Bargaining Life Away: Appellate Rights Waivers and the Death Penalty

EDMUND A. COSTIKYAN*

In our criminal justice system, it is now a matter of little note that the vast majority of cases are resolved by guilty plea rather than at trial, without a single fact ever presented to a jury. Since the passage of the Sentencing Reform Act of 1984, it has become common practice for plea agreements to require not only that a defendant waive her right to trial by pleading guilty, but also that she waive her right to ever appeal her conviction or sentence. This Note explores the waiver of appellate rights from both a due process and public policy standpoint, arguing ultimately that when a defendant faces a potential death sentence at any point during the adjudication of her case, her appellate rights cannot be constitutionally waived; additionally, that in both the interest of justice and the public interest, such waivers should not be sought or upheld.

Part II of this Note introduces the relevant background of the plea bargaining system and the use of appellate waivers. Part III discusses the issues raised both when a defendant is asked to waive her appellate rights and by the enforcement of such waivers once effected, before addressing the arguable benefits of such waivers. Finally, Part IV seats these arguments in the context of capital punishment, where, due to the finality of the

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* Notes Editor, Colum. J.L. & Soc. Probs., 2019–2020. J.D. Candidate 2020, Columbia Law School. The author would like to thank the team at the Georgia Innocence Project, especially director Clare Gilbert, and Susan Simpson of the Undisclosed podcast, for their indispensable guidance, support, and friendship. The author would also like to thank the staff of the *Columbia Journal of Law and Social Problems* for their astute comments and tireless commitment to excellence. This Note owes a special debt to Mr. Dennis Perry, whose story inspired it, and who remains incarcerated for a crime that he (in the unwavering belief of the author, if not in the eyes of the law) did not commit. To Dennis, and all others who might walk free today if they had not been induced to sign away their appellate rights in the terrifying face of mortal peril: this Note is for you. For more on Dennis' case, see *The State v. Dennis Perry*, UNDISCLOSED PODCAST (2018), http://undisclosed-podcast.com/episodes/season-3 [http://perma.cc/SY4B-NSCR]. Please consider donating to the Georgia Innocence Project *at* https://www.georgiainnocenceproject.org/ to support the amazing work they do to vindicate the rights of the wrongfully convicted.

punishment and its powerful coercive force, the unreviewability of a conviction is at the highest level of concern.

I. INTRODUCTION

Imagine yourself in the shoes of a defendant who has been arrested for murder. Your lawyer tells you that unless you accept a guilty plea, the prosecution will seek the death penalty. And not just any guilty plea will suffice — rather, to avoid the chance of being sentenced to death at trial, you must agree to waive your right to ever challenge your conviction or your sentence. Facing the prospect of execution, what would you choose?

This Note addresses the calamitous convergence of three widely accepted, but also widely criticized, features of the United States criminal justice system: the system of plea bargaining, the inclusion of appellate rights waivers (hereinafter, appellate waivers) in plea bargains or post-conviction sentencing agreements, and the death penalty.

The U.S. Supreme Court has held that plea bargaining is not inherently coercive even when a defendant is faced with choosing between a plea deal and a potential death sentence.[1] Indeed, a defendant need not know what the actual sentencing result of her plea will be for her waiver of rights to be considered legally knowing and voluntary.[2] However, this Note argues that the inclusion of appellate waivers in plea bargaining or post-conviction sentencing agreements where the death penalty is a possible sentence vitiates the defendant's ability to validly enter into a knowing and voluntary waiver agreement. Public policy rationales also strongly counsel against the acceptance of these appellate waivers by courts because such waivers not only undermine confidence in the verdict against a defendant, but also implicate a lack of transparency in the proceedings. Further, these waivers insulate errors, misconduct, and conflicts of interest on the part of police, judges, prosecutors, and even defense counsel from appellate review.

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1. *See* Brady v. United States, 397 U.S. 742 (1970) (holding, inter alia, that a New Mexico statute allowing the imposition of a death sentence only upon recommendation by a jury did not impermissibly coerce defendants into accepting plea bargains rather than asserting their right to a jury trial).

2. *See* United States v. Ruiz, 536 U.S. 622, 630 (2002) (holding, inter alia, that the Constitution "does not require [a defendant to have] complete knowledge of the relevant circumstances, but permits a court to accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehension under which a defendant may labor").

These concerns are heightened in the unique context of capital punishment. They arise both when a defendant chooses to plead guilty, either in exchange for the prosecution agreeing not to seek the death penalty at sentencing, or when, after being found guilty of a capital crime, a defendant agrees to waive her appellate rights prior to sentencing in hopeful exchange for leniency. In the latter scenario, the waiver of appellate rights is at its most problematic, due to its greater potential to conceal constitutional violations or other serious errors which may have occurred at trial. These include the wrongful conviction of innocent defendants and the heightened coercive power which comes into play during sentence bargaining at the post-conviction and pre-sentencing stage of proceedings.

This Note argues that in the unique context of capital punishment, due to its uniquely coercive force, the use and enforcement of appellate waivers is rendered untenable by the impossibility of providing true constitutional due process to the waiving defendants. Part II of this Note begins by providing an overview of the relevant background in the law governing plea bargaining, sentencing agreements, and the waiver of appellate rights. Part III discusses the controversial factors present in seeking and enforcing the waiver of appellate rights, before raising the arguable benefits of such waivers. Additionally, this Part explains why appellate waivers are especially problematic when effected as part of sentencing agreements under which a defendant agrees to waive some or all appellate rights in exchange for a concession at sentencing after a trial conviction. Finally, Part IV frames these issues in the context of capital cases, arguing that when a defendant faces the death penalty at any point in her journey through the criminal justice system, these constitutional and public policy issues are amplified further to a point that appellate waivers cannot be sought without impermissibly pressuring the defendant. This Part argues further that in such a case, it is impossible for a defendant to validly waive her post-conviction appellate rights, and any such waiver, if effected, should not be enforced by reviewing courts.

II. A PRIMER ON PLEA BARGAINING, SENTENCING AGREEMENTS, AND APPELLATE WAIVERS

This Part of the Note introduces the relevant background of the system of plea bargaining, post-conviction sentencing agreements, and appellate waivers. Part II.A explains the importance of plea bargaining to the criminal justice system and the procedures in place to establish that a defendant's guilty plea is made in satisfaction of constitutional requirements. Part II.B discusses sentencing agreements, which can be made as part of a plea bargain or after a conviction at trial, and which must meet the same constitutional requirements for enforceability. Part II.C examines the practice of seeking, or even requiring, waivers of appellate rights as part of a plea bargain or a sentencing agreement, the constitutional and statutory rights and requirements surrounding them, and the reasons for the rapid increase in the use of such waivers after the introduction of the Sentencing Reform Act of 1984.

A. PLEA BARGAINING

Plea bargains account for an enormous percentage of case adjudications in our criminal justice system. As the Supreme Court noted in its 2012 decision in *Missouri v. Frye*, "[n]inety-seven percent of federal convictions . . . are the result of guilty pleas."[3] This percentage has remained about the same in the intervening years.[4] Therefore, it is needless to say that "[plea bargaining] is not some adjunct to the criminal justice system; it *is* the criminal justice system."[5] A guilty plea is "more than a confession . . . it is itself a conviction: nothing remains but to give judgement."[6] As such, criminal defendants are entitled to constitutional protections both during plea negotiations and when entering a guilty plea, for which the primary protection is the classic requirement that all guilty pleas and sentencing agreements be "intelligent and voluntary."[7]

3. Missouri v. Frye, 566 U.S. 134, 143 (2012). At this time, ninety-four percent of state convictions were also the result of guilty pleas. *Id.* at 143.

4. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL STATISTICS 25 (2017) (showing only slight variations yearly with 96.9% of cases resolved via plea agreement in 2013 and 97.2% in 2017).

5. *Frye*, 566 U.S. at 144 (emphasis in original) (internal quotation marks omitted) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining As Contract*, 101 YALE L.J. 1909, 1912 (1992)).

6. Boykin v. Alabama, 395 U.S. 238, 242 (1969).

7. *Id.* This is also often rendered as "knowing and voluntary."

This requirement has its roots in the Fifth Amendment, which requires that no person can be "compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law[.]"[8] These constitutional requirements have been incorporated to apply to the states as well via the Fourteenth Amendment.[9]

For federal courts, this requirement is codified in Rule 11 of the Federal Rules of Criminal Procedure (hereinafter, Rule 11), which sets out strict conditions for how the court must question a defendant, via what is known as the Rule 11 colloquy, to ensure that her plea is being entered knowingly and voluntarily.[10] However, the

8. U.S. CONST. amend. V.

9. *See* Malloy v. Hogan, 378 U.S. 1, 11 (1964) ("It would be incongruous to have different standards determine the validity of a claim of [Fifth Amendment] privilege based on the same feared prosecution, depending on whether the claim was asserted in state or federal court. Therefore, the same standards must determine whether an accused's silence in either a federal or state proceeding is justified.").

10. Rule 11 provides, in pertinent part, that, before accepting a guilty plea, "the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel — and if necessary, have the court appoint counsel — at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a);

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future."

FED. R. CRIM. P. 11. A collateral attack on a sentence is an attempt to overturn a verdict via a separate proceeding such as a federal or state habeas hearing, as opposed to via a traditional direct appeal. Under Rule 11, waivers of either or both kinds of appellate rights can be effected via a plea or sentencing agreement, but that the terms of either must be clearly recorded in the Rule 11 colloquy and the waiver made knowingly and voluntarily by the defendant. *See Collateral Attack*, BLACK'S LAW DICTIONARY (10th ed. 2014).

colloquy itself does not matter as much as the defendant's personal knowledge. The Supreme Court held in *United States v. Dominquez Benitez* that errors in presenting the colloquy to the defendant are to be considered harmless unless the defendant can show that, but for the error, she would not have pleaded guilty; i.e., that her plea failed the *knowing* requirement: had she known what she was required t in order to enter a valid guilty plea, she would have chosen instead to go to trial.[11]

In addition, Rule 11 requires that a judge "address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement)."[12] This parenthetical qualification was essentially a creation of the Supreme Court's opinion in *Brady v. United States*, in which the Court first addressed the already widespread practice of plea bargaining.[13] The *Brady* Court found that it does not violate the Fifth Amendment for a prosecutor "to influence or encourage a guilty plea by opportunity or promise of leniency[,]"and that a guilty plea is not considered unconstitutionally coerced just because it may be "influenced by the fear of a possible higher penalty for the crime charged if a conviction is obtained" after a trial.[14]

The *Brady* Court was careful to note, while holding that this did not occur in Brady's case, that "agents of the State may not produce a plea by actual or threatened physical harm or mental coercion overbearing the will of the defendant."[15] As the Court stated, "waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."[16] In other words, while plea agreements are not inherently coercive, the resultant guilty plea must still be voluntary under a due process analysis. This is because a guilty plea is not just a confession and, as such, not just a waiver of Fifth Amendment privilege, but also a waiver of several other constitutional rights applicable to

11. United States v. Dominguez Benitez, 542 U.S. 74, 81–82 (2004) ("[W]here the burden of demonstrating prejudice (or materiality) is on the defendant seeking relief, we have . . . require[d] the showing of a reasonable probability that, but for the error claimed, the result of the proceeding would have been different[.]") (internal quotation marks and brackets omitted).

12. FED. R. CRIM. P. 11.

13. Brady v. United States, 397 U.S. 742, 750 (1970).

14. *Id.*

15. *Id.*

16. *Id.* at 748.

criminal defendants in both federal and state courts, including the Sixth Amendment right to trial by jury and "to confront one's accusers."[17] Indeed, the Court has even stated in another case that it "cannot presume a waiver of these three important . . . rights from a silent record."[18] Rather, the record must show "that the defendant voluntarily and understandingly entered [her] pleas of guilty."[19] This is the second purpose of the plea colloquy: to create a record that can be used by a reviewing court, should the conviction or sentence be appealed, to determine whether the rights waivers were indeed made knowingly and voluntarily — whether or not the guilty plea made under the plea agreement should stand.[20]

B. SENTENCING AGREEMENTS

Sentencing agreements represent a subsection of the plea bargaining system. Most plea bargains contain both a charge agreement and a sentencing agreement. A charge agreement pertains to the charges the prosecution is bringing against a defendant, whereas a sentencing agreement concerns the terms of the sentence the defendant will receive as a result of those charges.[21] Often these elements are inexorably linked, given that the charges brought against the defendant or pled to impact the sentence she ultimately receives. Plea bargains also commonly include a stipulation that the prosecution shall recommend a more lenient sentence to the judge, or simply refrain from recommending a harsher one.[22] However, unlike charge agreements, defendants and prosecutors can enter into sentencing agreements after a defendant has

17. Boykin v. Alabama, 395 U.S. 238, 243 (1969). The right to confront one's accusers, which is derived from the Sixth Amendment's guarantee that "the accused shall enjoy the right . . . to be confronted with the witnesses against him[,]" includes the right to cross-examine those witnesses at trial, and applies in both state and federal proceedings. U.S. CONST. amend. VI; *see* Pointer v. Texas, 380 U.S. 400, 406 (1965) (holding the Sixth Amendment to apply to the states).

