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Introduction

"[C]riminal justice today," Justice Anthony Kennedy declared, "is for the most part a system of pleas, not a system of trials."[1] Justice Kennedy's statement captures the stark reality that 90 percent of all federal criminal cases are disposed of by the plea bargain.[2] Despite the jury trial's esteemed placement in the American cultural zeitgeist, the fact remains that in 2010 only 2.8 percent of criminal defendants exercised their right to a jury trial.[3] Instead, the vast majority of defendants enter into "the supreme instance of waiver known to our system of justice:" the guilty plea.[4]

Until recently, plea-bargaining was dismissed as a "necessary evil," and delegated to private spheres shielded from the attention of the judicial and legislative branches.[5] However, the Supreme Court's recent decisions of *Lafler v. Cooper*[6] and *Missouri v. Frye*[7] demonstrate a profound shift in

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1. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1381 (2012) (arguing against the contention that a fair trial wipes clean any deficient performance by defense counsel during plea bargaining).

2. Bureau of Justice Statistics, U.S. Dep't of Justice, Sourcebook of Criminal Justice Statistics, Criminal Defendants Disposed of in U.S. District Courts, tbl. 5.22.2010 (Kathleen Maguire ed.), *available at* http://albany.edu/ sourcebook/pdf/t5222010.pdf.

3. *Id.*

4. *See* United States v. Dayton, 604 F.2d 931, 935 (5th Cir. 1979) (en banc).

5. *See Lafler* at 1397 (2012) (Scalia, J., dissenting) ("In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil.").

6. *See id*. at 1391 (majority opinion) (holding that counsel's erroneous advice that led to defendant's rejection of a plea bargain constituted ineffective assistance of counsel and

plea-bargaining law. In both cases the Court deemed defense counsel to have rendered ineffective assistance of counsel during the plea bargaining process.[8] In *Lafler v. Cooper*, defense counsel rendered ineffective assistance by giving erroneous advice that led his client to reject the favorable plea deal.[9] Analogously, in *Missouri v. Frye*, defense counsel rendered ineffective assistance by failing to inform his client of a plea deal offer that eventually lapsed.[10] The Court noted that an examination of these forfeited rights is necessary because plea-bargaining "is not some adjunct to the criminal justice system," but rather "*is* our criminal justice system."[11]

The Court's next step, following *Cooper* and *Frye*, should be to take a hard look at one of the most pervasive features of the plea-bargaining process: appellate waivers.[12] When a criminal defendant enters a plea of guilty, he surrenders a plethora of rights, including his right to a jury trial, his right to face his accuser in a court of law, and his right against self-incrimination.[13] More recently and startlingly, criminal defendants are also forfeiting their statutory right to appeal, as an estimated two-thirds of federal plea bargains contain appellate waivers.[14]

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the error amounted to prejudice).

7. *See* Missouri v. Frye, 132 S. Ct. 1399, 1410–11 (2012) (holding that counsel rendered ineffective assistance of counsel by not informing defendant of a favorable plea deal).

8. *See Lafler* 132 S. Ct. at 1376 (deeming defense counsel to have rendered ineffective assistance); s*ee also Frye* 132 S. Ct. at 1399 (affirming that the attorney's representation was deficient).

9. *See id.* ("As to prejudice, respondent has shown that but for counsel's deficient performance there is reasonable probability he and the trial court would have accepted the guilty plea.").

10. *See Frye* 132 S. Ct. at 1408 (stating that defendant's attorney was deficient because attorney did not inform his client of a favorable plea deal before the plea deal expired).

11. *See id.* at 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, Symposium: Punishment, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

12. *See* Editorial Trial Judge to Appeals Court: Review Me, N.Y. TIMES, July 17, 2012, at A24 [hereinafter *Review Me*] (noting that waivers are "a common but largely hidden element of plea bargains").

13. *See* G. NICHOLAS HERMAN, PLEA BARGAINING 89 (3d ed. 2012) (stating that a plea agreement may result in the defendant's forfeiture of some constitutional rights such as privilege against self-incrimination and the right to trial by jury).

14. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (Nov. 2005) ("In nearly two-thirds of the cases settled by plea agreement in our sample, the defendant waived his right to review.").

Appellate waivers create unique problems between attorney and client in a post-waiver situation.[15] Critically, waivers may vitiate an attorney's obligation to file a client's requested appeal.[16] Therefore, these waivers may cause defendants to lose two rights: their statutory appeal rights as well as their constitutional right to effective assistance of counsel.[17]

This Note advances that defense counsel renders ineffective assistance by refusing to file an appeal because of the presence of a waiver. Parts I and II of this Note will examine the appellate waiver and the circuit split regarding ineffective assistance in a post-waiver situation. Part III will argue that § 2255 ineffective assistance waivers are invalid and therefore should not bar courts from addressing whether an attorney renders ineffective assistance by failing to file a notice of appeal. And finally, Part IV will argue that counsel's role as advocate of his client and officer of the court creates the obligation to file a notice of appeal even in a post-waiver context.

I. The Appellate Waiver

A. The Right to Appeal

A plea deal begins with an offer by the prosecutor to defense counsel regarding the disposition of the defendant's case.[18] In order to incentivize the defendant to plead guilty, the prosecutor makes concessions, like a reduced sentence recommendation or a dismissal of one of the charges.[19]

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15. *See generally infra* Part III.B (discussing the ethical dilemma of a defense attorney allowing a client to sign waiver absolving attorney of any liability).

16. *See generally* United States v. Mabry, 536 F.3d 231 (3d Cir. 2008); Nunez v. United States, 546 F.3d 450 (7th Cir. 2008).

17. *See* U.S. CONST. amend. VI. ("In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence.").

18. *See generally* HERMAN, *supra* note 13 (discussing the negotiation process between prosecutors and defense counsel).

19. *See id.* at 1–2.

> Generally, plea negotiations result in one or more of the following: (1) the prosecutor agrees not to charge the defendant; (2) the defendant pleads guilty or nolo contendere to a reduced charge or lesser included charge; (3) the defendant pleads guilty or nolo contendere to a particular charge in exchange for the dismissal of other charges; (4) the defendant pleads guilty or nolo contendere as charged or to a lesser charge in return for a sentencing concession by the prosecutor; or (5) the

The defendant will be further incentivized to plead guilty because defendants who exercise their right to a jury trial typically receive excessively greater sentences due to the so-called "jury trial penalty."[20]

The plea agreement stipulates facts regarding the defendant's guilt,[21] and critically contains a sentencing recommendation.[22] In federal criminal law, a defendant may enter either a Type C plea bargain, which includes a binding sentencing recommendation, or a Type B plea bargain, which includes a non-binding sentencing recommendation.[23] The majority of plea agreements are Type B bargains, although commentators have called for a greater use of Type C bargains.[24] As a consequence, the vast majority of criminal defendants do not know the sentence they will receive and cannot withdraw their plea after receiving an unanticipated sentence.

A defendant pleads guilty at a plea hearing according to the procedural and substantive guidelines of Rule 11 of Criminal Procedure.[25] Before accepting the guilty plea, a judge will conduct a plea colloquy meant to ensure the defendant understands the rights that he is waiving.[26] The judge may choose to accept the plea deal upon determining that the defendant is knowingly and voluntarily pleading guilty.[27]

> defendant enters a conditional plea of guilty or nolo contendere, reserving the right to appeal the judgment and withdraw his plea in the event that the appellate court affords him relief on the adverse determination of a specified pretrial motion.

20. *See* DAVID W. NEUBAUER, AMERICA'S COURTS AND THE CRIMINAL JUSTICE SYSTEM 289 (4th ed. 2010).

21. *See* HERMAN, *supra* note 13, at 227 (describing how these stipulations of facts are generally binding on the parties).

22. *See id.* at 221–29.

23. FED. R. CRIM. P. 11(c)(1)(B)(C).

24. See Shayna M. Sigman, Comment *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317 (1999) (examining the pros and cons of different plea agreements, especially between Type B and Type C sentence bargain agreements).

25. FED. R. CRIM. P. 11(b); *see also* HERMAN, *supra* note 13, at 213–14.

26. *Id.*

27. *See* HERMAN, *supra* note 13, at 213–14 (3d ed. 2012).

