

APPEAL WAIVERS: WHEN MUST THEY BE RAISED?

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INTRODUCTION

Plea bargaining is the new normal for the U.S. judicial system. While the occurrence of jury trials has rapidly decreased, plea bargaining has become the most expedient way for prosecutors and defendants to reach judicial outcomes.¹ In the face of a new normal, prosecutors have increasingly included appeal waivers in their plea bargains in an attempt to limit defendants' ability to appeal a multitude of issues.²

In the last decade, the circuit courts have split on the issue of "whether a criminal defendant must raise the issue of an appeal waiver in his [or her] opening brief or whether it falls upon the government to raise the waiver as a defense in its reply."³ Some circuits, such as the Third Circuit and the D.C. Circuit, have concluded that a defendant is not required to acknowledge the existence of an appellate waiver in their opening brief, and can instead wait for the government to first invoke the waiver.⁴ The First Circuit, however, adamantly disagrees with this premise and contends that a defendant must raise an appeal waiver in an opening brief in order for the Court to understand why they ought to consider the case and appellate waiver altogether.⁵ According to the First Circuit, if the defendant does not first address the appeal waiver in their opening brief, he or she runs the risk of losing their ability to appeal their issue altogether.⁶

This Note proposes that the first approach, implemented by the Third Circuit and the D.C. Circuit, is the better approach that should be adopted by

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1. *See infra* Section I.B.
2. *See infra* Section II.A.
3. *United States v. Desotell*, 929 F.3d 821, 826 (7th Cir. 2019).
4. *See infra* Section III.A.1.
5. *See infra* Section III.A.2.
6. *See infra* Section III.A.2.

the United States Supreme Court. This Note contends that defendants should not be required to acknowledge their appeal waiver in their opening brief, despite the potential applicability of the waiver, and should instead be permitted to wait until the government chooses to invoke the waiver in response to the defendant's opening brief. This Note also contends that this is the better approach for three reasons. First, plea bargains are, at their core, contracts that are negotiated between the government and the defendant, and it should not be up to the defendant to draw the court's attention to a provision in the plea-bargaining contract that is favorable to their opposing party. Second, the defendant may have failed to address their waiver of appeal because they honestly and reasonably understood their appeal waiver to bar another issue, and not the issue the defendant is appealing. Finally, forcing a defendant to acknowledge their appeal waiver immediately is antithetical to both the spirit of Federal Rules of Criminal Procedure (FRCP) Rule 11 and also Federal Rules of Appellate Procedure (FRAP) Rule 28. For the aforementioned reasons, the Supreme Court should adopt the approach that allows defendants to acknowledge a potentially relevant appeal waiver after the government has invoked the waiver in their response.

This Note proceeds as follows: Part I provides an overview of the plea-bargaining system in the United States. It presents background information on the current plea-bargaining process and likewise explains the mechanics behind modern plea bargaining. Part I also lays the foundation for how and why appeal waivers have gained a foothold in the plea-bargaining system. Part II explains what exactly an appellate waiver is and what it looks like within a plea agreement. It likewise expounds the history behind appellate waivers and the authority that enables them. Furthermore, Part II recounts the requirements of a constitutional appeal waiver. Part III addresses the circuit court split on the issue of when exactly an appeal waiver must be raised, whether in the opening brief during an appeal, or in response to the government's invocation. It also describes the two approaches the circuit courts have taken on this issue. Part IV compares the two approaches and proposes that the Supreme Court should adopt the position expounded by the Third Circuit and the D.C. Circuit. Part IV also describes the recent Supreme Court case of *Garza v. Idaho* and discusses the implications of this decision on appeal waivers and how this opinion might inform a later decision more specifically related to when an appeal waiver must be first asserted.

I. AN OVERVIEW OF PLEA BARGAINING IN AMERICA

A. Background

Plea bargaining has long been a staple of the United States judicial process. From the 1970s to the modern 2010s, plea bargaining has been the primary way in which the vast majority of criminal cases in the United States

are resolved.⁷ As noted by Chief Justice Burger of the United States Supreme Court in the case of *Santobello v. New York*, plea bargaining “is an essential component of the administration of justice. Properly administered, it is to be encouraged.”⁸

As a preliminary matter, plea bargaining can be defined as “the exchange of official concessio[n]s [sic] for a defendant’s act of self-conviction.”⁹ The sorts of discounts, or benefits that the prosecution provides in the bargain, often relate to the court’s sentence or a prosecutor’s recommendation, the actual charged offenses, or situations such as accomplice liability, location of prison, credits for time served, support for parole application, and many other circumstances.¹⁰ The benefit offered by the defendants is always their agreeance to plead guilty.¹¹

Plea bargaining has a long and storied history in American jurisprudence. At the end of the nineteenth century, plea bargaining became one of the dominant ways in which criminal cases were resolved in the United States.¹² Although there was general disapproval towards the practice, plea bargaining flourished at a significant time in our legal history, where individual actors such as the jailer, the bondsman, the reporter, and the fixer exercised a more profound influence on the day to day administration of criminal justice.¹³ At the beginning of the twentieth century, plea bargaining had become even more common, as demonstrated through various crime commissions, and for the first time, the practice of plea bargaining drew the attention of the public, which mostly disapproved of the practice.¹⁴

Following the 1920s, the guilty plea became ever more important to the administration of justice in the U.S. judicial system.¹⁵ Criminal courts became more reliant on plea bargains, despite the growing apathy, or outright distaste, levied against plea bargains amongst legal scholars, academics, and the general public.¹⁶ Indicative of this generalized distaste, by 1958 many prosecutorial bodies worried that the United States Supreme Court might hold the practice illegal and ban plea bargaining altogether.¹⁷ To prevent this from happening, the Department of Justice took concrete, albeit questionable steps to ensure that

7. See Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1121 (2011).

8. *Santobello v. New York*, 404 U.S. 257, 260 (1971).

9. Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 3 (1979).

10. See *id.* at 3–4 & n. 11. Other benefits the prosecution might use to entice defendants to plea bargain include dismissing detainers from other jurisdictions, providing immunity for crimes that have yet to be charged, withholding detrimental information from the court, and much more.

11. See *id.* at 3–4.

12. See *id.* at 5.

13. See *id.* at 6.

14. See *id.*

15. See *id.*

16. See *id.*

17. See *id.*

the Supreme Court would never decide this issue relating to the constitutionality of plea bargaining.¹⁸ For this reason, the Supreme Court avoided this question, even during their “due process revolution.”¹⁹ In fact, a large portion of their decisions during this period of time inadvertently incentivized prosecutors to offer plea bargains because their decisions increased “the complexity, length, and cost of criminal trials,” thereby tying prosecutors’ hands and “exacerbate[ing] the pressures for plea bargaining.”²⁰

In 1970, after having directly avoided the question of the constitutionality of plea bargaining for decades, the Supreme Court finally determined that plea bargaining was “inherent in the criminal law and its administration”²¹ The Court venerated the institution of plea bargaining and explained its importance in our judicial system.²² In line with their due process revolution jurisprudence, the Court upheld plea bargaining, without delving into the more problematic aspects of the plea negotiating process.²³

B. Modern Plea Bargaining

The onslaught of plea bargaining has prompted many questions concerning the constitutional implications of the practice, and also the practicalities of ensuring a defendant’s plea is legitimate (i.e., voluntary) informed, in accordance with public policy, etc.²⁴ The Supreme Court has largely remained silent in regards to plea bargaining.²⁵ For decades, the Supreme Court has referred to jury trials as the primary way in which justice ought to be administered in the United States criminal courts.²⁶ The Court’s reluctance to legitimize plea bargaining, or as some commentators contend, the Court’s indifference to plea bargaining in general, reflects its desire to allow plea bargaining without critically investigating plea bargaining’s constitutional

18. *See id.*

19. *Id.*

20. *Id.*

21. *Brady v. United States*, 397 U.S. 742, 751 (1970).

22. *See id.*; *see also Parker v. North Carolina*, 397 U.S. 790, 808 (1970).

23. *Alschuler*, *supra* note 9, at 6 (citing *Brady*, 397 U.S. at 751).

24. *See generally Bibas*, *supra* note 7. For further information and materials relating to the constitutionality of plea bargaining, see generally George Fisher, *Plea Bargaining’s Triumph*, 109 YALE L.J. 857 (2000); GEORGE FISHER, *PLEA BARGAINING’S TRIUMPH: A HISTORY OF PLEA BARGAINING IN AMERICA* (2003); William J. Stuntz, *Bordenkircher v. Hayes: The Rise of Plea Bargaining and the Decline of the Rule of Law*, in *CRIMINAL PROCEDURE STORIES* 351 (Steiker ed., 2006); *Alschuler*, *supra* note 9; Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471 (1993).