18. *Boykin*, 395 U.S. at 243.

19. *Id.*

20. For an interesting and recent example of this analysis, *see* United States v. Brown, 892 F.3d 385, 394–97 (2018) (conducting a Rule 11 review of a defendant's plea colloquy and ultimately reprimanding the government that, had it fulfilled the requirements and created a record properly, "it could have preserved its appeal waiver and obviated the need for the past several pages of this opinion").

21. *See, e.g.*, *Plea Bargain*, BLACK'S LAW DICTIONARY (10th ed. 2014).

22. *See generally* Scott & Stuntz, *supra* note 5.

been found guilty at trial but prior to her sentencing.[23] Under such agreements, the defendant agrees to waive some right or rights in exchange for hopeful leniency at sentencing. Unfortunately, by this point in the criminal proceedings, the defendant's only remaining bargaining chips are her appellate rights.[24]

The Supreme Court has not yet addressed the issue of post-trial conviction sentencing agreements specifically, but most courts have ultimately found "no basis for distinguishing the two situations."[25] Sentencing agreements are considered contracts between a defendant and the government, to which "contract principles apply . . . just as they do to . . . plea agreements."[26] This being the case, courts apply the same analysis of knowing and voluntariness for testing the validity of rights waivers via sentencing agreements as they do for plea bargains.[27] The only outlier is the state of Minnesota, whose supreme court has held, citing both public policy and due process concerns, that a defendant may not waive her right to appeal after she has been convicted.[28] Otherwise, sentencing agreements are considered as valid and binding as plea

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23. *See generally* Gregory M. Dyer & Brendan Judge, *Criminal Defendants' Waiver of the Right to Appeal: An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV 649, 667 (1990).

24. Dyer & Judge, *supra* note 23, at 667.

25. People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989). *See also* Cubbage v. State, 498 A.2d 632, 637 (Md. 1985) (rejecting Cubbage's argument that the "circumstances of impending sentencing seem to severely limit the possibility that the criminal defendant has given a voluntary and knowing waiver" (internal brackets omitted)). This follows the Supreme Court ruling in *Bordenkircher v. Hayes* that the risk to a defendant of a more severe punishment should she not take a plea bargain — even if, as in this case, that risk is due to a direct threat by the prosecution to bring more serious charges — does not render her guilty plea involuntary under a due process analysis. Bordenkircher v. Hayes, 434 U.S. 357, 364–65 (1978).

26. Hooks v. State, 668 S.E.2d 718, 722 (Ga. 2008), *overruled by* Williams v. State, 695 S.E.2d 244, 245 (Ga. 2010) (overruling *Hooks* and other cases "to the extent they may be read as allowing a direct appeal from the denial of a merger claim"); *see also Cubbage*, 498 A.2d at 638 ("This reasoning is equally applicable to one who faces sentencing after having been found guilty and who bargains for sentencing advantages in consideration of a waiver of appeal."); State v. Butts, 679 N.E.2d 1170, 1172 (Ohio Ct. App. 1996) ("[A sentencing] agreement, like a plea agreement, is a valid contract with the state.").

27. *See supra* notes 25–26 and accompanying text.

28. Spann v. State, 704 N.W.2d 486, 494–95 (Minn. 2005). The precise holding in this case is that a defendant may not waive her right to appeal after she has been convicted *and sentenced*, as in this case the state offered to resentence Spann upon receiving his appeal after his initial sentencing in exchange for dropping that appeal and waiving his right to all future appeals. However, nothing in the opinion rests on the agreement having been made after the sentencing hearing; the legal analysis applies directly to any waiver of appellate rights made after a conviction at trial.

agreements as long as they are determined to have been made in satisfaction of the knowing and voluntary standard required.[29]

C. APPELLATE WAIVERS

This Part of the Note delves into appellate waivers, which are often included in plea bargains and sentencing agreements as a way of establishing the finality of a defendant's sentence. Via the following subparts it first discusses the historical background of waivable rights and explores the increase in the use of appellate waivers in plea bargaining after the introduction of the Sentencing Reform Act of 1984. Next, this Part lays out the current state of the law of appellate waivers. Finally, it discusses the use of appellate waivers as part of post-conviction sentencing agreements.

1. *Waivable Rights and the Sentencing Reform Act of 1984*

Since as early as 1894, the Supreme Court has rejected the notion that there is any right ensured by the Constitution for a defendant who has been found guilty at trial to appeal her conviction.[30] However, nearly every state, as well as the federal system, has a constitutional, statutory, or court rule schema for appellate review as of right for criminal convictions.[31] Only in non-capital cases in Virginia does a court have discretion to decide whether to allow a direct appeal.[32] Where a state has established a statutory schema for appeal as of right[33] this becomes a right which, like the constitutional rights which are waived via a guilty plea, can be waived only knowingly and voluntarily.[34] This is because the

29. *See supra* notes 25–26 and accompanying text.

30. McKane v. Durston, 153 U.S. 684, 687 (1894). ("An appeal from a judgment of conviction is not a matter of absolute right, independently of constitutional or statutory provisions allowing such appeal. . . . It is wholly within the discretion of the state to allow or not to allow such a review.").

31. Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1222 (2013).

32. *See id.* at 1222 n.7.

33. "Appeal as of right" is a term of art indicating an appeal to which the defendant has an established right (i.e., via statute, a state constitution, a court rule, etc.) as opposed to a discretionary appeal, which the defendant may make only upon consent by the court. *See Appeal*, BLACK'S LAW DICTIONARY (10th ed. 2014).

34. *See* Griffin v. Illinois, 351 U.S. 12 (1956). Compare also examples of other non-constitutional rights requiring knowing and voluntary waiver. *See, e.g.*, Newton v. Rumery, 480 U.S. 386 (1987) (finding that an agreement under which a man waived his right to file a civil rights action against his town was valid and enforceable because it was made knowingly and voluntarily); United States v. Mezzanatto, 513 U.S. 196 (1996) (holding that

Supreme Court has held that due process protections extend to the right to appeal a criminal conviction where a state has established that right.[35]

Appellate waivers can be effected as either part of a plea bargain, or under a sentencing agreement made after a defendant is convicted at trial.[36] As discussed in Part II.A of this Note, when a defendant pleads guilty to a criminal charge she must knowingly and voluntarily waive many of her rights.[37] The Supreme Court stated in *Mabry v. Johnson* that "[i]t is well settled that a voluntary and intelligent plea of guilty made by an accused person, who has been advised by competent counsel, may not be collaterally attacked."[38] That being said, some rights are retained after a guilty plea under which a defendant can still appeal her sentence or conviction. Some of these pertain to jurisdictional defects which the Supreme Court has held to be inherently unwaivable, and which are beyond the scope of this Note.[39]

However, there are also appellate rights that are retained following a guilty plea.[40] These waivable rights provide the prosecution with an incentive to include an express appellate waiver in any plea agreement with the defendant.[41] In fact, in 1997 the Department of Justice (DOJ) released a memo to all United States

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defendant's waiver of his right not to have any statements which he made during plea discussions used against him at trial was valid and enforceable because it was made knowingly and voluntarily); United States v. Ruiz, 536 U.S. 622 (2002) (holding that defendant's waiver of his right to receive impeachment material regarding witnesses against him under Giglio v. United States, 405 U.S. 150 (1972), was valid and enforceable because it was made knowingly and voluntarily).

35. Dyer & Judge, *supra* note 23, at 655–56. *See also Griffin*, 351 U.S. at 18; North Carolina v. Pearce, 395 U.S. 711 (1969) (holding that a court cannot in accordance with due process impose upon a defendant who has successfully appealed her conviction, been retried, and been reconvicted, a longer sentence than she originally received).

36. *See supra* Part II.A.

37. *See id.*

38. Mabry v. Johnson, 467 U.S. 504, 508 (1984).

39. For more information, see Blackledge v. Perry, 417 U.S. 21, 28 (1974) (finding that due process requires that challenges to convictions which are shown to have been the result of prosecutorial vindictiveness against a defendant seeking to exercise her right to appeal not be foreclosed by a guilty plea); Menna v. New York, 423 U.S. 61, 64 n.2 (1975) ("[A] plea of guilty to a charge does not waive a claim that judged on its face the charge is one which the State may not constitutionally prosecute."); Class v. United States, 138 S. Ct. 798, 805 (2018) (stating that a guilty plea does not bar an appeal where the defendant challenges the government's power to criminalize her conduct, and as such its power to constitutionally prosecute her).

40. *See infra* notes 45–49 and accompanying text.

41. Some of the rights discussed here are considered unwaivable in a minority of courts. This is discussed in greater detail in Part III.B of this Note. *See also infra* notes 161–174 and accompanying text.

Attorneys, directing them to draft all plea agreements so that the defendant — and only the defendant — must waive her right to appeal.[42] While the DOJ later withdrew this directive, the inclusion of appellate waivers in plea agreements is still common in many jurisdictions.[43] For some prosecutors, an appellate waiver is "not a bargaining chip in a poker game, but the ante required to even sit at the table."[44]

The practice of commonly including in plea agreements some waiver of explicit rights beyond those already discharged by a guilty plea began in the late 1980s, after the introduction of the Sentencing Reform Act of 1984 (SRA).[45] The SRA created the federal Sentencing Guidelines and introduced a system for the appellate review of sentences.[46] The SRA gave both defendants and the prosecution the right to "appeal sentences . . . imposed in violation of the law or as a result of an incorrect application of the [Sentencing G]uidelines . . . [or] that are plainly unreasonable . . . [or] sentence[s] imposed as a result of an . . . [intentional] departure from the applicable guideline range."[47]

The first case challenging a waiver of appellate rights under the SRA was decided in 1990, with the court reasoning that "a defendant may waive in a valid plea agreement the right of appeal[.]"[48] After all, "if defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute."[49] Thereafter, other federal districts, as well as state

42. David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV 1019, 1019 (1999) (citing United States v. Raynor, 989 F. Supp. 43, 44–45 (D.D.C. 1997) (citing U.S DEP'T OF JUSTICE, MEMORANDUM TO ALL U.S. ATTORNEYS FROM JOHN C. KEENEY, ACTING ASSISTANT ATTORNEY GENERAL 3 (Oct. 4, 1995))). The Sentencing Reform Act of 1984, under which defendants were granted appeals as of right for federal sentences, also granted the government similar appellate rights. *See infra* notes 46–47.

43. Carney, *supra* note 42, at 1019–20.

44. *Id.* at 1033.

45. 18 U.S.C § 3551 (1984).

46. Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH. J.L. REFORM 347, 365 (2015). Prior to the passage of the SRA, there had been no federal right to appellate review of sentences since 1891, which right had only existed since 1879. *See* D. Randall Johnson, *Giving Trial Judges the Final Word: Waiting the Right to Appeal Sentences Imposed Under the Sentencing Reform Act*, 71 NEB. L. REV. 694, 695 n.1 (1992).

47. Johnson, *supra* note 46, at 699.

48. United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990).

49. *Id.* (internal quotation marks omitted) (quoting United States v. Clark, 865 F.2d 1433, 1437 (4th Cir. 1989)).

courts, followed suit and began to uphold appellate waivers.[50] However, some courts have refused to uphold such waivers, arguing that they cannot meet the constitutionally required due process standard of knowledge and voluntariness, as well as citing public policy concerns.[51]

2. *The Law of Appellate Waivers Today*

The Supreme Court has never directly addressed the constitutionality of including appellate waivers in either plea bargains or sentencing agreements, and has, in fact, denied certiorari to cases raising the issue on several occasions.[52] Nonetheless, appellate waivers are in widespread modern use. It is unclear precisely what percentage of pleas today include them, but an empirical study of appellate waivers in federal circuits performed in 2005 found that, of the cases sampled, nearly two-thirds of those settled by plea agreement included an appellate waiver, though their usage varied broadly between different circuits.[53]

As per the DOJ, "the scope of a sentencing appeal waiver in a plea bargain will depend on the precise language used in the sentencing appeal waiver provision."[54] In all federal circuits, valid waivers of appellate rights are strictly construed against the

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50. *See, e.g.*, United States v. Navarro-Botello, 912 F.2d 318, 322 (1990); United States v. Rutan, 956 F.2d 827, 830 (8th Cir. 1992), *overruled by* United States v. Andis, 333 F.3d 886, 892 n.6 (8th Cit. 2003) (overruling *Navarro-Botello* only to the extent that it suggested that a defendant might not have the right to challenge an illegal sentence on direct appeal); United States v. Rivera, 971 F.2d 876, 896 (2d Cir. 1992); United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993).

