977).

<sup>61</sup> *Id.* at 71.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* (footnote omitted).

<sup>64</sup> *Brady v. United States*, 397 U.S. 742, 748 (1970).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.* For discussion of additional negative aspects of plea bargains, see generally Ross, *supra* note 46, at 723-25 (reviewing a range of criticisms of the plea bargaining process, from pressure on innocent defendants, to the influence of gamesmanship, to the fact that the system is as “irrational in its mercies as in its rigors”).

not accepted with such solemnity.<sup>68</sup> Criminal defendants often lack the resources, sophistication, and adequate representation<sup>69</sup> to proceed to trial or negotiate the best possible bargain. Therefore, the government's inclusion of waivers of appellate rights further isolates the plea-bargaining process and written plea agreements from adequate oversight and judicial review.

C. *Analyzing Written Plea Agreements and Their Validity: Contractual Principles*

When a defendant pleads guilty, the terms are generally also laid out in a written plea agreement between the prosecution and the defendant. These written agreements are evaluated pursuant to civil contract law, despite arising in the criminal context.<sup>70</sup> “A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”<sup>71</sup> Therefore the law governing contracts is particularly apposite to plea agreements: such agreements set forth the promises the government makes to a defendant and the promises the defendant makes in return.<sup>72</sup>

The Supreme Court has maintained that “plea agreements must be construed in light of the rights and obligations created

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<sup>68</sup> For example, in border states, the federal government employs what are known as “fast-track” programs, which would provide for disposition within 30 days of the defendant's arrest. See Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep't of Justice to All United States Attorneys 1, 3 (Jan. 31, 2012), <http://www.justice.gov/sites/default/files/dag/legacy/2012/01/31/fast-track-program.pdf> [<http://perma.cc/KYP7-CREC>].

<sup>69</sup> Those defendants who cannot afford to retain private counsel will be appointed counsel. Unfortunately, however, these attorneys often have too many cases and not enough time or money. *Five Problems Facing Public Defense on the 40th Anniversary of Gideon v. Wainwright*, NLADA, [http://www.nlada.org/Defender/Defender\\_Gideon/Defender\\_Gideon\\_5\\_Problems](http://www.nlada.org/Defender/Defender_Gideon/Defender_Gideon_5_Problems) [<http://perma.cc/CPK3-6CL5>] (last visited Apr. 17, 2016). National standards, for example, “limit felony cases to 150 a year per attorney. Yet felony caseloads of 500, 600, 800, or more are common.” *Id.*

<sup>70</sup> *United States v. Castro*, 704 F.3d 125, 135 (3d Cir. 2013) (citing *United States v. Goodson*, 544 F.3d 529, 535 n.3 (3d Cir. 2008)). Even though plea bargains resolve criminal matters, they are still just that—bargains. Therefore, they are governed by the law regulating agreements: contract law.

<sup>71</sup> RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

<sup>72</sup> Often, such promises take the following form: the defendant agrees to accept responsibility for one or more of the charges in the indictment (or lesser variations thereof) and possibly to cooperate with the government. In return, the government dismisses or reduces certain charges or agrees to suggest a lesser sentence for the charge to which the defendant pleads. Kevin Bennardo, *United States v. Erwin and the Folly of Intertwined Cooperation and Plea Agreements*, 71 WASH & LEE L. REV. ONLINE 160, 161-62 (2014); see also Scott & Stuntz, *supra* note 16, at 1909 (stating that when a defendant agrees to plead guilty, “the defendant relinquishes the right to go to trial . . . while the prosecutor gives up the entitlement to seek the highest sentence or pursue the most serious charges possible”).

by the Constitution.”<sup>73</sup> Defendants and prosecutors, like the parties to a standard executory contract, do not necessarily trade entitlements; rather, they exchange the risk that future events or circumstances will cause either party to regret concluding the earlier bargain.<sup>74</sup> The plea bargaining process reassigns the risks that each party must consider.<sup>75</sup> Prior to plea bargaining, defendants assume the risk inherent in going to trial—conviction with the maximum sentence imposed. The government, on the other hand, bears a reciprocal risk that the expenditure of limited resources on a trial will nevertheless result in an acquittal.<sup>76</sup> Once the parties reach a plea agreement, however, there is an inversion of risk. Now the defendant risks a favorable result at trial—an acquittal or a lighter sentence—while the prosecutor risks having foregone the possibility of procuring a more severe sentence at trial.<sup>77</sup>

Robert E. Scott and William J. Stuntz, two law professors from the University of Virginia, argue that participants in a plea bargain may also realize gains that have social value.<sup>78</sup> Plea bargaining, they contend, “provides a means by which prosecutors can obtain a larger net return from criminal convictions, holding resources constant. Criminal defendants, as a group, are able to reduce the risk of the imposition of maximum sanctions.”<sup>79</sup> These scholars maintain that “the existence of entitlements implies the right to exploit those entitlements fully, which in turn implies the right to trade the entitlement or any of its associated risks.”<sup>80</sup> Viewing plea bargaining as a systematic approach, rather than simply analyzing each individual defendant’s case, may reveal a more balanced view of the institution. Overall, society may thus deem the criminal justice system’s reliance on the negotiation process more legitimate and “normatively acceptable.”<sup>81</sup>

Arguably, contract law “is broader in scope and offers greater protection than the Constitution.”<sup>82</sup> In fact, the defendant

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<sup>73</sup> *Ricketts v. Adamson*, 483 U.S. 1, 16 (1987).

<sup>74</sup> Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1914 (1992).

<sup>75</sup> *Id.*

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 1915.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* This argument does, however, suffer from a few drawbacks. For example, as a democratic society, we do not generally approve of giving the government the power to “exploit” anything fully. Furthermore, we would not want defendants wielding such great power either; though everyone is presumed innocent until proven guilty, the prosecution should not allow a defendant to use constitutional safeguards as weapons of manipulation.

<sup>81</sup> *Id.*

<sup>82</sup> Cicchini, *supra* note 45, at 173.

waives numerous constitutional guarantees in order to plead guilty.<sup>83</sup> “[T]he Constitution is only effective in cases where the prosecutor reneges after the defendant enters a plea[:] contract law applies from the much earlier point where the parties actually reach an agreement.”<sup>84</sup> Therefore, contract law provides the most suitable and flexible standards for evaluating and enforcing plea agreements.<sup>85</sup>

### 1. Contracts, Generally

According to the *Restatement (Second) of Contracts*, a contract “is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.”<sup>86</sup> If a contract term, provision, or entire agreement is ambiguous or subject to multiple reasonable constructions, “that meaning is generally preferred which operates against the party who supplies the words or from whom a writing otherwise proceeds.”<sup>87</sup> In the case of a plea agreement, the prosecution will generally draft the document, and therefore any ambiguity should be construed against the government. The comment following section 206 of the *Restatement (Second) of Contracts* provides the rationale for so construing contractual terms: “Where one party chooses the terms of a contract, he is likely to provide more carefully for the protection of his own interests than for those of the other party. He is also more likely than the other party to have reason to know of uncertainties of meaning.”<sup>88</sup> Critically, the rule is invoked in situations paralleling those found in the criminal justice system—those in which the drafting party (i.e., the government) has the stronger bargaining position and in cases of standardized contracts.<sup>89</sup>

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<sup>83</sup> See *supra* note 6 and accompanying text.

<sup>84</sup> Cicchini, *supra* note 45, at 173-74.

<sup>85</sup> *Id.*; see also Ross, *supra* note 46, at 725 (“[D]efenders of plea bargaining sometimes invoke the models of contract law and economic theory to characterize plea agreements as voluntary transactions that maximize the welfare of both parties.”); *Guilty Pleas*, 40 GEO. L.J. ANN. REV. CRIM. PROC. 424, 443-45 (2011) (“[W]hether a party has breached a plea agreement is governed by the law of contracts. However, concerns unique to the criminal justice system lead to greater scrutiny by courts . . . . Due process requires that the agreement be interpreted in keeping with a defendant’s reasonable understanding and that any ambiguity be construed against the government.” (footnotes omitted)).

<sup>86</sup> RESTATEMENT (SECOND) OF CONTRACTS § 1 (AM. LAW INST. 1981).

<sup>87</sup> *Id.* § 206.

<sup>88</sup> *Id.* § 206 cmt. a.

