

Addressing Errors in Entering Appeal Waivers: Why Appeal Waivers Entered in Violation of the Due Process Clause or Rule 11 Should Be Severed from Otherwise Valid Plea Agreements

Most federal criminal cases are resolved by plea agreements, and many include appeal waivers. Although defendants rarely enter the appeal waiver in error, how the judiciary handles those cases is just as important to the criminal justice system as enforcing a correctly entered waiver. The circuits currently deal with appeal waiver errors differently, with one approach refusing to allow severance of the wrongly entered waiver from an otherwise valid plea agreement. The other approach corrects the error in a judicially efficient manner, thereby encouraging the practice of plea bargaining.

By Jeffrey M. Brandt

Because of the sheer number of plea agreements reached in the federal criminal justice system, errors will inevitably occur. The district courts sometimes overlook one or two steps: (1) reviewing with the defendant the waiver of the defendant's right to appeal any issues leading to the conviction and sentence or (2) ensuring that the defendant understands the meaning of the waiver as required under Fed. R. Crim. P. 11(b)(1)(N)(1). Defendants occasionally enter plea agreements unaware of the existence of the appeal waiver or without understanding the consequences of the waiver and any exceptions.

What the criminal justice system does to address these situations can have an impact on both the future of plea bargaining and the public's perception of the administration of justice. But the federal courts' treatment of erroneously entered appeal waivers is not uniform.

The approaches taken by the courts generally fall into two categories: courts that find that the wrongly entered appeal waiver may be severed from the otherwise valid agreement, and those that find the appeal waiver, must stand or fall with the entire plea agreement, even if the waiver was entered unconstitutionally. This article suggests the better solution for the entire federal criminal bench and bar is to allow severance of the appeal waiver.

The Stage Has Been Set for the Occasional Missed Appeal Waiver

In all likelihood, even those who have only limited exposure to federal criminal law are aware that an overwhelming number of federal cases are resolved through guilty pleas. At last count, more than 96 percent of federal cases resulting in a conviction were the result of guilty pleas.¹ Many of these convictions—if not most of them—were the result of plea agreements.

"These 'plea bargains' are important in the administration of justice" and serve "an important role in the disposition of today's heavy calendars." *Santobello v. New York*, 404 U.S. 257, 264, 92 S. Ct. 495 (1971) (Douglas, J. concurring). Justice Douglas noted that, even in 1970, 90.2 percent of all

criminal convictions in U.S. district courts were the result of guilty pleas. Plea bargaining is an accepted feature of the federal criminal justice system, and, "properly administered, it is to be encouraged." *Id.* at 260. One bargaining chip for plea negotiations is this right to appeal, which, if waived, is regularly bargained away through a written plea agreement. This is constitutionally allowable, because a defendant may waive his or her rights—including the right to appeal—in accordance with due process protections, as long as the waiver is knowingly, intelligently, and voluntarily entered. *See Iowa v. Tovar*, 541 U.S. 77, 88, 124 S. Ct. 1379 (2004); *Mabry v. Johnson*, 467 U.S. 504, 104 S. Ct. 2543, 2547 (1984); and Fed. R. Crim. P. 11(c)(6).

Most plea agreements include appeal waivers.² This is probably the case, because the government encourages its attorneys to include appeal waivers in exchange for concessions made to the defendant.³

Following the Supreme Court's conclusion that defendants may waive their statutory and even constitutional rights,⁴ the federal courts of appeals enforce appeal waivers.⁵ Assuming that one believes that plea agreements are good for the criminal justice system,⁶ the enforcement of appeal waivers and other plea agreement terms is also good for the administration of federal criminal justice. In many cases, a plea agreement is reached because the government has made a significant concession, and the defendant has probably benefited from the concession. Generally, the government should be able to rely on a correctly entered appeal waiver that is constitutionally and statutorily sound.

However, with the sheer number of federal cases being resolved by plea agreements that include an appeal waiver, mistakes will be made. The occasional case will arise in which the defendant entered the appeal waiver (but not the entire plea agreement) unknowingly, unintelligently, or involuntarily.⁷ The defendant may sign an agreement and plead guilty in a rush and without knowing that an appeal waiver was included. The defendant may have failed to understand what the terms of the waiver and the exceptions

(often presented in extreme legalese⁸) mean. Or, in some instances, the district court may forget to review with the defendant the existence of the appeal waiver during the plea hearing—an omission that may occur more often than we think⁹ and one that even the more conservative circuits occasionally recognize.¹⁰

In these rare cases, the way the federal courts resolve that error has an impact on not only the justice individual defendants receive but also the future effectiveness of plea bargaining. The federal criminal bar should strive for a result that corrects the error and does so with judicial efficiency. In other words, if the administration of justice significantly depends on the plea agreement and the government's ability to depend on an appeal waiver, we have a duty to make sure the errors in the process are recognized and corrected so that reliance on the system is not jeopardized. If the result for defendants in cases where a Rule 11 error or due process error is equitable, the outcome will encourage future plea agreements—much like enforcing valid appeal waivers does.