51. Bennardo, *supra* note 46, at 356 n.49 (citing United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997) ("Such a waiver is by definition uninformed and cannot be voluntary and knowing."); United States v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997); United States v. Melancon, 972 F.2d 566, 571 (1992) ("I do not think that a defendant can ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed at the time he or she enters into the plea agreement; such a 'waiver' is inherently uninformed and unintelligent.") (Parker, J., concurring specially)).

52. Jesse Davis, *Texas Law Rides to the Rescue: A Lone Star Solution for Dubious Federal Presentence Appeal Waivers*, 63 BAYLOR L. REV 250, 254 (2011) (citing United States v. Porter, 405 F.3d 1136 (10th Cir. 2005), *cert. denied*, 546 U.S. 980 (2005); United Stated v. Joyce, 357 F.3d 921 (9th Cir. 2004)).

53. Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212 (2005).

54. U.S. DEP'T OF JUSTICE, 626. PLEA AGREEMENTS AND SENTENCING APPEAL WAIVERS — DISCUSSION OF THE LAW, CRIMINAL RESOURCE MANUAL, https://www.justice.gov/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law [https://perma.cc/G2WF-F8D5] (last visited Jan. 23, 2020).

government.[55] The rights which a defendant can waive via an appellate waiver when entering a guilty plea, and which the government may seek for her to waive, include any statutory or constitutional rights that can be violated during a guilty plea or sentencing hearing, as well as the defendant's right to appeal the sentence itself under the SRA.[56] Some appellate waivers also require a defendant to waive her right to file ineffective assistance of counsel claims against her attorney.

This kind of waiver is more controversial, as ineffectiveness of counsel during plea bargaining, the plea entry process, or at sentencing, goes right to the primary requirement of upholding a waiver of appellate rights — the knowing and voluntary quality of the plea.[57] Indeed, while the DOJ announced in a 2014 memo that it "is confident that a waiver of a claim of ineffective assistance of counsel is both legal and ethical," the same memo also directed federal prosecutors to no longer seek such waivers in plea agreements.[58] This memo cited the DOJ's "strong interest in ensuring that individuals facing criminal charges receive effective assistance of counsel so that our adversarial system can function fairly, efficiently, and responsibly."[59] Despite this caution in the realm of effective assistance of counsel, appellate waivers are still used in a variety of other problematic situations, most perniciously in post-conviction sentencing agreements.

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55. J. Peter Veloski, *Bargain for Justice or Face the Prison of Privileges? The Ethical Dilemma in Plea Bargaining Waivers of Collateral Relief*, 86 TEMP. L. REV. 429, 434 (2014) (citing United States v. Guillen, 561 F.3d 527, 529–30 (D.C. Cir. 2009); United States v. Hahn, 359 F.3d 1315, 1329–30 (10th Cir. 2004); United States v. Teeter, 257 F.3d 14, 21–23 (1st Cir. 2001); United States v. Khattak, 273 F.3d 557, 560–61 (3d Cir. 2001); United States v. Fleming, 239 F.3d 761, 763–64 (6th Cir. 2001); United States v. Jemison, 237 F.3d 911, 916 (7th Cir. 2001); United States v. Estrada-Bahena, 201 F.3d 1070, 1071 (8th Cir. 2000); United States v. Fisher, 232 F.3d 301, 303 (2d Cir. 2000); United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000); United States v. Branam, 231 F.3d 931, 932–33 (5th Cir. 2000); United States v. Nguyen, 235 F.3d 1179, 1184 (9th Cir. 2000); United States v. Howle, 166 F.3d 1166, 1168–69 (11th Cir. 1999)).

56. Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 80 (2015); *see also supra* notes 45–47 and accompanying text.

57. *See* Klein et al., *supra* note 56, at 87 ("The most prevalent exception in those majority districts that require appellate and collateral attack waivers is for claims of ineffective assistance of counsel.").

58. Memorandum from James M. Cole, Deputy Attorney General, to Federal Prosecutors of the Department of Justice, (Oct. 14, 2014), https://www.justice.gov/file/70111/download [https://perma.cc/C373-GNZT]. This position does not appear to have changed in the intervening years.

59. *Id.*

3. *Appellate Waivers in Post-Conviction Sentencing Agreements*

When an appellate waiver is effected between a defendant and a prosecutor after she has been convicted at trial, but before sentencing, the defendant can waive her statutory appellate rights to challenge her conviction and collaterally attack her sentence.[60] This can include even waiver of the right to petition for post-conviction DNA testing for exculpatory evidence, or for a new trial should new material evidence be uncovered — even evidence of actual innocence.[61] Under a broad appellate waiver, by waiving her right to appeal her conviction the defendant is also waiving her right to challenge any errors which may have been made at trial, or could be made at the impending sentencing hearing.[62] This includes challenges to ineffective assistance of counsel; claims of prosecutorial misconduct, such as *Brady*[63] or *Giglio*[64] violations; the right to receive information about her case under the Freedom of Information Act; or the erroneous introduction of evidence against her.[65]

Appellate waivers made after a conviction at trial are adjudged by the same knowing and voluntariness standards as those made as part of a plea bargain.[66] For each, should the defendant challenge her waiver, the court will examine the record for evidence that the waiver was or was not made knowingly and voluntarily.[67] Federally, the requirements for documenting the knowing and voluntariness of a guilty plea are contained in Rule 11.[68] Rule 11 itself

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60. *See generally* Dyer & Judge, *supra* note 23.

61. Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV 952, 957–58 (2012). Almost every state, the District of Columbia, and the federal government, have all created statutory rights for the preservation of evidence for potential future DNA testing and to petition for that testing, though the scope of those rights varies. *See id.* nn.14 & 21 (citing Brandon Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1673–74 (2008)).

62. *See* Klein et al., *supra* note 56, at 83.

63. Brady v. Maryland, 373 U.S. 83, 86 (1963). Here the Supreme Court held that, in accordance with constitutional due process, a prosecutor must turn over to the defendant any material exculpatory evidence, as opposed to the other *Brady* decision discussed *supra*. *See* Brady v. United States, 397 U.S. 742 (1970); *see also supra* notes 13–16 and accompanying text.

64. Giglio v. United States, 405 U.S. 150, 153–54 (1972).

65. Klein et al., *supra* note 56, at 85; *see also* United States v. Ruiz, 536 U.S. 622, 633 (2002).

66. *See supra* notes 25–26.

67. *See, e.g.*, People v. Seaberg, 541 N.E.2d 1022, 1026 (N.Y. 1989) (discussing an appellate waiver in two different cases: one made as part of a plea bargain and one as part of a sentencing arrangement after a defendant's conviction at trial).

68. FED. R. CRIM. P. 11(b)(2); *see supra* note 10.

is not binding on the states.[69] However, "[a]ll courts . . . are required to apply federal standards to . . . claim[s] of ineffective assistance of counsel and to claim[s] that [a] plea of guilty was not voluntarily tendered."[70] This is because the knowing and voluntary standard for waiver of constitutional and other important rights is required by constitutional due process, which is applied to the states via the Fourteenth Amendment.[71]

The Rule 11 colloquy provides a roadmap for creating a record of knowing and voluntariness which can later be reviewed, as part of a totality of the circumstances analysis, to determine whether the guilty plea or waiver is valid and enforceable under this due process standard.[72] On appeal, the issue is reviewed de novo.[73] When a defendant has effected a waiver of her appellate rights, often the only collateral attack she can attempt is on the voluntariness of that waiver, even in the case of actual court errors when calculating her sentence, or where there is evidence of misconduct.[74] This speaks to the importance of building a clear record of the Rule 11 colloquy so that the court can accurately adjudge a defendant's understanding of the agreement she is entering into. This is especially critical in the capital context where a defendant's understanding or lack thereof may mean life or death.

Ultimately, plea bargaining, sentencing agreements, and appellate waivers are widespread and arguably integral features of the United States criminal justice system. With very few exceptions,[75] they are all considered valid waivers of rights if determined to have been made knowingly and voluntarily.[76] There are procedural safeguards in place, namely the Rule 11 colloquy, by which

69. *See, e.g.*, United States *ex rel.* Massey v. Follette, 320 F. Supp. 5, 7 (S.D.N.Y. 1970).

70. Pedicord v. Swenson, 304 F. Supp. 393, 396 (W.D. Mo. 1969).

71. *See, e.g.*, Malloy v. Hogan, 378 U.S. 1 (1964).

72. *See, e.g.*, FED. R. CRIM. P. 11(d); United States v. Gaither, 245 F.3d 1064, 1068 (9th Cir. 2001) ("Rule 11(d) requires the district court to determine whether a plea is voluntary and not the result of force or threats or of promises apart from a plea agreement before accepting the plea. In making this inquiry, we consider the totality of the circumstances, to determine the extent to which a defendant is permitted to make a free choice among the acceptable alternatives available at the plea stage." (internal quotation marks and citations omitted)); United States v. Rodríguez-Adorno, 852 F.3d 168, 174 (1st Cir. 2017) ("The relevant inquiry [into the voluntariness of a guilty plea] on appeal focuses on the totality of the circumstances, including the attributes of the particular defendant, the nature of the specific offence, and the complexity of the attendant circumstances." (internal quotation marks and citations omitted)).

73. *Gaither*, 245 F.3d at 1068.

74. *See infra* Part III.

75. *See infra* notes 124–125 and accompanying text.

76. *See supra* notes 6–19, 25–29, 34–35, and accompanying text.

reviewing courts can attempt to make this determination. Appellate waivers are popular with prosecutors, and strongly encouraged by the DOJ, as they can preclude many or all different types of attack on a conviction or sentence.[77] Although the Supreme Court has not spoken directly to their constitutionality, it seems likely that were it to address the issue, the Court would uphold their use.[78] However, appellate waivers possess many problematic features, particularly when they are used against defendants facing a potential death sentence.

III. APPELLATE WAIVERS: WHY THEY'RE MORE PROBLEMATIC THAN THEY'RE WORTH

This Part of the Note introduces the arguments for and against appellate waivers. Part III.A discusses the due process concerns that appellate waivers raise under the constitutionally-required knowing and voluntary standard, explores whether appellate waivers can truly be either knowing or voluntary, and introduces the idea that these concerns are amplified when an appellate waiver is effected as part of a post-conviction sentencing agreement. This subpart also addresses the anticipated counterarguments. Part III.B introduces the public policy concerns raised by appellate waivers, which arguably insulate misconduct and otherwise unconstitutional or erroneous convictions or sentences from appellate review, and which reduce transparency and fairness in the criminal justice system. Similarly, this subpart confronts the anticipated counterarguments and argues that the presented concerns are even stronger with regards to post-conviction waivers of appellate rights prior to sentencing.

A. DUE PROCESS

This Part discusses the due process concerns that appellate waivers raise. The following subparts introduce first the problems raised by the voluntariness requirement, then those raised by the knowing requirement. The final subpart discusses the "manifest injustice" exception, which ostensibly exists to protect defendants entering into appellate waivers but ultimately fails to do so.

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77. *See supra* notes 40–44 and accompanying text.
78. *See supra* note 52 and accompanying text.

1. *Voluntariness*

While the *Brady* Court held that the prospect of the death penalty is not so coercive that it invalidates a defendant's bargained-for guilty plea, it also noted that "the agents of the State may not produce a plea by actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[79] The Supreme Court has also recognized that there are circumstances under which the will of an individual may be overborne so as to make her actions involuntary even absent actual bad action on the part of any government actor; for example, the Court developed the prophylactic *Miranda* regime in order to protect a person being interrogated by the police from having her will overborne such that she should make incriminating statements without having validly — that is, knowingly and voluntarily — waived her Fifth Amendment right against self-incrimination.[80] This is also the rationale for requiring that the knowing and voluntariness inquiry be performed on a case by case, totality of the circumstances basis; as per the First Circuit in *Rodríguez-Adorno*, the inquiry must consider "the attributes of the particular defendant," because what may overbear the will of one person may not faze another.[81] In other words, in order to comport with constitutional due process, a guilty plea or important rights waiver has to be made knowingly and voluntarily by that individual, rather than give the mere appearance of knowing or voluntariness on its face.