<sup>89</sup> *Id.* Often, the government has a general template for its plea agreements that it adapts to each individual criminal case and defendant. Government Response in Opposition to Motion to Vacate Sentence Under 28 U.S.C. § 2255, *United States v. Martinez*, Nos. 3:05CR00781, 3:10CV831, 2010 WL 4218511 (N.D. Ohio July 20, 2010) (“When the government drafts a defendant’s plea agreement, it is created from a

## 2. Breach of Contract: When Is a Breach Material?

A plea agreement, like many contracts, obligates both parties to perform. The Supreme Court has held that “when a defendant is induced to plea bargain chiefly because of a prosecutor’s promises, such promises must be fulfilled.”<sup>90</sup> On the other hand, “if a defendant materially breaches the terms of a plea bargain,” the government is released from its promises.<sup>91</sup>

A contract is deemed to be breached when there is a “[v]iolation of a contractual obligation by failing to perform one’s own promise, by repudiating it, or by interfering with another party’s performance.”<sup>92</sup> Every breach gives rise to some form of remedy in the other party.<sup>93</sup> A breach may be active or passive, anticipatory or continuing, constructive, partial, or material, or even efficient.<sup>94</sup> In the context of plea bargaining, the most important type of breach is a material breach.

A material breach has been defined as one that is “significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages.”<sup>95</sup> The *Restatement (Second) of Contracts* lists the following factors a court may consider in determining the materiality of an alleged breach:

- (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

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standard template; the government then inserts and deletes paragraphs and tailors the language to fit that particular defendant’s negotiated facts, stipulations, and his anticipated criminal offense level and criminal history category.”).

<sup>90</sup> Julie A. Lumpkin, *The Standard of Proof Necessary to Establish That a Defendant Has Materially Breached a Plea Agreement*, 55 FORDHAM L. REV. 1059, 1067 (1987).

<sup>91</sup> *Id.*

<sup>92</sup> *Breach of Contract*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>93</sup> *Id.*

<sup>94</sup> *See id.* An active breach amounts to “acting outside of the contract’s terms,” whereas a passive breach involves a “failure to perform the requirements of a contract.” An anticipatory breach is one in which a party indicates that he or she “will not perform when performance is due” but a continuing breach “endures for a considerable [amount of] time.” *Id.* A constructive, or anticipatory, breach is one “caused by a party’s anticipatory repudiation, i.e., unequivocally indicating that the party will not perform when performance is due.” *Id.* A partial breach is one that is “less significant than a material breach and that gives the aggrieved party a right to damages, but does not excuse that party from performance; specif., a breach for which the injured party may substitute the remedial rights provided by law for only part of the existing contract rights.” *Id.* A material breach, on the other hand, is “significant enough to permit the aggrieved party to elect to treat the breach as total (rather than partial), thus excusing that party from further performance and affording it the right to sue for damages.” *Id.* Finally, an efficient breach consists of an “intentional breach of contract and payment of damages by a party who would incur greater economic loss by performing under the contract.” *Id.*

<sup>95</sup> *Id.*

- (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;
- (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;
- (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and]
- (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.<sup>96</sup>

Materiality is so important in the plea agreement context because a material breach of the plea agreement by either party may have significant consequences. For example, if a defendant agrees to cooperate by providing testimony against coconspirators, but refuses to take the stand when he or she is supposed to testify, that will often be treated as a material breach of the agreement. If so, the government will likely be able to revoke the deal, avoid double jeopardy concerns, and pursue further charges or harsher penalties for the crimes to which the defendant has already pleaded guilty. On the other hand, the converse would likely be true as well. If a defendant agrees to plead guilty and cooperates in exchange for a reduced sentence, but the government fails to suggest such a sentence, the government will have breached the agreement. These breaches are deemed grave enough that they deprive one party of the benefit of the bargain. Following a breach, the court must determine the appropriate remedy for the aggrieved party.

### 3. Available Remedies for Breach

There are numerous available remedies for a breach of contract.<sup>97</sup> In offering a wide variety of remedies, several interests of the nonbreaching party are being protected, including his interest in receiving the benefit of his bargain, his interest in having any benefit he conferred on the other party restored to him, and his interest in being reimbursed for loss caused by his detrimental reliance on the agreement.<sup>98</sup>

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<sup>96</sup> RESTATEMENT (SECOND) OF CONTRACTS § 241 (AM. LAW INST. 1981).

<sup>97</sup> *Id.* § 1 cmt. e (“The legal remedies available when a promise is broken are of various kinds. Direct remedies of damages, restitution and specific performance are the subject of Chapter 16 [of the RESTATEMENT (SECOND) OF CONTRACTS]. Whether or not such direct remedies are available, the law may recognize the existence of legal duty in some other way such as recognizing or denying a right, privilege or power created or terminated by the promise.”).

<sup>98</sup> *Id.* § 344.



A judgment or court order may provide for:

- (a) awarding a sum of money due under the contract or as damages,
- (b) requiring specific performance of a contract or enjoining its non-performance,
- (c) requiring restoration of a specific thing to prevent unjust enrichment,
- (d) awarding a sum of money to prevent unjust enrichment,
- (e) declaring the rights of the parties, and
- (f) enforcing an arbitration award.<sup>99</sup>

In the context of plea agreements, however, the relevant remedy is that of specific performance.<sup>100</sup> Specific performance is defined as “[t]he rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif[ically], a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate.”<sup>101</sup> It is a discretionary, equitable remedy.<sup>102</sup>

Specific performance is not the default remedy for breach of contract—quite the contrary. Therefore, it will be refused if such relief is unfair because “(a) the contract was induced by mistake or by unfair practices, (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or (c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.”<sup>103</sup> It will only be granted if failure to do so “would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons.”<sup>104</sup> Essentially, the question of whether specific performance is the appropriate remedy is one of fairness.

#### *D. A Standard Plea Agreement Provision: Waiver of the Right to Appeal*

A provision that has become standard fare in plea agreements is one that purportedly waives the defendant’s statutory right to appeal. Both the Federal Rules of Criminal

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<sup>99</sup> *Id.* § 345.

<sup>100</sup> After all, although the parties negotiating a plea agreement are dealing in things of value, the value is not measured in dollars. The important consideration is whether each party has received the benefit of his or her bargain.

<sup>101</sup> *Specific Performance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>102</sup> *Id.*

<sup>103</sup> RESTATEMENT (SECOND) OF CONTRACTS § 364(1) (AM. LAW INST. 1981).

<sup>104</sup> *Id.* § 364(2).

Procedure and federal statutes generally give criminal defendants the right to appeal their conviction or sentence.<sup>105</sup> Even when a defendant pleads guilty, certain issues may survive and be raised on appeal.<sup>106</sup> Such issues include (1) whether “the plea was knowing and voluntary,” (2) “whether the defendant received effective assistance of counsel,” (3) constitutional claims (i.e., double jeopardy), (4) claims provided by statute, and (5) cases “in which an appeal waiver is taken in the absence of an actual guilty plea” (i.e., during sentencing).<sup>107</sup> If a criminal defendant wishes to voluntarily and knowingly waive the right to appeal, whether during the plea itself or at sentencing, federal and state courts have upheld the right to do so.<sup>108</sup> The Supreme Court, however, has yet to address the validity of such waiver provisions.<sup>109</sup>

### 1. Waiver, Generally

“A person waives a right when he or she voluntarily relinquishes it.”<sup>110</sup> Thus, a person must first possess a right he or she could theoretically exercise; second, the person must consciously decide to forfeit or give up the exercise of that right.<sup>111</sup> Admittedly, rights may be waived generally, or for more limited purposes.<sup>112</sup> Occasionally, the relinquished rights are inconsequential to a particular defendant.<sup>113</sup> In the alternative, the waiver might carry weighty consequences, despite being made quickly and with little consideration.<sup>114</sup> The best-case scenario would involve the waiver of rights only after thoughtful deliberation and professional advice.<sup>115</sup>

Broadly speaking, courts disapprove of inferred waivers of constitutional rights.<sup>116</sup> Thus, the accused must “engage[] in conduct which may be characterized as ‘an intentional relinquishment or abandonment of a known right or privilege.’”<sup>117</sup>

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<sup>105</sup> See 18 U.S.C. § 3742(a) (2012); FED. R. CRIM. P. 32(j).

<sup>106</sup> Calhoun, *supra* note 10, at 131-34.