25. *See generally Bibas*, *supra* note 7. For a broader understanding of the Supreme Court’s case law surrounding plea bargaining, see *Boykin v. Alabama*, 395 U.S. 238 (1969); *Santobello v. New York*, 404 U.S. 257, 260–62 (1971); *North Carolina v. Alford*, 400 U.S. 25 (1970); *Parker v. North Carolina*, 397 U.S. 790 (1970); *United States v. Ruiz*, 536 U.S. 622 (2002); *Padilla v. Kentucky*, 559 U.S. 356 (2010).

26. *See Bibas*, *supra* note 7, at 1119.

implications.²⁷ The judicial system has arguably become addicted to the simplicities of the plea bargaining process, “relying on guilty pleas to resolve the vast majority of criminal cases, and could not afford to stifle this trade.”²⁸ Courts have long assumed that only a guilty person would be enticed to plead guilty for fear of a negative trial outcome.²⁹ These same courts in turn counted on jury trials to protect those defendants who were not guilty or those defendants whose cases warranted extensive consideration through the trial process. However, with the onslaught of plea bargaining and the uncertainties of trial, more defendants have chosen to plead guilty, even those defendants who are otherwise innocent, to avoid the uncertainties and unexpected outcomes of a jury trial.³⁰ This fear has similarly enticed defendants who would otherwise not accept plea bargains, to go further, and accept appellate waivers that further restrict their rights, in an attempt to secure a lesser sentence or bargain, through the plea negotiating process.³¹ This defendant-centered mindsight illustrates how appellate waivers have become successful tools included in plea bargains that further incentivize risk-averse defendants to accept pleas.

The Constitution provides no advice on the permissibility of plea bargains.³² “[T]he Bill of Rights provided no explicit protections for plea bargaining.”³³ Despite the court recognizing that plea bargaining plays an integral role in the administration of justice, defendants do not have a constitutional right to plea bargains.³⁴ For this reason, courts and legislatures have carved out the minutia of plea bargaining and codified the plea bargaining process.³⁵ This has allowed for particularized plea bargaining and a process that gave rise to appeal waivers, and other potentially controversial plea bargaining practices.

27. *See id.*

28. *Id.* For more information on the traditionally passive role of the judiciary, see ABRAHAM S. GOLDSTEIN, *THE PASSIVE JUDICIARY: PROSECUTORIAL DISCRETION AND THE GUILTY PLEA* (1981). *See generally* Rishi Batra, *Judicial Participation in Plea Bargaining: A Proposal for Reform*, CASETEXT, Sept. 2, 2015; MILTON HEUMANN, *PLEA BARGAINING: THE EXPERIENCES OF PROSECUTORS, JUDGES, AND DEFENSE ATTORNEYS* (1978).

29. *See* Bibas, *supra* note 7, at 1119.

30. *See id.*; *see also* William J. Stuntz, *Plea Bargaining and Criminal Law’s Disappearing Shadow*, 117 HARV. L. REV. 2548, 2555–56 (2004); Ronald Wright & Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003).

31. *See* Bibas, *supra* note 7, at 1119.

32. *See id.* at 1120.

33. *Id.* at 1119.

34. *See* Mabry v. Johnson, 467 U.S. 504, 507–08 (1984); *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). *See also* United States v. McCoy, 767 F.2d 395, 400 (7th Cir. 1985) (no absolute right to plea bargain); United States v. Osif, 789 F.2d 1404, 1405 (9th Cir. 1986) (government not obligated to re-offer previously rejected plea bargain).

35. *See generally* Bibas, *supra* note 7.

C. Mechanics and FRCP Rule 11

Plea bargaining, although not specifically delineated by the Supreme Court, has become fully legitimized through Rule 11 of the Federal Rules of Criminal Procedure.³⁶ Rule 11 permits “[a]n attorney for the government and the defendant’s attorney . . . [to] discuss and reach a plea agreement.”³⁷ “When the government and defendant agree to negotiate a plea . . . they must comply with Rule 11.”³⁸

Rule 11 sets forth the procedures by which prosecutors, judges, and defense attorneys must abide by before, during, and after the plea bargaining process.³⁹ Rule 11 of the Federal Rules of Criminal Procedure likewise ensures that pleas are voluntary and knowing.⁴⁰ Rule 11 mandates that the court ensure that the defendant understands the nature of the charges levied against him or her, the mandatory minimum and maximum sentences that he or she is facing, the multitude of constitutional waivers the defendant is waiving by pleading guilty, and finally that the answers that the defendant gives in open court on the record may be used against him or her in another proceeding.⁴¹ Rule 11(d)(1) compels the court to ensure that the defendant’s plea is entirely voluntary and has not been induced by a myriad of factors such as threats, force, or promises that are not codified in the plea agreement.⁴² A defendant may have a difficult time proving that he or she was coerced into accepting the plea agreement, as he or she must show that fear of the possible issues associated with not pleading guilty destroyed the defendant’s ability to weigh the pros and cons of accepting the plea agreement versus going to trial.⁴³ A partial inducement by the government will usually not be enough for a defendant to successfully challenge a plea agreement.⁴⁴

36. For information pertaining to the federal plea bargaining process, see *How Courts Work*, A.B.A. (Sept. 9, 2019), https://www.americanbar.org/groups/public_education/resources/law_relat ed_education_network/how_courts_work/pleabargaining/; U.S. DEP’T OF JUST., ANNUAL STATISTICAL REPORT: FISCAL YEAR 2010 (2010), www.justice.gov/usao/resources/annual-statistical-reports; U.S. DEP’T OF JUST., ANNUAL STATISTICAL REPORT: FISCAL YEAR 1976–7, chart 14, tbl.6 (1976), www.justice.gov/usao/resources/annual-statistical-reports.

37. FED. R. CRIM. P. 11(c)(1).

38. Note, *Sixteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1985-1986*, 75 GEO. L.J. 713, 974–75 (1987) [hereinafter *Preliminary Pleadings: Guilty Pleas*].

39. See generally FED. R. CRIM. P. 11.

40. See *id.* at 11(b)(2).

41. See *Preliminary Pleadings: Guilty Pleas*, *supra* note 38, at 969–70 (citing various provisions of FED. R. CRIM. P. 11(c)).

42. See *id.* and accompanying text.

43. See *id.* at 970.

44. See *id.*; see also *Brady v. United States*, 397 U.S. 742, 750 (1970); *Parker v. North Carolina*, 397 U.S. 790, 792, 794–95 (1970) (defendant’s plea still voluntary despite the prosecutor offering to reduce the penalty); *McMann v. Richardson*, 397 U.S. 759, 771–72 (1970) (earlier coerced confession did not necessarily make plea involuntary).

Rule 11 requires that there also be a factual basis for a plea.⁴⁵ The court must ensure that the crime to which the defendant is admitting is equivalent to the crime that he or she has been charged.⁴⁶ If there is an insufficient factual basis, Rule 11 requires the court to reject the plea agreement.⁴⁷ Even if the defendant accepts a plea while still adamantly maintaining his or her innocence, the acceptance of a plea will be enough to be considered accurate as long as there is robust evidence as to the defendant's guilt.⁴⁸ The court must likewise keep a record of the plea, in case the defendant decides to appeal the plea.⁴⁹

Notably, only those Rule 11 violations that affect a defendant's substantive rights, such as "constitutional error or special prejudice" will compel the court to set aside a plea.⁵⁰ Collateral relief will not be granted when Rule 11 violations merely result in technical violations or harmless error.⁵¹ To obtain collateral relief, the Rule 11 violation must have infringed on a defendant's substantive rights.⁵² This idea of harmless error is inconsistent and difficult to codify, as many courts have varied in determining what constitutes harmless error to the defendant.⁵³ If an appellate court does determine that the error was not harmless and was in fact a violation of the defendant's substantive rights, the judgment will be vacated and sent back to the district court.⁵⁴

II. APPEAL WAIVERS: WHAT ARE THEY?

A. What Is an Appeal Waiver?

Appeal waivers at a fundamental level are clauses in plea agreements that permit defendants to waive their right to appeal certain issues. Since their popular beginnings approximately twenty-five years ago, appeal waivers have become increasingly prevalent in the federal court system.⁵⁵ With the onslaught of appeal waivers included in federal plea agreements, federal courts have struggled to discern when appeal waivers are acceptable, and when they intrude

45. See FED. R. CRIM. P. 11(b)(3).

46. See *Preliminary Pleadings: Guilty Pleas*, *supra* note 38, at 971 (citing FED. R. CRIM. P. 11(f)); see also *Santobello v. New York*, 404 U.S. 257, 261 (1971) ("[T]he sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge.") (emphasis omitted)).

47. See *Preliminary Pleadings: Guilty Pleas*, *supra* note 38, at 972.

48. See *id.*

49. See *id.*

50. *Id.* (citing FED. R. CRIM. P. 11(h)).

51. See *Preliminary Pleadings: Guilty Pleas*, *supra* note 38, at 972; see, e.g., *United States v. Timmreck*, 441 U.S. 780, 784 (1979) (explaining that formal or technical violations of Rule 11 do not rise to the level of error that would warrant collateral relief).