Since the rise of appellate waivers, legal scholars, including some judges, have argued on various grounds that they should not be permitted. Professor Gregory M. Dyer and attorney Brendan Judge, addressing this issue directly in 1990, bypass the initial question of knowing and voluntariness and instead ground their argument, which states that appellate waivers should not be permitted, in the due process requirements that the Supreme Court has found applicable to established appellate rights.[82] As the Court wrote in *Rinaldi v. Yeager*, "[t]his Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede

79. Brady v. United States, 397 U.S. 742, 750 (1970).
80. Miranda v. Arizona, 384 U.S. 436, 444 (1966).
81. United States v. Rodríguez-Adorno, 852 F.3d 168, 174 (2017).
82. Dyer & Judge, *supra* note 23, at 655.

open and equal access to the court."[83] In the cases which establish this right, the impediment which the Court holds that a state cannot put in the path of a defendant seeking appellate review is indigency — the state must appoint counsel for an indigent defendant on an appeal as of right and must provide her with copies of her trial transcript so that she can prepare her appeal.[84]

Dyer and Judge argue that the jurisprudence the Court was expressing in these opinions is that "the state has a duty, under the due process clause, not to limit the opportunity of an appeal in a criminal case."[85] They support this argument additionally under the Supreme Court's opinion in *Pearce*, which declared unconstitutional the practice of "imposing greater sentences on retrial following a successful appeal," because of the deterrent or "chilling" effect this might have on a defendant considering appealing her sentence.[86] Similarly, in *Blackledge v. Perry*, the Supreme Court held that a prosecutor may not, in compliance with due process, charge a defendant with a felony offense based on the same conduct for which she had previously been convicted of a misdemeanor and subsequently appealed that conviction successfully.[87]

Thus, where a government practice acts to deter defendants from exercising their appellate rights, this "constitutes an unreasonable impediment to appellate review in violation of the constitutional right to due process."[88] As such, Dyer and Judge argue that appellate waivers do violate due process, even where a court has found them to have been made knowingly and voluntarily, because "*Blackledge* erects a due process bar to any systemic mechanism created by the state for the purpose of discouraging criminal defendants from seeking appellate review."[89]

Now, almost thirty years later, Dyer and Judge's argument would not pass constitutional muster. The holdings in *Rinaldi* and *Griffin*, while still good law, are considered Equal Protection cases addressing the inequality which would result if indigency alone could prevent a defendant from making an appeal, and have not

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83. Rinaldi v. Yeager, 384 U.S. 305, 310 (1966).

84. *Id.*; Griffin v. Illinois, 351 U.S. 12, 19 (1956) (holding that indigent defendants must be provided with copies of their trial transcripts).

85. Dyer & Judge, *supra* note 23, at 656; North Carolina v. Pearce, 395 U.S. 711, 724 (1969).

86. Dyer & Judge, *supra* note 23, at 656.

87. Blackledge v. Perry, 417 U.S. 21, 28 (1974).

88. Dyer & Judge, *supra* note 23, at 657.

89. *Id.* at 659.

been interpreted to hold, as Dyer and Judge reasoned, that there is a general government duty not to limit opportunity for appeal.[90] Indeed, *Pearce* and *Blackledge*'s holdings have been clarified by the Supreme Court not to mean that the prosecutors' actions in those cases violated due process because of any "due process bar" that the Court had established in *Blackledge*; but, rather, because the prosecutors' actions in those cases were retaliatory — the Court explained that "the due process violations in cases such as *Pearce* and [*Blackledge*] lay not in the possibility that a defendant might be deterred from the exercise of a legal right, but rather in the danger that the State might be retaliating against the accused for lawfully attacking [her] conviction."[91] Similarly, in *Chaffin v. Stynchcombe*, it was confirmed that "in the absence of vindictiveness" there is no inherent constitutional invalidity to a defendant being exposed to or receiving a harsher sentence after a successful appeal and retrial, "despite whatever incidental effect [this] might have on the right to appeal."[92]

In the standard plea bargaining context, Supreme Court precedent seems to allow little argument that appellate waivers should be considered inherently involuntary due to any coercive impact of plea bargaining. Considering that the Court has held that to seek a plea bargain is not unconstitutionally coercive, even when a defendant is charged under a statute that exposes her to a capital sentence only if she insists on asserting her right to trial by jury, it is difficult to imagine what the Court would hold to be so coercive beyond "actual or threatened physical harm or by mental coercion overbearing the will of the defendant."[93] Unlike in the *Miranda* interrogation context, the Court seems not to believe that the plea bargaining context is inherently likely to overbear the will of a defendant, or, at least, it does not believe that this presents any constitutional impairment of the plea bargaining system.[94] As the Court noted in *Bordenkircher*:

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90. *See, e.g.*, Ronald D. Rotunda & John E. Nowak, ROTUNDA AND NOWAK'S TREATISE ON CONSTITUTIONAL LAW-SUBSTANCE AND PROCEDURE § 1-8.41 (4th ed. 2017); Rinaldi v. Yeager, 384 U.S. 305, 310 (1966); Griffin v. Illinois, 351 U.S. 12, 19 (1956).

91. Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (internal citations omitted); North Carolina v. Pearce, 395 U.S. 711, 725 (1969); Blackledge v. Perry, 417 U.S. 21, 21 (1974).

92. Chaffin v. Stynchcombe, 412 U.S. 17, 29 (1973).

93. Brady v. United States, 397 U.S. 742, 750 (1970).

94. *See infra* notes 95–96 and accompanying text.

> acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. . . . [B]y tolerating and encouraging the negotiation of pleas, this Court has necessarily accepted as constitutionally legitimate the simple reality that the prosecutor's interest at the bargaining table is to persuade the defendant to forgo [her] right to plead not guilty.[95]

Indeed, the D.C. Circuit Court has reasoned subsequently that, "[t]o say that a practice is coercive or renders a plea involuntary means only that it creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty."[96] If this is true, then constitutionally it would seem that there is no greater coercion in persuading a defendant to give up her appellate rights that would render such a waiver involuntary.

Yet, consider the scenario in the sentencing agreement context, in which a defendant has already been convicted at trial and, prior to her sentencing hearing, the prosecutor presents her with an agreement for a more lenient sentence or sentencing recommendation, but which requires her to waive her right to appeal. For a factually guilty defendant, this may seem like an obvious bargain if she thinks that she has been tried fairly.[97] However, some courts have been hesitant to find a defendant who has never affirmatively admitted guilt to have validly waived her right to direct appeal, even after she has been found legally guilty.[98] And more troubling is the question: what about for a factually innocent defendant? While the threat of being found guilty by a jury and receiving a harsher sentence may lead even an innocent defendant to consider,

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95. *Bordenkircher*, 434 U.S. at 363–64 (internal citations omitted); Miranda v. Arizona, 384 U.S. 436, 436 (1996).

96. United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (internal quotation marks omitted).

97. However, this still presents issues with the due process "knowing" requirement. This is discussed in this Part, *infra*.

98. *See, e.g.*, State v. Gibson, 348 A.2d 769, 775 (N.J. 1975) ("[A] defendant who has not admitted [her] guilt should, as we view the interests of justice and appropriate policy considerations, not be deemed to have irrevocably waived [her] right of direct appeal from a conviction.); *see also* Dyer & Judge, *supra* note 23, at 667.

or in some circumstances even take, a guilty plea,[99] if the plea is offered pre-trial she still has the option of going to trial and taking her chances with the jury. Following a wrongful conviction, the situation becomes more dire.

If the prosecution seeks an appellate waiver after conviction, the defendant is faced with the choice of either waiving her right to appeal in exchange for hope of leniency at sentencing, or accepting a likely harsher sentence and hoping for vindication through the appellate process. This type of coercive force is potentially increased by the presumption that factually innocent defendants are likely to be offered better deals than factually guilty ones, as the prosecution's case is logically likely to be weaker against an innocent defendant.[100] In such a scenario, the defendant is asked to either waive her right to challenge her conviction, or to place her fate back in the hands of the criminal justice system which just utterly failed to provide her with justice by wrongfully convicting her. If the true test of whether a government bargaining practice is coercive and thereby renders a rights waiver involuntary is whether it is "likely to overbear the will of some innocent persons and cause them to plead guilty," then the practice of forcing this choice upon the defendant is a coercive one and does not comport with due process.[101]

2. *Actual Knowledge*

There are also due process arguments against the validity of appellate waivers under the knowing waiver requirement of constitutional due process which have led a minority of courts to refuse to uphold waivers they consider to be inherently unknowing.[102] As discussed in Part II.C of this Note, the Fourth Circuit in

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99. *See, e.g.*, North Carolina v. Alford, 400 U.S. 25, 36 (1970) ("[T]he Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.").

100. *See generally* Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013). This would logically be true both during plea bargaining and post-conviction, as a prosecutor with a weak case is less likely both to want to present her case at trial and to defend it on appeal.

101. *Pollard*, 959 F.2d at 1021.

102. *See, e.g.*, United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997) ("A plea that requires such a waiver of unknown rights cannot comport with Rule 11 or the Constitution."); United States v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997) ("[T]he Court could not conclude in logic or justice that the defendant's waiver of the right to appeal an illegal

Wiggins, first addressing the issue of an appellate waiver as part of a guilty plea post-passing of the SRA, reasoned that "[i]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute."[103] However, the critical distinction between the waiver of appellate rights and that of other rights is that a defendant must choose to waive her right to appeal trial or sentencing errors and violations *before* such issues actually arise.[104]

When a defendant waives other rights, such as her right to trial by jury or against compelled self-incrimination, "the act of waiving the right occurs at the moment the waiver is executed."[105] That is, when a defendant enters a guilty plea, she is simultaneously entering and executing a waiver of her right to a trial by jury.[106] The right to trial by jury on a charge is meaningless once a plea of guilty to that charge is entered. Similarly, when a defendant waives such rights via a guilty plea, she can have a high level of certainty in the outcome of her plea and, as such, in the effect of her waiver.[107] She knows she will be convicted of the charge to which she has agreed to plead guilty and "is relieved of the uncertainties that may result from exercising the right to trial."[108]

In comparison, "[w]hen the right to appeal is waived, the same level of foresight is impossible."[109] Entering into an appellate waiver "free[s a defendant] of none of the uncertainties that surround the sentencing process in exchange for giving up the right to later challenge a possibly erroneous application or interpretation of the Sentencing Guidelines or a sentencing statute."[110] She may understand the rights that she is waiving, but, as argued by D.C.

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sentence is 'knowing' inasmuch as the sentence is not and cannot be known at the time of the plea."). However, the abrogation of both of these decisions was ultimately recognized in United States v. Powers, 885 F.3d 728 (D.D.C. 2018).

103. United States v. Wiggins, 905 F.2d 51, 53 (4th Cir. 1990).

104. *See* Andrew Dean, Comment, *Challenging Appellate Waivers*, 61 BUFF. L. REV. 1191, 1199 (2013).

105. United States v. Melancon, 972 F.2d 566, 573 (5th Cir. 1992) (Parker, J., concurring specially).

106. Dean, *supra* note 104, at 1999.

107. Bennardo, *supra* note 46, at 356–57.

108. United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997).

109. Dean, *supra* note 104, at 1999.

110. *Raynor*, 989 F. Supp. at 44. This may not be true if the sentencing agreement includes a stipulation that the appellate waiver is contingent on the entry of a specific sentence, but this is generally not the case, as federally the specifics of sentencing are traditionally within the purview of the judge.

Circuit Judge Harold H. Greene, a "[c]ourt [cannot] conclude in logic or justice that a defendant's waiver of the right to appeal an illegal or improper sentence is 'knowing' inasmuch as the sentence is not and cannot be known at the time of the plea."[111] Indeed, in the Fifth Circuit case *United States v. Melancon*, Judge Robert Parker argued in his specially concurring opinion that his own court's acceptance of the concept that the waiver of appellate rights can be knowing and voluntary "manipulates the concept of knowing, intelligent, and voluntary waiver[.]"[112]

In the context of a post-trial conviction sentencing agreement, the question of whether a waiver of appellate rights can truly be knowing is even more pressing. Beyond the unforeseeability of potential errors at sentencing, for a defendant who has undergone a trial there are many potential appealable errors which may have occurred during that trial that she has no way to know about prior to her sentencing hearing, which often takes place immediately after the announcement of a conviction. At this point, a defendant cannot know if there were *Brady* or *Giglio* disclosure issues, whether there was misconduct by, or contamination of, the jury, whether the jury was properly selected and prepared, or whether the judge correctly decided the constitutional issues in her case, among other possible errors upon which her conviction could be reversed.[113] With regard to some of these issues a defendant's counsel should be able to advise her of the potential appealable issues immediately, but the majority of this information can only be discovered during a post-conviction investigation, which would not be done by her counsel if not in preparation for an appeal. Additionally, at that point in a criminal proceeding a defendant

111. United States v. Johnson, 992 F. Supp. 437, 439 (D.D.C. 1997) ("To cite the most obvious example, the defendant cannot know at the time [she] signs the plea agreement and enters the plea whether the sentencing court will find a basis for enhancing the defendant's offence level under the Sentencing Guidelines or whether the court will depart upward from the applicable guideline range. The enhancement or departure may be valid or not, but its validity can be ascertained only after the sentence has been formulated and pronounced. Thus, it is only after the judge has sentenced the defendant that the latter knows which rights [s]he waived, and whether those rights included the right to appeal a sentence in which the court may have erroneously applied the [Sentencing] Guidelines or otherwise ordered an illegal or even unconstitutional sentence. The waiver could be regarded as knowing only if it be assumed that the appeal rights need not stand regardless of the grossness of the error of the sentencing court or the court's intent and purpose.").