> In federal court, when a defendant enters a plea of guilty – whether as a "straight" guilty plea, plea of nolo contendere, Alford plea, conditional plea, or any of the foregoing pursuant to a plea agreement – Fed. R. Crim. P. 11 sets forth procedural and substantive requirements to be followed by the judge to ensure that the plea is knowingly, intelligently, and voluntarily made, and that there is a factual basis for the plea. Rule 11 is addressed to three core concerns: the plea must be free from coercion; the defendant must understand the nature of the charges

A defendant's sentencing hearing takes place at a later date, often several months later. Although the plea agreement usually contains a sentencing recommendation, the judge may ignore this recommendation and exercise his discretion in sentencing the defendant.[28] Further, per *United States v. Booker*,[29] the judge is not bound by the Sentencing Guidelines.[30]

Many appealable issues arise during the plea process.[31] The United States Sentencing Commission categorizes appeal rates under nine broad categories: Reasonableness Issues, 18 U.S.C § 3553 Factors Issues, Drug Trafficking Issues, Other Non-Guideline Issues, Departure Guidelines Issues, Criminal History Guidelines Issues, Fraud and Deceit Issues, Immigration and Naturalization Offenses Issues, and Role in the Offense Guidelines Issues.[32] General substantive reasonableness factors constituted the most appealed issue.[33] The second most popular issue was appealing a procedural error for the court failing to address or improperly considered § 3353 factor.[34]

Criminal defendants may challenge their conviction or sentence through two statutory avenues of appeal.[35] The first avenue is a direct appeal under 18 U.S.C § 3742, which permits a defendant to challenge the validity of his conviction. Section 18 USC § 3742 grants that:

> A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence – (1) was imposed in violation of the law; (2) was imposed as a result of an incorrect application of the sentencing guidelines; or (3) is greater than the

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against him; and the defendant must understand the consequences of his plea.

28. *See* United States v. Jackson, 563 F.2d 1145, 1146 (4th Cir. 1977) ("In our opinion each individual judge is free to decide whether, and to what degree, he will entertain plea bargains, and his refusal to consider any plea bargaining whatsoever will not vitiate a guilty plea which has otherwise been knowingly and voluntarily entered.").

29. *See* United States v. Booker, 543 U.S. 220, 225 (2005) (holding that the Sentencing Guidelines are discretionary and not mandatory).

30. *Id.* at 225.

31. *See* UNITED STATES SENTENCING COMMISSION, Sentencing Issues Appealed for Selected Guidelines, Table 59 (Fiscal Year 2011), *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/Table59.pdf.

32. *Id*.

33. *Id*.

34. *Id*.

35. *See* 18 U.S.C. § 3742 (2006).

> sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established by the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the maximum established in the guideline range; or (4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.[36]

Many of the most important recent Supreme Court criminal procedure decisions are the result of direct appeals.[37] Alternatively, the defendant may file a collateral appeal under 28 U.S.C. § 2255(a).[38] The cases of *Cooper* and *Frye* are both examples of defendants collaterally attacking their sentence pursuant to a § 2255 motion.[39] The right to collaterally appeal a sentence is such that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence or that the sentence was in excess of the maximum authorized by law, or is subject to collateral attack, may move the court which imposed the sentence to vacate, set aside, or correct the sentence.[40]

B. The Use of Appellate Waivers

An appellate waiver is a provision in the plea agreement whereby the defendant waives these rights to appeal.[41] One study estimated nearly two-thirds of plea bargains contain an appellate waiver provision.[42] Appellate waivers grew in popularity after the Sentencing Reform Act of 1984,[43]

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36. *Id.*

37. *See* United States v. Vanderwerff, 2012 WL 2514933 at 5 (D. Colo. 2012) ("Indeed, appellate waivers would have insulated from review the underlying convictions in some of the most notable criminal decisions in the Supreme Court's recent history."). *See also* Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy,* 55 Duke L.J. 209, 249 (2005) (noting that waivers would have precluded appellate review in *Apprendi v. New Jersey,* 530 U.S. 466 (2000); *Blakely v. Washington,* 542 U.S. 296 (2004); and *United States v. Booker,* 543 U.S. 220 (2005)).

38. 28 U.S.C. § 2255(a) (2012).

39. *See* Lefler v. Cooper, 132 S. Ct. 1376 (2012); *see also* Missouri v. Frye, 132 S. Ct. 1399 (2012).

40. 28 U.S.C. § 2255 (2012).

41. *See* King & O'Neill, *supra* note 14, at 219.

42. *Id.* at 211.

43. 18 U.S.C. § 3551 et seq. (2012).

which "provided hundreds of new sentencing issues for defendants to raise on appeal, even after pleading guilty."[44] Facing a wave of appeals, prosecutors began including appellate waivers in plea-bargain agreements.[45] Appellate waivers caught on in the Fourth, Fifth, and Ninth Circuits and quickly spread to the other circuits.[46] Prosecutors "loved them" and judges "encouraged them."[47] Today, the appeal waiver is one of the main features of the plea-bargaining system.[48] In fact, the official policy of the Department of Justice is to "require every defendant who signs a plea agreement to waive the right to appeal any sentencing error committed by the sentencing judge."[49]

Appeal waivers vary widely in scope. The most common appeal waiver is the direct appeal waiver, which bars a defendant from appealing the validity of the sentence he receives.[50] Typically, a direct appeal waiver will instruct that the defendant waives his right to appeal his sentence so long as his sentence does not extend higher than the upward range.[51] The following is a textual example of a typical direct appeal waiver:

> Defendant . . . is also aware that his sentence has not yet been determined by the Court. Defendant is aware that any estimate of probable sentencing range that he may have received from his counsel, the United States, or the probation office is a prediction, not a promise, and is not binding on the United States, the probation office, or the Court. Realizing the uncertainty in estimating what sentence he will ultimately receive, Defendant knowingly waives his right to appeal the sentence in exchange for the concessions made by the United States in this agreement.[52]

In addition to a direct appeal waiver, the defendant may agree to a broader waiver: the collateral attack waiver. A collateral attack waiver

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44. *See* King & O'Neill, *supra* note 14, at 219–220.

45. *Id.*

46. *Id.* at 221.

47. *Id.*

48. *See* Jack W. Campbell IV & Gregory A. Castanias, *Feature: Sentencing—Appeal Waivers: Recent Decisions Open the Door to Reinvigorated Challenges*, 24 CHAMPION 34 (2000).

49. *See id.* (citing *United States v. Raynor*, 989 F. Supp. 43, 44–45 (D.D.C. 1997)).

50. *See* United States v. Mabry, 536 F.3d 231, 234 (3rd Cir. 2008).

51. *See* United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992) ("[A] defendant could not be said to have waived his right to appellate review of a sentence imposed in excess of the maximum penalty provided by statute . . . .").

52. *See id.* at 494 n.1.

prevents the defendant from raising challenges regarding circumstances distinct from the legality of the conviction and sentence, such as ineffective assistance of counsel or prosecutorial abuse.[53] An example of a collateral attack waiver is waiving any right "to challenge any conviction or sentence or the manner in which the sentence was determined in any collateral proceeding, including but not limited to a motion brought under Title 28, United States Code, Section 2255."[54] Collateral attack waivers are estimated to accompany three-quarters of direct appeal waivers.[55] Further, of these plea agreements containing collateral attack waivers, one–third do not retain the right to raise an ineffective assistance of counsel claim.[56] Consequently, appeal waivers have been demonstrated to bar constitutional claims including ineffective assistance of counsel claims.[57]

C. The Costs and Benefits of Appellate Waivers

Ten circuit courts have expressly upheld the use of appeal waivers.[58] Reasoning that because a defendant may waive his constitutional rights, courts declare that a defendant may also waive a statutory right to appeal.[59] Circuit courts like the appellate waiver because it has reduced the number of appeals, thereby easing the burden of a crowded appeals docket.[60] In a comprehensive study on appellate waivers, Nancy King found that prosecutors believe that appellate waivers have reduced their appellate

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53. *See Mabry*, 536 F.3d at 234 (discussing the waiver of the right to collaterally attack the sentence and its consequences).

54. *Id.* at 233.

55. *See* King & O'Neill, *supra* note 14, at 213.

56. *Id.*

57. *Id.*

58. *See* United States v. Wiggins, 905 F.2d 51, 52–54 (4th Cir. 1990); United States v. Navarro-Botello, 912 F.2d 318 (9th Cir. 1990); United States v. Rutan, 956 F.2d 827 (8th Cir. 1992); United States v. Rivera, 971 F.2d 876 (2d Cir. 1992); United States v. Melancon, 972 F.2d 566 (5th Cir. 1992); United States v. Bushert, 997 F.2d 1343 (11th Cir. 1993); United States v. Hernandez, 134 F.3d 1435 (10th Cir. 1998); United States v. Fleming, 239 F.3d 761, 763–64 (6th Cir. 2001); United States v. Teeter, 257 F.3d 14 (1st Cir. 2001); United States v. Hare, 269 F.3d 859 (7th Cir. 2001).

59. *See* United States v. Andis, 552 F.3d 391 (8th Cir. 2002); *but see* United States v. Perez, 46 F. Supp. 2d 59, 65 (D. Mass 1999) (pointing out that this syllogism "too quickly assumes that there is no constitutional dimension to the right to appeal . . . . 'Once a system of appellate courts is put into place . . . a defendant's ability to appeal may not be unduly burdened.'") (citing *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996)).