52. See *Preliminary Pleadings: Guilty Pleas*, *supra* note 38, at 972.

53. See *id.* at 973.

54. See *id.* at 974.

55. Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 348 (2015).

on a defendant's constitutional rights to due process, effective assistance of counsel, and more. As such, appeal waivers can be particularly difficult to craft and also to enforce.⁵⁶

1. History of Appellate Waivers

The beginnings of appellate waivers can be traced to the influx of appellate review and the circuitous ways parties avoided appellate review in response to the sentencing reforms of the Federal Sentencing Guidelines.⁵⁷ Appellate review, which had become a part of modern sentencing policy in the 1970s and 80s, became the “glue” holding together the new sentencing scheme called the Federal Sentencing Guidelines.⁵⁸ The Federal Sentencing Guidelines were promulgated as a byproduct of the Sentencing Reform Act of 1984.⁵⁹ Underlying the new sentencing system was appellate review, which presumptively favored both the prosecution and the defense.⁶⁰ Prosecutors were empowered to appeal judicial sentences that were lower than the law provided.⁶¹ Likewise, defendants were able to appeal sentences where judges exceeded permitted sentencing limits.⁶² For this reason, “[a]ppellate review of sentencing emerged as the primary enforcement mechanism for sentencing reform in federal courts as well as in the courts of more than a dozen states.”⁶³ However, this sentencing reform via appellate review brought about by the sentencing guidelines was counteracted by a variety of measures, including the weakening of this appellate review “by federal law exempting from judicial review decisions by prosecutors to . . . grant a downward departure . . . , file a safety-valve motion for a sentence below the statutory minimum sentence, . . . seek a reduced sentence under Rule 35,” and much more.⁶⁴ The primary, and most germane, way in which appellate review was undercut was by clauses in plea agreements, known as appellate waivers, which allowed parties to waive their rights to appeal.⁶⁵

Appeal waivers were a result of an “explosion in the number of criminal appeals” after the Federal Sentencing Guidelines came into effect.⁶⁶ These appeal waivers were, and remain, clauses in plea agreements by which parties

56. *See id.*

57. *See generally* Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005).

58. *Id.* at 214. *See generally* Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1443–47 (1997) (explaining the lack of appellate review in federal courts before 1980).

59. *See* King & O’Neill, *supra* note 57, at 214.

60. *See id.* at 214–15.

61. *See id.* at 214.

62. *See id.* at 215.

63. *Id.*

64. *Id.* at 218; *see id.* at 215–19.

65. *See id.* at 219.

66. *Id.*

waive appeal rights.⁶⁷ Before the enactment of the guidelines, defendants who entered guilty pleas had little right to appeal. “Because defendants waived most pretrial and trial rights when pleading guilty, and because sentencing appeals were futile, criminal appeals were primarily reserved for those few defendants who were convicted after trial.”⁶⁸ This trend was altered by the new sentencing statutes and guidelines, which made it considerably easier for defendants to appeal their sentences.⁶⁹ The sentencing guidelines provided numerous new sentencing issues that defendants were allowed to appeal even after pleading guilty.⁷⁰ In response to these new rules, many defendants who had pleaded guilty began to appeal their sentences.⁷¹ In a desire to avoid these sorts of challenges in the future, prosecutors began to include appeal waivers in their plea agreements.⁷²

Appellate waivers first appeared in the Fourth Circuit in the early 1990s.⁷³ Following the Fourth Circuit, appeal waivers were quickly validated in the Fifth Circuit and Ninth Circuit.⁷⁴ After appeal waivers popularized in the Fourth, Fifth, and Ninth Circuits, they soon infiltrated other circuits as prosecutors across the country employed them in their plea agreements.⁷⁵ “By the end of 1995, six additional courts of appeals had upheld the validity of appeal waivers, and United States Attorneys received a memo from Washington encouraging them to consider whether the employment of appeal waivers would be a ‘useful addition’ in their districts.”⁷⁶ The circuit courts’ legitimization of these waivers enticed prosecutors to systematically offer much lower sentences, often through agreements to drop or not to add a charge, and often in exchange for the defendant’s waiver of everything, including the right to appeal.⁷⁷

Judges, like prosecutors, similarly supported the practice of including appeal waivers in plea bargains.⁷⁸ “In 1995, in response to a Federal Judicial Center survey on the Guidelines sent to over 1,100 of the 1,189 federal district and circuit judges, 67 percent of district judges who responded and 62 percent of responding circuit judges agreed that ‘[w]aivers of appeal should be used

67. *See generally id.*

68. *Id.* at 219.

69. *See id.*

70. *Id.* at 219–20.

71. *See id.*

72. *See id.* at 220.

73. *See id.*

74. *See id.* at 221.

75. *See id.*

76. *Id.* (quoting John C. Keeney, *Justice Department Memo: Use of Sentencing Appeal Waivers to Reduce the Number of Sentencing Appeals*, 10 FED. SENT’G REP. 209, 209 (1998)).

77. *See id.* at 220. For a review of cases where appeal waivers were upheld in the early 1990s, *see* *United States v. Melancon*, 972 F.2d 566, 567–68 (5th Cir. 1992); *United States v. Navarro-Botello*, 912 F.2d 318, 321 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52–53 (4th Cir. 1990).

78. *See* Lynn Fant & Ronit Walker, *Reflections on a Hobson’s Choice: Appellate Waivers and Sentencing Guidelines*, 11 FED. SENT’G REP. 60 (1998).

more frequently.”⁷⁹ With prosecutors and judges on board and in favor of appeal waivers, their prevalence within the federal court system inevitably expanded, as did the case law determining when and under what circumstances appeal waivers are enforceable.

2. Mechanics of Modern Federal Appellate Waivers

Appellate waivers have become “a dominant feature of the plea bargaining landscape.”⁸⁰ The commonplace and typical kind of appeal waivers seen today are provisions in defendants’ plea agreements that waive the defendant’s right to appeal her sentence, conviction, or both.⁸¹ Appeal waiver provisions are often customized by prosecutors on a case-by-case basis, and, “as a result, the waivers vary widely in scope from broad blanket waivers of all appellate rights to individually-tailored waivers in which the defendant retains the right to appeal specified aspects of the sentence under particular conditions.”⁸²

The initial stages of the plea-bargaining process, that precede an appellate waiver, begin with a Rule 11 hearing.⁸³ At this hearing, the relevant parties are required by Federal Rules of Criminal Procedure Rule 11 to disclose to the federal district court that there is a plea agreement.⁸⁴

Federal plea agreements may take one of three forms: (1) binding on the government to dismiss or forego charges, (2) binding on the government to recommend (or not oppose) a particular sentence or calculation under the U.S. Sentencing Guidelines, and (3) binding on the court to impose a particular sentence or reach a particular calculation under the U.S. Sentencing Guidelines.⁸⁵

At the Rule 11 plea hearing, the district court judge must determine whether the defendant who is accepting the plea comprehends the rights that he or she is foregoing by accepting the plea agreement and pleading guilty.⁸⁶ This process, called a plea colloquy, is meant to assure the court that the defendant is informed of his or her decision and knowingly and voluntarily accepts the

79. King & O’Neill, *supra* note 57, at 221–22 (alteration in original) (emphasis omitted) (quoting MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUD. CTR., THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY, REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 tbl.14 (1997)).

80. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 211 (1995).

81. Bennardo, *supra* note 55, at 348.

82. *Id.* at 348–49 (internal quotation marks omitted). See Roger W. Haines, Jr., *Waiver of the Right to Appeal Under the Federal Sentencing Guidelines*, 3 FED. SENT’G REP. 227, 229 (1991).

83. See FED. R. CRIM. P. 11(c)(2).

84. See *id.*

85. Bennardo, *supra* note 55, at 349 (citing FED. R. CRIM. P. 11(c)(1)).

86. See FED. R. CRIM. P. 11(b)(1).

provisions of the plea agreement.⁸⁷ If the agreement includes an appeal waiver, the district court is required to question the defendant about this particular appellate waiver provision during the plea colloquy.⁸⁸ “Only upon finding that the defendant is entering her guilty plea knowingly and voluntarily may the district court accept the defendant’s guilty plea.”⁸⁹

Notably, district courts are free to accept or reject a plea agreement. They are not bound to the plea agreement and may “categorically reject agreements that contain appellate waiver provisions.”⁹⁰ Furthermore, district court judges may reject plea agreements in situations where they feel the defendant is not fully informed of the consequences of accepting the plea agreement or in cases where the district court believes that the appeal waiver is antithetical to the interests of justice.⁹¹

The presentence investigation report (PSR) is created upon the entrance of a guilty plea.⁹² “This report contains a calculation of the defendant’s advisory sentencing range from the U.S. Sentencing Guidelines Manual.”⁹³ At the sentencing hearing, after the defendant has accepted the guilty plea and the PSR has been created, the district court must shore up any disagreements regarding the PSR and likewise “calculate the defendant’s advisory Guidelines range of imprisonment on the record.”⁹⁴ After this calculation, “[t]he district court often enters judgment on the same day as sentencing. A defendant has fourteen days following the entry of judgment to file a notice of appeal.”⁹⁵

B. Requirements of a Constitutional Appeal Waiver

The Circuit Courts have uniformly accepted the validity of appellate waiver provisions and held them to be enforceable.⁹⁶ “Effective waivers of statutory rights must be knowing and voluntary, cannot violate public policy, and must comply with due process. The federal appellate courts have rejected challenges to appellate waivers on all three of these grounds.”⁹⁷

1. Appeal Waiver is Knowing and Voluntary

Federal Circuit Courts have held that a defendant may waive their prospective sentencing appellate rights so long as their waiver is voluntary and

87. *See id.* at 11(b)(2).