<sup>107</sup> *Id.* at 132-33.

<sup>108</sup> See, e.g., United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992); Johnson v. United States, 838 F.2d 201, 203-04 (7th Cir. 1988).

<sup>109</sup> Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 211 (2005).

<sup>110</sup> Jason Mazzone, *The Waiver Paradox*, 97 NW. U. L. REV. 801, 804 (2003).

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* For example, a criminal defendant with a lengthy criminal history may not bat an eyelash at relinquishing his right to testify for fear of impeachment on the stand.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> Brewer v. Williams, 430 U.S. 387, 412 (1977) (Powell, J., concurring).

<sup>117</sup> Estelle v. Williams, 425 U.S. 501, 524 (1976) (Brennan, J., dissenting) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

In *Johnson v. Zerbst*, the Supreme Court considered whether the right to counsel was waived. Its analytical framework has been universally applied to other constitutional and statutory rights the accused has allegedly foregone.

“[C]ourts indulge every reasonable presumption against waiver” of fundamental constitutional rights and that we “do not presume acquiescence in the loss of fundamental rights.”

....

... This protecting duty imposes the serious and weighty responsibility upon the ... judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive [particular] right[s] ... , whether there is a proper waiver should be clearly determined by the trial court, and it would be fitting and appropriate for that determination to appear upon the record.<sup>118</sup>

Procedural safeguards thus ensure that defendants understand and appreciate the gravity of the rights they forego and that such understanding is memorialized in a written record.

## 2. Allocution to Determine a Waiver's Validity

Because a court will generally enforce an appellate waiver that has been deemed knowing, intelligent, and voluntary, it is important to consider just how a court makes such a determination. Before accepting a guilty plea, pursuant to Federal Rule of Criminal Procedure 11, a court must engage in an on-the-record colloquy with the defendant to ensure that he or she understands the binding plea agreement and is entering into it voluntarily.<sup>119</sup> Such a colloquy should include a discussion of the waiver of the right to appeal, even if no particular litany or recitation is required.<sup>120</sup>

The U.S. Court of Appeals for the Eleventh Circuit considered the adequacy of such a colloquy and the resulting validity of an appellate waiver in *United States v. Buchanan*.<sup>121</sup> The appellate waiver provision in the defendant's signed plea agreement, as well as the colloquy in which the court and defendant engaged, are reproduced in pertinent part below to

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<sup>118</sup> *Johnson*, 304 U.S. at 464-65 (footnotes omitted) (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937); *Ohio Bell Tel. Co. v. Pub. Utils. Comm'n*, 301 U.S. 292, 307 (1937)).

<sup>119</sup> See FED. R. CRIM. P. 11(b); *United States v. Buchanan*, 131 F.3d 1005, 1007 (11th Cir. 1997).

<sup>120</sup> *Buchanan*, 131 F.3d at 1008; see *Hoeft v. Laclair*, No. 08-CV-6060 VEB, 2011 WL 1198763, at \*1 (W.D.N.Y. Mar. 28, 2011).

<sup>121</sup> *Buchanan*, 131 F.3d at 1006, 1007-08.

provide an example of appropriate measures taken by a trial court. The agreement stated:

[T]he defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum set forth for the offense and pursuant to the sentencing guidelines, and expressly waives the right to appeal defendant's sentence, directly or collaterally, on any ground except for an upward departure by the sentencing judge or a sentence above the statutory maximum or a sentence in violation of the law apart from the sentencing guidelines; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), the defendant is released from this waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).<sup>122</sup>

Before accepting the defendant's plea, the District Court conducted the requisite Rule 11 colloquy.

THE COURT: The other thing you need to understand about this plea agreement is that it contains a provision where you are waiving your right to appeal. This U.S. attorney's office places this provision in its plea agreement. That's real important that you understand that when you go into sentencing and you get sentenced to something, even if it's worse than you think you should get, or even if its [sic] something that you really don't like, if it's a legal sentence and it's within the guidelines, you don't have a right to appeal that sentence under this plea agreement; do you understand?

THE DEFENDANT: Yes, sir.

THE COURT: The only way that you can take an appeal of the sentence that you get in this case is going to be if, one, it's an illegal sentence, or, two, if the judge does an upward departure.

If the Court—if the guidelines are calculated to be at this level, and he goes above that, you have a right under this plea agreement to take an appeal; otherwise you have no right to appeal unless the Government decides for some reason it needs to appeal. And if that happens, then you can also take an appeal.

What this means practically is that if you show up, even if Judge Adams determines the guidelines to be higher than you think they are, his determination counts. And if he sentences you within those guidelines, you are not going to be able to appeal that sentence no matter how much you dislike them; do you understand that?

THE DEFENDANT: Yes, sir.<sup>123</sup>

The court held that this waiver—which was clear and unambiguous—was knowingly and voluntarily entered into.<sup>124</sup>

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<sup>122</sup> *Id.* at 1006-07 (citing the written plea agreement).

<sup>123</sup> *Id.* at 1007.

<sup>124</sup> *Id.*

Thus, the court enforced the waiver provision and dismissed the defendant's appeal.<sup>125</sup>

In essence, a colloquy must comport with the guidelines in Rule 11, and a defendant must understand the rights he or she is foregoing. If the allocution satisfies these requirements, the defendant's waiver will be deemed knowing, intelligent, and voluntary, and therefore valid. Although the colloquy above is acceptable and can be used as a model for other federal judges, it must not be replicated verbatim. This theoretically guarantees that any given colloquy will reflect the specific facts and circumstances pertinent to each individual defendant before the court, thereby increasing the likelihood that the specific defendant fully understands the rights he or she is relinquishing. There may, however, be circumstances in which a defendant knowingly waives his or her right to appeal but should be allowed to file an appeal nonetheless.

### 3. The Third Circuit's "Miscarriage of Justice" Standard

Even in the face of a valid waiver, however, the U.S. Court of Appeals for the Third Circuit has created an exception allowing for review of procedurally barred issues in certain instances. In *United States v. Khattak*, the Third Circuit declined to blindly prohibit the review of all arguments on appeal that would otherwise be precluded by a valid waiver of the right to appeal.<sup>126</sup> The court determined that "[t]here may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver."<sup>127</sup> Other federal circuits have expressly identified such "unusual circumstances" that would justify reaching the merits of an appeal: where (1) a sentence exceeds the statutory maximum penalty, (2) a sentence is based on constitutionally impermissible factors (e.g., race),<sup>128</sup> (3) a defendant claims he or she has received ineffective assistance of counsel,<sup>129</sup> or (4) waiver provisions are "too broad to be valid."<sup>130</sup> The Third Circuit has declined to provide specific examples.<sup>131</sup>

Instead, the Third Circuit adopted an approach similar to that employed by the First Circuit, setting forth certain

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<sup>125</sup> *Id.* at 1007-09.

<sup>126</sup> *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

<sup>127</sup> *Id.*

<sup>128</sup> *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000).

<sup>129</sup> *United States v. Joiner*, 183 F.3d 635, 645 (7th Cir. 1999).

<sup>130</sup> *Khattak*, 273 F.3d at 562 (citing *United States v. Goodman*, 165 F.3d 169, 174 (2d Cir. 1999)).

<sup>131</sup> *Id.* at 563.

factors to consider before disregarding the defendant's waiver. Those factors include:

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.<sup>132</sup>

These factors may be useful in guiding a reviewing court's determination of when a particular sentencing error warrants the vacatur of an otherwise valid appeal waiver.<sup>133</sup> The court emphasized, however, that the governing standard in these cases remains "whether the error would work a miscarriage of justice."<sup>134</sup>

## II. *UNITED STATES V. ERWIN*

The issue before the U.S. Court of Appeals for the Third Circuit in *United States v. Erwin* was one of remedies. Specifically, the court addressed whether the government could enforce a plea agreement by specific performance where a criminal defendant violated his plea agreement by filing an appeal, despite executing a voluntary and knowing waiver of the right to appeal.<sup>135</sup>

On May 9, 2011, the government filed a sealed criminal complaint against Christopher Erwin and 21 others in the U.S. District Court for the District of New Jersey.<sup>136</sup> Each defendant was charged with conspiracy to distribute and possess with intent to distribute oxycodone.<sup>137</sup> Erwin, one of the defendants, had managed a large-scale oxycodone distribution ring in New Jersey for approximately two years, illegally selling hundreds of thousands of oxycodone tablets on the black market.<sup>138</sup> Erwin executed a written plea agreement with the prosecution in May 2012.<sup>139</sup> He agreed to plead guilty to a one-count information charging him with the oxycodone distribution conspiracy, and the government promised not to bring further criminal charges.<sup>140</sup>

Schedule A of the plea agreement established that under the applicable Sentencing Guidelines, the defendant's offense

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<sup>132</sup> *Id.* (quoting *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001)).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *United States v. Erwin*, 765 F.3d 219, 223 (3d Cir. 2014).

