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Examining Rule 11(b)(1)(N) Error: Guilty Pleas, Appellate Waiver, and *Dominguez Benitez*

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Examining Rule 11(b)(1)(N) Error: Guilty Pleas, Appellate Waiver, and *Dominguez Benitez*†

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I. Introduction

In our modern justice system, over ninety-five percent of federal criminal cases result in guilty pleas.[1] Guilty pleas are often the product of direct bargaining between the prosecutor and defense counsel about the charges against the defendant and the punishment the prosecution seeks, although a defendant may choose to plead guilty without any commitment from the prosecution.[2] The widespread and commonplace role of guilty pleas[3] in the criminal justice system has far-reaching effects on

1. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."); *Overview of Federal Criminal Cases Fiscal Year 2015*, UNITED STATES SENTENCING COMM'N 4 (June 2016), http://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2016/FY15_Overview_Federal_Criminal_Cases.pdf ("Case Disposition: In fiscal year 2015 the vast majority of offenders (97.1%) pleaded guilty.").

2. *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 1000 (5th ed. 2009) ("[M]ore common is explicit bargaining in which the defendant enters a plea of guilty only after a commitment has been made that concessions will be granted (or at least sought) in his particular case."). There are two main types of plea bargaining that occur during negotiations with a prosecutor. *See* 2 JOSHUA DRESSLER & ALAN C. MICHAELS, UNDERSTANDING CRIMINAL PROCEDURE: ADJUDICATION 192 (4th ed. 2006). First, the defendant may agree to plead guilty to a lesser charge or the prosecutor may agree to drop a charge entirely ("charge bargaining"). *Id.* Second, the defendant may agree to plead guilty in exchange for the prosecutor's recommendation of a sentence agreed upon by the defendant, or the prosecutor may agree not to object to the defendant's requested sentence ("sentence bargaining"). *Id.*

3. This Note uses the terms "guilty plea" and "plea deal" interchangeably to indicate a negotiated plea bargain resulting in a guilty plea.

the rights of defendants, including the constitutional right to a jury trial, the right to counsel, and the privilege against self-incrimination.[4] In particular, appeal waivers prevent a defendant from appealing parts of his conviction, often including his sentence.[5] Because the right to appeal exists in a legal purgatory, lingering somewhere above a purely statutory right but not rising to the level of a constitutionally guaranteed right,[6] appeal waivers draw concerns about lack of procedural fairness and abuse by prosecutors and defense counsel alike.[7]

Federal Rule of Criminal Procedure 11[8] provides the advisements and questions that a judge must include in his determination that the defendant is entering a valid guilty plea.[9] Rule 11(b)(1)(N)[10] requires that the judge determine on the record that the defendant understands he waives his right to future appeals.[11] This Note advocates that Rule 11(b)(1)(N) is unique because it concerns appellate waiver.[12] As such, when a judge deviates from the rule, the standard of review should not be only

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4. *See* discussion *infra* Part II.A (discussing the requirements to protect a defendant's constitutional rights when he enters a guilty plea).

5. *See Trial Judge to Appeals Court: Review Me*, N.Y. TIMES (July 16, 2012), http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?_r=0 (last visited Mar. 2, 2017) ("Congress gave appeals courts the power to review federal sentences to ensure the government applies the law reasonably and consistently. Without an appeals court's policing, the odds go up that prosecutors will do neither.") (on file with the Washington and Lee Law Review).

6. *See* discussion *infra* Part III.A (advocating that appellate rights occupy a role protected by the criminal justice system).

7. *See* discussion *infra* Part V (arguing that some degree of due process is required within an appeal, although there is no due process right to access the appellate process); *see also Trial Judge to Appeals Court: Review Me*, *supra* note 5 ("Waivers are a common but largely hidden element of plea bargains—which, in many federal cases, aren't really bargains because the power of prosecutors is often so much greater than that of the defendants or their lawyers.").

8. FED. R. CRIM. P. 11.

9. *See* discussion *infra* Part II.B (recounting the purpose and standards under Rule 11 to ensure the guilty plea is voluntary and intelligent).

10. FED. R. CRIM. P. 11(b)(1)(N).

11. *See* discussion *infra* Part III.B (examining the effects of appellate waiver on a defendant's ability to appeal constitutional and procedural defects).