60. *See* King & O'Neill, *supra* note 14, at 230.

burden.[61] Further, defendants sometimes view the waiver favorably because the waiver might give them the benefit of a reduced sentence.[62]

Despite the benefits, the Supreme Court has not yet approved of appellate waivers.[63] Further, recent district court decisions rejecting plea-bargain agreements containing waivers suggest "an opportunity for renewed challenges to sentencing-appeal waivers."[64] Appeal waivers garner much criticism.[65] Opponents point to the unequal bargaining position between the United States government and the typical criminal defendant.[66] Criminal defendants not only lack the vast informational advantage of the government, but most criminal defendants belong to society's most vulnerable classes.[67] In fact, over 52 percent of federal criminal defendants in 2011 did not receive their high school diploma and 45 percent were non-US citizens.[68] Thus, appeal waiver opponents suggest that our system of pleas then "looks more like a system of railroading."[69] In addition to general fairness concerns, appeal waivers pose unique challenges for attorneys and their obligation to clients in post-waiver cases.

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61. *Id.*

62. *See* United States v. Rutan, 956 F.2d 827, 829 (8th Cir. 1992) ("We also note that plea agreements are of value to the accused in order to gain concessions from the government."), *overruled by* United States v. Andis, 333 F.3d 886 (8th Cir. 2003); *see also* United States v. Elliot, 264 F.3d 1171, 1174 (10th Cir. 2011) ("A waiver of appellate rights can be of great value to an accused as a means of gaining concessions by the government.").

63. *See* Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and the Waiver of the Right to Appeal*, 51 B.C.L. REV. 871, 878 (2010). *But see also* Reimelt at n.73:

> Commentators suggest that although the Supreme Court has not ruled on the issue specifically, its approval of prosecutorial solicitation of waivers of the protections of Rule 11(e)(6) of the FRCP and Rule 410 of the Federal Rules of Evidence suggest that the Court would approve the practice of conditioning pleas on appellate waivers if the issue came before it.

64. *See* Campbell & Castanias, *supra* note 48, at 34.

65. *See* King & O'Neill, *supra* note 14, at 211.

66. *See Review Me*, *supra* note 12 (describing the plea bargaining process as "coercion").

67. *See infra*, note 68.

68. *See* UNITED STATES SENTENCING COMMISSION 2011, Sourcebook of Federal Sentencing Statistics, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/sbtoc11.htm.

69. *See Review Me*, *supra* note 12.

II. Circuit Split Regarding Appellate Waivers

A. Must Defense Counsel File a Notice of Appeal in a Post-Waiver Situation?

Appeal waivers have caused a significant split among the federal circuit courts, with criminal defendants' Sixth Amendment right caught up in the fray.[70] The issue posed is this: If a criminal defendant signs a waiver but nevertheless asks his attorney to file an appeal, must the attorney do so? If the attorney fails to do so, has the attorney rendered ineffective assistance of counsel?

The Sixth Amendment ensures the right to effective assistance of counsel and the Supreme Court consistently maintains that the right to assistance of counsel means the right to *effective* assistance of counsel.[71] In order to constitute ineffective assistance, the attorney's conduct must be objectively unreasonable, and the attorney's conduct must have caused cognizable harm to the plaintiff.[72] Furthermore, it is established that a lawyer who disregards a defendant's specific instruction to file a notice of appeal acts in a professionally unreasonable manner.[73] However, post-waiver situations have called this well-settled doctrine into question.

B. Flores-Ortega Presumption: Defense Counsel Must File a Notice of Appeal in a Post-Waiver Situation

Eight circuits maintain that an attorney renders ineffective assistance by not filing a requested appeal in a post-waiver situation.[74] The Court of

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70. *See generally infra* Part II.B–II.C.

71. *See* McMann v. Richardson, 397 U.S. 759, 771 (1970) (holding that a competently counseled defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus).

72. *See* Strickland v. Washington, 466 U.S. 668 (1984) (setting forth the framework for judging an ineffective assistance of counsel claim).

73. *See* Rodriguez v. United States, 395 U.S. 327 (1969) (holding a rule invalid since it makes an indigent defendant (who must prepare his petition under § 2255 without assistance of counsel) face "the danger of conviction because he does not know how to establish his innocence").

74. *See* United States v. Garrett, 402 F.3d 1262 (10th Cir. 2005); United States v. Sandoval-Lopez, 409 F.3d 1193, 1195-99 (9th Cir. 2005); Gomez-Diaz v. United States, 433 F.3d 788, 791-94 (11th Cir. 2005); Campusano v. United States, 442 F.3d 770 (2d Cir. 2006); United States v. Poindexter, 492 F.3d 263 (4th Cir. 2007); United States v. Tapp, 491 F.3d 236 (5th Cir. 2007); Watson v. United States, 493 F.3d 960 (8th Cir. 2007); Campbell

Appeals for the Second Circuit addressed the issue in *Campusano v. United States*.[75] Jose Campusano was charged with one count of distributing and possessing with intent to distribute 27 grams of cocaine.[76] On November 7, 2001, Campusano entered a plea of guilty.[77] At the plea hearing, the following exchange occurred:

> THE COURT: Have you discussed with your attorney how the sentencing guidelines might apply to your case?
>
> THE DEFENDANT: I'm not to [sic] certain about that, but - -
>
> THE COURT: Have you discussed the sentencing guidelines with your attorney?
>
> THE DEFENDANT: I've spoken about that but I didn't understand it that clearly.[78]

Due to Campusano's demonstrated lack of understanding, the lower court adjourned to encourage Campusano's attorney to discuss the Sentencing Guidelines with his client.[79] The lower court reconvened later that day and Campusano entered his plea.[80] As part of the plea agreement, Campusano waived his right to directly appeal or collaterally attack the sentence he would later receive.[81]

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v. United States, 686 F.3d 353 (6th Cir. 2012).

75. *See* Campusano v. United States, 442 F.3d 770, 772 (2d Cir. 2006) (holding that the *per se* rule that an attorney who fails to file a requested appeal constitutes prejudice applies in a post-waiver situation).

76. *Id.*

77. Brief and Appendix for the Petitioner-Appellant at 4, Campusano v. United States, 442 F.3d 770 (2d Cir. 2006) (No. 04-5134-pr), 2005 WL 5012245.

78. *Id.* at 4.

79. *Id*.

80. *Id.* at 4–6.

81. *See* Campusano v. United States, 442 F.3d 770, 772 (2d Cir. 2006). The court stated:

> The relevant language reads as follows: 'It is further agreed (i) that the defendant will neither appeal, nor otherwise litigate under Title 28, United States Code, Section 3355, any sentence within or below the stipulated Guidelines range set forth above (108 to 135 months) . . . . Furthermore, it is agreed that any appeal as to the defendant's sentence that is not foreclosed by this provision will be limited to that portion of the sentencing calculation that is inconsistent with (or not addressed by) the above stipulation.

Campusano's sentencing hearing occurred months later on March 26, 2002 and lasted several days.[82] At the hearing, the lower court wrestled with the issue of whether or not to apply a firearm enhancement to Campusano's sentence.[83] If a firearm enhancement applied, then Campusano would receive a greater sentence.[84] A firearm enhancement would also render Campusano ineligible for the safety valve exemption, which would allow him to receive a downward departure of his sentence.[85] The relevant rule stated: "[A]djustment should be applied if the weapon was present unless it is clearly improbable that the weapon was connected with the offense."[86] The police did seize a gun from Campusano when he was arrested.[87] However, Campusano was not arrested until *several months after* the commission of the offense.[88] Further, police only seized the firearm in a search of Campusano's home incident to his arrest.[89] Thus, the firearm was not present at the time of the crime and firearm enhancement was not applicable.[90]

However, Campusano's attorney failed to emphasize this critical point.[91] Campusano's attorney skipped over the presence prong, instead arguing the weapon was improbably related with the offense.[92] Campusano's attorney emphasized witness testimony that Campusano only possessed the firearm because he took the gun from a neighbor who had threatened to use the weapon to kill his wife.[93] However, the "improbably related" test was a more difficult hurdle to overcome than the objective "presence" requirement. The lower court rejected Campusano's arguments,

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82. *See* Brief and Appendix for the Petitioner-Appellant at 3, Campusano v. United States, 442 F.3d 770 (2d Cir. 2006) (No. 04-5134-pr), 2005 WL 5012245 (stating that sentencing proceedings occurred on March 26, April 18, and May 21, 2002).

83. *See id.* at 7 (quoting the lower court as stating that it was "deeply troubled" by the question of whether to apply the enhancement).

84. *See id.* at 11.

85. *Id.*

86. *Id.* at 6.

87. *Id.* at 1–2.

88. *Id.* at 1.

89. *Id.* at 1–2.

90. *Id.* at 8–9.

91. *See id.* at 6–7 (stating that Campusano's attorney "inexplicably failed to argue" that the gun was recovered months after the date of the charged crime).

92. *See id.* (arguing the weapon was improbably related with the offense).