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

level was 39.<sup>141</sup> The plea agreement thus does not provide for a specific period of incarceration, but rather outlines the procedure by which the court would arrive at an appropriate sentence.<sup>142</sup> If the court adhered to the parameters set forth in the plea agreement, the defendant could not appeal his sentence or other provisions of his guilty plea.<sup>143</sup> The waiver of the defendant's right to appeal was contained in paragraph 8 of Schedule A:

Christopher Erwin knows that he has and, except as noted below in this paragraph, voluntarily waives, the right to file any appeal, . . . including but not limited to an appeal under 18 U.S.C. § 3742 . . . , which challenges the sentence imposed by the sentencing court if that sentence falls within or below the Guidelines range that results from a total Guidelines offense level of 39. This Office [the United States Attorney for the District of New Jersey] will not file any appeal, motion[,] or writ which challenges the sentence imposed by the sentencing court if that sentence falls within or above the Guidelines range that results from a total Guidelines offense level of 39. The parties reserve any right they may have under 18 U.S.C. § 3742 to appeal the sentencing court's determination of the criminal history category. The provisions of this paragraph are binding on the parties even if the Court employs a Guidelines analysis different from that stipulated to herein. Furthermore, if the sentencing court accepts a stipulation, both parties waive the right to file an appeal . . . claiming that the sentencing court erred in doing so.<sup>144</sup>

Both the government and the defendant reserved the right to "oppose or move to dismiss" any appeal that fell within the scope of the waiver.<sup>145</sup>

In addition to the plea agreement, the defendant entered into a written cooperation agreement, providing that in the event the defendant "substantially assisted in the investigation or criminal prosecution of others," the government would seek a downward departure from the Sentencing Guidelines range.<sup>146</sup> The plea and cooperation agreements, taken together, "constituted the full and complete agreement" between the government and the

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<sup>141</sup> *Id.* at 223-24. "Each type of crime is assigned a base offense level, which is the starting point for determining the seriousness of a particular offense. More serious types of crime have higher base offense levels . . . ." *An Overview of the Federal Sentencing Guidelines*, U.S. SENTENCING COMM'N, [http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview\\_Federal\\_Sentencing\\_Guidelines.pdf](http://www.ussc.gov/sites/default/files/pdf/about/overview/Overview_Federal_Sentencing_Guidelines.pdf) [<http://perma.cc/8BDW-KPW8>] (last visited May 18, 2016). With an offense level of 39 and a criminal history score of 0-1, the defendant may have faced a sentence of 262-327 months. *Sentencing Table* (U.S. SENTENCING COMM'N (Nov. 1, 2012), [http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/Sentencing\\_Table.pdf](http://www.ussc.gov/sites/default/files/pdf/guidelines-manual/2012/manual-pdf/Sentencing_Table.pdf) [<http://perma.cc/US59-2ZDG>]).

<sup>142</sup> *See Erwin*, 765 F.3d at 224.

<sup>143</sup> *See id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* (quoting ¶ 9 of Schedule A of the plea agreement).

<sup>146</sup> *Id.*

defendant.<sup>147</sup> The cooperation agreement also provided that if the defendant were to “violate *any* provision of this cooperation agreement or the plea agreement,” the government “will be released from its obligations under this agreement and the plea agreement, including any obligation to file” the downward departure motion.<sup>148</sup> “In addition, [the defendant] shall thereafter be subject to prosecution for any federal criminal violation of which [the prosecution] has knowledge. . . .”<sup>149</sup>

In the months after the agreements were executed, the defendant did offer “‘important and timely’ assistance” to the government; in return, the government wrote a letter to the court asking for the downward departure contemplated in the cooperation agreement.<sup>150</sup> In assessing the appropriate sentence, the district court agreed with the parties and the presentence investigation report that

[the defendant’s] total offense level of 39 and criminal history category of I yielded an initial Guidelines range of 262 to 327 months of imprisonment. The court noted that [defendant’s] sentence was “capped at” 240 months “because of the statutory maximum.” Citing its July letter to the court, the Government then moved for a five-level downward departure pursuant to U.S.S.G. § 5K1.1. The Government clarified that, to the extent there “may be some question as to where to start,” it was requesting a departure from offense level 39 to offense level 34, as opposed to from the statutory maximum of 240 months. Erwin did not object, and the court granted the Government’s motion.<sup>151</sup>

Ultimately, the court could impose a minimum of 151 months and a maximum of 188 months of imprisonment.<sup>152</sup> The court elected to impose the maximum term of imprisonment, as well as a term of three years supervised release and a \$100 special assessment.<sup>153</sup>

In response, the defendant filed a timely appeal, arguing that the district court erred in its application of the downward departure by starting at an offense level of 39, because when combined with his criminal history, the Guidelines range was higher than the statutory maximum sentence.<sup>154</sup> The government did not move for dismissal based on the appellate waiver, nor did it cross-appeal. Instead, the prosecution argued that the

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<sup>147</sup> *Id.* (quoting supp. app. 46).

<sup>148</sup> *Id.* (quoting supp. app. 48) (emphasis added).

<sup>149</sup> *Id.* (quoting supp. app. 48).

<sup>150</sup> *Id.* at 224-25.

<sup>151</sup> *Id.* at 225 (citations omitted).

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*



defendant should be resentenced de novo, where the government would seek a “modest increase” in sentence.<sup>155</sup>

The Third Circuit would not reach the merits of defendant’s appeal if “(1) the issues raised fall within the scope of the appellate waiver; and (2) he knowingly and voluntarily agreed to the appellate waiver; unless (3) enforcing the waiver would ‘work a miscarriage of justice.’”<sup>156</sup> The court held that the defendant’s waiver of his right to appeal was knowing and voluntary and that the appeal “fit[] squarely within the scope of the waiver.”<sup>157</sup>

The court next considered whether or not the enforcement of the appellate waiver would constitute an “error amounting to a miscarriage of justice.”<sup>158</sup> The court reviewed the defendant’s claims of constitutional and procedural error, but determined that they were of no avail.<sup>159</sup> The court reasoned that “[e]ven assuming the District Court erred procedurally . . . , its arguably erroneous calculation would be ‘precisely the kind of “garden variety” claim of error contemplated by [an] appellate waiver.’”<sup>160</sup> Ultimately, the court concluded that enforcing the waiver against the defendant would work no miscarriage of justice.<sup>161</sup>

Once the court determined that it would not consider the merits of the defendant’s appeal, the court contemplated the appropriate remedy available to the government.<sup>162</sup> The court acknowledged that in general, where a valid waiver bars the issues raised by a defendant’s appeal, the court would dismiss the appeal, thereby upholding the defendant’s sentence.<sup>163</sup> It did, however, entertain (and ultimately agree with) the government’s argument that a mere dismissal of the defendant’s appeal “would neither make the Government whole for the costs it has incurred because of [the defendant’s] breach nor adequately deter other cooperating defendants from similar breaches.”<sup>164</sup> Specifically, the government moved the court to vacate the defendant’s sentence and allow the government to pursue the remedies outlined in the

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<sup>155</sup> *Id.* (quoting Brief for Appellee at 34, *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014) (No. 13-3407)).

<sup>156</sup> *Id.* (quoting *United States v. Grimes*, 739 F.3d 125, 128-29 (3d Cir. 2014)).

<sup>157</sup> *Id.* at 226.

<sup>158</sup> *Id.* (quoting *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001)).

<sup>159</sup> *Id.* at 226-27.

<sup>160</sup> *Id.* at 227 (quoting *United States v. Castro*, 704 F.3d 125, 141-42 (3d Cir. 2013)).

<sup>161</sup> *Id.* at 228.