Two Different Approaches

Generally, there are two approaches to dealing with appeal waivers that have not been properly entered. The first approach efficiently addresses and corrects the error by allowing the wrongly entered appeal waiver to be severed from the otherwise valid plea and ignored. A court of appeals may then address the defendant's substantive arguments on the merits. Although the government does not get the full benefit of its bargain here, the circumstance is rare, and the otherwise valid plea agreement remains in place to limit the amount of time the courts spend on the matter.

The second approach to dealing with appeal waivers refuses to allow severance of the waiver. This approach requires the defendant to choose whether or not to seek to have the entire plea agreement thrown out (and to take a significant risk, even if the agreement is otherwise valid) or to drop the complaint altogether, giving up on what may be a valid argument related to the defendant's sentence. Because most defendants pleaded guilty for a good reason and do not wish to face the charges again, this approach will result in the defendant's agreeing to allow the court to ignore the error, which is sometimes a constitutional error. This outcome is not good for the appearance of the administration of justice and could have a negative impact on whether future defendants agree to plead guilty under a plea agreement. Moreover, in the cases in which the defendant chooses to seek to withdraw the entire plea agreement, the approach is not judicially economic, because it forces the defendant, the government, and the district court judge to return to square one. Finally, this approach is founded upon case

law that, in turn, is based on an obsolete version of Rule 11. In other words, it does not appear that this approach is even founded on good law.

Example of a Case in Which the Defendants Unknowingly Enters an Appeal Waiver

To help identify the differences in how courts handle the unknowingly entered appeal waiver, consider the following pattern that has emerged, as shown in the following examples. At the change of plea hearing, the district court notices that the defendant has not signed the agreement and asks the defendant to do so.¹¹ The defendant signs the agreement for the first time during the hearing. Even though the agreement includes an appeal waiver, the district court fails to review its existence with the defendant, violating Rule 11. As to an appeal, the district court notes only that the government could "appeal the sentence if it does not feel the sentence is reasonable." The district court then accepts the defendant's plea, finds the defendant guilty, and later imposes a significant sentence of more than 20 years.

Defense counsel, although aware of the appeal waiver, takes the prudent route and files a timely notice of appeal.¹² Before appellate counsel files an opening brief, the government moves to dismiss the appeal on the grounds that the plea agreement included an appeal waiver. At this point, the court of appeals does not yet know what issues the defendant will raise. Although the defendant may challenge the waiver on appeal (even though the issues the defendant may wish to raise may not be covered by the waiver, and even though case law may allow the court of appeals to ignore the waiver to correct manifest injustice), the court of appeals in this example dismisses the appeal.

In this example, the defendant files a motion under 28 U.S.C. § 2255 within the time required. In the motion, the defendant argues that he or she had entered the appeal waiver—and not the entire plea—unknowingly and unintelligently. In support of this argument, the defendant notes the district court's failure to review the existence, nature, or consequences of the appeal waiver during the Rule 11 colloquy. The defendant also alleges that trial counsel was ineffective for failing to notify the defendant that the appeal waiver was included in the plea agreement. The defendant asks the district court to strike the appeal waiver and to enter an amended judgment order that would allow the defendant to appeal to the circuit court again—this time without the appeal waiver that he or she did not knowingly or intelligently enter in the first place.

The district court denies the request, finding that trial counsel was effective. Although the court does not directly acknowledge its failure to question the defendant about the appeal waiver, the court finds that other evidence in



the record shows that the appeal waiver was informed and voluntary.¹³ Then, citing published cases from other circuits and noting an unpublished case from its own circuit, the district court rules that it could not strike the appeal waiver without invalidating the entire plea agreement. The defendant unsuccessfully seeks certification for appeal in the district and circuit courts.

At this point, we have a case in which Rule 11 has been violated, and the same appeal waiver that was not correctly entered has prevented the defendant from challenging a significant sentence on appeal. If the viability of plea agreements from the government's perspective depends on the government's ability to rely on appeal waivers in an overwhelming majority of cases, the viability of these agreements from the viewpoint of the defense bar also depends on the courts' agreement to address and correct this type of injustice.