93. *Id.* at 7.

finding that Campusano's firearm could be related to his drug activity.[94] Campusano received a two-point firearm enhancement, and was subsequently denied safety valve eligibility.[95] Campusano twice asked his attorney to appeal the decision, but his attorney failed to do so.[96]

Consequently, Campusano filed a § 2255 collateral attack, alleging,

> (1) [C]ounsel's failure to advance a reasonable argument for the Petitioner's ineligibility for exposure to a two-level firearm enhancement and counsel's related failure to advise the Petitioner concerning this enhancement; (2) counsel's failure to advise the Petitioner that the application of the two-level firearm enhancement rendered him ineligible for a two-level "safety valve" reduction; (3) counsel's failure to present a reasonable argument for a downward departure; and, (4) counsel's failure, in light of the district court's denial of the safety-valve reduction and its application of the firearm enhancement, to follow the Petitioner's instructions to file a notice of appeal on his behalf.[97]

After the district court dismissed Campusano's ineffective assistance of counsel motion brought pursuant to § 2255, the Court of Appeals for the Second Circuit reviewed the case.[98] The Second Circuit, in an opinion written by then-circuit judge Sonia Sotomayor, held that Campusano's attorney rendered ineffective assistance of counsel for failing to file the requested appeal.[99] In so deciding, the court relied on the case of *Roe v. Flores-Ortega*.[100] The Supreme Court decided in *Flores-Ortega* that: (1) A lawyer who disregards a defendant's specific instructions to file a notice of appeal acts in a manner that is professionally unreasonable; (2) Where counsel's error leads to forfeiture of appeal prejudice is presumed; (3) When counsel fails to file a requested appeal, a defendant is entitled to a

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94. *Id.* at 10.

95. *Id.* at 11.

96. *See* Campusano v. United States, 442 F.3d 770, 772 (2d Cir. 2006)

97. Brief and Appendix for the Petitioner-Appellant at 11, Campusano v. United States, 442 F.3d 770 (2d Cir. 2006) (No. 04-5134-pr), 2005 WL 5012245.

98. *Campusano*, 442 F.3d at 775.

99. *See id.* ("[W]e now hold . . . that where counsel does not file a requested notice of appeal and fails to file an adequate *Anders* brief, courts may not dismiss the hypothetical appeal as frivolous on collateral review.").

100. *See* Roe v. Flores-Ortega, 528 U.S. 470, 483 (2000) (finding that counsel's failure to timely file notice of appeal deprived defendant of appellate proceedings altogether, and was presumptively prejudicial).

new appeal without showing that his appeal would likely have merit.[101] Although *Flores-Ortega* did not specifically address a post-waiver case, the Second Circuit took "very seriously the need to make sure that defendants are not unfairly deprived of the opportunity to appeal."[102] Explaining that "constitutional protections are endangered" if counsel fails to pursue an appeal, the court held that "where counsel does not file a requested notice of appeal and fails to file an adequate *Anders*[103] brief, courts may not dismiss the hypothetical appeal as frivolous on collateral review."[104] Seven other circuits also employ the Second Circuit's reasoning, maintaining that *Flores-Ortega* is a per se rule and the presence of an appeal waiver does not vitiate counsel's appeal obligations.[105]

C. Third and Seventh Circuit Conclude § 2255 Waiver Bars Appeal

The Third and Seventh Circuit hold a divergent view from the majority of courts. In 2008, the Third Circuit first addressed the issue in the case of *United States v. Mabry*.[106] James Mabry was charged with possession with intent to distribute cocaine and crack, possession of a firearm during a drug trafficking crime, and felon in possession of firearm.[107] Mabry pleaded guilty to the charge of possession with intent to distribute in exchange for the government dismissing the remaining charges.[108] In his guilty plea, Mabry agreed to a very broad appeal waiver, barring both a direct appeal

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101. *Id.* at 470, 471.

102. Campusano v. United States, 442 F.3d 770, 775 (2d Cir. 2006).

103. Anders v. California, 386 U.S. 738, 744 (1967) (stating that appointed counsel must, upon determining a case to be wholly frivolous and requesting permission to withdraw, file a brief referencing anything in the record that might arguably support the appeal).

104. *Campusano*, 442 F.3d at 775.

105. *See* United States v. Poindexter, 492 F.3d 263, 273 (4th Cir. 2007); United States v. Tapp, 491 F.3d 263, 266 (5th Cir. 2007); Campbell v. United States, 686 F.3d 353, 358 (6th Cir. 2012); Watson v. United States, 493 F.3d 960, 964 (8th Cir. 2007); United States v. Sandoval-Lopez, 409 F.3d 1193, 1195-99 (9th Cir. 2005); United States v. Garrett, 402 F.3d 1262, 1266-67 (10th Cir. 2005); Gomez-Diaz v. United States, 433 F.3d 788, 791-94 (11th Cir. 2005).

106. *See* United States v. Mabry, 536 F.3d 231, 242 (3d Cir. 2008) (enforcing defendant's collateral attack waiver and refusing to consider whether defendant's attorney rendered ineffective assistance of counsel).

107. *Id.* at 233.

108. *Id.*

and a collateral attack.[109] However, Mabry raised serious objections to issues at his sentencing hearing, and he asked his attorney to file a § 3742 direct appeal to challenge the correctness of the calculation of his sentence under the Sentencing Guidelines.[110] Despite the express instruction to do so, Mabry's attorney did not perform the "ministerial task"[111] of filing the notice of appeal.[112] Mabry was therefore barred from directly appealing his sentence.[113] Consequently, Mabry filed a § 2255 pro se collateral attack, arguing his attorney's failure to file the § 3742 appeal constituted ineffective assistance of counsel.[114]

The Third Circuit Court of Appeals dismissed Mabry's § 2255 petition.[115] Rather than focusing on the *Flores-Ortega* presumption like the *Campusano* court, the *Mabry* court instead hinged the decision on Mabry's § 2255 appeal waiver.[116] The court determined that because Mabry had signed a § 2255 appeal waiver, and the waiver was valid, Mabry's § 2255 appeal must necessarily be dismissed.[117] The *Mabry* court criticized the other circuits for their "flawed reasoning" in relying on *Flores-Ortega* rather than examining the § 2255 waiver itself: "[The *Campusano* court] did not evaluate the validity of the habeas waiver, but instead skipped immediately to the merits of the argument raised in the § 2255 motion, namely whether trial counsel was ineffective in failing to file a direct

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109. *Id.* at 238.

110. *Id.* at 235 ("Namely, (1) a two-point enhancement for possession of a firearm during and in relation to a drug trafficking crime under U.S.S.G. §2D1.1(b)(1) should not have been applied; (2) a one-point deduction for acceptance of responsibility should have been applied; (3) defendant was improperly designated an armed career criminal under U.S.S.G. §4B1.1; and (4) the criminal history category used by the District Court substantially overrepresented the defendant's criminal history.").

111. *See* Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) ("[F]iling a notice of appeal is a purely ministerial task, and the failure to file reflects inattention to the defendant's wishes.").

112. *See* United States v. Mabry, 536 F.3d 231, 234 (3d Cir. 2008) ("In the motion, he complained of counsel's failure to file an appeal notwithstanding his request that counsel do so).

113. *Id.* at 235.

114. *Id.* at 234.

115. *Id.* at 244.

116. *See id.* at 241 ("In any event, we believe that the other courts of appeals that have considered this issue have applied *Flores-Ortega* to a situation in which it simply does not 'fit.'").

117. *See id.* at 244 (finding that Mabry's waiver was "knowing and voluntary" and that enforcement would not work a miscarriage of justice).

appeal."[118] Thus, the *Mabry* court dismissed the petitioner's claim on procedural grounds, and refused to consider the substantive Sixth Amendment issue. In so deciding, The Third Circuit joined the Seventh Circuit in finding that a failure to file an appeal does not constitute ineffective assistance of counsel.[119] Because 70% of appeal waivers do not exempt ineffective assistance of counsel claims, the Third and Seventh Circuit's mode of analysis poses severe threats to a defendant's appeal rights.[120]

D. Suggested Resolution of the Circuit Split

The circuit split should be resolved in favor of finding that an attorney renders ineffective assistance for failure to file a requested appeal. Two points compel this conclusion. First, the right to effective assistance of counsel should not be waivable, thereby rendering the Third and Seventh Circuits' analysis erroneous. Second, an attorney has the obligation to file the appeal not only because of the *Flores-Ortega* presumption as described by the *Campusano* court, but also because of the attorney's twin roles as advocate and officer of the court. Therefore, a criminal defendant may not waive the enshrined right to effective assistance of counsel and this right encompasses filing a requested appeal in a post-waiver case.

III. The Right to Effective Assistance of Counsel is Not Waivable

A. Section 2255 Ineffective Assistance Waivers

The right to assistance of counsel is enshrined in the Sixth Amendment of the Constitution, which mandates that "the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence."[121] The right is fundamental to American conceptions of justice, and Supreme Court decisions continually reinforce the significance of the right.[122] Despite the

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118. *Id.* at 240.