12. *See* discussion *infra* Part III.B (analyzing the policy concerns behind widespread use of appellate waiver).

the objective standard articulated in *United States v. Dominguez Benitez*,[13] which concerned a different Rule 11 violation.[14] Instead, appellate courts should add a voluntariness and intelligence inquiry for review of Rule 11(b)(1)(N) errors.[15]

Many federal circuit courts already conduct the additional voluntary and intelligent inquiry when examining Rule 11(b)(1)(N) errors.[16] However, the circuits lack uniformity in articulation and application, such that a split of authority arises between the courts over the method of analysis and standard of review.[17] Without consistency among the circuits, defendants fare differently in challenging the enforceability of their appellate waivers, which are meant to prevent an appellate court from hearing appeals on the merits.[18] Expressly adopting the voluntariness and intelligence inquiry alongside the objective standard from *Dominguez Benitez* ensures that the circuits reviewing plea hearing colloquies for Rule 11(b)(1)(N) errors find the same showing of prejudice.[19]

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13. 542 U.S. 74 (2004).

14. *See* discussion *infra* Part V (arguing that the standard in *Dominguez Benitez* alone is insufficient to review Rule 11(b)(1)(N) errors, but further noting that it may be adequate for review of other Rule 11 errors outside the scope of this Note). In *Dominguez Benitez*, the Court ruled that the defendant had to show that he would not have pleaded guilty had the judge advised the defendant that he could not withdraw his plea if the court did not accept the government's sentencing recommendation. *See* discussion *infra* Part III.D.

15. *See* discussion *infra* Parts IV & V (surveying the various circuits' approaches to the voluntariness and intelligence inquiry and arguing why the additional test should be included).

16. *See* discussion *infra* Parts IV.B–C (examining the approaches of the First, Second, Third, Fourth, Sixth, Seventh, Eighth, and Ninth Circuits, which acknowledge or include a voluntariness and intelligence inquiry in plain error review of Rule 11(b)(1)(N) errors).

17. *See* discussion *infra* Part IV (presenting the muddled approaches of the circuits as falling into three general categories: circuits that apply solely the objective test, circuits that apply the voluntariness and intelligence examination but do not expressly acknowledge it, and circuits that conduct a voluntariness and intelligence examination).

18. *See* discussion *infra* Parts IV & V (analyzing various outcomes under the circuits' inconsistent approaches to appellate waiver).

19. *See* discussion *infra* Part V (advocating the positive effects and policy implications of adopting the voluntariness and intelligence inquiry).

Part II of this Note develops the landscape of the constitutional and procedural requirements for ensuring a defendant's guilty plea is valid.[20] Part III examines appellate waiver and federal case law on appealing guilty pleas and establishes the standards for plain error review of Rule 11 violations in general.[21] Part IV details the various approaches of the federal circuit courts regarding review of Rule 11(b)(1)(N) errors, with a focus on the circuits that add a voluntary and intelligent inquiry to the objective standard of review.[22] In Part V, this Note advocates that adding a voluntary and intelligent inquiry to the objective standard satisfies due process concerns and analyzes the effects of implementing such an inquiry.[23] Part V concludes that adding the voluntariness and intelligence inquiry for plain error review of Rule 11(b)(1)(N) violations ensures that a defendant understands the rights he waives in a guilty plea with an appellate waiver.[24]

II. Receiving the Guilty Plea

A. Voluntary and Intelligent Requirement

The Supreme Court has varied its treatment of guilty pleas over the last century, reflecting the progression of the role the guilty plea plays in the modern justice system. The Court first stated the constitutional requirements for accepting a guilty plea pursuant to a plea deal in *Kercheval v. United States*,[25] in which

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20. *See* discussion *infra* Part II (noting that appellate rights are safeguards meant to protect the defendant's rights and Congress intended Rule 11(b)(1)(N) to be the procedural mechanism for that protection).

21. *See* discussion *infra* Part III (setting up the framework for plain error review).

22. *See* discussion *infra* Part IV (offering the approaches to review).

23. *See* discussion *infra* Part V (elaborating on the due process rights guaranteed in the appellate process, even if the right to appeal is not a due process requirement).

24. *See* discussion *infra* Part V (arguing that the voluntariness and intelligence inquiry ensures consistency in outcomes for defendants across the circuits).

25. 274 U.S. 220 (1927).

the Court established the voluntary and intelligent standard.[26] Forty years later, the Court elaborated on the constitutional requirements for a guilty plea in the landmark case *Boykin v. Alabama*.[27] Under *Boykin*, an appellate court must find reversible error when the record does not reflect that the defendant voluntarily and intelligently entered the guilty plea.[28] The waiver of rights encompassed by a guilty plea cannot be inferred or presumed from a silent record because highly protected constitutional rights are at stake, including the right to trial by jury, the right to confrontation, and the privilege against self-incrimination.[29] A defendant who enters a guilty plea

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26. *See id.* at 223 ("[A] plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences."). Throughout different jurisdictions, courts refer to the "understanding" requirement as "intelligent" or "knowing." *See* Mary K. Wheeler, *Guilty Plea Colloquies: Let the Record Show . . .* , 45 MONT. L. REV. 295, 296 n.5 (1984). By most accounts, the three terms refer to the same constitutional standard. *See id.* ("The concept of understanding has also been expressed through use of the terms 'intelligent' and 'knowing.' Many courts use these terms interchangeably.").

27. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969) ("It was error, plain on the face of the record, for the trial judge to accept petitioner's guilty plea without an affirmative showing that it was intelligent and voluntary."). In *Boykin*, the defendant entered a guilty plea after he was indicted for five counts of robbery in Alabama state court. *Id.* at 239. At the guilty plea hearing, the judge did not engage the defendant in colloquy or question him in open court. *Id.* Although the Alabama Supreme Court affirmed the death sentence imposed by the jury, it raised the issue of the constitutionality of the guilty plea colloquy at the defendant's automatic appeal. *Id.* at 240. Finding that the issue was properly before the Court on appeal, it concluded that the judge's failure to engage in colloquy with the defendant required reversal of the defendant's guilty plea because there was no evidence of voluntariness and intelligence on the record. *Id.* at 242.

28. *See id.* at 244 (affirming the Alabama Supreme Court justices who dissented at the defendant's appeal and agreeing that "there was reversible error because the record [did] not disclose that the defendant voluntarily and understandingly entered his pleas of guilty" (internal quotation marks omitted)); *see also* Boykin v. State, 207 So. 2d 412, 415 (Ala. 1968) (Goodwyn, J., dissenting)

> We do not say that the trial judge may not accept a plea of guilty in a capital case, but if he does so he must see to it, first, that the plea is entirely voluntary and that the defendant fully realizes and is competent to know the consequences of such a plea.

(citations omitted).

29. *See Boykin*, 395 U.S. at 243 ("We cannot presume a waiver of these

inevitably surrenders these constitutional rights.[30] Thus, courts must pay special attention to whether the waiver is voluntary and intelligent.

Although posited together in *Boykin*, the voluntariness and intelligence requirements have individually garnered their own jurisprudence as the Supreme Court narrowed the scope of each concept. In *Brady v. United States*,[31] the Supreme Court articulated the standard for voluntariness of a guilty plea as

> a plea of guilty entered by one fully aware of the direct consequences, including the actual value of any commitments made to him by the court, prosecutor, or his own counsel, must stand unless induced by threats (or promises to discontinue improper harassment), misrepresentation (including unfulfilled or unfulfillable promises), or perhaps by promises that are by their nature improper as having no proper relationship to the prosecutor's business (e.g. bribes).[32]

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three important federal rights from a silent record."). In the opinion, the Court referenced landmark cases that created constitutional protections for defendants under the umbrella of due process, including *Duncan v. Louisiana*, 391 U.S. 145 (1968) (ruling that the Fourteenth Amendment incorporates the right to jury trial for serious offenses to states courts), *Pointer v. Texas*, 380 U.S. 400 (1965) (concluding that the Sixth Amendment applies to states through the Fourteenth Amendment), and *Malloy v. Hogan*, 378 U.S. 1 (1964) (deciding that the Fourteenth Amendment guarantees a defendant the privilege against self-incrimination). *Boykin*, 395 U.S. at 243.

30. *See* LAFAVE ET AL., *supra* note 2, at 1048–49 ("[I]n the wake of *Boykin*, most jurisdictions revised their procedures for taking pleas so that defendants were specifically warned of the constitutional rights lost by entry of a plea other than not guilty.").

31. 397 U.S. 742 (1970).

32. *Id.* at 755 (quoting Shelton v. United States, 246 F.2d 571, 572 (5th Cir. 1957) (en banc), *rev'd on other grounds*, 356 U.S. 26 (1958)) (ruling that fear of the imposition of the death sentence did not make the defendant's guilty plea involuntary). In *Brady*, the defendant pleaded guilty under a kidnapping statute that allowed a jury to recommend the death penalty if he chose to proceed to trial. *Id.* at 743. Previously, in *United States v. Jackson*, 390 U.S. 570 (1968), the Court held that the death penalty portion of the kidnapping statute was unconstitutional because it tended to discourage defendants from exercising their right to a jury trial for fear of the jury imposing the death penalty. *Brady*, 397 U.S. at 746–47. In his petition for relief, Brady argued that every guilty plea entered under the kidnapping statute overturned in *Jackson* should be invalidated. *Id.* at 747. The Court rejected the defendant's arguments entirely and ruled that "a plea of guilty is not invalid merely because entered to avoid the possibility of a death penalty." *Id.* at 755. Referencing similar language as in