112. United States v. Melancon, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring specially).

113. *See* Brady v. Maryland, 373 U.S. 83, 83 (1963); Giglio v. United States, 405 U.S. 150, 154 (1972).

cannot know whether her counsel has been constitutionally effective, either.[114] Under these circumstances, a defendant knows remarkably little about what potential claims she is waiving for such a waiver to be considered knowing.

A majority of courts have rejected arguments that appellate waivers cannot be truly knowing.[115] They have argued that "[w]aivers of the legal consequences of unknown future events are commonplace,"[116] and that in order to knowingly waive her right to appeal, a defendant need not "know with specificity what claims . . . , if any, [s]he is foregoing."[117] The Rule 11 colloquy or other state waiver inquiry "focuses on the defendant's understanding of the appellate right that she is waiving, not her knowing of the sentencing proceeding's outcome."[118] These courts hold appellate waivers to be knowing as long as the defendant understands "the nature of the waiver."[119] The knowledge which is required, then, is not knowledge of the effect of her waiver — that is, what her precise sentence will be should she plead guilty — but rather simply the knowledge that the right she is waiving exists, and that she is giving it up.[120] As the Supreme Court noted in *Brady*:

> the rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant does not correctly assess every relevant factor entering into [her] decision. A defendant is not entitled to withdraw [her] plea merely because [s]he discovers long after the plea has been accepted that [her] calculus misapprehended the quality of the State's case or the likely penalties attached to alternate courses of action.[121]

However, this reasoning focuses on mistakes on the part of the defendant. Naturally, a defendant should not be able to challenge a validly entered guilty plea because she believed, in the absence of government misconduct, that the prosecution had a stronger

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114. This also creates arguable conflict of interest issues with defense counsel. *See infra* Part III.B.

115. *See* Bennardo, *supra* note 46, at 358; Dean, *supra* note 104, at 1200–01.

116. United States v. Khattak, 273 F.3d 557, 561 (3d Cir. 2001).

117. United States v. Hahn, 359 F.3d 1315, 1326 (10th Cir. 2004).

118. Bennardo, *supra* note 46, at 538.

119. *Id.*

120. *Id.*

121. Brady v. United States, 397 U.S. 742, 757 (1970) (internal citations omitted).

case against her than ultimately turned out to be the case — or because she later, while subjected to the punishment to which she agreed, regrets her decision and thinks that she could have made a better one. Appellate waivers are different because they prevent a defendant from raising appeals based even on errors made by the court which a defendant could not possibly anticipate at the time of her waiver, and as such could not have factored into her decision to make it.

The D.C. District Court in *Raynor* proposed, for example, a scenario in which, at sentencing, a court makes "incorrect, unsupportable factual findings," which affect the sentence the defendant receives, such as finding that a defendant was arrested in possession of fifty grams of crack cocaine when she in fact had only five.[122] "The sentencing range under the [Sentencing] Guidelines would be increased drastically and unjustifiably," and the defendant would likely be sentenced to a much longer sentence than she could possibly have anticipated when deciding to enter into the agreed-upon plea bargain with the prosecutor.[123] If her plea bargain had contained an appellate waiver, under the majority rationale she would have no available avenue to challenge the sentencing error.

3. *The Manifest Injustice Exception*

Some jurisdictions do recognize a "manifest injustice" or "miscarriage of justice" exception, under which a court can refuse to enforce an otherwise valid appellate waiver where it believes doing so would effect a miscarriage of justice.[124] However, in very few cases have courts actually invalidated an appellate waiver on this basis; only two such instances have been found.[125] In fact, there are more cases in which a court has found that an appellate waiver is enforceable because it was made knowingly and voluntarily even

122. *See* United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997) (discussing examples of state errors at sentencing which could trap a defendant in an unjust sentence should she have effected a waiver of her appellate rights).

123. *Id.*

124. *See, e.g.*, United States v. Kutz, 702 Fed. Appx. 661 (10th Cir. 2017); United States v. Mabry, 536 F.3d 231 (3d Cir. 2008); Rojas-Medina v. United States, 290 F. Supp. 3d 145 (D.P.R. 2018); State v. Toavs, 906 N.W.2d 354 (S.D. 2017).

125. *See* United States v. Castro, 704 F.3d 125, 139 (3d Cir. 2013) (stating that enforcing an otherwise valid appellate waiver would work a miscarriage of justice where the prosecution has failed to prove an essential element of the charge of conviction beyond a reasonable doubt); United States v. Adams, 814 F.3d 178, 183 (4th Cir. 2016) (stating that enforcing an otherwise valid appellate waiver would work a miscarriage of justice where the appellant could prove that he was actually innocent of the offense).

when the defendant was attempting to appeal her sentence because of an alleged court error such as in the example above.[126] These opinions argue that "[t]o allow alleged errors in computing a defendant's sentence to render a waiver unlawful would nullify the waiver based on the very sort of claim it was intended to waive."[127] This speaks to the power of appellate waivers, especially considering the Supreme Court's statement in *Rosales-Mireles v. United States* that, under normal circumstances, a miscalculation of a defendant's Sentencing Guidelines range calls for the courts to vacate a defendant's sentence, as "such an error will in the ordinary case . . . seriously affect the fairness, integrity, or public reputation of judicial proceedings."[128]

It may be true that prosecutors and courts would prefer avoiding the consideration of such claims, "barring the possibility of a clairvoyant defendant."[129] That said, if in almost all cases courts refuse to review manifest injustice claims even for plausibility of unforeseeable court error, an appellate waiver can only be considered knowing and voluntary if the defendant is assumed to have considered and accepted the risk of being subjected to an inordinately harsh sentence based on factually erroneous findings of facts affecting sentencing or other unforeseeable error. In the post-trial conviction context, the defendant must then bear the risk that

126. *See* United States v. Smith, 500 F.3d 1206, 1213 (10th Cir. 2007) (holding that a valid appellate waiver bars a defendant from appealing her sentence on the ground that she received a much longer sentence due to a misapplication of a statutory sentencing enhancement); United States v. Kutz, 702 Fed. Appx. 661 (10th Cir. 2017) (stating that the miscarriage of justice exception does not apply where the defendant's allegation is that the court erred in applying a sentencing enhancement.); United States v. Chaidez-Guerrero, 665 Fed. Appx. 723, 725 (10th Cir. 2016) (holding that a valid appellate waiver bars a defendant from appealing his sentence on the ground that he received a much longer sentence under the Sentencing Guidelines because the court erred in finding that he was in possession with a greater quantity of drugs than the parties had stipulated to in their plea agreement); United States v. Fisher, No. 13-CR-10145-EFM, 2018 WL 558100, at *5 (D. Kan. Jan. 25, 2018) (finding that when a waiver itself is not unlawful, there is no miscarriage of justice in enforcing it, and that allegations that a court committed a legal error in determining a defendant's sentence cannot raise to the level of a miscarriage of justice); United States v. Pierce, 476 Fed.Appx. 984, 988 (3d Cir. 2012) (holding that defendant's claim that the court erred in applying a sentence enhancement to his sentence was barred by his valid appellate waiver). *See also* Kristine Cordier Karnezis, *Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Arrangement*, 89 A.L.R.3d 864, § 3.4 *Miscarriage of Justice* — originally published 1979 and updated weekly with new cases — for a comprehensive list of other cases in which the court has rejected a defendant's argument that enforcing her appellate waiver would work a miscarriage of justice.

127. *Smith*, 500 F.3d. at 1213.

128. Rosales-Mireles v. United States, 138 S. Ct. 1897, 1903 (2018).

129. United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997).

errors occurred during the trial or pre-trial period which, if the conviction were appealable, could lead to its reversal. If these are the risks that a defendant must "knowingly" bear when agreeing to waive her appellate rights, then she should be able to demand much greater consideration in return from the prosecution. Where the defendant is facing a potential death sentence, these constitutional stakes are even higher.

B. PUBLIC POLICY

This Part addresses the public policy concerns with respect to the use of appellate waivers. Generally, the Supreme Court has held that, so long as any ultimate waiver is knowing and voluntary, there is little with which a prosecutor and a defendant cannot bargain.[130] However, it is a long-standing concept of contract law[131] that there are some bargains which may be in accordance with *constitutional* principles, but that society cannot condone in the name of public policy and the public good.[132] Beyond their questionable constitutionality, there are many compelling public policy rationales for invalidating appellate waivers, either across the board or for waiver of certain kinds of appellate rights. These rationales include the public interest in the fairness and transparency of the criminal justice system and in ethical decision-making by its actors. The following first subpart addresses these concerns.

There are also significant policy considerations supporting the use of appellate waivers, including that idea that appellate waivers increase the finality of verdicts and the efficiency of courts, and that they reduce strain on the judicial system by reducing the number of appeals it has to contend with. Additionally, it is arguable that in some ways, appellate waivers can be considered to benefit criminal defendants. The second following subpart discusses these considerations.

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130. Brady v. United States, 397 U.S. 742, 748 (1970). *See also, e.g.*, United States v. Mezzanatto, 513 U.S. 196, 210 (1995); Town of Newton v. Rumery, 480 U.S. 386, 393 (1987); United States v. Hodge, 412 F.3d 479, 490–91 (3d Cir. 2005); United States v. Pollard, 959 F.2d 1011, 1018 (D.C. Cir. 1992).

131. Plea bargains and sentencing agreements are contracts made between the defendant and the government which are generally governed by contract law. *See supra* note 26 and accompanying text.

132. *See generally* Watts v. Malatesta, 186 N.E. 210 (N.Y. 1933); *In re* Baby M, 537 A.2d 1227 (N.J. 1988).

1. *Public Policy Rationales Against Appellate Waivers*

Appellate waivers prevent a defendant from challenging her sentence or conviction on appeal even when that conviction is based on legal error.[133] However, it is not only the defendant who has an interest in seeing erroneous or otherwise unjust sentences overturned. Constitutional criminal law necessarily develops through the appellate process, so the public has an interest in making sure that appeals happen so it can keep developing.[134] This is true for every United States citizen, even if they are in no way involved in or connected to criminal activity — wrongful accusations and even convictions can happen to anyone.[135] As district court Judge John Kane pointed out in his opinion in *United States v. Vanderwerff*, an appellate rights waiver would have "insulated from review the underlying convictions in some of the more notable criminal decisions in the Supreme Court's recent history," such as in *Apprendi v. New Jersey*, *Blakely v. Washington*, and *United States v. Booker*.[136] If appellate waivers had been part of those defendants' plea bargains, their sentences would almost certainly have never been reviewed. This would have prevented the important constitutional issues in those cases from being identified, and prevented their resultant criminal constitutional rights

133. *See supra* notes 122–130 and accompanying text.

134. *See* Dyer & Judge, *supra* note 23, at 663.

135. While it is certainly true that indigent defendants and people of color are more likely to be wrongfully convicted, they are by no means the only ones at risk. *See generally* EQUAL JUSTICE INITIATIVE, https://eji.org/issues/wrongful-convictions [https://perma.cc/3MHG-9EQZ] (last visited Feb. 2, 2020); *Browse Cases*, NATIONAL REGISTRY OF EXONERATIONS, https://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx [https://perma.cc/MUQ9-NXXC] (last visited Feb. 2, 2020). *See also supra* notes 95–101 and accompanying text.

136. United States v. Vanderwerff, No. 12-CR-00069, 2012 WL 2514933, at 5* (D. Colo. June 28, 2012), *rev'd*, 788 F.3d 1266 (10th Cir. 2015) (citing King & O'Neill, *supra* note 53, at 249). *See also* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that when a defendant exercises her right to trial by jury, the Sixth and Fourteenth Amendments require that any factual determination which authorizes an increase in the maximum allowed prison sentence for her conviction must be made by a jury, not a judge, and must be found beyond a reasonable doubt); Blakley v. Washington, 542 U.S. 296, 313–14 (2004) (making the same general holding as *Apprendi* in the specific context of a sentence under the Sentencing Guidelines); United States v. Booker, 543 U.S. 220, 245 (2005) (indicating that the Sixth Amendment does not permit the Sentencing Guidelines to be mandatory, as the Sentencing Guidelines allowed sentence enhancements based on findings of fact by judges, rather than juries, and by only a preponderance of the evidence).

precedents from being set, thus adding to the body of law that protects all citizens from governmental overreach.[137]

The use of appellate waivers also undermines the public interest in the fairness of the criminal justice system generally. Though this purpose was arguably subverted in part by the Supreme Court's decision in *Booker*, finding that the Sentencing Guidelines were mere guidelines rather than binding rules,[138] one of the original purposes of their introduction was to bring more uniformity to criminal sentences.[139] Indeed, in *Booker*, the majority defended its reinterpretation of the Sentencing Guidelines as advisory against the dissenters' assertion that this change defied Congressional intent by stating, *inter alia*, that this was more consistent with Congress' intent to avoid unwarranted sentencing disparities.[140] Appellate waivers "hide from view the extent of uneven application of the law regulating the criminal process" by shielding the resultant sentence from any level of review.[141] While the Sentencing Guidelines are no longer mandatory, their purpose of guiding the sentences of similarly situated defendants toward greater uniformity is still a federal goal, laudable under the principles of fairness, and should be pursued where possible.[142]

Appellate waivers also undermine the transparency of the criminal justice system which is necessary to vindicate the public's interest in its fairness. As Justices Oliver Wendell Holmes and Louis Brandeis wrote in their dissenting opinion in *Olmstead v. United*

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137. *See Vanderwerff*, 2012 WL 2514933, at *5; *see also generally* King & O'Neill, *supra* note 53, at 248–51; Dean, *supra* note 104, at 1218–20.