All or Nothing at All

In this example, the district court did not recognize its Rule 11 error but disposed of the case by finding that the appeal waiver could not be severed from the plea agreement. By taking the all-or-nothing approach, a court forces the defendant to elect whether to move to withdraw his or her entire guilty plea. This approach results in the defendant's attempt to withdraw the entire plea agreement just to try to correct a perceived sentencing error, a bad use of judicial resources, or an instance in which a federal court has failed to correct a recognized error.

For example, the Sixth Circuit is hesitant to "disturb the parties' allocation of risk in an agreement" by altering the plea agreement. *United States v. Bradley*, 400 F.3d 459, 464 (6th Cir. 2005). To the Sixth Circuit, doing so would "threaten to damage the parties' ability to ascertain their legal rights when they sit down at the bargaining table and, more problematically for criminal defendants, they threaten to reduce the likelihood that prosecutors will bargain away counts (as the prosecutors did here) with the knowledge that the agreement will be immune from challenge on appeal." *Id.* The Seventh Circuit feels similarly: "If the law allowed the defendant to get off scot-free in the event the argument later is shown to be a winner, then the defendant could not get the reduction in the first place." *Young v. United States*, 124 F.3d 794, 798 (7th Cir. 1997).

This all-or-nothing approach will often fail to correct the constitutional error. Even in the few cases in which defendants unknowingly and unintelligently entered the appeal waiver, they entered the plea agreement correctly overall. And even defendants who failed to understand the nature and consequences of the appeal waiver might understand that seeking to have the entire plea agreement thrown out is simply too risky. Thus, in these circumstances, the defendant's unconstitutionally entered appeal waiver will remain in effect as a part of the unchallenged plea agreement.

Moreover, the all-or-nothing approach can be inefficient. If the defendant seeks to have the entire plea agreement stricken just to raise an issue that may affect sentencing, the parties and the court become embroiled in a new round of litigation. If the defendant is successful, the parties start

the plea process anew. If the appeal does not allow the severance of the appeal waiver and nothing is thrown out on appeal, the defendant may opt to proceed with a § 2255 motion, further dragging out the case. And if the § 2255 motion is successful in showing that the appeal waiver was wrongly entered, the appeal would finally be taken.

Finally, the all-or-nothing approach appears to be based on case law that, in turn, is based on an outdated version of Rule 11 that did not even require district courts to review appeal waivers with defendants. If the foundation for the all-or-nothing option is bad law, it is easier to dispose of the approach altogether.

The All-or-Nothing Approach Appears to Be Based on Outdated Case Law

In dealing with appeal waivers, the Sixth and Seventh Circuits appear to adopt the all-or-nothing approach. Other courts, including the district court in the case that was the basis for the hypothetical example discussed above, have cited certain Sixth and Seventh Circuit cases to support their conclusion that appeal waivers cannot be severed from plea agreements. These cases are *United States v. Robinson*, 455 F.3d 602 (6th Cir. 2006), and *United States v. Hare*, 269 F.3d 859 (7th Cir. 2001). Close examination of those cases, however, strongly suggests that they do not stand for the proposition cited.

In *Robinson*, the question before the Sixth Circuit was whether an appeal waiver in a plea agreement was a "contract of adhesion."¹⁴ *Robinson*, 455 F.3d at 610–11. The Sixth Circuit concluded that an appeal waiver was not an adhesion contract, in part based on the idea that, like any defendant, the appellant in that case "was free to reject the agreement." *Id.* at 611, citing *United States v. McClure*, 338 F.3d 847, 850–51 (8th Cir. 2003) (finding plea agreement not a contract of adhesion; defendant did not have to enter into agreement but was free to hold out for better terms, to proceed to trial, or to plead guilty without an agreement); *United States v. Difeaux*, 163 F.3d 725, 728 (2nd Cir. 1998) (finding plea agreement waiving appeal rights if sentence imposed was within stipulated guidelines range upheld against argument that it was adhesion contract).