As stated in *Brady*, the "relevant circumstances" surrounding a plea are the strongest indicators of whether the defendant entered the guilty plea voluntarily.[33] Notably, the Court held that, even though the defendant's plea "may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful."[34] The defendant was not subject to threats of physical harm or coercion, was appointed competent counsel, and was questioned by the judge before the judge accepted the plea.[35] Combined, these factors satisfied the Court that Brady entered his plea voluntarily.[36] The Court concluded that, although fear of the maximum penalty is a common motivation for a defendant to enter a guilty plea, it does not render a guilty plea involuntary.[37]

Kercheval, the Court described a plea as "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge." *Id.* at 748.

33. *See id.* at 749 ("The voluntariness of Brady's plea can be determined only by considering all of the relevant circumstances surrounding it."). Although plea bargaining occurred under the table in the past, "today the prevailing practice is for the voluntariness inquiry to include a determination of whether a plea agreement has been reached and, if so, what it is." *See* LAFAVE ET AL., *supra* note 2, at 1043 (providing an overview of the voluntariness inquiry the court performs to accept the defendant's guilty plea pursuant to a plea deal).

34. *Brady*, 397 U.S. at 758.

35. *See id.* at 749 (summarizing why the record established the defendant's voluntariness).

36. *See id.* (examining the circumstances surrounding the defendant's decision to enter a guilty plea). The Court further elaborated that the defendant had "full opportunity to assess the advantages and disadvantages of a trial as compared with those attending a plea of guilty" and that "there was no hazard of an impulsive and improvident response to a seeming but unreal advantage." *Id.* at 754. Finally, the trial judge's colloquy in open court was more than satisfactory because the judge was "obviously sensitive to the requirements of the law with respect to guilty pleas." *Id.* at 754–55.

37. *See id.* at 752 ("For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated.").

In *Henderson v. Morgan*,[38] the Supreme Court elaborated on the intelligence requirement[39] and ruled that the defendant must possess "a demonstrable understanding of only those elements deemed 'critical' to a particular offense."[40] Not only was the defendant uninformed of the "critical" element of intent for the second-degree murder charge to which he pleaded, but there were various other circumstantial indications that the defendant did not understand the nature of his guilty plea.[41] Notably, the defendant's prior classification as a "retarded" prepubescent and being only nineteen years old at the time of indictment factored heavily into the Court's evaluation of the defendant's capacity for understanding.[42] The Court further examined the role of capacity to plead guilty in *Godinez v. Moran*,[43] in which it considered whether the same standard for competency applies for standing trial, waiving counsel, and entering a guilty plea.[44] In finding

38. 426 U.S. 637 (1976).

39. *Id.* at 645 ("[T]he plea could not be voluntary in the sense that it constituted an intelligent admission that he committed the offense unless the defendant received real notice of the true nature of the charge against him . . . ." (internal citation and quotation marks omitted)). The defendant in *Henderson* was indicted for first-degree murder and pleaded guilty to second-degree murder. *Id.* at 638. At sentencing, the defendant testified that he "meant no harm to that lady" when he entered her room with a knife and stabbed her. *Id.* at 643. In his petition for habeas corpus relief, the defendant claimed that his guilty plea was not voluntary and intelligent because he did not know "that intent to cause death was an element of the offense." *Id.* at 639. Because the record indicated that the defendant was not informed about all of the "critical" elements of the charge to which he pleaded, the Court found that the guilty plea was not intelligent and was, therefore, unenforceable. *Id.* at 647.

40. *See* Julian A. Cook, *Federal Guilty Pleas Under Rule 11: The Unfulfilled Promise of the Post*-Boykin *Era*, 77 NOTRE DAME L. REV. 597, 602 (2002) (discussing the scope of *Henderson*'s effect on the voluntary and intelligent requirement).

41. *See Henderson*, 426 U.S. at 646 ("There is nothing in this record that can serve as a substitute for either a finding after trial, or a voluntary admission, that respondent had the requisite intent.").

42. *See id.* at 641–42 (noting the importance of the defendant's history of delayed mental development and age at the time of offense).

43. 509 U.S. 389 (1993).