138. *Booker*, 542 U.S. at 220.

139. *See, e.g.*, Graham C. Mullen, *Preface*, 33 GEO. L.J. ANN. REV. CRIM. PROC. i, i (2004) ("The SRA, the love child of polar-partisan Senators Strom Thurmond and Ted Kennedy, established the United States Sentencing Commission to resolve the unwarranted sentencing disparities among defendants with similar records . . . found guilty of similar criminal content.") (internal parentheticals and citations omitted) (quoting 28 U.S.C. § 991 (2000)). Despite the downgrading of the Sentencing Guidelines to non-binding in *Booker*, this wording has not changed in the most recent version of the statute. *See* 28 U.S.C. § 991 (2008).

140. *Booker*, 542 U.S. at 250.

141. King & O'Neill, *supra* note 53, at 251.

142. The impact that the Sentencing Guidelines still have on federal sentencing post-*Booker* should not be understated. As of 2018, the United States Sentencing Commission reported that within-range sentences are imposed in about fifty percent of federal cases, and that, of the cases in which below-range sentences are imposed, about forty percent are as a result of grounds for downward departure specifically recognized by the Sentencing Guidelines. *See* U.S. SENTENCING COMM'N, FEDERAL SENTENCING: THE BASICS 4 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-projects-and-surveys/miscellaneous/201811_fed-sentencing-basics.pdf [https://perma.cc/E3AN-7GXW].

States, the reasoning of which was later adopted by the majority of the Court in *McNabb v. United States*[143]:

> [i]n a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. . . . If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means — to declare that the government may commit crimes in order to secure the conviction of a private criminal — would bring terrible retribution.[144]

In this way, the integrity of the entire criminal justice system is imperiled by both injustices on the part of the government in achieving convictions, and also by the appearance of injustice. The waiver of appellate rights "offends judicial integrity by foreclosing from th[e] [c]ourt the ability to directly review errors surrounding a defendant's conviction and sentence."[145] And, as the Supreme Court stated in *McNabb*, "[a] conviction resting on [flagrant disregard of the law by government actors] cannot be allowed to stand without making the courts themselves accomplices in wilful [sic] disobedience of law." Judicial integrity and the appearance of such integrity is damaged by the acceptance of appellate waivers.[146] By allowing prosecutors to seek and enforce appellate waivers, Dyer and Judge argue, "courts are becoming accomplices to police violations and trial court errors. . . . Courts must be allowed to review alleged errors and violations in order to maintain the integrity of the United States' legal system."[147]

Furthermore, appellate waivers act to shield from review not only police violations and trial court errors, but also bad action on the part of government actors and even defense attorneys. Appellate waivers arguably "invite unethical behavior by insulating the actions of defense attorneys, prosecutors, and judges from

143. McNabb v. United States, 318 U.S. 332 (1943). *See also* Dyer & Judge, *supra* note 23, at 663–65.

144. Olmstead v. United States, 277 U.S. 438, 468 (1928).

145. United States v. Melancon, 972 F.2d 566, 577 (5th Cir. 1992) (Parker, J., concurring specially) (internal quotation marks omitted).

146. *See, e.g.*, Dyer & Judge, *supra* note 23, at 663–65; *Melancon*, 972 F.2d at 573 (Parker, J., concurring specially).

147. Dyer & Judge, *supra* note 23, at 664.

review."[148] Therefore, it is in the public interest for defense attorneys, prosecutors, and judges to believe that they do not have carte blanche to engage in unethical or illegal practices in order to protect their own interests or to secure convictions and sentences, so that the integrity of the criminal justice system may be maintained and the instance of injustice minimized.

Appellate waivers can also incentivize bad action on the part of judges themselves. Judges have a personal interest in accepting guilty pleas or sentencing agreements containing appellate waivers as such waivers insulate their sentencing decisions from review and ensure that they will not be reversed.[149] As a defense attorney told Professors King and O'Neill, "[judges] d[on't] want to be reversed, [and] these waivers g[ive] them a level of comfort."[150] Hence, there is a concern that a judge's personal interest in the approval of appellate waivers may lead her to accept or enforce them uncritically.[151]

The actions of prosecutors are also concealed by appellate waivers. This is a concern during the plea bargaining stage, but a much graver concern where a defendant has been convicted of a crime and enters into an appellate waiver prior to her sentencing hearing. During plea bargaining, the Supreme Court has held, generally, that beyond not engaging in coercive action in violation of due process or with vindictive motivation, prosecutors have little duty to the defendant.[152] Indeed, they need not disclose even *Brady* material exculpatory evidence or *Giglio* witness impeachment evidence to a defendant prior to entering into a plea agreement.[153] However, "plea bargaining, just like other forms of negotiation where the parties may not be of equal bargaining power, is clearly capable of producing unconscionable results."[154] To prevent such unconscionable results, "appellate review must be available."[155]

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148. Dean, *supra* note 104, at 1221.

149. *Id.* This assumes that the waiver is upheld as voluntary and knowing, which, statistically, it most likely will be, if it is challenged at all. *See supra* notes 124–129 and accompanying text.

150. King & O'Neill, *supra* note 53, at 248. Naturally, however, this is anecdotal, and both King & O'Neill and Dean, *supra* note 104, at 1222, note that it is unclear how much fear of reversal dictates the actions of judges.

151. Dean, *supra* note 104, at 1221.

152. *See, e.g.*, United States v. Ruiz, 536 U.S. 622 (2002); Bordenkircher v. Hayes, 434 U.S. 357 (1978); Machibroda v. United States, 368 U.S. 487 (1962).

153. *Ruiz*, 536 U.S. at 628–33. *See also* Giglio v. United States, 405 U.S. 150 (1972); Brady v. Maryland, 373 U.S. 83 (1963).

154. State v. Gibson, 348 A.2d 769, 784–85 (N.J. 1975) (Pashman, J., dissenting).

155. *Id.* at 529.

The availability of review for convictions and sentences obtained via a conviction at trial and a subsequent sentencing agreement is even more imperative to maintain the integrity of prosecutorial action. As compared to during plea bargaining, at trial and during the pre-trial period prosecutors have constitutional duties of disclosure to the people they are seeking to convict.[156] They must ensure that the defendant's right to a fair and impartial jury is vindicated by not committing any *Batson* or other jury selection or questioning violations.[157] These, among other potential prosecutorial violations, such as suborning perjury, are unlikely to be revealed at trial, but generally require a post-conviction investigation to determine that they were made. If a defendant is persuaded to waive her appellate rights after the entry of her conviction, this almost certainly precludes the possibility that prosecutorial misconduct will be uncovered. And, logically, where a prosecutor has engaged in intentional misconduct such as withholding material exculpatory evidence from the defense, having succeeded in securing a conviction at trial, that prosecutor is most likely to offer the defendant an attractive sentencing agreement in exchange for her appellate rights — precisely in order to ensure that her misconduct will remain concealed and that the conviction will stand. Not only does this present a clear conflict of interest, but it also undermines a main purpose of the criminal justice system by insulating convictions obtained unjustly and encouraging prosecutors not to abide by their constitutional duties.[158] After all, "prosecutors do not have the singular function of advancing the rights of their side, but must also remember that the defendant, as a member of the public, is entitled to fair treatment."[159]

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156. *See, e.g.*, *Giglio*, 405 U.S. at 154–55; *Brady*, 373 U.S. at 86.

157. *See* U.S. CONST. amend. VI; Batson v. Kentucky, 476 U.S. 79 (1986) (holding that excluding potential jurors from a jury panel on the basis of their race violates the Sixth and Fourteenth Amendments).

158. This Note does not suggest that all, or even many, prosecutors would be eager to commit constitutional violations just to secure convictions where they know or believe they can protect themselves from review, but such violations can happen. Since a prosecutor is logically more likely to offer a post-conviction sentencing agreement in exchange for an appellate waiver where she would rather the conviction not be reviewed, public policy should not condone the upholding of sentencing agreements under which the defendant waives her right to appeal where there is facially significant evidence of prosecutorial misconduct so that this evidence can be considered by the reviewing court.

159. Alexandra W. Reimelt, Note, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 902–03 (2010) (citing People v. Ventura, 531 N.Y.S.2d 526, 532 (App. Div. 1988)).

For defense attorneys, appellate waivers also raise clear conflict of interest concerns. If an agreement does not make an exception to the waiver that allows a defendant to raise ineffective assistance of counsel (IAC) claims, as DOJ guidance has suggested they should,[160] there is a clear self-interested incentive for defense attorneys to advise their clients to waive their appellate rights.[161] Defense attorneys may not be as zealous and thorough in their defense, or may even take greater risks than they would normally consider, where they know that "their past and future mistakes are protected from scrutiny."[162] As one interviewed defense attorney told King and O'Neill, "[waivers] do have the advantage of putting an end to it. It's peace of mind, nice to know you're not going to end up in two years arguing [against a claim of ineffective assistance of counsel]."[163] When advising a client as to whether she should accept an appellate waiver, "defense counsel is put in the untenable position of having to render advice to a client about [whether she has herself] rendered constitutionally sufficient performance," or to opine about whether she will do so at sentencing, and even whether she is rendering constitutionally sufficient performance in that moment via her advice about the appellate waiver.[164]

Even where a defense attorney does not actively seek to pursue her own interests over those of her client's, such a scenario presents an insurmountable conflict of interest. This has also led a number of state legal ethics boards, as well as the National Association of Criminal Defense Lawyers, to find that this kind of agreement may violate their rules of professional conduct for lawyers.[165] The State Bar of Nevada Standing Committee on Ethics and Professional Responsibility has stated that "a waiver must exclude all potential claims of ineffective assistance of counsel," reasoning that "[a]n attorney should not be in a position to make a decision as to the effectiveness of [her] own representation, particularly when, as [with appellate waivers,] the decision will be final

160. *See supra* notes 57–59 and accompanying text.
161. *See* King & O'Neill, *supra* note 53, at 245–48.
162. *Id.* at 247.
163. *Id.* at 245–46.
164. Alan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, 25 CRIM. JUST., no. 1, Spring 2010, at 2 (2010).
165. *See* Veloski, *supra* note 55, at 446–448 and accompanying footnotes.

and unreviewable."[166] For these reasons, the DOJ also announced in 2014 that ineffective assistance of counsel claim waivers would no longer be included in federal plea bargains and sentencing agreements.[167]

The Supreme Court's ruling in *Wheat v. United States*[168] provides an additional argument against the enforcement of appellate waivers. There, the Court rejected the defendant's waiver of his Sixth Amendment right to be represented by conflict-free counsel, finding that "to allow a defendant to be represented by an attorney with a conflict of interest . . . 'not only constitutes a breach of processional ethics and invites disrespect for the integrity of the court, but is also detrimental to the independent interest of the trial judges to be free from future attacks over the adequacy of the waiver.'"[169] Although this case dealt with a different kind of conflict of interest in an attorney, the public policy reasoning the Court lays out in *Wheat*[170] arguably counsels against the acceptance of appellate waivers as well, or at least those which do not exempt IAC claims from the waiver. However, many state courts still routinely accept and enforce waivers which foreclose IAC challenges

166. State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 48, at 1, 3 (2011), https://www.nvbar.org/wp-content/uploads/Ethics_Op_48.pdf [https://perma.cc/3LF7-RNLC]. State ethics board opinions are merely advisory, not binding, but it is still telling that many state and national organizations for ethical lawyering consider this kind of appellate waiver to be unethical.

167. *See* Jackelyn Klatte, *Guilty as Pleaded: How Appellate Waivers in Plea Bargaining Implicate Prosecutorial Ethics Concerns*, 28 GEO. J. LEGAL ETHICS 643, 644 (2015). For their current stance, see generally U.S. DEP'T OF JUSTICE, *supra* note 54 ("The courts of appeals have held that certain constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement. For example, a defendant's claim that he or she was denied the effective assistance of counsel at sentencing, that he or she was sentenced on the basis of race, or that the sentence exceeded the statutory maximum, will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement." (internal citations omitted)).

168. Wheat v. United States, 486 U.S. 153 (1988).

169. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 160–61 (1995) (quoting *Wheat*, 486 U.S. at 162).