Thus, nothing in *Robinson* stood for the proposition that a district court may not strike from an appeal waiver a term or provision that had been entered unconstitutionally. The *Robinson* case involved the issue of whether an appeal waiver was an adhesion contract, and the ruling concluded that the waiver was not such a contract, because the defendant was free to go to trial. In reaching its conclusion in *Robinson*, the Sixth Circuit cited the Seventh Circuit's ruling in *Hare*. In *Hare*, the defendant argued that his appeal waiver should be ignored because it was a contract of adhesion. *Hare*, 269 F.3d at 862, and the Seventh Circuit rejected the proposition that the appeal waiver was an adhesion contract. Addressing the idea of whether the appeal waiver could be ignored, the *Hare* court noted that the defendant had not asked and was not asking to set aside his plea. *Id.* Instead, the defendant wanted the appeal waiver that he believed was invalid to be ignored without challenging the rest of the agreement. On this issue, the Sev-

enth Circuit stated, “A waiver of appeal is valid, and must be enforced, unless the agreement in which it is contained is annulled (for example, because [it is] involuntary).” *Id.* at 860.¹⁵

For that proposition, *Hare* cited *United States v. Wenger*, 58 F.3d 280 (7th Cir. 1995), as well as a handful of Seventh Circuit cases that could be traced back to *Wenger*. See *Hare*, 269 F.3d at 860. Accordingly, it is *Wenger* that provided the grounds for the proposition the Seventh Circuit cited in *Hare* and the Sixth Circuit cited in *Robinson*. It is because of *Wenger* that the foundation for the all-or-nothing proposition fails.

In *Wenger*, the defendant pleaded guilty in the early 1990s. At that time as now, Rule 11 required a district court to specifically question a defendant about several matters before the court was permitted to accept a guilty plea. Rule 11(c)(6) (1995). But when the defendant in the *Wenger* case pleaded guilty, the existence of an appeal waiver was not one of the subjects of the case.

On appeal, the Seventh Circuit was asked to treat an appeal waiver—the type of right that could be waived simply by being listed in the written appeal waiver and that did not have to be addressed by the district court¹⁶—as if Rule 11 required the district court to review it with the defendant before accepting a guilty plea. *Wenger*, 58 F.3d at 282. The Seventh Circuit wrote that the defendant in that case “believes that the district court should have included the waiver of appeal in the Rule 11 colloquy.” *Id.* But the Seventh Circuit correctly made clear that an appeal waiver was not possible in light of Rule 11, as it was written at that time, because “the list in Rule 11(c) is not elastic, and warnings about waivers of appeal are not to be found there.” *Id.* The Seventh Circuit was not free to rewrite Rule 11, and the *Wenger* court denied relief on these grounds.

Thus, *Hare* held that an appeal waiver could not be severed from the plea agreement based on the conclusion reached in *Wenger* that “[w]aivers of appeal must stand or fall with the agreements of which they are a part.” *Wenger*, 58 F.3d at 282. But that statement must be taken in context. First, the *Wenger* court had just made clear that the district court had to review with the defendant the specific rights that Rule 11 listed. The Seventh Circuit was certainly not saying in *Wenger* that the rights expressly listed in Rule 11 could not be severed if the district court had failed to review those rights with the defendant at the plea hearing. Instead, the *Wenger* court was concluding that an appeal waiver needed to rise or fall with the agreement because an appeal waiver was not a right listed in Rule 11.

It is also important to note that the defendant in *Wenger* did not raise any constitutional issue, including a due process claim on the ground that he had entered the appeal waiver unknowingly or unintelligently. See *Wenger*, 58 F.2d at 282 (“*Wenger* does not say that his lawyer slipped the language into the agreement without telling him. He does not claim to be illiterate.”). Thus, the *Wenger* court’s conclusion that an appeal waiver would fail only if the entire plea agreement failed related only in the context of Rule 11, not in the face of an argument that the defendant had properly pleaded guilty but had unconstitutionally entered

the appeal waiver.

In 1999, Subdivision (c)(6) was amended specifically to reflect the increasing practice of including provisions in plea agreements that require the defendant to waive certain appellate rights. Inserted into Subdivision (c)(6) (and now found at Rule 11(b)(1)(N)), the amended list specifically included “the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” Rule 11(c)(6) (1999).

This amendment was a result of a case that came out of the First Circuit, in which that court of appeals noted that the *Wenger* decision was superseded by the amended list at Rule 11(c)(6). Now that Rule 11 required the district court to review the right to appeal with the defendant, an appeal waiver would be invalidated if the district court failed to note the waiver’s existence. As noted by the First Circuit,

While some courts previously had held waivers of appellate rights to be valid despite the absence of specific questioning during the change-of-plea colloquy, e.g., [*United States v.*] *Michelsen*, 141 F.3d [867,] 871–72 [(8th Cir. 1998)]; *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995), these decisions antedate the adoption of Rule 11(c)(6). That rule—which was in force when [the defendant in this First Circuit case] changed her plea—alters the decisional calculus. In explicating the rationale for adopting the rule, the advisory committee made it pellucid that such an inquiry, properly performed, offers considerable assurance of the defendant’s knowledge and volition. See Fed. R. Crim. P. 11(c)(6), advisory committee notes.