88. *See id.* at 11(b)(1)(N).

89. Bennardo, *supra* note 55, at 350 (citing FED. R. CRIM. P. 11(b)(2)).

90. *Id.*; *see also* Douglas A. Berman, *Windows into Sentencing Policy and Practice: The Crack/Cocaine Ratio and Appeal Waivers*, 10 FED. SENT’G REP. 179, 181 (1998); FED. R. CRIM. P. 11(c)(3)(A) (providing district courts the authority to reject plea agreements).

91. *See* Bennardo, *supra* note 55, at 350–51.

92. *See id.* at 351.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.* *See generally* Calhoun, *supra* note 80; Haines, Jr., *supra* note 82, at 229.

97. Bennardo, *supra* note 55, at 355–56.

intelligent.⁹⁸ Borrowing from the Supreme Court's language in *Brady v. United States*, the Circuit Courts have concluded that waivers of constitutional rights in guilty pleas, waivers such as appellate waivers, must be "voluntary[,] . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."⁹⁹ This language has been incorporated into the Federal Rules of Criminal Procedure Rule 11, and judges, when conducting the plea colloquy, must ensure that the defendant fully understands the rights she is relinquishing and that she is doing so voluntarily, not under the threat of coercion.¹⁰⁰

For this reason, a defendant is entitled to appeal issues that relate to the validity of the agreement or the waiver itself "because such issues relate to the knowing and voluntary nature of the agreement."¹⁰¹ An example of this is that an appellate waiver can never forgo a claim that the plea agreement was the product of ineffective assistance of counsel.¹⁰² This speaks to voluntariness and intelligence, and if an ineffective assistance of counsel claim prevails, the agreement and the waiver would be invalid.¹⁰³ Furthermore, an appeal waiver does not disqualify an argument that the sentence levied after the acceptance of a guilty plea violated the particular terms of the plea agreement.¹⁰⁴ These issues bear on the waiver's effectiveness. "Thus, unless an exception or a meritorious claim of invalidity exists, a knowing and voluntary appellate waiver will bar the appellate court from considering any claims within its scope."¹⁰⁵

2. Appeal Waiver Does Not Violate Public Policy

Federal courts have continued to discern whether appellate waivers violate public policy and whether they are in the public interest.¹⁰⁶ "Although a few courts have disallowed appeal waivers on public policy grounds, the vast majority have resolved the public policy debate in favor of upholding such waivers."¹⁰⁷

Courts often rely on similar rationales for maintaining that appellate waivers do not violate public policy. These rationales include:

98. *See id.* at 356.

99. *Brady v. United States*, 397 U.S. 742, 748 (1970).

100. *See* FED. R. CRIM. P. 11(b)(2).

101. *Bennardo*, *supra* note 55, at 354; *see also* *Calhoun*, *supra* note 80, at 140–41 (1995).

102. *See* *Bennardo*, *supra* note 55, at 354; *see also* *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009) ("[B]ecause the defendant's attorney failed to ensure the defendant understood the consequences of his waiver, the waiver was not knowing, intelligent, and voluntary.").

103. *See* *Bennardo*, *supra* note 55, at 354.

104. *See id.*; *see, e.g.*, *United States v. Gonzalez*, 16 F.3d 985, 990 (9th Cir. 1993) ("By opposing the acceptance of responsibility adjustment, the government by its breach of the agreement released [the defendant] from his promise in paragraph 11 not to appeal."); *United States v. Schwartz*, 511 F.3d 403, 405 (3d Cir. 2008).

105. *Bennardo*, *supra* note 55, at 354–55.

106. *See* *Calhoun*, *supra* note 80, at 159.

107. *Id.* (footnote omitted).

the need to deal with a caseload perceived to be overburdened with frivolous appeals, the need for finality in the process, the view that the practice furthers the defendant's interests because such waivers operate as an additional bargaining chip in the plea negotiation process, and the view that appeals are less necessary as a corrective process in this situation because the defendant's interests are sufficiently protected by the close judicial supervision of the plea bargaining process at the trial level.¹⁰⁸

With these reasons in mind, the federal appellate courts have not determined that the negative policy implications associated with appellate waivers outweigh the more positive rationales behind said appellate waivers.¹⁰⁹

One of the major benefits of appellate waivers that courts and scholars point towards is that appellate waivers further the public policy interests of "finality and efficiency."¹¹⁰ These commentators claim that appellate waivers promote efficiency and finality interests because they make it nearly impossible for defendants to overturn or even combat these judgments.¹¹¹ In turn, by making it extremely difficult for defendants to overturn or even fight their sentencing appellate waivers, this reduces the burden on courts or federally appointed attorneys, and the entirety of the criminal justice system.¹¹² This decreased workload allows attorneys, judges, and others within the court systems to reallocate their time to prosecuting other crimes or bolstering the administration of justice in other areas.¹¹³ Consequentially, so these proponents argue, this reallocation of judicial and governmental resources positively affects the public, who experience lower crime rates, increased accessibility to the justice system, and more.¹¹⁴

Other judges and scholars emphatically reject this opinion and argue that finality and efficiency interests are overborne by the negative implications of finality, largely that this "finality comes at the expense of the error-correcting function of the appellate process."¹¹⁵ If a judgment is erroneous, so argue these opponents, then finality of the process is a negative implication rather than a positive implication, because appellate waivers vastly reduce a defendant's ability to fight an erroneous judgment or sentence.¹¹⁶

Furthermore, these opponents argue that appellate waivers are, in reality, not as efficient as proponents suggest. When a defendant requests an appeal, despite having an appeal waiver, defense counsel will often file an *Anders* brief

108. *Id.* (footnotes omitted).

109. *See* Bennardo, *supra* note 55, at 362.

110. *Id.*; *see, e.g.*, United States v. Navarro-Botello, 912 F.2d 318, 322 (9th Cir. 1990) (explaining that one of the most important benefits of plea bargaining is that it brings finality).

111. *See* Bennardo, *supra* note 55, at 362.

112. *See id.*

113. *See id.*

114. *See id.*

115. *Id.* at 363.

116. *See id.*

in conjunction with the request.¹¹⁷ “In an *Anders* brief, defense counsel references ‘anything in the record that might arguably support the appeal,’ but states that the attorney could not find any non-frivolous issues for appeal.”¹¹⁸ Upon deciding an *Anders* appeal, the appellate court must then independently review the entirety of the trial record to ensure that the appeal is warranted, or, instead, if the appeal is “wholly frivolous.”¹¹⁹ This process takes a substantial amount of time and court resources, as the judges, their clerks, the appellate attorneys, and more must review the whole trial record.¹²⁰ Thus, opponents contend that appeal waivers are not necessarily more efficient as a whole, particularly in the case of *Anders* appeals.¹²¹

Another public policy benefit that proponents argue is that plea bargaining in general, and specifically appellate waivers, promotes freedom of bargaining.¹²² These proponents contend that public policy supports self-interested bargaining, where each party may bargain and negotiate for things that they believe will further their own personal self-interest.¹²³ Public policy interests protect a criminal defendant’s right to best protect their own freedom interests. “Any restriction on the enforceability of appellate waivers reduces the number of bargaining chips available to criminal defendants, undermines their ability to safeguard their own interests, and ultimately makes successful bargaining less likely.”¹²⁴ Moreover, individuals may always forfeit their right to appeal.¹²⁵ They may “simply . . . declin[e] to file a notice of appeal” or “dismiss[] an appeal once filed.”¹²⁶ Additionally, there are numerous other ways that a defendant can decline or forfeit their right to appeal. For this reason, proponents argue that if an individual chooses not to appeal or freely waives their right to appeal, society should not bar the defendant from doing so.¹²⁷

Opponents of the public policy rationale argue that appellate waivers erode the integrity of the criminal justice system.¹²⁸ Judges and commentators contend that the judges, prosecutors, defense attorneys, and other actors in this process are self-interested and may push for an appellate waiver so that they will not be held accountable for potential mistake or wrongdoing during review

117. *See id.*

118. *Id.* (quoting *Anders v. California*, 386 U.S. 738, 744 (1967)).

119. *Anders*, 386 U.S. at 744; *see also* Bennardo, *supra* note 55, at 363.