170. *See Wheat*, 486 U.S. at 162–63.

to plea bargains under *Padilla*,[171] *Frye*,[172] and *Lafler*,[173] as well as claims, for defendants who go to trial, that their counsel was ineffective in representing them at trial, in the pre-trial period, or at sentencing.[174]

2. *Public Policy Rationales for Appellate Waivers and Their Counterarguments*

This subpart introduces the prevailing arguments in favor of appellate waivers and the counterarguments thereto. First, it discusses the finality and efficiency of verdicts which the use of appellate waivers can provide, before detailing the benefits that appellate waivers ostensibly provide criminal defendants and the flipside of this contention.

i. *Finality and Efficiency*

The first prevailing argument is that appellate waivers act to increase the finality of verdicts, increase efficiency, and reduce strain on the judicial system by reducing the number of appeals it has to deal with.[175] Many courts emphasize these as important functions of the plea bargaining system in general which support the enforcement of appellate waivers.[176] As the Fourth Circuit stated in *United States v. Wiggins*, "[w]e are not prepared to allow indiscriminate hearings on issues upon which the parties have

171. Padilla v. Kentucky, 599 U.S. 356, 374–75 (2010) (holding that the Sixth Amendment's guarantee of effective assistance of counsel requires defense attorneys to provide accurate information to clients about the potential immigration consequences of entering a guilty plea).

172. Missouri v. Frye, 566 U.S. 134, 150–51 (2012) (holding that the Sixth Amendment's guarantee of effective assistance of counsel requires defense attorneys to relay all plea offers from the prosecution to her client).

173. Lafler v. Cooper, 566 U.S. 156, 174–75 (2012) (finding that an attorney is ineffective under the Sixth Amendment where the attorney, exhibiting deficient performance, prejudices a defendant by advising her not to accept a favorable plea agreement).

174. *See generally* Veloski, *supra* note 55; Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance — Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647 (2013); Klatte, *supra* note 167. A defendant could naturally still challenge the knowing and voluntariness of her appellate waiver on the claim that the ineffectiveness of her counsel rendered the appellate waiver unintelligent or involuntary — however, where a Rule 11 or other plea colloquy has been completed and the defendant is on record confirming her knowing and voluntariness, the defendant will have difficulty prevailing on such a claim.

175. *See* Bennardo, *supra* note 46, at 363–64; Johnson, *supra* note 46, at 709–10.

176. *See, e.g.*, United States v. Wiggins, 905 F.2d 51, 54 (4th Cir. 1990); United States v. Navarro-Botello, 912 F.2d 318, 322 (9th Cir. 1990).

clearly agreed, and thereby eliminate the chief virtues of the plea system — speed, economy, and finality."[177]

Despite this perception, research has shown that appellate waivers may not actually further these chief virtues. Attorney Andrew Dean argues that appellate waivers have not reduced the rate of criminal appeals.[178] He presents figures that illustrate "steady growth in the number of criminal appeals filed" from 2001 to 2010 in each of the federal districts.[179] Additionally, he points out that if appellate waivers were effective in reducing the number of, or slowing the growth of, criminal appeals, the data should show less of an increase in the percentage of new criminal appeals filed each year in circuits which use them.[180] But this is not what his research shows; even when controlling for the increasing number of convictions in a given district per year, Dean found that the data "demonstrate that appeal waivers have been ineffective in reducing the number of new criminal appeals commenced each year."[181]

Of course, in terms of furthering the goal of finality, where defendants have waived their appellate rights, even if they commence a criminal appeal, it is unlikely that they will prevail as long as the court determines that the waiver was made knowingly and voluntarily. As such, some judicial resources may be used in reviewing and rejecting the claim on appeal, but, due to the valid appellate waiver, the inquiry will end there.

That being said, some commentators argue that this kind of finality is not actually in the public interest, but "comes at the expense of the error-correcting function of the appellate process."[182] Professor Andrew Kim points out that "although restrictions on post-trial review inherently make criminal convictions more final" they also "can produce net waste of state resources by increasing wrongful conviction costs" and "can actually make defendants less willing to obey the law in the future by making the justice system appear procedurally unfair."[183] In this way, appellate waivers contravene the public policy incentives of maintaining transparency

177. *Wiggins*, 905 F.2d at 54 (quoting Blackledge v. Perry, 417 U.S. 21 (1974)) (internal brackets and quotation marks omitted).

178. *See* Dean, *supra* note 104, at 1202–04.

179. *Id.* at 1205–07 figs. 1–6.

180. *Id.* at 1208.

181. *Id.*

182. Bennardo, *supra* note 46, at 363. *See also* Johnson, *supra* note 46, at 709–10.

183. Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 563–64.

and the appearance of fairness in the criminal justice system, which may raise crime.[184]

Additionally, when appellate waivers result in an unappealable wrongful incarceration, a person who is either factually innocent, guilty but convicted through a violation of her rights, or is serving an erroneously long sentence, can ultimately cost the justice system more than what it would have cost to simply review and correct the wrongful sentence or conviction.[185] Professor Kim's study indicates that "correcting a sentence that is improperly long by even a few months can save the state thousands of dollars[.]"[186] Correcting these sentences requires appellate review, which also costs the state resources. Ultimately, though, he estimates that "the average state direct appeal saves around $14,700 in reduced incarceration and costs around $7900 in total administrative costs."[187] Hence, allowing for defendants to appeal would, on average, better serve the public policy goal of efficient use of government resources than enforcing appellate waivers in the name of ostensibly resource-saving finality.

ii. *Benefits for Defendants*

The second prevailing public policy argument in favor of appellate waivers is that they are good for defendants.[188] Proponents argue that the ability to waive appellate rights is an additional bargaining chip that defendants can use during charge or sentence negotiations.[189] However, this argument rests on the assumption that such waiver can be knowing and voluntary.[190] Additionally, Professor Robert Calhoun observes that "many defendants find themselves faced . . . with a flat requirement that they waive their appeal rights as a precondition to a bargaining."[191] Where this is the case, the appellate waiver provision acts to increase the bargaining power of the prosecution, not the defendant. In our plea bargaining system, where the balance of power already weighs

184. *Id.* at 565.
185. *Id.* at 564.
186. *Id.* at 592.
187. *Id.* at 599.
188. *See generally* Reimelt, *supra* note 159, at 874–75; Calhoun, *supra note* 169, at 159; Bennardo, *supra* note 46, at 364–65.
189. Calhoun, *supra* note 169, at 159.
190. *See id.* at 167. *See also supra* Part III.A.
191. *See* Calhoun, *supra* note 169, at 167.

heavily in favor of the government, it contravenes public policy to impose this additional "price of admission" on defendants.[192]

Professor Calhoun points out that, logically, when prosecutors do not essentially require a waiver of appellate rights, they are most likely to bargain for such a waiver where the defendant has "arguably meritorious appeal issues, otherwise there would be little incentive [for] the prosecutor to make significant concessions [in exchange for an appellate waiver]."[193] This means that defendants who are innocent or who have been deprived of fair treatment will face the most pressure to waive their appellate rights, as they will be offered the most compelling bargains.[194] In this way, appellate waivers discourage or even prevent appeal by defendants who have the most reason to appeal, but also "function as the worst form of screening mechanism, removing from the system precisely the cases we would most want appealed."[195] Thus, appellate waivers act to the detriment of the public interest in the fairness and integrity of the criminal justice system. It may be true, as Alexandra Reimelt mentions, that appellate waivers do benefit some defendants, who, seeing little chance for acquittal, "can obtain concessions in [their] probable penalty, begin the correctional process promptly, and free [themselves] from the burdens of trial[.]"[196] However, the potential benefit to such defendants does not justify the enforcement of appellate waivers in light of the many other strong detriments they effect upon public policy concerns.

Ultimately, there are strong due process and public policy arguments against the use and enforcement of appellate waivers, both as part of plea bargains and especially as part of post-conviction sentencing agreements. It is arguable that such waivers cannot meet the constitutional due process requirement that the waiver has been made voluntarily due to the coercive force of plea or sentence bargaining. Additionally, such waivers arguably cannot be made constitutionally knowingly due to the impossibility of a defendant having actual knowledge of the rights she is waiving, especially in a post-conviction, pre-sentencing context. Troublingly, these factors may weigh even more heavily against defendants who are factually innocent. Moreover, even if, as most courts

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. Reimelt, *supra* note 159, at 874 (citing Brady v. United States, 397 U.S. 742 (1970)).

have held, the due process concerns do not invalidate the constitutionality of appellate waivers, they should not be sought or enforced on public policy grounds, as they undermine transparency, integrity, and the appearance of fairness in the criminal justice system. Additionally, they undermine the goal of uniformity of sentences under the Sentencing Guidelines and raise strong conflict of interest concerns with regard to the conduct of defense attorneys in advising about such waivers. These concerns are at their most powerful in the capital context, where the criminal justice system wrestles with questions of life or death.

IV. DEATH IS DIFFERENT: APPELLATE WAIVERS IN THE CAPITAL CONTEXT

In the unique capital punishment context, the due process and public policy issues discussed in this Note counsel even more strongly against the seeking or enforcement of appellate waivers.[197] This is especially true when they are made as part of a post-conviction sentencing agreement. This Part of the Note refocuses the discussion of appellate waivers to contexts in which a defendant is facing, or may face, the death penalty.

The following subparts begin by discussing the way in which both the constitutional issues and the public policy issues with appellate waivers are amplified when they intersect with capital punishment, particularly for factually innocent defendants.[198] They then use the phenomenon of death penalty volunteerism as a lens through which to view these issues, arguing that the jurisprudence surrounding this phenomenon also counsels against allowing defendants to waive their appellate rights where they may face the death penalty. The final subpart argues that insulating capital cases from review serves no compelling public interest due to the staggeringly high error rate found in capital convictions.

197. *See supra* Part III.A (discussing these due process issues); Part III.B (discussing these public policy issues).

198. ELIZABETH DAVIS & TRACY L. SNELL, U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS BUREAU OF JUSTICE STATISTICS, STATISTICAL BRIEF: CAPITAL PUNISHMENT, 2016 1 (2018) ("At year-end 2016, 34 states and the federal government authorized the death penalty.").

A. THE HEIGHTENED ISSUES WITH APPELLATE WAIVERS IN CAPITAL CASES

It is a well-known and oft repeated adage that "death is different."[199] This is because, in the words of Justice Thurgood Marshall, "[d]eath is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such."[200]

Due process and public policy concerns are at their apex when considering capital punishment. In cases where the death penalty is on the table at any point during plea or sentencing negotiations (even where, or perhaps especially where, the negotiations are to take the death penalty *off* the table), the constitutional principles of due process, as well as the many strong public policy justifications against appellate waivers, argue powerfully against their usage. Appellate waivers in the death penalty context, too, are most problematic when made as part of a sentencing agreement after a defendant has been found guilty at trial, but should also not be permitted when a defendant is voluntarily pleading guilty to an offense for which she could receive the death penalty.

The Supreme Court has of course held that the threat of the death penalty alone does not render a guilty plea involuntary.[201] However, it is undeniable, as researcher Susan Ehrhard points out, that the "incentives for prosecutors, defense attorneys, and defendants to plea bargain in death-eligible cases are magnified," as a result of the defendant's desire to avoid capital punishment, and the government's desire to avoid the high cost of a capital trial.[202] These magnified incentives further compound the problem that there is likely to be greater pressure on factually innocent defendants, or even factually guilty defendants who would have strong appellate claims, to waive their appellate rights.[203]

With regard to innocent defendants, "while there is little empirical evidence that innocent defendants plead guilty to avoid more lengthy terms of imprisonment, there is evidence that

199. Gregg v. Georgia, 428 U.S. 153, 188 (1976).

200. Furman v. Georgia, 408 U.S. 238, 346 (1972) (Marshall, J., concurring).

201. *See* Brady v. United States, 397 U.S. 742 (1970); Bordenkircher v. Hayes, 434 U.S. 357 (1978).

202. Susan Ehrhard, *Plea Bargaining and the Death Penalty: An Exploratory Study*, 29 JUST. SYS. J. 313, 314 (2008).

203. *See supra* notes 99–101 and accompanying text.

innocent defendants plead guilty to avoid death."[204] In her study of attitudes toward the plea bargaining process in capital cases, Ehrhard found that "[d]efense attorneys and prosecutors felt that the option to file a death notice puts the prosecution in a unique position of strength and affects the defense's decision regarding a plea in ways that a potential sentence of life or life without parole does not."[205]

If the test of whether a government practice in plea bargaining is unconstitutionally coercive is that it "creates improper pressure that would be likely to overbear the will of some innocent persons and cause them to plead guilty," then, given this evidence, the practice of plea bargaining over capital punishment seems to clearly fail.[206] The death penalty, as the ultimate sanction, *does* have more coercive power over defendants in bargaining than other potential punishments; it has simply been found by the Supreme Court not to be unconstitutionally coercive to the point that it renders a guilty plea per se unknowing or involuntary. However, as Professor Nancy King writes, "[f]ew bargaining chips are as powerful as the risk of execution, and the prosecutor's threat to seek a death sentence if the defendant does not cooperate is an American tradition."[207] Given that death is different and has this coercive power, it is all the more important that review of convictions and sentences not be precluded in any case in which the death penalty was a potential conclusion of sentencing. In this way, it can be confirmed that the level of coercive force used in plea bargaining did not reach such a height that it invalidated the knowing and voluntariness of that individual defendant's plea and waiver.