119. *See* Nunez v. United States, 546 F.3d 450, 456 (7th Cir. 2008) (denying collateral relief based on defendant's collateral attack waiver).

120. King & O'Neill, *supra* note 14, at 246.

121. U.S. CONST. amend. VI.

122. *See* Lafler v. Cooper, 132 S. Ct. 1376 (2012); s*ee also* Missouri v. Frye, 132 S. Ct. 1399 (2012).

right's esteemed placement in our spectrum of liberties, the protection has been rendered vulnerable by the widespread use of collateral attack waivers. Approximately one-third of all criminal defendants who enter into plea-bargain agreements waive their right to effective assistance of counsel.[123]

B. Ineffective Assistance Waivers Present Ethical Problems for Defense Counsel

Supreme Court precedent mandates that a criminal defendant is entitled to effective assistance of counsel, and this right ensures conflict-free representation.[124] In addition to case law, the American Bar Association's Model Rules of Professional Conduct describe professional guidelines for attorneys, and the Supreme Court has legitimized these codified standards as "important guides" for determining standards for counsel's performance.[125] The Model Rules illuminate the conflict of interest dilemma that ineffective assistance waivers present to defense counsel.[126]

Ineffective assistance waivers violate Model Rule 1.7, which holds that a lawyer must not represent a client if the representation involves a conflict of interest.[127] A conflict of interest exists if there is a significant risk that the representation of a client will be materially limited by a personal interest of the lawyer."[128] By advising a client to waive the right to bring an ineffective assistance claim, the attorney is limiting his own personal liability and safeguarding his own personal interests. The best interest of the client is lost as a result. The Missouri Ethics Body found that ineffective assistance waivers were unethical, concluding that defense counsel cannot "provide competent and diligent representation to the

123. King & O'Neill, *supra* note 14, 213 ("Three-quarters of the defendants in our sample who waived appeal also waived collateral review; of these, fewer than one-third preserved the right to raise a claim of ineffective assistance of counsel.").

124. *See* Alabama v. Washington, 53 U.S. 654 (2002); *see also* Strickland v. Washington, 466 U.S. 668, 685 (1984) ("[T]he Court has recognized that 'the right to counsel is the right to effective assistance of counsel.") (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970))).

125. Missouri v. Frye, 132 S.Ct. 1399, 1408 (2012).

126. *See* MODEL RULES OF PROF'L CONDUCT (1983) [hereinafter MODEL RULES].

127. *Id.* at R. 1.7 (1983).

128. *Id*. at R. 1.7(a)(2) (1983).

defendant regarding the effectiveness of defense counsel's representation of the defendant."[129]

Ineffective assistance waivers also violate Model Rule 1.8, which mandates that an attorney shall not make an agreement limiting the lawyer's liability to a client for malpractice.[130] A waiver of ineffective assistance of counsel is an express agreement that limits the attorney's liability, because it forecloses the possibility of the defendant raising any objections to his attorney's performance. Thus, an attorney who helps structure a plea deal containing a waiver, and then advises his client to agree to such a waiver, creates an unacceptable conflict of interest. Critics have compared the conflict of interest as "akin to a doctor handing a patient a liability waiver just as the patient is being wheeled into surgery or, more aptly, like advising a client regarding an agreement that would limit the lawyer's prospective malpractice liability."[131]

An ex-ante remedy to this ethical dilemma is for defense attorneys to prevent their clients from waiving this right.[132] State advisory opinions have in fact stated that attorneys are obligated to not allow their client to sign these provisions.[133] The ex-post remedy is for courts to refuse to enforce ineffective assistance waivers. Most state ethics bodies that have considered the issue have decided that collateral waivers are unenforceable on ethical grounds.[134] Federal courts need to follow the example of state courts and determine that an attorney may not ethically advise his client to agree to a plea agreement containing such a waiver. Federal courts should also refuse to enforce a provision that so flagrantly violates the ethical boundaries of the attorney-client relationship.

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129. Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (May 19, 2009).

130. MODEL RULES, *supra* note 162, at R. 1.8(h)(1) (1983).

131. Allan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, 25 CRIMINAL JUSTICE 1 (2010) (discussing appeal waivers and the ethical constraints placed on defense attorneys and prosecutors in using these waivers).

132. *See id.* ("[D]efense counsel should be assertive in seeking revisions to plea agreements that preserve a client's claims of ineffective assistance of counsel. . . .").

133. *See* Ellis & Bussert, *supra* note 131 ("Importantly, the ethics bodies in five of six jurisdictions, which have considered the question, have issued opinions excluding ineffective assistance of counsel claims from the scope of permissible post-conviction waivers").

134. *See id.*

C. Ineffective Assistance of Counsel Waivers Violate Defendant's Due Process Rights

An ineffective assistance of counsel waiver is not only unethical but also hardly lawful. Criminal defendants have a Sixth Amendment right to effective assistance of counsel at every critical stage of a criminal proceeding.[135] Supreme Court precedent establishes that this right to counsel extends to the sentencing phase.[136] The government violates a criminal defendant's due process right by asking the defendant to waive the fundamental right to effective assistance of counsel.

1. The Supposed Validity of Ineffective Assistance of Counsel Waivers

The circuit courts typically uphold ineffective assistance waivers if the claim does not relate to the decisions leading up the entrance of the plea. The courts first addressed the validity of ineffective assistance of counsel waivers by looking at whether § 2255 waivers were *generally* valid.[137] The Fifth Circuit, in *United States v. Wilkes*,[138] began the analysis by noting that courts had already enforced the validity of knowing and voluntary direct appeal waivers.[139] A collateral waiver could also be entered knowingly and voluntarily.[140] Finding no logical reason for distinguishing between direct appeal waivers and collateral waivers, the Fifth Circuit decided that collateral waivers were valid as well.[141] Other circuits similarly enforce collateral attack waivers.[142] Despite this general determination, the Fifth

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135. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1385 ("The Sixth Amendment requires effective assistance of counsel at critical stages of the criminal proceeding.").

136. *See* Glover v. United States, 531 U.S. 198, 203–04 (2001); *see also* Mempa v. Rhay, 389 U.S. 128, 135 (1967) (indicating the significant influence defense counsel plays during a sentencing hearing).

137. *See* United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994) (dismissing defendant's § 2255 appeal because defendant knowingly and voluntarily waived his right to appeal).

138. *See id.* at 652 (denying defendant's motion to vacate his sentence because he waived his right to post-conviction relief as part of a plea deal).

139. *See id.* at 653 ("[U]nder the United States v. Melancon . . . , a defendant can waive his right to appeal as part of a plea agreement if the waiver is informed and voluntary.").

140. *See id.*

141. *See id.* ([W]e see no principled means of distinguishing such a waiver from the waiver of a right to appeal.").

142. *See* Mason v. United States, 211 F.3d 1065, 1069 (7th Cir. 2000); Watson v. United States, 165 F.3d 486, 488–89 (6th Cir. 1999); United States v. Pruitt, 32 F.3d 431,

Circuit was weary of applying the presumptive validity to ineffective assistance of counsel claims.[143] The Ninth Circuit also expressed doubt that a § 2255 waiver could bar an ineffective assistance claim.[144] The Fifth and Ninth Circuit's reluctance to extend the validity of the § 2255 waiver to ineffective assistance of counsel claims evinces a respect for the importance of the constitutional protection.

Nevertheless, years later the Fifth Circuit joined the Seventh Circuit by expressly holding that a § 2255 waiver *could* bar ineffective assistance of counsel claims.[145] The Seventh Circuit framed the issue by asking whether a plea agreement that "waives the right to file a petition under § 2555 bars a defendant from arguing that he received ineffective assistance of counsel when negotiating the agreement or that the agreement was involuntary."[146] The court concluded that justice necessitates that "the right to mount a collateral attack pursuant to a § 2255 survives [a waiver] only with respect to those discrete claims which relate directly to the negotiation of the waiver."[147] Thus, the Seventh Circuit concluded that a defendant could not waive his right to effective assistance of counsel regarding assistance leading up to the plea. The Tenth Circuit, in *United States v. Cockerham*,[148] adopted the Seventh Circuit's analysis.[149] The Tenth Circuit concluded that the issue is whether the "ineffective assistance tainted the voluntariness of the plea" or "the waiver agreement itself."[150] Post-plea issues, including counsel errors at sentencing, did not go to the "voluntariness of the plea" or "the waiver agreement itself."[151] Accordingly, the Tenth Circuit concluded

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433 (9th Cir. 1994); United States v. Cockerham 237 F.3d. 1179, 1181 (10th Cir. 2001); Latorre v. United States, 193 F.3d 1035, 1037 (8th Cir. 1999).

143. *See* United States v. Wilkes, 20 F.3d 651, 653 (5th Cir. 1994) ("Such a waiver may not always apply to a collateral attack based upon ineffective assistance of counsel.").