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* (citation omitted) (quoting Brief for Appellee at 16, *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014) (No. 13-3407)).

breach provision of the plea agreement.<sup>165</sup> The defendant argued that if the court were to grant the relief requested by the government, it “would, as a practical matter, end this [c]ourt’s review for miscarriage of justice, as defendants would be wary to appeal even in the most egregious cases of error.”<sup>166</sup>

The Third Circuit also addressed three related questions: (1) whether the defendant did in fact breach the plea agreement, (2) if so, whether one of the remedies specified in the breach provision—resentencing—was appropriate, and (3) whether the cross-appeal rule divested the court of jurisdiction to grant resentencing.<sup>167</sup> The court quickly dispensed with the first question; the defendant breached the plea agreement because he promised not to appeal his sentence and subsequently did.<sup>168</sup> The Third Circuit held that specific performance (i.e., *de novo* resentencing) was warranted.<sup>169</sup> It found this remedy especially feasible in light of the detailed breach provision in the plea agreement.<sup>170</sup>

In so holding, the court emphasized the “bargained for exchange” between the parties: the defendant agreed to plead guilty and cooperate with the government in order to secure convictions against his codefendants. Furthermore, the defendant waived most aspects of his right to appeal his sentence, thereby conserving prosecutorial resources.<sup>171</sup> The government, on the

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<sup>165</sup> *Id.* Such remedies would include withdrawing its motion for a downward departure during sentencing and bringing additional criminal charges. The government indicated that given the choice, it would withdraw its motion. *Id.*

<sup>166</sup> *Id.* (quoting Brief for Appellee at 10, *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014) (No. 13-3407)).

<sup>167</sup> *Id.*

<sup>168</sup> *Id.* at 229. In fact, the court relegated its brief discussion of this issue to footnotes 5 and 6 of the decision. It rejected the defendant’s argument that waiving his right to file an appeal was separate and distinct from promising not to file one. *Id.* at 229 n.5. Furthermore, it rejected the proposition that the breach was not material. *Id.* at 229 n.6. The court determined that the defendant’s “breach defeated the parties’ bargained-for objective and deprived the government of a substantial part of its benefit.” *Id.*

<sup>169</sup> *Id.* at 231. In finding this remedy not only available to the government, but also appropriate, the court focused on the classic rule of contract law providing that “a party should be prevented from benefitting from its own breach.” *Id.* at 230 (quoting *Assaf v. Trinity Med. Ctr.*, 696 F.3d 681, 686 (7th Cir. 2012)). In the criminal context, the court believed that its “failure to enforce a plea agreement against a breaching defendant ‘would have a corrosive effect on the plea agreement process’ by ‘render[ing] the concept of a binding agreement a legal fiction.’” *Id.* (quoting *United States v. Williams*, 510 F.3d 416, 422-23 (3d Cir. 2007)). The court further stressed the importance of the plea bargaining process and its benefits: the defendant’s case is resolved quickly and with a sense of certainty, judges and prosecutors conserve resources, and the public is protected from potentially dangerous offenders. *Id.* In order for the benefits of plea bargaining to be realized, however, “dispositions by guilty plea [must be] accorded a great measure of finality.” *Id.* (quoting *Blackledge v. Allison*, 431 U.S. 63, 71 (1977)). According to the court, “Appellate waivers exist precisely because they preserve the finality of judgments and sentences imposed pursuant to valid guilty pleas.” *Id.*

<sup>170</sup> *Id.* at 231.

<sup>171</sup> *Id.* at 230.

other hand, promised not to bring further criminal charges against Erwin and to seek a downward departure for his cooperation.<sup>172</sup> The court determined that the defendant “received the full benefit of his bargain,” but the government did not.<sup>173</sup> Whereas the defendant received a quick disposition and reduced sentence, the government was forced to devote “valuable resources in litigating an appeal that should never have been filed in the first place.”<sup>174</sup>

After resolving the remedy question, the court addressed whether the cross-appeal rule barred *de novo* resentencing.<sup>175</sup> The cross-appeal rule provides that “a party aggrieved by a decision of the district court must file an appeal in order to receive relief from the decision.”<sup>176</sup> The court held that the cross-appeal rule was inapplicable in this instance.<sup>177</sup> The court reasoned that the government could not have filed a cross-appeal because “only a party aggrieved by a final judgment may appeal” or cross-appeal.<sup>178</sup> Furthermore, “[t]he Federal Government enjoys no inherent right to appeal a criminal judgment.”<sup>179</sup> The government could have only appealed pursuant to 18 U.S.C. § 3742, which would have permitted the prosecution to appeal the defendant’s sentence if it “(1) was imposed in violation of law; (2) resulted from an incorrect application of the Sentencing Guidelines; (3) departed from the applicable Guideline range; or (4) was plainly unreasonable, if imposed for an offense where there is no applicable Guideline.”<sup>180</sup> The government could not have appealed under any of the avenues available via 18 U.S.C. § 3742(b); therefore, the court would have dismissed any appeal filed by the government for want of jurisdiction.<sup>181</sup>

Regardless, the court determined that the remedy the government sought—*de novo* resentencing—would not substantially affect the rights of the defendant.<sup>182</sup> Cleverly, the court pointed out that the defendant had asked for resentencing;

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<sup>172</sup> *Id.*

<sup>173</sup> *Id.* at 230-31.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 232.

<sup>176</sup> *Id.* (quoting *United States v. Tabor Court Realty Corp.*, 943 F.2d 335, 342 (3d Cir. 1991)).

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* (quoting *Rhoads v. Ford Motor Co.*, 514 F.2d 931, 934 (3d Cir. 1975)). Here, the government was not aggrieved by a final judgment. In fact, it arguably got a better result because the sentence was higher than it might have been. The government’s complaint here is the fact that the defendant appealed the sentence.

<sup>179</sup> *Id.* (quoting *Arizona v. Manypenny*, 451 U.S. 232, 246 (1981)). Neither 28 U.S.C. § 1291 nor 18 U.S.C. § 3731 authorize an appeal or apply in these circumstances. *Id.* at 232-33.

<sup>180</sup> *Id.* at 233 (citing 18 U.S.C. § 3742(b)).

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

the defendant was therefore getting “exactly what he asked for.”<sup>183</sup> The court conducted a review of Supreme Court and circuit court precedent, which enabled the court to reinforce its decision.<sup>184</sup> First, the court considered *Greenlaw v. United States*, decided by the Supreme Court in 2008.<sup>185</sup> There, the Court held that where a defendant unsuccessfully challenges his sentence as excessive, a Court of Appeals could not sua sponte increase the sentence absent a governmental cross-appeal.<sup>186</sup> The Third Circuit distinguished *Greenlaw* on the basis that the government in the present case did not deliberately disregard a sentencing error (as occurred in *Greenlaw*), and the defendant should have foreseen the possibility that the government would seek redress for a breach of the plea agreement.<sup>187</sup>

The Third Circuit also considered precedent from its sister circuits.<sup>188</sup> For example, the Seventh Circuit had found that a defendant’s breach of his appellate waiver provision permits the prosecution to seek specific performance of the plea agreement, even without a cross-appeal.<sup>189</sup> The Seventh Circuit held that “dismissal of [the defendant’s] impermissible appeal would be an ‘incomplete response’ because ‘the prosecutorial resources are down the drain.’”<sup>190</sup> Finally, the Third Circuit relied on the Supreme Court’s decision in *Ricketts v. Adamson*.<sup>191</sup> There, the Court held that a defendant’s breach of the plea agreement (failing to testify against his coconspirators in their retrial) subjected him to a first degree murder prosecution not barred by double jeopardy.<sup>192</sup> Ultimately, the Third Circuit determined that the defendant “made a calculated decision to advance an interpretation of his appellate waiver that proved erroneous,” and “[i]t would be unjust to permit him to escape the consequences.”<sup>193</sup>

Finally, the court considered whether or not it possessed the authority to remit the matter for de novo resentencing.<sup>194</sup> The court found authority in 28 U.S.C. § 2106, which permits a court to modify, vacate, set aside, or reverse any judgment lawfully before it.<sup>195</sup> In addition, it allows a court to remand the case for

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<sup>183</sup> *Id.*

<sup>184</sup> *Id.* at 233-35.

<sup>185</sup> *Id.* at 233-34 (citing *Greenlaw v. United States*, 554 U.S. 237 (2008)).