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

121. *See* Bennardo, *supra* note 55, at 363–64.

122. *See id.* at 364.

123. *See id.*

124. *See id.* (citing *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009); *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001)).

125. *See id.*

126. *See id.* at 364–65.

127. *See id.* at 365.

128. *See id.* at 362.

by appellate courts.¹²⁹ For judges, this kind of protection from review affects judicial integrity.¹³⁰ “An aversion to reversal or a desire to reduce the likelihood of continued proceedings after remand may motivate a judge to accept a plea agreement containing an appellate waiver.”¹³¹

Prosecutors may likewise be enticed to offer an appellate waiver. Prosecutors may include an appellate waiver in a plea bargain where there are concerns of potentially dubious practices by the prosecution.¹³² To protect their questionable behavior, prosecutors may offer a plea bargain with serious discounts on the condition that the defendant accepts the appellate waiver.¹³³ For defense attorneys, critics contend that defense attorneys may have a personal interest in encouraging defendants to accept an appeal waiver. Defense attorneys may prompt defendants to accept plea bargains with appeal waivers in order to insulate themselves from wrongdoing.¹³⁴ Some opponents even argue that this personal interest may rise to the level of a conflict of interest.¹³⁵ Furthermore, other critics argue that defense attorneys may encourage defendants to accept appeal waivers to avoid a charge of ineffective assistance of counsel.¹³⁶ Despite a seemingly enforceable appellate waiver, defendants may usually still attack a plea agreement or waiver under the auspice of ineffective assistance of counsel.¹³⁷

3. Due Process and Impermissible Chill

Constitutional due process protects a defendant’s right to appeal and prevents courts from otherwise chilling this constitutional right.¹³⁸ However, most courts have not found an impermissible chill linked with the offering of appellate waivers.¹³⁹ The Supreme Court, in *Brady*, while not addressing this exact issue, concluded that the offering of benefits from prosecutors encouraging defendants to accept stipulations like appeal waivers did not impermissibly chill the defendant’s constitutional due process rights.¹⁴⁰

Offers to drop charges or otherwise minimize a defendant’s punishment in exchange for the waiver of a defendant’s appellate rights do not impermissibly chill the exercise of those rights any

129. *See id.*

130. *See id.* at 367.

131. *Id.* at 368.

132. *See id.*

133. *See id.*

134. *See id.* at 368.

135. *See id.* at 367.

136. *See id.* at 368.

137. *See id.*

138. *See id.*

139. *See id.*

140. *See United States v. Brady*, 397 U.S. 742, 748 (1970).

more than the same sorts of offers in a greater plea agreement chill a defendant's exercise of her right to a jury trial.¹⁴¹

Demonstrating a sufficient chill is a difficult barrier for a defendant to overcome.¹⁴² Defendants are more likely to win on a voluntariness argument, by claiming that her options were so limited, she was forced to accept the government's offer, and as such, her appellate waiver was for all intents and purposes involuntary.¹⁴³

4. Narrow Exceptions to Appellate Waivers

Despite upholding the constitutionality of appeal waivers, the federal appellate courts have nevertheless carved out specific and particularized exceptions to the validity of appellate waivers. Even with the existence of a valid appellate waiver, the federal circuit courts will allow an appeal in circumstances where the defendant was sentenced in excess of the statutory maximum or "based on an impermissible factor, such as race."¹⁴⁴ Additionally, some circuits will not enforce an appellate waiver where enforcement would constitute a "miscarriage of justice."¹⁴⁵ This is a legal term of art and difficult to quantify. In *United States v. Teeter*, however, the First Circuit described a miscarriage of justice as encompassing factors such as

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.¹⁴⁶

Furthermore, some circuits, like the Fourth Circuit, will refuse to validate an otherwise permissible appeal waiver when a defendant contends ineffective assistance of counsel at the sentencing stage.¹⁴⁷ An example of this is seen in the Fourth Circuit, in *United States v. Attar*, where the court held that appellate waivers do not prevent a defendant from challenging a sentence due to ineffective or incompetent attorneys.¹⁴⁸ However, "[a]ppellate claims of other constitutional violations—such as violation of the Eighth Amendment's prohibition against cruel and unusual punishment or the Fifth Amendment's double jeopardy clause—are not recognized as exceptions to appellate waivers."¹⁴⁹

141. Bennardo, *supra* note 55, at 369.

142. *See id.*

143. *See id.*

144. *Id.* at 353.

145. *Id.*

146. *United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001).

147. *See* Bennardo, *supra* note 55, at 353–54.

148. *United States v. Attar*, 38 F.3d 727, 732–33 (4th Cir. 1994).

149. Bennardo, *supra* note 55, at 354.

III. WHEN MUST THE ISSUE OF AN APPEAL WAIVER BE RAISED?

In this Part, this Note will address the current circuit split on “whether a criminal defendant must raise the issue of an appeal waiver in his opening brief or whether it falls upon the government to raise the waiver as a defense in its reply.”¹⁵⁰ The Third Circuit, in *United States v. Goodson*, concluded that a defendant was not required to acknowledge the existence of an appellate waiver in their opening brief, nor did the defendant’s lack of acknowledgement bar the issue from appellate review.¹⁵¹ This opinion is likewise reflected in other circuit courts, such as the D.C. Circuit, as seen in *United States v. Powers*.¹⁵² The First Circuit, however, disagrees with this premise and contends that a defendant must raise an appeal waiver in an opening brief in order for the court to understand why they ought to consider the case and appellate waiver altogether.¹⁵³

A. Circuit Split: When Does the Defendant Have to Raise the Issue of an Appellate Waiver?

This Section will discuss the relevant case law that has been decided across the circuit courts and set the stage for the two different paths the circuit courts have taken on this issue. Three circuit courts have heavily weighed in on this issue. Both the D.C. Circuit and the Third Circuit have concluded that a defendant may raise, for the first time, his or her defenses against the appeal waivers in their reply brief.¹⁵⁴ The First Circuit has taken a completely different approach and has concluded that defendants may not raise their defenses against an appellate waiver in a reply brief for the first time.¹⁵⁵ The First Circuit states that a waiver of appeal cannot be treated like an affirmative defense, which is permissible to address after the government raises an issue, and instead must be raised in an opening brief.¹⁵⁶

1. A Defendant Does Not Need to Raise an Appellate Waiver in the Opening Brief

Both the D.C. Circuit and the Third Circuit have determined that a defendant may wait to raise their defenses against an appellate waiver until after the government has invoked the waiver.¹⁵⁷ This means that the defendant does

150. *United States v. Desotell*, 929 F.3d 821, 826 (7th Cir. 2019).

151. *United States v. Goodson*, 544 F.3d 529, 533–36 (3d Cir. 2008).

152. *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018).

153. *See United States v. Arroyo-Blas*, 783 F.3d 361, 367 (1st Cir. 2015) (“We expect and require counsel to address a waiver of appeal head-on and explain why we should entertain the appeal.”).

154. *See infra* Section III.A.1.

155. *See infra* Section III.A.2.

156. *See id.*

157. *See United States v. Goodson*, 544 F.3d 529, 533–36 (3d Cir. 2008); *see also Powers*, 885 F.3d at 732.

not have to raise the issue of their appellate waiver in their opening brief, and may proceed as though there was no waiver of the issue on appeal.¹⁵⁸

In *United States v. Goodson*, the Third Circuit addressed the question of whether the defendant Goodson was obliged in his opening appellate brief to acknowledge the existence of an appellate waiver or required to immediately explain why the appellate waiver does not preclude appellate review.¹⁵⁹ The court held

that a defendant is not obliged in his opening brief to acknowledge the existence of an appellate waiver and/or to explain why the waiver does not preclude appellate review of the substantive issue raised. Rather, it is only after the government has invoked an appellate waiver as a bar to [the court's] review that a defendant must raise any challenge to the waiver's enforceability.¹⁶⁰

In *Goodson*, the defendant was convicted of wire fraud and uttering counterfeit security.¹⁶¹ Following his guilty plea, which included a waiver of his right to file a direct appeal under 18 U.S.C. § 3742(a), the defendant challenged a portion of his plea agreement related to supervised release and consent to search Goodson's place of business.¹⁶² In concluding that Goodson was not required to acknowledge the existence of an appellate waiver in his opening brief, the court raised several points to substantiate their holding.¹⁶³

First, the court explained that in an earlier Third Circuit case, *United States v. Gwinnett*, they clarified that the court retained subject matter jurisdiction over an appeal by a defendant, despite the defendant having signed an appeal waiver, supposedly waiving their right to appeal that issue.¹⁶⁴ The court reiterated that "an appellate waiver is not dispositive of whether [it] may exercise appellate jurisdiction, [and] it is unclear in the wake of *Gwinnett* whether a defendant must affirmatively address the applicability of an appellate waiver in his opening brief."¹⁶⁵ After this prelude, the court then addressed the validity of the government's position, in favor of requiring a defendant to "affirmatively address the applicability of an appellate waiver in their opening brief" rather than in a reply brief.¹⁶⁶ The court, before addressing specifics of the argument, determined that judicial efficiency was the only basis that weighed in favor of requiring the appellate waiver to be addressed in the opening brief.¹⁶⁷ However, the court quickly rejected this judicial efficiency argument and cited three

158. See *Goodson*, 544 F.3d at 533–36; see also *Powers*, 885 F.3d at 732.

159. See *Goodson*, 544 F.3d at 533–34.

160. See *id.* at 536.

161. See *id.* at 531–33.

162. See *id.*

163. See *id.* at 534–36.

164. See *id.* at 534–35 (citing *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007)).

165. *Id.* at 534.