United States v. Teeter, 257 F.3d 14, 24 (1st Cir. 2001). In the *Teeter* case, the district court had not reviewed with the defendant the existence of the appeal waiver during the Rule 11 colloquy; therefore, the appeal waiver would not be enforced if the defendant did not otherwise know of the waiver, and the district court’s failure prejudiced the defendant. In its opinion, the court noted the following:

Consequently, we hold that the district court must inquire specifically at the change-of-the-plea hearing into any waiver of appellate rights. Neglecting this duty will constitute error and may serve to invalidate the waiver, depending upon what the record shows as to the defendants’ knowledge (that is, whether the defendant, notwithstanding the absence of a particularized inquiry, understood the full significance of the waiver) and the existence *vel non* of prejudice.

Teeter, 257 F.3d at 24,¹⁷ citing Fed. R. Crim. P. 11(h) and *United States v. Bushbert*, 997 F.2d 1343, 1351–52 (11th Cir. 1993).

In sum, *Wenger* was premised on the fact that appellate rights were not listed in Rule 11. Consequently, the district court had no duty to review the rights, the appeal waiver was valid simply because it was included in the written plea agreement, and the defendant had no grounds to have

the appeal waiver excised from the agreement. *Wenger* did not stand for the proposition that rights expressly listed in Rule 11 could not be severed in light of a constitutional error. And once Rule 11 was amended to list appellate rights, *Wenger* was rendered meaningless on this legal question.

Severing the Waiver

As opposed to the all-or-nothing approach followed by the Sixth and Seventh Circuits and discussed above, other circuits simply sever wrongly entered appeal waivers. Let us consider again a case like our example discussed above, where the plea agreement contains an appeal waiver but the district court does not adequately review the waiver as required under Rule 11. Unlike the response of the court of appeals in our hypothetical, in a case heard by the Second Circuit in 2009, *United States v. James*, 322 F. App'x 32 (2d Cir. 2009), the court of appeals did not summarily dismiss the appeal. Instead, the *James* court reviewed the record to determine whether the waiver was validly entered.

In that case, Betty Peter appealed her sentence on the grounds that it had been procedurally and substantively unreasonable. Her plea agreement contained an appeal waiver; however, in one of those uncommon instances, the district court had failed to review the waiver with her. The government, acting in the best interests of both the administration of justice and the viability of plea agreements, conceded that the district court had not questioned Peter regarding the waiver, violating Rule 11, and therefore did not move to dismiss the case.

The Second Circuit, following the approach to sever the waiver, did not “consider the waiver” in this case. *Id.* The *James* court did not require wholesale rejection of the plea agreement to proceed, and, instead, went forward with a review of Peter’s challenge to her sentence. As may be likely in many cases, this efficient approach did not alter the outcome of the case. The Second Circuit found that the district court had not unreasonably sentenced Peter and affirmed the lower court’s decision.

The Fifth Circuit takes a similar approach, showing a willingness to ignore the waiver when it was entered unconstitutionally or in violation of Rule 11. See *United States v. Baty*, 980 F.2d 977 (5th Cir. 1992). The Eleventh Circuit has also adopted this approach. See *United States v. Adams*, 275 F. App'x 902 (11th Cir. 2008), in which the court stated the following: “The appropriate remedy in a situation where the record shows that a defendant did not knowingly and voluntarily waive his right to appeal his sentence is to sever the waiver from the remainder of the agreement and to consider on appeal the sentencing issues raised by the defendant that would have been barred by the waiver.” *Id.* at *903 (citing *United States v. Bushert*, 997 F.2d 1343, 1353–54 (11th Cir. 1993)).

This view is superior to the all-or-nothing approach for several reasons. The most obvious is that it recognizes the changes to Rule 11, beginning in 1999, that require the district court to address the appeal waiver with the defendant as a part of accepting a plea. But severing a wrongly entered appeal waiver from an otherwise valid plea agreement is also more efficient, because it allows the court to address any sentencing arguments quickly.

Although, in that limited circumstance, the government does not get the benefit of its bargain, it should not get that benefit if the defendant was unaware of that concession. Moreover, the situation is rare, and chances are that the sentence will be affirmed. Finally, to require a defendant to choose between seeking to vacate the entire plea agreement (and risk a longer sentence) to raise a sentencing issue and asking the court to ignore the error is no choice at all. For the same reasons that the government’s appeal waiver should be recognized in an overwhelming number of cases, when the defendant did not properly or knowingly enter the waiver, the courts should ignore the waiver. These policies together encourage plea bargaining as well as the continued use of plea agreements.