<sup>186</sup> *Id.* (citing *Greenlaw*, 544 U.S. at 248).

<sup>187</sup> *Id.* at 234.

<sup>188</sup> *Id.* at 234-35.

<sup>189</sup> *Id.* at 234.

<sup>190</sup> *Id.* at 235 (quoting *United States v. Hare*, 269 F.3d 589, 862 (7th Cir. 2001)).

<sup>191</sup> *Id.* (citing *Ricketts v. Adamson*, 483 U.S. 1 (1987)).

<sup>192</sup> *Id.* (citing *Adamson*, 483 U.S. at 8).

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*; 28 U.S.C. § 2106 (2012).

appropriate action under the circumstances.<sup>196</sup> A court must consider any change in fact or law since judgment was entered.<sup>197</sup> Applying these principles, the *Erwin* court held that the validity of the defendant's sentence was a matter lawfully before it, and the defendant's breach of the plea agreement constituted a significant change in fact.<sup>198</sup> As a result, the court granted the relief sought by the prosecution, allowing for the possibility of an increased sentence for the defendant.<sup>199</sup>

### III. BROADER IMPLICATIONS: THE SLIPPERY SLOPE

#### A. *Flaws in the Third Circuit's Assumptions and Reasoning*

In *United States v. Erwin*, the Third Circuit began its analysis like any other case in which a criminal defendant pleaded guilty, waived his right to appeal, and subsequently filed an appeal anyway. First, it evaluated whether the defendant's waiver was knowing and voluntary. After determining that it was, the *Erwin* court also concluded that the appeal before it fell within the scope of that waiver.<sup>200</sup> In light of the facts at bar, the court rightly decided that enforcing the appellate waiver would not constitute a miscarriage of justice. The court should have concluded the inquiry there—case dismissed.

Instead, however, the court considered the government's—and likely *only* the government's—plea for relief. In so doing, the Third Circuit erroneously, or at the very least too summarily, deemed the defendant's breach a material one. The court discussed the materiality of the breach in a footnote: “[T]he breach defeated the parties’ bargained-for objective and deprived the Government of a substantial part of its benefit.”<sup>201</sup> The cases the court cited seem inapposite—or tenuous analogies at best. The court cited four cases in support of its determination that the defendant's breach was a material one. First, the court cited *Pittsburgh National Bank v. Abdnor*.<sup>202</sup> The case detailed the

<sup>196</sup> *Erwin*, 765 F.3d at 235 (quoting 28 U.S.C. § 2106).

<sup>197</sup> *Id.* (quoting *In re Elmore*, 382 F.2d 125, 127 & n.12 (D.C. Cir. 1967)).

<sup>198</sup> *Id.* at 235-36.

<sup>199</sup> *Id.* at 236.

<sup>200</sup> In so doing, the court neglected the contract law principle that any ambiguity in an agreement is to be construed against the drafter (i.e., the government). RESTATEMENT (SECOND) OF CONTRACTS § 206 (AM. LAW INST. 1981). *Erwin*'s appeal can arguably be based on the fact that the language in the agreement is ambiguous as to the starting point from which the government would move for the downward departure. *Erwin*, 765 F.3d at 225. In this case, perhaps the court could have found that *Erwin*'s appeal was not barred by the appellate waiver provision.

<sup>201</sup> *Erwin*, 765 F.3d at 229 n.6.

<sup>202</sup> *Id.* (citing *Pittsburgh Nat'l Bank v. Abdnor*, 898 F.2d 334 (3d Cir. 1990)).

federal standard for determining the materiality of a breach of contract, namely

(1) [w]hether the breach operated to defeat the bargained-for objective of the parties; (2) whether the breach caused disproportionate prejudice to the non-breaching party; (3) whether custom and usage considers such a breach to be material; and (4) whether the allowance of reciprocal non-performance will result in the accrual of an unreasonable and unfair advantage.<sup>203</sup>

*Pittsburgh National Bank*, however, dealt with a loan agreement and whether or not failure to cash a check under that agreement was a material breach. The factual circumstances were not analogous to those in *Erwin*. Nor were the facts from *Total Containment, Inc. v. Environ Products, Inc.* analogous to those in *Erwin*. There, the district court held that the plaintiff had committed a material breach by filing suit against the defendant in violation of mutual general releases of a settlement agreement between the parties.<sup>204</sup> Lastly, the court's reliance on *Maslow v. Vanguri*<sup>205</sup> failed to recognize the differences between a civil and criminal case. The facts were arguably more similar: one party appealed despite a provision in a civil settlement agreement not to. In *Maslow*, however, the court *detailed* the reasons why it was clear that the no-appeal provision of the agreement was central to the parties and was not collateral or an afterthought.<sup>206</sup>

The parties' bargained-for-objective is not so readily ascertainable that it only warrants mention in a two-sentence footnote. Considerable negotiation is required to enter into both a plea agreement and a cooperation agreement in a large conspiracy case. Additionally, the defendant held up the majority of his bargain: he accepted responsibility and pleaded to the designated charge, and he provided valuable assistance to the government. Thus, the court was disingenuous in failing to fully set forth its reasoning for declaring the breach material.

According to the government's reply brief, though it could seek additional charges against Erwin, it only asked the court for de novo resentencing, at which it would not move for a downward departure and would seek "only a modest increase in [the defendant's] sentence."<sup>207</sup> This would not, however, *preclude* the

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<sup>203</sup> *Abdnor*, 898 F.2d at 338 (quoting *E. Ill. Trust & Sav. Bank v. Sanders*, 826 F.2d 615, 617 (7th Cir. 1987)).

<sup>204</sup> *Total Containment, Inc. v. Environ Prods., Inc.*, 921 F. Supp. 1355, 1417-18 (E.D. Pa. 1995), *aff'd in part, vacated in part*, 106 F.3d 427 (Fed. Cir. 1997).

<sup>205</sup> *Erwin*, 765 F.3d at 229-30 n.6 (citing *Maslow v. Vanguri*, 896 A.2d 408 (Md. Ct. Spec. App. 2006)).

<sup>206</sup> *Maslow*, 896 A.2d at 423-24.

<sup>207</sup> Brief for Appellee at 34, *United States v. Erwin*, 765 F.3d 219 (3d Cir. 2014) (No. 13-3407).

government from seeking additional charges or more punitive forms of relief in the future. This is evidenced by the government's argument in its reply brief that "[t]he availability of remedies beyond mere dismissal of the appeal has practical benefits for all actors in the criminal justice system, particularly 'other defendants by enabling them to make believable promises not to appeal.'"<sup>208</sup> This presumes the very fact that defendants and the government are two parties on equal footing and that defendants always receive valuable consideration for each knowing concession. Because appellate waiver provisions are essentially standard form and are unlikely to be negotiable in most instances, this foundational assumption should be questioned in the context of appellate waivers. It should also be questioned whether, in this case specifically and in others, the government's main objective in negotiating with defendants is the procurement of a final disposition (via an appellate waiver) or perhaps, as here, cooperation. The government in this case benefitted substantially from the bargain it reached with the defendant, who pleaded guilty, cooperated fully, and helped the government secure plea agreements and convictions in numerous other cases associated with the conspiracy. Notwithstanding the additional time and expense the government had to dedicate to litigating this appeal,<sup>209</sup> it surely expended substantially fewer resources than it would have if Erwin's case had gone to trial.

Lastly, it is clear that the court, at least in part, rendered this holding not just against this particular criminal defendant, but also against all of those similarly situated. The penultimate paragraph of the decision states, "In what has become a common sequence, a defendant who waived his appellate rights as part of a plea bargain, and received a substantial benefit in exchange, has failed to keep his promise."<sup>210</sup> Yet again, the court failed to recognize that the government (and the courts) still received substantial benefits, too. The government did not need to prove beyond a reasonable doubt that the defendant committed the crimes charged at trial. It did not need to pick a jury, put on witnesses, call experts, or argue a summation. It secured a conviction. It secured convictions against numerous other

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<sup>208</sup> *Id.* at 33 (quoting *United States v. Hare*, 269 F.3d 589, 862-63 (7th Cir. 2001)).

<sup>209</sup> In failing to move to enforce the appellate waiver, the government rendered it nonbinding and needlessly protracted the litigation. It seems to this author that the government strategically appealed this case in order to secure for itself the remedy of specific performance in future cases. This is further evidenced by the fact that the government only sought a modest increase in the defendant's sentence—it did not want to push its luck too far.