This is especially important in the case of defendants who have been convicted after a trial and who have maintained their innocence throughout the proceedings, as suggested by the New Jersey Supreme Court's opinion in *State v. Gibson*.[208] The coercive power

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204. Ehrhard, *supra* note 202, at 314 (citing M.L. RADELET, ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992)).

205. Ehrhard, *supra* note 202, at 316.

206. United States v. Pollard, 959 F.2d 1011, 1021 (D.C. Cir. 1992) (internal quotation marks omitted).

207. Nancy J. King, *How Different Is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 210 (2004).

208. State v. Gibson, 348 A.2d 769, 511-12 (1975) (stating that a defendant who has not admitted guilt and has been convicted at trial, contrasted with one who has pleaded guilty, should in the interest of justice be permitted to appeal her sentence notwithstanding an appellate rights waiver). In such a situation, defendant would still be subject to revocation

of an offer by the prosecution to take the death penalty off the table in exchange for the waiver of all future appeals on a legally guilty but factually innocent defendant, who has just been shockingly confronted with the failure and injustice of the criminal justice system, need scarcely be explained.[209] Especially given the conflict of interest issues with representation by counsel in such an inherently coercive situation, it is not possible to ensure that a defendant's waiver is being made truly knowingly and voluntarily.[210] No amount of questioning during a plea colloquy, reading the text of the waiver strictly against the government, or warning of the potential for conflicts of interest, can overcome this constitutional impairment.

B. DEATH PENALTY VOLUNTEERISM ARGUMENTS AS APPLIED TO PRE-CONVICTION AND PRE-SENTENCING WAIVER OF APPELLATE RIGHTS

This Note does not present an argument on the issue of whether a defendant who has been sentenced to death should be able to waive her right to post-conviction review and essentially volunteer for death.[211] However, some of the arguments at play in that

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of any concessions she had obtained from the state in exchange for her waiver, thus diminishing the chance that such appeals will be made frivolously. *Id.*

209. For an exploration of a disturbing example of this scenario, see *The State v. Dennis Perry*, UNDISCLOSED PODCAST (2018), http://undisclosed-podcast.com/episodes/season-3 [http://perma.cc/SY4B-NSCR].

210. *See supra* notes 161–174 and accompanying text.

211. *See, e.g.*, Kristen M. Dama, *Redefining a Final Act: The Fourteenth Amendment and States' Obligation to Prevent Death Row Inmates from Volunteering to Be Put to Death*, 9 U. PA. K. CONST. L. 1083 (2007); Jeffrey Kirchmeier, *Let's Make a Deal: Waiving the Eighth Amendment by Selecting a Cruel and Unusual Punishment*, 32 CONN. L. REV. 615 (2000); Patricia Cooper, *Competency of Death Row Inmates to Waive the Right to Appeal: A Proposal to Scrutinize the Motivations of Death Row Volunteers and to Consider the Impact of Death Row Syndrome in Determining Competency*, 28 DEV. MENTAL HEALTH L. 105 (2009); Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (2001); Michelle C. Goldbach, *Like Oil and Water: Medical and Legal Competency in Capital Appeal Waivers*, 1 CAL. CRIM L. REV. 2 (2000); Tim Kaine, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483 (1983); J.C. Oleson, *Swilling Hemlock: The Legal Ethics of Defending a Client Who Wishes to Volunteer for Execution*, 63 WASH. & LEE L. REV. 147 (2006); Paula Shapiro, Comment, *Are We Executing Mentally Incompetent Inmates Because They Volunteer to Die?: A Look At Various States; Implementation of Standards of Competency to Waive Post-Conviction Review*, 57 CATH. U.L. REV. 567 (2008); Christopher J. Skinner, *Retaining the Cultural Meaning of Capital Punishment by Prohibiting Volunteerism on Death Row and the Implications of its Continued Practice*, 39 LINCOLN L. REV. 55 (2012); Melvin I. Urofsky, *A Right To Die: Termination of Appeal for Condemned Prisoners*, 75 J. CRIM. L. & CRIMINOLOGY 553 (1984); *see also infra* notes 212–215 and accompanying text.

debate are also relevant when considering appellate waivers in capital cases made either via a guilty plea or prior to sentencing. Since the Supreme Court's 1976 holding in *Gregg v. Georgia*, which initiated the "modern era" of the death penalty in the United States, through 2003, there were 885 executions, 106 of which were of so-called "volunteers."[212] However, these nearly all volunteers for death were not defendants who, having been sentenced to death, immediately waived all rights to challenge that sentence in order to be swiftly executed; rather, in almost every case, these were defendants who had completed many years of appellate review of their sentences prior to electing to waive their remaining appeals.[213] This is because nearly every jurisdiction that allows the death penalty requires unwaivable, mandatory appellate review of capital sentences prior to actual execution.[214] Even for those that do not, the Supreme Court has held that due process requires that a defendant undergo a competency hearing prior to pleading guilty to a capital crime or waiving post-sentencing rights to appeal a capital sentence in order to determine that she is competent to make the decision to accept death.[215] The Eighth Amendment also forbids the imposition of the death penalty on the mentally handicapped and those who have committed their capital crimes under the age of eighteen.[216]

Because death is indeed different, the due process bar to administering this unique punishment is higher; as Professor King writes, "the irrevocability of the sentence justifies greater oversight than would be available in noncapital cases."[217] In its

212. John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 939–40 (2005) (citing John H. Blume, *Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285 (2002); Gregg v. Georgia, 428 U.S. 153 (1976)).

213. *See generally* Blume, *supra* note 212; Stephen Blank, *Killing Time: The Process of Waiving Appeal in the Michael Ross Death Penalty Cases*, 14 J.L. & POL'Y 735 (2006); Robert Johnson et al., *Autonomy in Extremis: An Intelligent Waiver of Appeals on Death Row*, 39 AM. J. CRIM. JUST. 787 (2014). An exception to this, of course, is *Gilmore v. Utah*, but the Court there specifically did not address whether the defendant was "unable as a matter of law to waive the right to state appellate review," as "the question [was] simply not before [it]." 429 U.S. 1012, 116 (1976) (Burger, C.J., concurring).

214. Anthony J. Casey, *Maintaining the Integrity of Death: An Argument for Restricting a Defendant's Right to Volunteer for Execution at Certain Stages in Capital Proceedings*, 30 AM. J. CRIM. L. 75, 88 (2002).

215. *See* Rees v. Peyton, 384 U.S. 312, 312–14 (1966).

216. *See* Atkins v. Virginia, 536 U.S. 304, 321 (2002); Roper v. Simmons, 543 U.S. 551, 578–79 (2005).

217. Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 174 (1999).

decision in *Furman v. Georgia*, which effectively ended the death penalty in the United States until *Gregg*,[218] the Supreme Court stated that the Eighth Amendment right against being subjected to cruel and unusual punishment requires jurisdictions to ensure (via their death penalty legislation and court oversight) that the death penalty is not administered arbitrarily or discriminatorily.[219] The state bears the responsibility for "maintaining the consistent and appropriate application of the death penalty."[220] Allowing a defendant to waive her right to appellate review in the capital context prevents the state from fulfilling both of these responsibilities. Precluded from reviewing the case, the state cannot ensure that the death penalty was imposed non-arbitrarily, non-discriminatorily, and consistently to similarly situated defendants in that jurisdiction.[221]

This reasoning holds even in cases where the death penalty is threatened but later taken off the table by the prosecution as a result of some concession by the defendant in her plea bargain, or, more problematically, in a post-trial conviction sentencing agreement, due to the heightened coercion that exists when the death penalty is involved. This coercion, while apparently not bringing the coercive force to an unconstitutional level, does arguably impose upon the court a greater duty to review the sentence to ensure that it does not violate due process or the Eighth Amendment.[222] Additionally, as Professor Anthony Casey argues, "it is clear that society's interest in non-arbitrary and consistent application requires assurances of guilt and the appropriateness of a death sentence."[223] Where review of a death sentence, or a lesser sentence for a capital eligible crime, is precluded by an appellate waiver, this defeats that interest and reduces the transparency and appearance of justice in the criminal justice system, which are all the more imperative to public policy concerns when dealing with the death penalty.[224] Where the death penalty is concerned, it serves no compelling public interest to preclude review of a sentence,

218. *See* Gregg v. Georgia, 428 U.S. 153 (1976); *see also supra* note 212 and accompanying text.

219. Furman v. Georgia, 408 U.S. 238, 249 (1972).

220. Casey, *supra* note 214, at 94.

221. *See id.* at 94–95.

222. *See supra* notes 201–210 and accompanying text.

223. Casey, *supra* note 214, at 96.

224. *See supra* notes 143–145 and accompanying text as to the public policy rationales for the necessity of transparency and the appearance of justice in the criminal justice.

especially when a defendant is claiming innocence or that her conviction or sentence was otherwise illegal or in error.

C. THE ERROR RATE IN CAPITAL SENTENCING

Attorney Sara Golden has observed that "the error rates [in capital sentencing] are staggering."[225] In a study of 5760 death sentences imposed between 1973 and 1995, sixty-eight percent were found to have contained serious error, and in fifty-six percent the defendant was found "not to have been deserving of the death sentence."[226] While one can hope that those statistics have improved in the intervening years, without appellate review of death sentences and other sentences imposed in the shadow of capital plea bargaining, it is impossible to know. As goes the common adage of Benjamin Franklin, "it is better one hundred guilty [p]ersons should escape than that one innocent [p]erson should suffer[.]"[227] Certainly, then, it is better to preclude defendants from bargaining away their appellate rights in capital cases than to foreclose their appeals and execute the undeserving.

Ultimately, the due process concerns raised by appellate waivers generally are powerful enough where a defendant is facing or may face capital punishment that such waivers cannot truly be made in satisfaction of the constitutionally required knowing and voluntary standard. Death is different, and, as such, capital punishment requires greater oversight than any other punishment the criminal justice system can inflict.[228] This mandate is vitiated by the use of appellate waivers in capital contexts. Additionally, the interests of society in ensuring the fairness and transparency of the criminal justice system and its actors are most powerfully raised where this ultimate sanction is concerned, which may allow the government to take from a person her most important right of all — to live.

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225. Sara L. Golden, *Constitutionality of the Federal Death Penalty Act: Is the Lack of Mandatory Appeal Really Meaningful Appeal?*, 74. TEMP L. REV. 429, 429 (2001).

226. *Id.* at 1, citing James S. Liebman, et al., *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV 1849 (2000).

227. BENJAMIN FRANKLIN, *To Benjamin Vaughan*, *in* THE WRITINGS OF BENJAMIN FRANKLIN 293 (Albert H. Smyth ed., 1906).

228. *See supra* notes 217–221 and accompanying text.

V. CONCLUSION

Federal circuits and state courts vary widely in their usage (or non-usage) of appellate waivers, with some jurisdictions including them in nearly all plea agreements, and some jurisdictions refusing to enforce them at all.[229] Although the Supreme Court has not yet ruled directly on the constitutionality of appellate waivers, given a thorough analysis of the involved precedents, and its denials of certiorari to date, it is likely that should it accept such a case, it would find appellate waivers generally to be constitutional.[230] However, there are still underlying arguments against the constitutionality of such waivers, as well as strong public policy rationales against their use.

While these arguments may not be powerful enough to overcome the precedents set in many jurisdictions which approve of appellate waivers in standard plea bargaining scenarios in the absence of a Supreme Court ruling to the contrary, the additional constitutional and public policy concerns which surround capital punishment push the use of appellate waivers in capital cases firmly beyond questionable acceptability into unconstitutionality and unconscionability. This is especially true at the post-trial conviction and pre-sentencing stage, when even innocent defendants may be unconstitutionally pressured into accepting appellate waivers in order to save their lives, even by their own defense attorneys.

Beyond the plight of innocent or otherwise wrongfully incarcerated defendants, allowing appellate waivers, especially in capital cases, strongly contravenes many of the goals of public policy. These include reducing transparency, fairness, and the appearance of fairness in the criminal justice system, as well as insulating both court error and active misconduct by police, prosecutors, defense attorneys, and judges from discovery. Appellate waivers can also decrease cost efficiency in the criminal justice system by trapping defendants in erroneous sentences, or on death row, rather than providing them a chance for review. For these reasons, appellate waivers should not be sought or enforced, especially against defendants who have been convicted at trial but have not yet been

229. *See, e.g.*, King & O'Neill, *supra* note 53, at 231–32.
230. *See supra* note 52 and accompanying text.

sentenced, and most especially in capital cases, where the due process and public policy concerns against them are at their apex.