Conclusion

The federal criminal justice system does not face a threat of being overrun by cases involving unknowingly entered appeal waivers or violations of Rule 11(b)(1)(N). But in those occasional cases that arise, justly and efficiently resolving the error is important not just for the individual case but for the continuation of the plea bargaining process.

Of the two generally followed options—the one allowing severance of the wrongly entered appeal waiver—is a much better approach, because it recognizes and corrects the error by allowing the waiver to be severed from the otherwise valid guilty plea. Admittedly, this approach means that the government does not get the full benefit of its bargain. But in these rare cases, the “penalty” of severance encourages the government to help watch for Rule 11 violations.¹⁸ Moreover, correcting errors in those rare cases helps promote plea agreements in the long run. The value of plea agreements is great enough for the government, defendants, and the judiciary to join forces in an effort to support this approach to appeal waivers entered in error. **TFL**

Jeffrey M. Brandt is a partner at Robinson & Brandt, PSC in Covington, Ky., where he practices exclusively in criminal defense, focusing on federal cases and appeals. © 2010 Jeffrey M. Brandt. All rights reserved.



Endnotes

¹Federal Judicial Caseload Statistics, Table D-4 (U.S. District Courts—Criminal Defendants disposed of, by Type of Disposition and Major Offense (Excluding Transfers), During the 12-Month Period Ending March 31, 2009) (March 31, 2009).

²*United States v. Peter*, No. 08-1544, 2009 U.S. App. LEXIS 7636 (2d Cir. 2009).

³David E. Carney, *Waiver of the Right to Appeal Sentencing in Plea Agreement with the Federal Government*, 40 WM & MARY LAW REVIEW 1019 (March 1999) (“During the summer of 1997, the Department of Justice issued a directive requiring all future federal plea agreements to include language providing that a defendant waive her statutory right to appeal the sentence imposed by a judge. ...”)

⁴See *United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct.

797, 801 (1995).

⁵Consistent with that principle, the courts of appeals have upheld the general validity of a sentencing appeal waiver in a plea agreement. *See, e.g., United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994), *cert denied*, 115 S. Ct. 1957 (1995); *United States v. Busbert*, 997 F.2d 1343, 1350 (11th Cir. 1993), *cert denied*, 115 S. Ct. 652 (1994); *United States v. DeSantiago-Martinez*, 980 F.2d 582, 583 (9th Cir. 1992), amended, 38 F.3d 394 (1994), *cert denied*, 115 S. Ct. 939 (1995); *United States v. Melancon*, 972 F.2d 566, 567–568 (5th Cir. 1992); *United States v. Rivera*, 971 F.2d 876, 896 (2nd Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829–830 (8th Cir. 1992).

⁶For one discourse on the pitfalls of plea bargaining, see Paul Craig Roberts and Lawrence M. Stratton, *THE TYRANNY OF GOOD INTENTIONS*, 82–104 (2000).

⁷The government is concerned that defendants will argue that appeal waivers were involuntary because they did not know what the ultimate sentence would be. This surely is a problem—that a defendant waives his or her right to appeal a sentence even before seeing what happens at sentencing, and often a significant sentencing error occurs. But even though a serious question may exist as to whether a defendant can knowingly waive an error that has not yet occurred, it is enough to note that thus so far the circuit courts have generally rejected that argument. *See, e.g., United States v. Rutan*, 956 F.2d 827 (8th Cir. 1992); and *United States v. Navarro-Botello*, 912 F.2d 318 (9th Cir. 1990).

For now the defense bar would hope that, when a defendant has entered a broad appeal waiver but the district court appears to have committed a prejudicial error at sentencing, the U.S. Attorney's Office would purposely ignore the waiver any time a question exists as to the whether a guidelines error has occurred. *See* U.S. ATTORNEYS' CRIMINAL RESOURCE MANUAL at 626, ¶ 2 ("Use of waiver of appeal rights in a manner resulting in sentences in violation of the Sentencing Guidelines could prompt a court of appeals to reconsider its decision to uphold the validity of a sentencing appeal waiver. Alternatively, the reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice. To avoid these concerns, in a case involving an egregiously incorrect sentence, the prosecutor should consider electing to disregard the waiver and to argue the merits of the appeal.")