144. *See* United States v. Abarca, 985 F.2d 1012, 1014 (9th Cir. 1993) ("[W]e do not hold that [defendant's] waiver categorically forecloses him from bring any section 2255 proceeding, such as a claim of ineffective assistance of counsel.").

145. *See* United States v. White, 307 F.3d 336, 343 (5th Cir. 2002) (suggesting that there are some ineffective assistance of counsel claims that should not be immune from waiver).

146. Jones v. United States, 167 F.3d 1142, 1144–45 (7th Cir. 1999).

147. *Id.* at 1145.

148. *See* United States v. Cockerham, 237 F.3d 1179, 1184 (10th Cir. 2001).

149. *Id.*

150. *Id.* (quoting United States v. Vasquez, 194 F.3d 1321 (10th Cir. 1999)).

151. *Id.* at 1184.

that a defendant could validly waive his right to effective assistance of counsel.[152]

2. Ineffective Assistance Waivers Violate Due Process

The Tenth Circuit's analysis creates dangerous implications for criminal defendants. A criminal defendant is owed the right to effective assistance of counsel at all "critical stages" of the criminal process.[153] Maintaining that a defendant has this unfettered right in pre-plea proceedings but not post-plea proceedings is an arbitrary distinction that violates due process.

a. Ineffective Assistance Waivers are Fundamentally Uninformed

Ineffective assistance waivers violate a defendant's due process rights because a defendant cannot knowingly waive his right to effective assistance of counsel. In general, appeal waivers are considered "knowing" if the criminal defendant knows that he is waiving a right to appeal.[154] The federal courts maintain that the defendant does not necessarily have to know what claims he is waiving the right to appeal.[155] The Ninth Circuit summarized this distinction, saying, "Whatever appellate issues might have been available to [defendant] were speculative compared to the certainty derived from the negotiated plea with a set sentence parameter. He knew he was giving up possible appeals, even if he did not know exactly what the nature of those appeals might be."[156]

Ineffective assistance waivers are fundamentally different from direct appeal waivers and should not be deemed "knowing" in the same sense as direct appeal waivers. Section 2255 waivers often contain broad language and do not explicitly state that the defendant is giving up his right to effective assistance of counsel.[157] If a defendant agrees in a plea colloquy

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152. *Id.* at 1187.

153. *See generally* Lafler v. Cooper, 132 S.Ct. 1376, 1385 (2012).

154. Reimelt, *supra* note 63, at 880.

155. *See id.* ("The U.S. Supreme Court holds that defendants may knowingly and voluntarily waive even uncertain rights.").

156. United States v. Navarro-Botello, 913 F.2d 318, 320 (9th Cir. 1990).

157. *See* Nunez v. United States, 546 F.3d 450, 453 (7th Cir. 2008) (explaining that when asked, Nunez stated that he understood that the waiver covered every issue other than the voluntariness of the plea).

not to bring "any motions pursuant to a § 2255 appeal," the defendant does not necessarily know that his Sixth Amendment right is implicated. For example, in *Nunez v. United States*,[158] the Seventh Circuit found that defendant Nunez waived his right to bring an ineffective assistance claim because his plea agreement contained a broad collateral attack waiver.[159] The Supreme Court remanded the case based on Seventh Circuit's broad interpretation of the waiver and asked if the § 2255 waiver necessarily comprehended an ineffective assistance waiver.[160] On remand, the Seventh Circuit maintained that the broad collateral waiver encompassed an ineffective assistance waiver.[161] As a consequence, the Seventh Circuit dismissed Nunez's claim that his attorney's failure to file his requested appeal constituted ineffective assistance of counsel.[162]

Further, a criminal defendant assumes that the plea process will proceed within constitutional limitations.[163] The Fourth Circuit summarizes this point, maintaining,

> Nor do we think such a defendant can fairly be said to have waived his right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel, for a defendant's agreement to waive appellate review of his sentence is implicitly conditioned on the assumption that the proceedings following entry of the plea will be conducted in accordance with constitutional limitations.[164]

Therefore, a criminal defendant cannot knowingly waive his right to effective assistance of counsel because: (1) Section 2255 waivers are often written in broad and ambiguous language that do not mention effective assistance of counsel; and (2) A criminal defendant will assume the plea proceedings will proceed within constitutional limitations.

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158. Nunez v. United States, 495 F.3d 544 (7th Cir. 2007), *vacated*, 544 U.S. 911 (2008).

159. *Id.*

160. *See* United States v. Mabry, 536 F.3d 231, n.15 (3d Cir. 2008).

161. *See Nunez*, 546 F.3d at 453 ("Because the plea was voluntary, the waiver of appeal must be in force. And that waiver knocks out Nunez's argument that his lawyer failed to follow his direction to file an appeal.").

162. *Id.*

163. *See* United States v. Attar, 38 F.3d 727, 732 (4th Cir. 1994) (holding that waiver-of-appeal provision in the plea agreement does not bar an appeal).

164. *Id.*

b. Ineffective Assistance Waivers are Involuntary

Ineffective assistance waivers also violate due process because a criminal defendant cannot voluntarily relinquish his right to effective assistance of counsel. The majority of circuits maintain a rather narrow interpretation of voluntary, holding that it means that the defendant cannot be *coerced* into agreeing to an appellate waiver provision.[165] The defendant must not have been under threat or coercion, the defendant must not have been fed false promises, and the defendant must be mentally competent and not under the influence of drugs to the extent his judgment was impaired.[166]

However, ineffective assistance waivers implicate constitutional considerations and demand a different analysis. The example of Michael Powell provides an illustration of the unacceptable unfairness of the waivers.[167] In 1999, Powell, an indigent defendant in extremely poor health, pled guilty to selling drugs and waived the right to directly appeal or collaterally attack his sentence.[168] Powell was diagnosed with kidney disease at the age of 18, underwent dialysis three times a week, and needed a kidney transplant.[169] Such a severe medical condition qualified Powell for a downward departure of his sentence.[170] However, Powell's defense counsel failed to move for a downward departure that is explicitly reserved for this type of situation.[171] If Powell's attorney had competently argued for the downward departure, Powell could have received the mandatory minimum of six months.[172] Instead, Powell was sentenced to 136 months imprisonment.[173] Thus, defense counsel's lack of adequate representation at sentencing resulted in Powell serving *six years longer* than he would have under the downward departure.[174] Moreover, Powell was powerless to

165. G. NICHOLAS HERMAN, PLEA BARGAINING (3d ed. 2012).

166. *See id.* at 11–13.

167. *See* Brief for Appellant Michael Powell at 4, United States v. Powell, 251 F.3d 155 (3d Cir. 2000) (No. 99-3962) 2000 WL 34024438 (explaining that defendant pled guilty to "conspiracy to distribute and possess with intent to distribute cocaine").

168. *Id.* at 3.

169. *Id.* at 34.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.*

challenge his attorney's ineffective assistance because he signed a collateral waiver.[175]

Michael Powell's guilty plea did not strip him of his right to competent counsel. Rather, much of defense counsel's most important work for his client occurs at the sentencing hearing. In a system where barely 3 percent of defendants plead "not guilty," the guilt/innocence phase of the plea bargain process is often trivial.[176] What really matters to the client is not the entrance of guilty or not guilty, but how much time he will have to serve. As the American Bar Association concludes:

> It is unfortunately too often the case that the defense attorney considers his job completed once he has assisted the defendant through the guilt phase of the proceedings and perhaps jock-eyed for the most lenient sentencing judge…. Many lawyers view their functions at sentencing to involve superficial incantations of mercy; others merely to seek the lightest possible sentence without much concern for the real needs of the defendant. . . . [However], for many convicted defendants the sentence will be the most important and the only really difficult issue in the case.[177]

It is not in the defendant's self-interest to give a free pass to his attorney to render ineffective assistance of counsel at his sentencing hearing. Accordingly, such a waiver is inherently involuntary, and inclusion of the waiver violates a defendant's due process rights. Therefore, ineffective assistance waivers are invalid because such provisions violate a defendant's due process rights and contravene legal ethics.

IV. Attorney's Failure to File Appeal Constitutes Ineffective Assistance

The right to effective assistance of counsel is not a waivable right, and this right encompasses an attorney filing a requested appeal in a post-waiver case. Three reasons compel this conclusion. First, as already described, the Supreme Court case of *Roe v. Flores-Ortega*[178] requires an

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175. *See* United States v. Powell, 251 F.3d 155 (Table) (3d Cir. 2000) (affirming the judgment of the trial court).

176. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS Table 9 (2009), *available at* http://www.bjs.gov/content/pub/pdf/fjs09.pdf.

177. *See* ABA STANDARDS RELATING TO SENTENCING ALTERNATIVES AND PROCEDURES, 241–248 (1968) [hereinafter ABA STANDARDS].