166. *Id.*

167. See *id.*

“reasons that favor permitting a defendant to wait until the government first chooses to invoke the waiver.”¹⁶⁸

According to the Third Circuit, the first reason that weighs in favor of permitting a defendant to wait to address the appellate waiver after the opening brief is that it is the government’s responsibility to invoke the waiver, not the defendant’s, because it is “by and large, the government that bargains for and benefits from an appellate waiver in a plea agreement.”¹⁶⁹ According to the court, if the government wants to safeguard the benefit of its bargain for an appellate waiver, then the impetus should be upon the government to actually invoke the waiver’s germaneness.¹⁷⁰ Furthermore, the court asserted that the government may always choose to invoke an appellate waiver, and if the government has not invoked the waiver, there is no actual reason why the defendant should have to address the applicability or enforceability of the waiver.¹⁷¹

The second reason a defendant should not be required to acknowledge an appellate waiver in his opening brief, according to the Third Circuit, is that the defendant may have a reasonable belief that the appellate waiver does not actually extend to this specific issue addressed in his or her appeal.¹⁷² Citing their jurisprudence stating that waiver of appeals should always be strictly construed, the court explained that the language of a waiver is exceedingly important, and like in a contract, often gives rise to ambiguity.¹⁷³ According to the court, just because a defendant did not raise the appeal waiver in his opening brief, does not mean that a defendant should be “foreclosed from asserting in his reply brief what may be a meritorious argument concerning the unenforceability of an appellate waiver he does not believe bars [the court’s] review.”¹⁷⁴

The final reason the court cites in favor of allowing a defendant to raise an appellate waiver after the opening brief, is that the federal criminal rules, specifically the Federal Rules of Criminal Procedure Rule 11(b)(1)(N), strongly lean “in favor of affording a defendant an opportunity to dispute in his reply brief whether his waiver prohibits an appeal.”¹⁷⁵ They further contend that if they were to deny a defendant the “opportunity to challenge the . . . enforceability of an appellate waiver merely by not having done so in his opening brief, [the court] would be adopting an approach that conflicts with the spirit and purpose of Rule 11(b)(1)(N).”¹⁷⁶

168. *Id.*

169. *Id.*

170. *See id.*

171. *See id.* at 534–35.

172. *See id.* at 535.

173. *See id.* For further information on strict interpretation of appellate waivers, see *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

174. *Goodson*, 544 F.3d at 535.

175. *Id.* at 536.

176. *Id.* (citing FED. R. CRIM. P. 11(b)(1)(N)).

The D.C. Circuit, in accordance with the Third Circuit's decision in *Goodson*, concluded in the recent 2018 case *United States v. Powers*, that the defendant Powers did not forfeit his right to challenge his appeal waiver's enforceability when he raised the appeal waiver for the first time in his reply brief, rather than in his opening brief.¹⁷⁷ In *Powers*, the defendant was convicted by plea of guilty for failing to remove asbestos-ridden material from historic property he was remodeling.¹⁷⁸ As part of his plea agreement, Powers waived his right to appeal his sentence as procedurally or substantively unreasonable and the prosecution likewise explained to Powers that he was relinquishing his right to appeal, except as to a few limited circumstances delineated in his plea agreement.¹⁷⁹ Powers agreed to these terms and stated that he knew what rights he was waiving.¹⁸⁰

The D.C. Circuit, while holding in favor of the government as to the merits of the case,¹⁸¹ nonetheless sided with Powers and concluded that "Powers was not required to assume in his opening brief that the government would rely on the appeal waiver. Rather, he could wait to see if the government would invoke the appeal waiver in its brief, and then, if so, contest the appeal waiver's enforceability in his reply brief."¹⁸² The court rejected the government's contention that Powers forfeited his challenges to the waiver's validity by first raising them in the reply brief rather than the opening brief.¹⁸³ The court acknowledged that appellants ordinarily are required to raise any issues that are ripe for consideration in an opening brief, however, they asserted that "an appellant generally may, in a reply brief, 'respond to arguments raised for the first time in the appellee's brief.'"¹⁸⁴ For this reason, Powers did not therefore "forfeit his challenges to the appeal waiver's enforceability by waiting to assert them until his reply brief."¹⁸⁵

2. A Defendant Does Need to Raise an Appellate Waiver in Opening Brief

The First Circuit, in disagreement with its sister courts cited above, rejects the premise that a defendant may raise an appellate waiver after their opening brief, instead requiring a defendant to raise an appellate waiver in their opening brief, or run the risk of completely forfeiting their right of appellate review of the issue altogether.¹⁸⁶

177. See *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018).

178. See *id.* at 730–31.

179. See *id.*

180. See *id.*

181. See *id.* at 732 ("On the merits, however, Powers's arguments against enforcing the appeal waiver are unpersuasive.").

182. *Id.*

183. See *id.*

184. *Id.* (quoting 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3974.3 (4th ed. 2017)).

185. *Id.*

186. See *infra* Section III.A.2.

The First Circuit has reiterated this principle, that a defendant must address their appellate waiver in their opening brief, in multiple cases and has doubled down on this precedent in recent cases. One of the numerous cases the court has applied this principle, and one in which they engaged in a discussion of the merits of requiring a defendant to address their appellate waiver in an opening brief, is *United States v. Miliano*.¹⁸⁷ In *Miliano*, the defendant was convicted of conspiracy to commit money laundering.¹⁸⁸ Miliano appealed this sentence after having pled guilty to both the conspiracy count and to a related forfeiture count.¹⁸⁹ The plea agreement contained a clause that waived Miliano's right to appeal his sentence if the court complied with the plea agreement's sentencing terms.¹⁹⁰ Miliano appealed his sentence but the First Circuit rejected his appeal, holding that Miliano failed to show that enforcement of his waiver would result in a clear and gross injustice.¹⁹¹

The court, in deciding their second holding, first addressed Miliano's failure to address the waiver in his opening brief and criticized Miliano's "attempts to avoid the effect of the waiver"¹⁹² The court further disapproved of Miliano's failure to file a reply brief to the government's brief, which relied heavily on the waiver.¹⁹³ The Court again asserted that Miliano's "struthious approach" not to raise the waiver in his opening brief "was a poor strategic choice."¹⁹⁴ After explaining the defendant's shortcomings, the court held, as to the defendant's choice not to address the appellate waiver in his opening brief, that "[a] defendant who waives his right to appeal and thereafter attempts to avoid the effect of the waiver must confront the waiver head-on."¹⁹⁵ They further held that a defendant who "simply ignores the waiver and seeks to argue the appeal as if no waiver ever had been executed . . . forfeits any right to contend either that the waiver should not be enforced or that it does not apply."¹⁹⁶ The court cited a previous opinion to bolster this holding, citing *Sandstrom v. ChemLawn Corp.*, where the First Circuit concluded that "arguments not made in an appellant's opening brief are deemed waived."¹⁹⁷

In *United States v. Arroyo-Blas*, the First Circuit again engaged in a discussion pertaining to the enforceability of waivers that are not addressed in a defendant's opening brief.¹⁹⁸ In *Arroyo-Blas* the defendant was convicted on a guilty plea of numerous drug-related crimes and sentenced to over a decade in

187. *United States v. Miliano*, 480 F.3d 605 (1st Cir. 2007).

188. *See id.* at 605–07.

189. *See id.*

190. *See id.*

191. *See id.* at 607.

192. *Id.* at 608.

193. *See id.*

194. *Id.* at 607.

195. *Id.* at 608.

196. *Id.*

197. *Id.* (citing *Sandstrom v. ChemLawn Corp.*, 904 F.2d 83, 87 (1st Cir. 1990)).