⁸For example, many appeal waivers have reserved the right for the defendant to appeal a sentence "beyond the statutory maximum." A defendant would understand what impact that reservation would have on his or her case only if his or her attorney could explain to the defendant what the phrase "statutory maximum" meant and the attorney would be able to explain the phrase only if the attorney knew for sure what it meant. For a period following *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531 (2004), attorneys and jurists fought over the meaning. The courts of appeals finally stepped in to resolve the question. *See United States v. Bond*, 414 F.3d 542, 545–46 (5th

Cir. 2005) (resolving whether the parties in that particular case understood the phrase "statutory maximum" by declaring that it meant what the U.S. Supreme Court defined the phrase to mean in *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738 (2005)). In other words, how could the federal bar expect defendants to understand the meaning of an appeal waiver that uses terms whose interpretation is subject to debate?

⁹*See, e.g., United States v. Morales-Escobedo*, No. 09-50099, 2010 U.S. App. LEXIS 3962 (9th Cir. 2010) (refusing to enforce the appeal waiver because, "[a]t the plea colloquy, the district court briefly reviewed the plea agreement with [the defendant] but failed to make any mention of the appellate waiver"); *United States v. Goodson*, 544 F.3d 529, 540 (3rd Cir. 2008) (finding plain error where the district court asked the defendant personally whether he understood that he had given up substantial appellate rights but failed to verify that the defendant understood the breadth of the waiver); and *United States v. Rodriguez-Rivera*, 518 F.3d 1208, 1214–15 (10th Cir. 2008) (finding error but not plain error where the district court failed to discuss the existence of an appeal waiver).

¹⁰*See, e.g., United States v. Manigan*, 592 F.3d 621, 627–28 (4th Cir. 2010) (holding that, although the defendant had waived his right to appeal in a formal plea agreement, the waiver was insufficient because the Rule 11 colloquy did not demonstrate that the waiver was given knowingly and intelligently).

¹¹The example is based on *United States v. Donald Lynch*, 3:05-cr-00010 (E.D. Va. 2009). For the purpose of this article, the key facts from the example case are that the district court failed to review with the defendant the existence of the appeal waiver and the defendant attempted to appeal his sentence.

¹²This is certainly the prudent route in appeal waiver cases when the defendant has nevertheless expressly asked counsel to appeal. *See Roe v. Flores-Ortega*, 528 U.S. 470, 478, 120 S. Ct. 1029 (2000) (noting that to satisfy the duty to consult, counsel must advise the defendant of advantages and disadvantages of appealing, make a reasonable effort to determine the defendant's wishes, and file notice if directed); *but see Nunez v. United States*, 546 F.3d 450, 454 (7th Cir. 2008) (questioning *Flores-Ortega's* application in an appeal waiver case); and *id.* at 455 ("With the waiver in force, counsel's duty to protect his client's interests militates *against* filing an appeal.") (emphasis added).

Filing the notice in a case involving a waiver may also be advisable when a question exists as to whether the waiver will cover the issue the defendant wishes to raise. This is because, in the best case scenario, it is the court of appeals that reviews (1) the validity of the appeal waiver, (2) the scope of any valid appeal waiver, and (3) the question of whether the issues the appellant wishes to raise are precluded by the scope of the waiver. In some circuits, the court of appeals may also determine whether to ignore the appeal waiver in order to avoid a miscarriage of justice. *See, e.g., United States v. Guillen*, 561 F.3d 527, 531 (D.C.

WAIVERS *continued on page 51*

care providers in various regulatory and litigation matters. A graduate of the Ohio State University Moritz College of Law, she has externed for Hon. Judge James L. Graham in the U.S. District Court for the Southern District of Ohio and served as a legal intern in the Ohio Court of Claims, Victims of Crime Division.

Endnotes

¹*United States v. Santos*, 553 U.S. 507, 128 S. Ct. 2020, 2023 (2008).

²Fernich, Marc, *Money Laundering After “Santos”*: A Supreme Mess, 240 N.Y.L.J. (Oct. 17, 2008).

³*U.S. v. Kratt*, 579 F.3d 558, 561–562 (6th Cir. 2009).

⁴Carlos F. Gonzalez and Regan Kruse, *U.S. Anti-Money Laundering Laws in the Wake of U.S. v. Santos*, ANDREWS WHITE-COLLAR CRIME REPORTER, 24 NO. 4 ANWCCR 2, at 3 (Dec. 31, 2009), quoting *Santos* at 2025 (Scalia J., joined by Souter, Thomas and Ginsburg J.J.)

⁵*Id.* quoting *Santos* at 2035–36, 2044 (Alito, J., dissenting, joined by Roberts, C.J., Kennedy, and Breyer, J.J.).