<sup>210</sup> *Erwin*, 765 F.3d at 236 (quoting *United States v. Whitlow*, 287 F.3d 638, 639 (7th Cir. 2002)).

defendants involved in the conspiracy as well. Had the prosecution merely moved to enforce the waiver, the litigation would have been substantially shorter. In essence, judicial economy and conservation of prosecutorial resources, while admirable goals when they can be fulfilled, should not be the guiding principles of this nation's jurisprudence. If they become such, this country may begin down a slippery slope leading to compelled self-incrimination, the abolishment of the adversarial system in favor of an inquisitorial one, and other such Orwellian measures. Instead, the Third Circuit should have concluded its analysis once it determined that Erwin's appeal fit squarely within the scope of his valid appellate waiver and enforcing the waiver would not work a miscarriage of justice. The prosecution should not be able to use pleas in violation of waivers as a backdoor mechanism for seeking enhanced criminal sanctions.

*B. A Criminal Defendant Must Be Afforded Due Process*

The provisions of the Bill of Rights to the U.S. Constitution were included to ensure that the tyrannical abuses suffered under the reign of the English Crown would not endure in the new nation.<sup>211</sup> The intent and centrality of the Due Process Clause should not be circumvented by the desire for judicial economy. When Christopher Erwin filed his appeal, he argued that his sentence was calculated improperly and therefore should be reduced. Had he lost, Erwin likely assumed that at worst, his sentence would be upheld. Instead, he was exposed to further deprivation of liberty—the government would seek a “modest” *increase* in his sentence. Even one additional hour in prison constitutes a further deprivation of liberty under constitutional principles.

At the heart of the Due Process Clause is the prohibition of arbitrary deprivation of liberty interests by the government.<sup>212</sup> Erwin and future defendants in his position could be further deprived of liberty simply because they lose their appeal, not because they have engaged in further illicit conduct or have

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<sup>211</sup> David A. Lieber, *The Cruikshank Redemption: The Enduring Rationale for Excluding the Second Amendment from the Court's Modern Incorporation Doctrine*, 95 J. CRIM. L. & CRIMINOLOGY 1079, 1098 (2005) (“The addendum of a Bill of Rights reflected a profound and enduring belief among Anti-Federalists that the Constitution itself failed to provide sufficient checks on federal power.”).

<sup>212</sup> See *Due Process Clause*, BLACK'S LAW DICTIONARY (10th ed. 2014); Rosalie Berger Levinson, *Reining in Abuses of Executive Power Through Substantive Due Process*, 60 FLA. L. REV. 519, 519 (2008) (“The touchstone of due process is protection of the individual against arbitrary action of government.” (quoting *Cty. of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998))).



harmed anything other than the government's purse. A procedure whereby a defendant must either forfeit his right to challenge the very validity of the waiver potentially barring meritorious claims for relief or face a harsher sentence, further criminal charges, or a complete rescission of a plea agreement he may have already substantially performed forces a defendant to make a Hobson's choice.<sup>213</sup>

C. *Specific Performance Is Not an Appropriate Remedy*

In granting the government's request for relief in *Erwin*, the Third Circuit failed to recognize the door it would open to the prosecution in the future. Worse yet, perhaps it did. The court promised to continue to evaluate the validity of appellate waivers and whether arguments raised on appeal fall within the scope of those waivers.<sup>214</sup> Further, it would "continue to review conscientiously whether enforcing defendants' appellate waivers would yield a miscarriage of justice[,] . . . but . . . any such defendant must accept the risk that, if he does not succeed, enforcing the waiver may not be the only consequence."<sup>215</sup>

The court failed to realize<sup>216</sup> that precisely such a grave risk will prevent most defendants, even those with meritorious claims, from pursuing them. No rational defendant—or rational attorney—will pursue an appeal he may lose if the result would be additional sanctions. Only those defendants who have faced treatment that would "shock the conscience" of the court would even consider raising such a claim.<sup>217</sup>

Moreover, the court does not consider that other remedies are available, such as dismissing the appeal. Perhaps it is not as gratifying a result to the government, but it has proven workable for years.<sup>218</sup> In contract, specific performance is only contemplated

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<sup>213</sup> A defendant can either (1) appeal his sentence, thus risking violation of the plea agreement and more severe punishment, or (2) do nothing, thereby accepting an unjust or illegal sentence. Neither scenario is particularly appealing.

<sup>214</sup> *Erwin*, 765 F.3d at 236.

<sup>215</sup> *Id.*

<sup>216</sup> Or at least, the court failed to candidly articulate why it found this approach to be proper.

<sup>217</sup> Most errors are not so egregious, however. For example, a defendant may be erroneously sentenced to a term of imprisonment that exceeds the statutory maximum by two years, and while this does not rise to the level of unconscionability, it may satisfy the criteria for a "miscarriage of justice."

<sup>218</sup> See, e.g., *United States v. Stabile*, 633 F.3d 219, 248 (3d Cir. 2011) (refusing to set aside the defendant's appeal waiver and dismissing his appeal where the "sentence imposed by the District Court does not amount to a miscarriage of justice"); *United States v. Snead*, 241 F. App'x 62, 66 (3d Cir. 2007) (enforcing appellate waiver against defendant, "thereby affirming the sentence of the District Court"); *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (enforcing defendant's

as a discretionary, equitable remedy when alternatives are inappropriate or inadequate.<sup>219</sup>

The circumstances in which specific performance is traditionally denied, such as where “(a) the contract was induced by mistake or by unfair practices, (b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or (c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair,”<sup>220</sup> also support its relative absence in the criminal justice system. It is likely that appellate waivers, at least in certain circumstances, are procured by mistake or unfair practices—they may be a nonnegotiable provision of the agreement. Allowing the government to seek harsher penalties against a defendant who believes he has a meritorious claim could very well cause unreasonable hardship or loss to that defendant—because additional jail time is a substantial loss of liberty. Whether the exchanges between prosecution and defendant are grossly inadequate—a fact-specific inquiry—would be determined by the court on a case-by-case basis.

In light of these considerations, dismissal of the appeal is sufficient to restore the government from any loss it may have suffered as a result of the defendant’s breach of the plea agreement, which in most circumstances will not be material. The government seeks the waiver of the right to appeal because it wishes the disposition to be final and to conserve resources. Notwithstanding that the government must respond to an appeal that is barred by waiver, the government still does not have to prosecute the defendant, nor does the government have to call witnesses and convince a jury of the defendant’s guilt beyond a reasonable doubt.<sup>221</sup> If the government prevails, the merits of the defendant’s argument will not be reached, and the result will remain the same. Though concededly imperfect, it is a better remedy than constructively precluding appellate review of plea agreements altogether.

#### *D. Public Policy Disfavors Increased Sanctions*

Although it may seem like incarcerating convicted offenders for longer periods of time, regardless of the mechanism, serves the public interest, the opposite may actually be true. Our

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waiver of his right to appeal, therefore depriving the court of “jurisdiction to consider the merits of his appeal”).

<sup>219</sup> *Specific Performance*, BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>220</sup> RESTATEMENT (SECOND) OF CONTRACTS § 364 (AM. LAW INST. 1981).

<sup>221</sup> Furthermore, a defendant convicted by a jury could still appeal said conviction or sentence. 18 U.S.C. § 3742 (2012).

nation's federal prisons are overcrowded—with some institutions more than 30% over capacity.<sup>222</sup> Longer sentences are not linked to reducing recidivism, and in fact, they may lead to higher rates of incarceration.<sup>223</sup>

Especially in those situations where sentences no longer serve to rehabilitate offenders, the remaining justifications are mostly punitive.<sup>224</sup> Beginning in the 1980s, “people began to lose faith in the rehabilitative system, and the focus of sentencing shifted to a retribution theory.”<sup>225</sup> Beginning with the Reagan administration’s “war on drugs,” Congress passed “a number of drug statutes that carried mandatory minimum penalties,” and the U.S. Sentencing Commission was tasked with organizing a determinate system of sentencing.<sup>226</sup> Lengthy mandatory minimum sentences exacerbate the problems of overcrowding and increase

<sup>222</sup> U.S. GOV'T ACCOUNTABILITY OFF., GAO-12-743, A REPORT TO CONGRESSIONAL REQUESTERS, BUREAU OF PRISONS, GROWING INMATE CROWDING NEGATIVELY AFFECTS INMATES, STAFF, AND INFRASTRUCTURE 12 (2012), <http://www.gao.gov/assets/650/648123.pdf> [<http://perma.cc/294Q-2ZVL>]. As of 2011, “crowding (or population in excess of rated capacity)” reached levels of 39%. Furthermore, the Federal Bureau of Prisons’ “2020 long-range capacity plan projects continued growth in the federal prison population from fiscal years 2012 through 2020, with systemwide crowding exceeding 45 percent through 2018.” *Id.* at intro. As of April 28, 2016, the federal prison system housed 196,134 inmates. *Population Statistics*, FED. BUREAU OF PRISONS, [https://www.bop.gov/about/statistics/population\\_statistics.jsp](https://www.bop.gov/about/statistics/population_statistics.jsp) [<http://perma.cc/RT5F-N8GA>] (last updated Apr. 28, 2016).