178. Roe v. Flores-Ortega, 528 U.S. 470 (2000) (holding that Strickland v. Washington,

attorney to file for an appeal upon the express instruction to do so.[179] Second, the attorney's role as advocate necessitates that he safeguards the rights of his client.[180] Third, the attorney's role as officer of the court appeals means that he helps protect the integrity of the criminal justice system.[181]

A. Attorney's Role as Client's Advocate

An attorney's role as advocate compels that he files an appeal in a post-waiver situation. As an advocate, attorneys are endowed with the responsibility of zealously protecting the rights of their client, and the right to appeal is one such right.[182] It is true that a criminal defendant who has signed an appeal waiver faces a small chance of appellate success.[183] However, attorneys who do not file a requested appeal foreclose the possibility of vindicating *any* wrongs done to their client.[184] Further, courts have not only carved out exceptions to enforcing appeal waivers, but the jurisprudential landscape is also continuing to evolve.[185] Consequently,

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466 U.S. 668 (1984), provides the proper framework for evaluating a claim that counsel was constitutionally ineffective for failing to file a notice of appeal).

179. *Id.*

180. *See* MODEL RULES, *supra* note 162, at pmbl. ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.")

181. *See id*. at R. 3.3 cmt. 2 ("This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the interest of the adjudicatory process.").

182. *See* MODEL RULES, *supra* note 126.

183. *See* Reimelt, *supra* note 63, at 879 (noting that the majority of courts uphold the validity of appeal waivers).

184. *See* Campusano v. United States, 442 F.3d 770, 772–73 ("Although applying the *Flores-Ortega* presumption to waiver cases would bestow on most defendants nothing more than the opportunity to lose the second circuit would not cut corners where Sixth Amendment rights are at stake."); *see also* Campbell v. United States, 686 F.3d 353, 358 (6th Cir. 2012):

> We made clear that the failure to perfect a direct appeal, in derogation of a defendant's actual request, is a per se violation of the sixth amendment. Consistent with *Flores-Ortega*, we also indicated that such a violation occurs without regard to the probability of success on appeal because such a failure on the attorney's part deprives the defendant of any counsel whatsoever, for purpose of the *Strickland* analysis, prejudice must be presumed.

See also Campbell 686 F.3d at 358 ("Even where an appeal appears frivolous, an attorney's obligations to his or her client do not end at the moment the guilty plea is entered.").

185. *See infra* Part IV(A)(2).

attorneys would be remiss to fail to file a notice of appeal because they could be surrendering a client's meritorious claim.

1. Exceptions to Enforcement of Appellate Waivers

Appellate waivers are not enforced in certain circumstances.[186] Such circumstances include: the sentence imposed is in excess of the statutory maximum,[187] the plea proceedings violated defendant's Sixth Amendment right to counsel,[188] the waiver was involuntary,[189] the sentence was influenced by a constitutionally impermissible factor like race[190] or naturalized status,[191] or the sentence imposed diverges from the sentence agreed to in the plea agreement.[192] Ineffective assistance of counsel waivers, as previously discussed, will also not be enforced if the ineffective assistance pertained to the plea negotiations.[193]

In addition to these outlined exceptions, the Second, Fourth, and Seventh Circuits have also added a catch-all qualifier, the so-called "whim qualifier." The Fourth Circuit explained, "[a] defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court."[194] Further, the First Circuit, Third Circuit, and Tenth Circuit also prescribe to the idea that an appellate waiver will not be enforced if doing so would result in a "miscarriage of justice."[195] The Tenth Circuit attempted to explain this vague phrase, noting that it includes situations: "(1) where the district court relied on an impermissible factor such as race, (2) where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, (3) where the sentence exceeds the statutory maximum, or (4) where the waiver is

186. *See supra* notes 140–145.

187. United States v. Attar, 38 F.3d 727, 729–32 (4th Cir. 1994).

188. *Id.*

189. United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995).

190. United States v. Hicks, 129 F.3d 376, 377 (7th Cir. 1997).

191. United States v. Jacobson, 15 F.3d 19, 22 (2d Cir. 1994).

192. United States v. Navarro-Botello, 912 F.2d 318, 326 (9th Cir. 1990).

193. *See supra* Part III.C(1).

194. United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992) (holding, however, that the defendant's knowing and voluntary waiver of his right to appeal his sentence as part of his plea agreement precluded him from challenging his sentence that departed upward twelve months from guidelines).

195. *See* United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001); *see also* United States v. Teeter, 257 F.3d 14, 24–25 (1st Cir. 2001).

otherwise unlawful."[196] However, the fourth prong itself of "otherwise unlawful" is vague. A competent advocate could very well argue that his client's waiver constitutes a miscarriage of justice, or that a sentence was so outrageous that it should fall under the "whim" exception.

2. Evolution of "Knowing and Voluntary" Conceptions

Importantly, several judges have "broken ranks" from the normal conception of the "knowing and voluntary" test, and argued that giving up one's right to appeal can never be knowing and voluntary.[197] For example, in *United States v. Raynor*, District Judge Friedman articulated that:

> [A] defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such a waiver is by definition uninformed and unintelligent and cannot be voluntary and knowing. Until the sentence is imposed, the defendant cannot possibly know what it is he or she is waiving. A plea that requires such a waiver of unknown rights cannot comport with Rule 11 or the Constitution.[198]

The court went on to explain the uninformed nature of appellate waivers:

> [W]hen a defendant gives up the right to a trial in favor of a plea, he or she knows that there will no longer be twelve jurors sitting in judgment, that there will no longer be live testimony and the right to confront witnesses, and that there will be no speedy and public trial . . . . When a defendant waives the right to appeal a sentence, however, he or she is freed 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. [Such errors could include the court] mak[ing] incorrect, unsupportable factual findings with respect to the amount of drugs involved, the nature of the relevant conduct to be considered or

196. United States v. Bell, 437 Fed. Appx. 658, 663 (10th Cir. 2011).

197. Campbell & Castanias, *supra* note 48, at 34 ("Three recent district court decisions—two from the United States District Court for the District of Columbia and one from the United States District Court for the District of Massachusetts—have broken rank with this body of precedent, presenting an opportunity for renewed challenges to sentencing-appeal waivers.").

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

> whether . . . [the] defendant[] was involved in more than minimal planning with respect to the narcotics conspiracy to which they pled.[199]

In *United States v. Melancon*, District Judge Parker made a persuasive case for an appellate waiver never being knowing, saying, "What is really being waived is not some abstract right to appeal, but the right to correct an erroneous application of the Guidelines or an otherwise illegal sentence."[200] Judge Parker continued, "This right cannot come into existence until after the judge pronounces sentence; it is only then that the defendant knows what errors the district court has made . . . ."[201]

Recent Supreme Court decisions give further weight to the criticism of the knowing and voluntary test. In *United States v. Booker,*[202] the Court held that the Sentencing Guidelines were not mandatory, but discretionary.[203] Now a defendant signing a sentencing-appeal waiver does not even know that the judge must sentence him within certain defined parameters. Furthermore, the cases of *Frye* and *Cooper* demonstrate that the Court is concerned that plea bargain defendants receive a fair sentence.[204] In light of *Frye* and *Cooper*, at least one district court judge has rejected a plea bargain because it contained an appellate waiver.[205]

As more criticism is launched at courts and as more judges break ranks, the "knowing and voluntary" test evolves. This evolution paves the way for dedicated attorneys to create pathways to the non-enforcement of appellate waivers. Defense counsel owes a duty to their clients to file requested appeals on the chance that the appeal is meritorious.

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199. *Id.* at 44.

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

201. *Id.* (emphasis omitted).

202. United States v. Booker, 543 U.S. 220, 249–50 (2005) (holding that the federal sentencing guidelines were subject to the Sixth Amendment jury trial requirement).

203. *Id.* at 259 (excising the provision of the Federal Sentencing Act that made the federal sentencing guidelines mandatory).

204. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (finding that defense counsel has the "duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused"); *see also* Lafler v. Cooper, 132 S. Ct. 1376, 1391 (2012) (holding that the correct remedy for counsel's ineffective assistance in advising defendant to reject a plea offer was to order the State to reoffer the plea agreement).

205. *See* United States v. Vanderwerff, 2012 WL 2514933 at 6 (D. Colo. 2012) (stating that although favorable sentencing consequences might have induced Vanderwerff's acceptance of the plea bargain, they did not justify inclusion of an appellate waiver).

B. Attorney's Role as Officer of the Court

In addition to being advocates, attorneys are officers of the court.[206] As officers of the court, attorneys must work within their proper role as defense counsel and not usurp the role of the judge. Further, attorneys must help promote the integrity of the justice system by working to ensure criminal defendants receive fair and just sentences.