198. *United States v. Arroyo-Blas*, 783 F.3d 361 (1st Cir. 2015).

prison.¹⁹⁹ The defendant again agreed to an appeal waiver which was enforceable so long as he was convicted within the Federal Guideline's sentencing range.²⁰⁰ When discussing the enforceability of the appeal waiver, the court first conducted a threshold inquiry into whether the appeal falls within the scope of the appeal waiver provision in his plea bargain.²⁰¹ The court then turned to Arroyo-Blas's failure in his opening brief to address the important waiver of appeal issue "in any meaningful way."²⁰² The court then rejected the defendant's defense regarding counsel's "abject failure to engage with the waiver of appeal."²⁰³ Defendant's counsel stated that "his understanding [was] that a waiver of appeal is akin to an affirmative defense and, therefore, need not be addressed unless and until the government raises the issue."²⁰⁴ The court soundly rejected defense counsel's understanding and explained that a waiver of appeal has never been equated "with an affirmative defense that need not be addressed by an appellant's opening brief."²⁰⁵ The First Circuit further commented that equating an appeal waiver with an affirmative defense "would be nonsensical given that a defendant is required to affirmatively acknowledge his agreement to and understanding of an appeal waiver provision [and], [i]ndeed, the very purpose of an appeal waiver is to bar an appeal."²⁰⁶

The court further emphasized this point, stating that this decision should "remove any lingering doubts" and that it "expect[s] and require[s] counsel to address a waiver of appeal head-on and explain why [they] should entertain the appeal."²⁰⁷ The court further accentuated its holding by comparing an appellant who fails to raise his or her waiver of appeal in an opening brief with an ostrich who "buries his head in the sand and expects that harm will pass him by."²⁰⁸ The court further recognized that in previous cases it "ha[s] deigned to 'sift the rudiments of the claim from the record' when an appellant failed to make a complete argument about an appeal waiver in his opening brief."²⁰⁹ Rejecting that precedent in this case and onward, the First Circuit held that "an appellant who fails to make an argument with respect to an appeal waiver in his opening brief risks waiving that issue."²¹⁰

199. *See id.* at 362–65.

200. *See id.*

201. *See id.* at 365.

202. *Id.*

203. *Id.* at 366.

204. *Id.* at 366–67.

205. *Id.* at 367.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* (alteration omitted) (quoting *United States v. Gil-Quezada*, 445 F.3d 33, 37 (1st Cir. 2006)).

210. *Id.*

IV. WHICH APPROACH SHOULD BE ADOPTED?

In this Part, this Note discusses which approach should be adopted by the Supreme Court and implemented across the circuit courts. This Note argues that a criminal defendant should not be forced to raise the issue of an appeal waiver until after the government has raised an appeal waiver as a defense to defendant's opening brief. This issue is important because depending upon the circuit court's position on this matter, if a defendant does not raise the issue immediately in their opening brief, they may forfeit their right to appellate review altogether.²¹¹ This Note contends that a defendant should not be required to raise an appeal waiver in their opening brief for three reasons. First, this Note argues that it is the government's responsibility to invoke the appellate waiver, not the defendant's responsibility. Second, this Note contends that the defendant should not be required to address his or her appeal waiver in the opening brief because the defendant may hold an honest misunderstanding as to the applicability of the waiver. Finally, this Note argues that the spirit of both Rule 11 of the Federal Rules of Criminal Procedure and Rule 28 of the Federal Rules of Appellate Procedure lean in favor of allowing a defendant to address the issue of an appeal waiver in a reply brief.

This topic is important for other reasons as well. The Supreme Court, in February of 2019, weighed in on the general issue of appeal waivers in *Garza v. Idaho*.²¹² In this case, though the Court primarily focused on whether a presumption of prejudice applies regardless of whether a defendant has signed an appeal waiver, the Court also speaks to the importance of appeal waivers and the timeliness of this issue.²¹³ This Note discusses the implications of *Garza* on the circuit courts' decision in this arena, and whether the Supreme Court is likely to weigh in on this issue in the near future. Furthermore, this Note attempts to predict how the Supreme Court would likely decide on this issue as to when an appeal waiver must be raised.

A. Opening Brief or Elsewhere?

In this section this Note argues that the Supreme Court should grant certiorari to clarify this circuit split and in granting certiorari, should hold that a defendant does not need to raise the issue of their waiver of appeal in an opening brief. Citing the arguments made by the Third Circuit in *Goodson* and in accordance with the principles delineated in the Federal Rules of Appellate Procedure Rule 28, this Note first argues that requiring a defendant to raise the issue of an appeal waiver in their opening brief is antithetical to the nature of plea bargaining, as it is the government who should be required to first raise the issue of an appeal waiver, as they are the party who will be benefiting from the invocation of an appeal waiver. This Note will next argue that a defendant

211. See *United States v. Powers*, 885 F.3d 728, 732 (D.C. Cir. 2018) (“[G]overnment initially asserts that Powers forfeited those challenges to the waiver’s enforceability by raising them for the first time in his reply brief.”).

212. See generally *Garza v. Idaho*, 139 S. Ct. 738 (2019).

213. See *id.*

should not be required to first raise the issue of appeal waiver, because the defendant may have an honest belief that the appeal waiver does not cover the issue that the defendant is attempting to appeal. The third and final reason this Note argues that a defendant should not be required to raise a waiver of appeal in their opening brief is that requiring this would be antithetical to both the spirit of Federal Rules of Criminal Procedure, Rule 11 and also the Federal Rules of Appellate Procedure, Rule 28, which allows a defendant to address new issues first raised by the appellee in their reply brief.

The first reason that the Supreme Court should adopt a standard allowing defendants to wait to raise their appellate waiver beyond the opening brief is because plea bargains are by and large contracts that are negotiated between the government and the defendant, and it should not be up to the defendant to draw the court's attention to a hypothetical provision in the plea bargaining contract that is favorable to their opposing party (i.e., the government). Moreover, it is the government that largely benefits from and bargains for the plea agreement.²¹⁴ For this reason, if the government is the one that benefits most from the plea bargain, or is the party that seeks to protect the advantage of the bargain, it should be the party that is required to first address the appeal waiver that has supposedly barred appellate review of the particular issue at bar. The defendant, the party that least benefits from the bargain, should not be required to essentially perform the government's job by drawing attention to the waiver and arguing the applicability of a particular contractual provision beneficial to the government. Furthermore, as the Third Circuit explains in *Goodson*, "the mere fact that a plea agreement contains a waiver of a defendant's right to file a direct appeal does not mean that the enforceability of that waiver is automatically at issue in that appeal. This is so because the government may always choose not to invoke an appellate waiver."²¹⁵ Just because there is an appeal waiver that may be at issue, does not mean that the government will invoke the appeal waiver at all. Thus, courts should not force defendants to immediately address an appeal waiver when the government may not have plans to address the issue. Moreover, like the Fifth Circuit explains in *United States v. Story*, if the government does not attempt to enforce an appellate waiver, that non-enforced waiver is not binding on the appellant defendant.²¹⁶ "Allowing the defendant to respond in his reply brief to the government's invocation of a waiver . . . requires the government in the first instance to do the heavy lifting and to explain why an appellate waiver should preclude [the court's] review."²¹⁷

The second reason that a defendant should not be required to address their waiver of appeal in their opening brief is that the defendant may have a completely honest and reasonable understanding that their waiver of appeal does not encompass the issue that they are raising on appeal. As stated by the Third Circuit in both *Goodson* and *Khattak*, waivers are meant to be strictly

214. See *United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004).

215. *United States v. Goodson*, 544 F.3d 529, 535 (3d Cir. 2008).

216. See generally *United States v. Story*, 439 F.3d 226 (5th Cir. 2006).

217. *Goodson*, 544 F.3d at 535.

construed and interpreted, and as such, the language in waivers are similar to language in contracts.²¹⁸ The language in the waiver, like the language in a contract, may be ambiguous or open to interpretation. A defendant should not be required to anticipate the government's argument and address an appeal waiver in their opening brief when they reasonably understand the waiver as dealing with a different issue than the issue that they are appealing. Moreover, this does not mean that the government cannot address the applicability of the waiver in their reply brief. If the government believes that the appeal waiver bars the appeal, the government can still invoke the waiver and address the reasons why the appeal waiver precludes the court's review.²¹⁹

The third and final reason that a defendant should be permitted to wait until after the government asserts the applicability of the appellate waiver, is that not permitting this would be antithetical to both the spirit of the Federal Rules of Criminal Procedure, Rule 11 and also the Federal Rules of Appellate Procedure, Rule 28. The Federal Rules of Criminal Procedure, Rule 11 protects defendants who waive their right to appeal certain issues.²²⁰ Rule 11(b)(1)(N), which specifically addresses the circumstances in which an appeal waiver is permissible, "was adopted because the Advisory Committee believed it was important to insure first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant."²²¹ These procedural protections that were implemented by the Advisory Committee that amended the Federal Rules of Criminal Procedure, Rule 11 in 1999, display the committee's desire to afford defendants "an opportunity to dispute in [their] reply brief whether [their] waiver prohibits . . . appeal."²²² Again, as the court in *Goodson* remarks, if appellate courts were to "hold that a defendant forfeited his opportunity to challenge the validity and enforceability of an appellate waiver merely by not having done so in his opening brief, [appellate courts] would be adopting an approach that conflicts with the spirit and purpose of Rule 11(b)(1)(N)."²²³

Furthermore, Federal Rules of Appellate Procedure, Rule 28 permits a defendant to respond to arguments first raised in the appellee's brief.²²⁴ Although "[i]t is clearly settled that the appellant cannot raise new issues in a reply brief," the appellant can nevertheless address the issues that were raised by the appellee in their reply to the appellant's opening brief.²²⁵ The potential rule advocated by this Note is in accordance with this principle because it allows appellants to wait to address appeal waivers until after the appellee raises the

218. *See id.* at 535; *see* United States v. Khattak, 273 F.3d 557, 562 (3d Cir. 2001).