⁶*Id.*

⁷Barry Boss, Jon May, and Matt Swerdlin, *Money Laundering Defense After Santos and Regalado Cuellar*, 32 SEP. CHAMP. 2., at 3.

⁸“Transactions that ‘normally occur’ during the course of committing a particular crime are likely ‘not identifiable uses of profits and thus do not violate the money-laundering statute’. ... [P]laying the expenses of ... illegal

activity cannot possibly violate the money laundering statute, because by definition profits consist of what remains after expenses are paid. Defraying an activity’s costs with its receipts simply will not be covered.’ Based on this reasoning, *Santos* would seem to stand for the remarkable proposition that distributions to co-conspirators are outside the money laundering statute and that only financial transactions involving an individual’s or entity’s take-home profit from criminal activities (after paying all expenses) can qualify as money laundering.” *Id.* at 4.

⁹*Id.*, quoting Pub. L. No. 111-21, 123 Stat. 1617 (2009).

¹⁰Daniel Margolis and Anne Lefever, *What Proceeds? Whether the Term is Defined as Net or Gross Profits Makes the Big Difference*, 242 N.Y.L.J., quoting Press Release of Sen. Patrick Leahy, Chairman, S. Judiciary Comm., *Introducing the Fraud Enforcement and Recovery Act* (Feb. 5, 2009), S. 386, 111th Cong. § 2 (2009), available at leahy.senate.gov/press/press_releases/release/?id=c556b483-a161-4e19-894d-dc9221b8cac3 (Last checked on April 6, 2010).

¹¹See *U.S. v. Kelley, II*, No. 08-00327-CG, 2009 WL 2382752 at *4 (S.D. Ala. July 29, 2009).

¹²Judge Jeffrey S. Sutton served as a law clerk to Justice Antonin Scalia between 1991 and 1992.

¹³Evan Ennis, *An Uncertain Precedent*, *U.S. v. Santos and the Possibility of a Legislative Remedy*, 95 CORNELL L. REV. 191 (Nov. 2009) at 203.

¹⁴*Id.*

WAIVERS continued from page 47

Cir. 2005); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003) (en banc); *United States v. Khatkhat*, 273 F.3d 557, 563 (3rd Cir. 2001); *United States v. Teeter*, 257 F.3d 14, 25–26 (1st Cir. 2001).

¹³The case that formed the basis for the example here came from the Fourth Circuit, which ruled that an appeal waiver is ineffective if the district court fails to question the defendant about it, *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992); *United States v. Wessells*, 936 F.2d 165, 167–68 (4th Cir. 1991), unless other evidence in the record shows that the waiver was informed and voluntary. *United States v. Davis*, 954 F.2d 182, 186 (4th Cir. 1992). See, e.g., *United States v. Goins*, 51 F.3d 400, 403 (4th Cir. 1995).

¹⁴Also before the Sixth Circuit was the question of whether the appeal waiver was enforceable. *Robinson*, 455 F.3d at 609. The district court had mentioned the existence of the appeal waiver at the plea hearing but had not addressed the appellant to ascertain if he understood that provision. *Id.* The Sixth Circuit reviewed the decision for plain error and found none. *Id.* at 610. This was not the analysis in *Robinson*, in which the Sixth Circuit cited *Hare*, and this analysis did not address the question of whether an appeal waiver could be severed from a plea agreement. Thus, this section of *Robinson* was not relevant to the dis-

trict court’s decision.

¹⁵The *Robinson* decision cites *Hare*, 269 F.3d at 862, for this quote; but the quote is found at 860.

¹⁶See *Wenger*, 58 F.3d at 282 (“Most waivers are effective when set out in writing and signed.”); see, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041 (1973) (Fourth Amendment right to privacy); *United States v. Mezzanatto*, 513 U.S. 196, 115 S. Ct. 797 (1995) (right to exclude from evidence a proffer made as part of plea negotiations).

¹⁷It is interesting to note that the *Hare* court cited *Teeter* despite the recognition that *Wenger* could no longer control the issue. *Hare* cited *Teeter* for the proposition that an appeal waiver must be enforced unless the complete plea agreement is annulled. *Hare*, 269 F.3d at 860. But *Teeter* does not support the all-or-nothing approach to plea agreements. Instead, *Teeter* stands for the proposition that appeal waivers are valid but only if they are knowingly and intelligently entered.

¹⁸See *Goodson*, 544 F.3d at 540 n.10 (concluding that Rule 11 “error was compounded, in our view, by the government’s failure to ask the District Court to comply with the mandate of Rule 11(b)(1)(N)”).