1. Proper Division of Power in the Courtroom

The judicial system relies on a proper division of power between prosecutor, defense attorney, and judge. Appellate court judges exercise the unique right to decide whether or not an appeal has merit.[207] An attorney does not have the right to determine if an appeal should be granted. Accordingly, even when an attorney believes his client's appeal would be frivolous, he may not ignore the client's direction.[208] Rather, the attorney must file an *Anders* brief with both the court and the client, requesting to withdraw but referring to "anything in the record that might arguably support the appeal."[209]

In *United States v. Gomez-Perez*,[210] the Second Circuit extended the *Anders* brief logic to the post-waiver situation.[211] In *Gomez-Perez*, the defendant filed a pro se appeal despite the presence of an appellate

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206. Powell v. Alabama, 53 S. Ct. 55, 73 (1932); *see also Ex parte* Garland, 71 U.S. 333, 378 (1866).

> Attorneys and counselors are not officers of the United States; they are not elected or appointed in the manner prescribed by the Constitution for the election and appointment of such officers. They are officers of the court, admitted as such by its order, upon evidence of their possessing sufficient legal learning and fair private character.

207. *See Vanderwerff*, 2012 WL 2514933 at 5 ("The responsibility of appellate review is to decide how well the sentencing judge has established the sentence within this described discipline.").

208. *See* Anders v. California, 386 U.S. 738, 744 (1967) (stating that the court, not counsel, must decide whether a case is wholly frivolous).

209. *Id.*

210. *See* United States v. Gomez-Perez, 215 F.3d 315, 319 (2d Cir. 2000) (holding that an *Anders* brief is required in situations where the defendant has executed a waiver of appeal and then filed his own pro se notice of appeal).

211. *See id.* (finding that an *Anders* brief requirement was necessary to ensure that constitutional rights were not "trampled" by increasing use of appeal waivers in plea agreements).

waiver.[212] The Second Circuit determined that the *Anders* brief is still required in the post-waiver situation.[213] Further, the *Anders* brief in a post-waiver situation must specifically address: "(1) whether the plea and waiver were knowing, voluntary, and competent; (2) whether it would be against the defendant's interest to contest his or her plea; and (3) any issues implicating rights that cannot be, or arguably were not, waived."[214] By insisting on an *Anders* brief even in a post-waiver situation, *Gomez-Perez* affirms that the appellate court is the ultimate decider of the merits of a criminal defendant's claim.

The Second Circuit extended the *Gomez* reasoning in the *Campusano* case.[215] If the attorney is asked to file an appeal that the attorney believes to be frivolous due to an appellate waiver, the attorney must nevertheless file the appeal in conjunction with an *Anders* brief.[216] The attorney's role is that of the advocate, and the judge's role is that of deciding the merits of the case. A proper respect for the division of power in the courtroom demands that an attorney file a notice of appeal in a post-waiver situation.[217]

2. Promoting Sentencing Uniformity in the Criminal Justice System

Attorneys are also obligated to file appeals because appeals are essential in ensuring uniformity and justness in sentencing.[218] In 1984, Congress enacted the Sentencing Reform Act,[219] which established the

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212. *Id.* at 317.

213. *Id.* at 319.

214. Campusano v. United States, 442 F.3d 770, 774 (2d Cir. 2006).

215. *See id.* at 775 (holding that when defense counsel fails to file a requested notice of appeal and an adequate *Anders* brief, courts may not dismiss the appeal as frivolous on collateral review).

216. *See id.* at 771–72 ("[E]ven after a waiver, a lawyer who believes the requested appeal would be frivolous is bound to file the notice of appeal and submit a brief pursuant to [*Anders*].").

217. *See* United States v. Vanderwerff, 2012 WL 2514933 at 4 (D. Colo. 2012) ("The pervasive waiver of individual rights has fundamentally altered the function of the courts. The act of judging, once central to the determination of guilt or innocence, has been shunted to the margins.").

218. *See id.* at 5 ("Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions.").

219. *See* United States Sentencing Commission, *Guidelines Manual*, §1A1.2 (Nov. 2012). The Guidelines explain Congress' goal:

> The Sentencing Reform Act of 1984 (Title II of the Comprehensive

United States Sentencing Commission and set out as its goal to create a uniform system of sentencing in this country.[220] The fact that the Sentencing Guidelines are now advisory and not mandatory does not change the underlying goal that criminal defendants receive fair and just sentences.[221]

Plea-bargaining can frustrate sentencing justness and uniformity because prosecutors wield wide discretionary power in determining what charges to bring and thereby what sentencing levels will be on the table. Unfairness in sentencing can create disastrous consequences, like incentivizing a risk-averse innocent defendant to plead guilty.[222] A criminal defendant may feel compelled to take a plea deal because post-trial sentences, though rarely imposed, are very harsh.[223]

> Crime Control Act of 1984) provides for the development of guidelines that will further the basic purposes of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation. The Act delegates broad authority to the Commission to review and rationalize the federal sentencing process.

220. *See id.* §1A1.3 (Nov. 2012). The Guidelines describe three significant sentencing reforms:

> The Act's basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system. To achieve this end, Congress first sought honesty in sentencing. It sought to avoid the confusion and implicit deception that arose out of the pre-guidelines sentencing system which required the court to impose an indeterminate sentence of imprisonment and empowered the parole commission to determine how much of the sentence an offender actually would serve in prison. This practice usually resulted in a substantial reduction in the effective length of the sentence imposed, with defendants often serving only about one-third of the sentence imposed by the court. Second, Congress sought reasonable uniformity in sentencing by narrowing the wide disparity in sentences imposed for similar criminal offenses committed by similar offenders. Third, Congress sought proportionality in sentencing through a system that imposes appropriately different sentences for criminal conduct of differing severity.

221. *See* United States v. Booker, 543 U.S. 220 (2005).

222. *See* Lafler v. Cooper, 132 S.Ct. 1376, 1397 (2012) (Scalia, J., dissenting) ("[Plea bargaining] presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . . .").

223. *See* Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1138 (2011) ("The expected post-trial sentence is imposed in only a few percent of cases. It is like the sticker price for cars: only an ignorant, ill-advised consumer would view full price as the norm and anything less as a bargain.").

The story of Erma Faye Stewart, a single mother of two in Hearne, Texas, presents a human face to this unsettling reality.[224] Ms. Stewart was arrested as part of a large drug bust based upon an informant's tip to the police.[225] Ms. Stewart was booked in jail and given a public defender.[226] Maintaining her innocence, Ms. Stewart pleaded with her attorney to conduct investigative work to prove her innocence, but her attorney urged her to take the plea deal.[227] Ms. Stewart did not have the money to post bond, and a jury trial would be scheduled months in advance.[228] Worried about her children, Ms. Stewart pled guilty and was sentenced to ten years probation and a $1,000 fine.[229] The other cases in the "drug bust" went to trial,[230] where the informant was flatly disproven and the cases collapsed.[231] All cases were dismissed, except for those defendants who had already taken the plea deal.[232] Unable to find work and saddled with a felony conviction, probation, court fines, and probation fines, Ms. Stewart lost her home, and consequently, lost her children to the foster care system.[233]

Ms. Stewart's case speaks to the grim reality that plea-bargaining involves a game of risks. Defendants are incentivized to take plea deals, even if they maintain their innocence, because of financial desperation or fears of harsh sentences at trial.[234] In fact, the Innocence Project estimates that 25% of all DNA exonerations involve crimes where the defendant pled guilty, made an incriminating statement, or delivered an outright confession.[235]

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224. *See* Michelle Alexander, Op-Ed., *Go To Trial: Crash the Justice System*, N.Y. TIMES, Mar. 10, 2012, at SR5.

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

230. *Frontline: The Plea* (PBS television broadcast June 17, 2004), *available at* http://www.pbs.org/wgbh/pages/frontline/shows/plea/view/.

231. *Id.*

232. *Id.*

233. *Id.*

234. *See* HERMAN, *supra* note 13, at 9 ("[P]leading to a lesser charge, or even as charged, will be attractive if the plea is exchanged for a sentence that is lighter than would otherwise be the case if the defendant was convicted at trial.").

235. False Confessions, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/False-Confessions.php (last visited Mar. 8, 2013).

The only way to ensure that Congress' goal of fairness in sentencing is achieved is through the appellate process. As Judge Kane warned in his *Vanderwerff* decision, "Indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions."[236] Thus, the integrity of the judicial system hinges on appellate review; allowing attorneys to refuse to file appeals undermines goals of justice.

Conclusion

In conclusion, the Supreme Court's recent extension of the right to effective assistance of counsel to the plea-bargaining process suggests a shift in the jurisprudential landscape. Plea-bargaining merits closer scrutiny, and the appellate waiver is one such feature that demands examination. While the appellate waiver has been approved both by the federal circuit courts and in practice, limitations should still be placed on the waiver to ensure defendants are afforded constitutional protections. In particular, appellate waivers should not alter pre-existing obligations between defense attorneys and their clients, like the obligation to file a requested appeal. The Supreme Court should resolve the current circuit split and find that an attorney renders ineffective assistance of counsel by failing to file a requested appeal in a post-waiver situation.

236. United States v. Vanderwerff, 2012 WL 2514933 at 4 (D. Colo. 2012).