<sup>223</sup> See Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1139 (2010) (stating that empirical studies “suggest that longer prison terms do not significantly reduce recidivism and may even be counterproductive”); Don M. Gottfredson, *Effects of Judges’ Sentencing Decisions on Criminal Careers*, RES. IN BRIEF, Nov. 1999. (concluding based on examination of criminal careers of felony offenders sentenced in New Jersey that sentence length had little effect—other than that of incapacitation—on recidivism); TIM RIORDAN, POLITICAL & SOC. AFFAIRS DIV., SENTENCING PRACTICES AND RECIDIVISM (2004) (concluding that available research suggests that sentencing practices do not have a significant effect on recidivism); U.S. DEPT OF JUSTICE, AN ANALYSIS OF NON-VIOLENT DRUG OFFENDERS WITH MINIMAL CRIMINAL HISTORIES (1994) (finding that short prison sentences are just as likely as long sentences to deter low-level drug offenders with minimal criminal histories from future offending); Cassia Spohn & David Holleran, *The Effect of Imprisonment on Recidivism Rates of Felony Offenders: A Focus on Drug Offenders*, 40 CRIMINOLOGY 329 (2002) (comparing recidivism rates of felony offenders sentenced in Kansas City and finding that offenders sentenced to prison have higher recidivism rates than those sentenced to probation).

<sup>224</sup> 18 U.S.C. § 3553(a)(2) (2012) (Courts “shall impose a sentence sufficient, but not greater than necessary.” Courts must consider “the need for the sentence imposed (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense; (B) to afford adequate deterrence to criminal conduct; (C) to protect the public from further crimes of the defendant; and (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.”); Meghan J. Ryan, *Taking Another Look at Second-Look Sentencing*, 81 BROOK. L. REV. 149, 149-52 (2015) (arguing for sentencing reform, especially in light of “concerns about over-incarceration, excessive punishments, the neglect of criminal offenders’ humanity, and the fairness of our criminal justice system”).

<sup>225</sup> Whitley Zachary, *Prison, Money, and Drugs: The Federal Sentencing System Must Be More Critical in Balancing Priorities Before It Is Too Late*, 2 TEX. A&M L. REV. 323, 326 (2014).

<sup>226</sup> *Id.* at 323.

prosecutorial discretion in charging decisions,<sup>227</sup> thus granting prosecutors even greater power in the plea bargaining process.

*E. Alternatives to Automatically Allowing Specific Performance*

The Fifth Circuit has recognized that an appellate waiver is only “enforceable to the extent that the government invokes the waiver provision in [the defendant’s] plea agreement.”<sup>228</sup> Where the government does not object to the defendant’s appeal “based on his appeal waiver, the waiver is not binding because the government has waived the issue.”<sup>229</sup> Therefore, as a prerequisite to seeking specific performance of a plea agreement in which the defendant has allegedly committed a breach, the government must move to dismiss the appeal. Failure to make such a motion is a further waste of resources because it forces the judiciary to reach the merits of the appeal, which is precisely the conundrum that would be avoided by a motion to dismiss.

If the Third Circuit and its sister circuits wish to perpetuate a rule of law in which a defendant’s appeal (despite a waiver of that right) constitutes a material breach punishable by specific performance, that rule should be limited. There should also be an intent requirement. Any criminal defendant who files a frivolous appeal in bad faith, with reckless disregard for judicial integrity or with solely dilatory intent, should be subject to sanctions. Instead of treating the appeal as a breach of contract, the remedy can be one not unlike that provided by Federal Rule of Civil Procedure 11, which allows for sanctions against an attorney or party who misrepresents information to the court or files frivolous motions.<sup>230</sup> Courts can look to Rule 11 jurisprudence to guide any such claims in the criminal context, as long as courts are mindful of criminal defendants’ constitutional rights.

Thus, to establish such a violation, there must always be a well-developed record that clearly demonstrates that the defendant’s appellate waiver was entered into knowingly, intelligently, and voluntarily. In addition, one or more of the

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<sup>227</sup> Prosecutors enjoy vast discretion in choosing what crime to charge in any given case. Thus, prosecutors may influence sentencing to a greater degree than they had before simply by choosing whether to charge a crime to which a mandatory minimum sentence or sentence enhancement applies. Michael A. Simons, *Prosecutors as Punishment Theorists: Seeking Sentencing Justice*, 16 GEO. MASON L. REV. 303, 305, 324-25 (2009) (stating that there is “no question that mandatory sentences shifted enormous sentencing authority to prosecutors” and that “this shift is significant, given that nearly half of all federal criminal prosecutions involve narcotics or firearms charges, the main areas in which mandatory sentences apply”).

<sup>228</sup> *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006).

<sup>229</sup> *Id.*

<sup>230</sup> FED. R. CIV. P. 11(c).

following conditions must be met: (1) the defendant has no cognizable meritorious underlying claim, (2) the underlying appellate claim, even if theoretically barred by waiver, would be one so minor or inconsequential that it would not work a miscarriage of justice, or (3) the plea agreement explicitly recognizes that an appeal within the scope of the waiver would constitute a material breach.

Alternatively, only in cases where the defendant (or his counsel) has clearly acted in bad faith, filed a frivolous suit, or demonstrated an intent to waste the court's and the government's time by filing such an appeal should a defendant's actions be treated as a material breach. On the other hand, when a defendant merely brings a claim and has a weak or losing argument, the court should not subject him to punishment as severe as it would impose for intentional or reckless conduct.

A requirement like Rule 11 would force the government to decide whether this new procedural avenue for enhancing a criminal defendant's sentence would be worth it in any given case. The government would be forced to expend resources to prove the elements outlined above; thus, in cases where a defendant's behavior is particularly noxious, the government may wish to avail itself of further punishment. But where a defendant's appeal is less offensive to the government and is arguably meritorious, the government may argue that the preservation of prosecutorial and judicial resources is of paramount concern and merely move to dismiss the appeal.

## CONCLUSION

In the American adversarial system, those citizens—innocent and guilty alike—who are accused of committing a crime are provided constitutional safeguards to prevent arbitrary, discriminatory, or otherwise unjust enforcement of the law. Unfortunately, however, most criminal defendants do not have the time, sophistication, or resources to stand resolute on their rights in the face of the United States of America. Therefore, even with copiously full dockets, it is incumbent upon the judiciary to maintain its role as arbiter of justice and fairness.

Because plea bargaining is the predominant method for disposing of criminal cases, it is critical that there be comparable levels of judicial oversight and consideration as there would be in a public trial. Courts should not abandon their impartiality in order to free up the docket. When a criminal defendant pleads guilty, waives his right to appeal, and nevertheless appeals, a federal court must determine whether the waiver is

constitutionally valid and enforceable. If so, the court should dismiss the appeal absent demonstrable injustice to the defendant. Only in the extraordinary cases where it is clear that the defendant's motion was frivolous or filed in bad faith or with dilatory intent should the courts be vested with the authority to release the government entirely from its obligations under the plea agreement and return to the status quo ante. Otherwise, the lack of judicial oversight and appellate review could easily open the door to governmental abuse in the plea bargaining process. Constitutional rights could be ignored indiscriminately, and the general public may lose faith in the government, thereby depriving the criminal justice system of its legitimacy. Defendants should certainly not be permitted to waste judicial resources with impunity, but judicial economy should not be achieved through prosecutorial extortion that undermines defendants' constitutional rights.

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