219. *See Goodson*, 544 F.3d at 535.

220. *See id.*; *see also* FED. R. CRIM. P. 11.

221. *Goodson*, 544 F.3d at 535–36 (internal quotations omitted).

222. *Id.* at 536.

223. *Id.*

224. *See* FED. R. APP. P. 28(c).

225. 16AA CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION § 3974.3 (4th ed. 2017) (citing FED. R. APP. P. 28(c)).

waiver in their response to the appellant's opening brief. Moreover, the committee that drafted Rule 28 seemingly foresaw situations where appellants had to respond to issues that they had not originally addressed. If the Supreme Court treats appellate waivers in a similar way, this would be in accordance with the spirit of FRCP Rule 11 and the requirements of FRAP Rule 28.

Those who support the First Circuit's opinion that appellants should be required to raise the issue of their waiver of appeal in their opening brief may argue that a defendant should not be allowed to figuratively hide their head in the sand and wait for the government to assert the appellate waiver. The First Circuit, however, fails to cite reasons why a defendant should be required to raise the appeal waiver in the opening brief, only alluding to the fact that it is dishonest or perhaps cowardly not to confront the appeal waiver "head-on" and merely wait for the government to bring up the issue.²²⁶ The opposing view, allowing defendants to raise the appeal waiver after the government asserts its enforceability, has more supporters amongst the circuit courts and also appeals to more legal principles. For example, in accordance with contract law, if the appeal waiver is unambiguous, the burden is on the moving party (i.e., the appellant), to explain why the appellate waiver is inapplicable.²²⁷ The appellant is still required to defend against the enforceability of the waiver. This Note merely proposes that, in light of the adversarial nature of our criminal justice system, the government should be the first party to address the most damning element of the appellant's argument, and that the appellant should not be the party required to devastate their own case before the adversarial process has hardly begun.

B. Garza v. Idaho

In 2019, the Supreme Court decided the case *Garza v. Idaho*.²²⁸ *Garza* is the most recent case in which the Supreme Court has addressed the nuances of appeal waivers. In *Garza*, the defendant signed two plea agreements, which included appeal waivers.²²⁹ After sentencing, Garza told his defense counsel that he wanted to appeal, despite the appeal waivers preventing him from appealing both of the state criminal charges levied against him. Garza's attorney advised Garza that it would be problematic for him to appeal his convictions because of the appeal waivers.²³⁰ After the time period for appeal lapsed, Garza sought post-conviction relief, alleging ineffective assistance of

226. *United States v. Arroyo-Blas*, 783 F.3d 361, 367 (1st Cir. 2015).

227. *See id.* at 365 ("Should we find any ambiguities in the waiver provision, we resolve them in favor of allowing the appeal to proceed But, [i]f a plea agreement unambiguously resolves an issue, that usually ends the judicial inquiry . . . [a]nd, as in contract law, we will not conjur[e] up an ambiguity [in a plea agreement] where none legitimately exists.") (internal quotation marks omitted)).

228. *See generally* *Garza v. Idaho*, 139 S. Ct. 738 (2019).

229. *See id.* at 742–43.

230. *See id.*

counsel because his attorney did not file the notice of appeal despite Garza's repeated requests.²³¹

The Court held as to the merits of the argument that Garza's attorney rendered deficient performance when he ignored Garza's request to file an appeal on his behalf.²³² Furthermore, the Court held that the attorney's deficient performance was presumptively prejudicial, despite the appeal waivers.²³³ In coming to this conclusion, Justice Sotomayor for the Court clarified numerous questions surrounding appeal waivers. First, the Court explained that "no appeal waiver serves as an absolute bar to all appellate claims."²³⁴ The Court further substantiated the Eleventh Circuit's decision in *United States v. Hardman*, that "[a] valid and enforceable appeal waiver . . . only precludes challenges that fall within its scope."²³⁵ The Court likewise compared a plea bargain to a contract, concluding that like any other contract, "the language of appeal waivers can vary widely, with some waiver clauses leaving many types of claims unwaived."²³⁶ Moreover, the Court asserted that even appellate claims that have been seemingly waived may proceed if the prosecution forfeits or waives the appellate waiver.²³⁷ Finally, the Court stated that "a defendant who has signed an appeal waiver does not, in directing counsel to file a notice of appeal, necessarily undertake a quixotic or frivolous quest."²³⁸

This language by the Supreme Court in *Garza*, although technically not addressing the issue of whether a defendant must raise their appeal waiver in their opening brief, seems to suggest that the Supreme Court would likely agree with this Note's position that a defendant should not be required to raise their waiver of appeal in their opening brief, and should instead be permitted to wait for the government to invoke the waiver in their response.

First, based on the language used by the Supreme Court in this recent 2019 case, the Court seemed to strongly assert defendant's appellate rights in the face of stricter and encompassing waivers of appeal included in plea agreements. The Court asserted that an appeal waiver is not a bar to appellate claims, and also does not prevent a defendant from bringing an issue to an appellate court that he or she may or may not have waived. The Court seemingly appeared to safeguard the rights of defendants, whilst also reminding their audience that appellate courts retain subject matter jurisdiction to review potentially waived issues, despite an appellate waiver that may be enforceable. In doing this, the Supreme Court allows defendants the benefit of the doubt, which would align with this Note's argument that the spirit of plea bargaining is to protect

231. *See id.*

232. *See id.* at 746.

233. *See id.* at 747.

234. *Id.* at 744.

235. *Id.* (alteration in original) (citing *United States v. Hardman*, 778 F.3d 896, 899 (11th Cir. 2014)).

236. *Id.* at 744.

237. *See id.* at 745.

238. *Id.*

defendants, rather than to further restrict their appellate rights. Thus, requiring defendants to discuss their appeal waivers in their opening briefs, or lose all appellate claims to that issue, would be antithetical to the purpose behind plea bargaining.

Second, similar to the language used in *Goodson* by the Third Circuit, the Supreme Court compared plea agreements to contracts that have ambiguous provisions, with multiple meanings, that may lead a defendant to question whether or not they have actually waived their relevant issue on appeal. The Supreme Court recognized that “the language of appeal waivers can vary widely” and that sometimes it may be difficult for a defendant to understand if he or she has actually waived their issue.²³⁹ This statement by the Supreme Court is also in accordance with this Note’s argument that some defendants may fail to acknowledge their appeal waiver in their opening brief because they honestly and reasonably did not know that they waived the relevant issue.

Finally, the Supreme Court strongly asserted that an appeal, in the face of an appeal waiver that has a strong chance of precluding that issue, is not “a quixotic or frivolous quest.”²⁴⁰ This again encourages defendants to appeal even if they may have to overcome an appeal waiver. The Court further explained that multiple factors might allow even a waived claim to go forward, such as “if the prosecution forfeits or waives the waiver.”²⁴¹ Likewise, this language is supportive of this Note’s argument that the defendant should not be forced to first assert the appeal waiver, when the government might not want to invoke it altogether, and instead may choose to waive or forfeit the waiver.

Based on the Supreme Court’s language in *Garza*, although not directly on point, it seems reasonable that the Supreme Court would support a rule that defendants should not be forced to address an appeal waiver in their brief, and should instead be permitted to respond to the government’s invocation of the waiver, if and when the government decides to exert the waiver’s enforceability.

CONCLUSION

This Note contends that the current circuit split regarding when appeal waivers must be raised should be decided in agreeance with the Third Circuit and D.C. Circuit. In accordance with their decisions, there are three reasons why a defendant should not be required to raise his or her appeal waiver in an opening brief, and instead should be allowed to wait until the government chooses to invoke the waiver. First, plea bargains are, at their core, contracts that are negotiated between the government and the defendant, and it should not be up to the defendant to draw the court’s attention to a provision in the plea-bargaining contract that is favorable to the opposing party. Second, defendants may have failed to address their waiver of appeal because they honestly and reasonably understood their appeal waiver to preclude an issue not at bar. Finally, forcing a defendant to acknowledge their appeal waiver

239. *Id.* at 744–45.

240. *Id.* at 745.

241. *Id.*

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immediately is antithetical to both the spirit of the Federal Rules of Criminal Procedure, Rule 11 and also the Federal Rules of Appellate Procedure, Rule 28. For the aforementioned reasons, the Supreme Court should adopt an approach allowing defendants to acknowledge a relevant appeal waiver after the government has invoked the waiver in their response. Moreover, the Supreme Court's decision in *Garza* leans in favor of this approach and suggests that the Court would likely decide in favor of allowing defendants to first raise their appeal waivers after their opening briefs.