44. *See id.* at 398 ("And while the decision to plead guilty is undeniably a profound one, it is no more complicated than the sum total of decisions that a defendant may be called upon to make during the course of a trial."). Furthermore, states are free to implement "competency standards that are more

that the competency standards were the same, the Court also determined that the intelligence requirement mandates that the defendant have the capacity to enter a guilty plea.[45]

In these landmark cases, the Supreme Court attempted to provide clear protections for the defendants' constitutional rights by requiring guilty pleas to be voluntary and intelligent. But even after elaboration upon these standards, lower courts still struggled to grasp the substance of what it meant for a plea to be voluntary and intelligent.[46] Consequently, Congress implemented procedural safeguards to protect the constitutional and due process rights at stake in a guilty plea.[47]

B. Procedural Requirement: Federal Rule of Criminal Procedure 11

Congress enacted Rule 11 in 1944 to create procedural requirements for a judge to accept a guilty plea in open court.[48] Rule 11 underwent various changes, although few were notable until Congress added the factual basis requirement in 1966.[49] While most guilty pleas involve a waiver of constitutional rights and an actual admission of guilt, "the latter element is not a constitutional requisite to the imposition of criminal penalty."[50]

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elaborate . . . [but] the Due Process Clause does not impose these additional requirements." *Id.* at 402.

45. *See id.* ("[A] trial court must satisfy itself that the waiver of his constitutional rights is knowing and voluntary.").

46. *See* discussion *infra* Part IV (analyzing cases on appeal in which the district courts differed on their determinations of voluntariness and intelligence for the guilty plea).

47. *See* discussion *infra* Part II.B (detailing the procedural requirements under Rule 11 for the court's colloquy at the guilty plea hearing).

48. *See* Cook, *supra* note 40, at 606 (providing the history of Rule 11); *see also id.* at 606–12 (offering a detailed examination of the Advisory Committee notes and amendments over the life of Rule 11).

49. *See id.* at 606 n.52 (discussing the factual basis addition to Rule 11); FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

50. North Carolina v. Alford, 400 U.S. 25, 37 (1970) ("An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime."). In *Alford*, the defendant was

In *North Carolina v. Alford*,[51] the Court cautioned, however, that "the prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve."[52]

After confirming the application of the factual basis rule in *Alford*, in 1975 Rule 11 underwent its most dramatic changes in light of *Boykin v. Alabama*.[53] The 1975 alterations moved Rule 11 closer to its appearance today by requiring the judge to address the defendant in open court regarding his understanding of the charges, adequacy of counsel, constitutional rights, and mandatory maximum and minimum penalties.[54] Importantly, the Rule 11 amendments expressly acknowledged the existence of plea bargaining outside of the courtroom and instructed the judge on determining whether the plea was voluntary and intelligent in direct response to *Boykin*.[55]

Following these amendments, Rule 11's requirements have only lengthened and range today from the constitutional advisements referenced in *Boykin*[56] to purely statutory information about the mandatory maximum and minimum sentences.[57] Under Rule 11, a "guilty plea is valid only if it

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indicted for first-degree murder and pleaded guilty to second-degree murder after considering the overwhelming evidence against him. *Id.* at 26–27. Alford testified at his hearing that he did not commit the crime, but decided to plead guilty to avoid a possible death sentence. *Id.* at 28. The court accepted his plea because it found sufficient evidence that the defendant committed the crime, despite Alford's denial. *Id.* at 37.

51. 400 U.S. 25 (1970).

52. *Id.* at 39.

53. *See* 395 U.S. 238, 242 (1969) (developing the voluntary and intelligent requisite for guilty pleas); *supra* notes 27–29 and accompanying text (examining *Boykin*).

54. *See* Cook, *supra* note 40, at 607–08 (citing Act of July 31, 1975, Pub. L. No. 94-64, 89 Stat. 370) (discussing the 1975 amendments and their effect on expanding the role and comprehensiveness of Rule 11 in the guilty plea process).

55. *See id.* at 608–09 (noting that this development was a direct reaction to the *Boykin* voluntariness and intelligence requirement).

56. *See* discussion *supra* Part II.A (detailing the constitutional requirements for guilty pleas).

57. *See infra* notes 131–132 and accompanying text (describing particular

demonstrates on the record that the defendant has knowingly and voluntarily waived his constitutional rights."[58] Rule 11(b)(1)

> requires that the judge address the defendant personally in open court to inform the defendant, and to determine that the defendant personally understands, that the defendant will be waiving the following rights by pleading guilty: (1) the right not to plead guilty; (2) the right to a jury trial; (3) the right to be represented by counsel; (4) the nature of the charge to which the defendant is pleading; (5) any mandatory minimum penalty; (6) any maximum possible penalty; (7) the defendant's waiver of certain appeal rights; and (8) the government's right to use the defendant's statements in a perjury prosecution.[59]

Only when the court is satisfied that the defendant understands each of these advisements and voluntarily waives these rights may the judge accept the guilty plea.[60]

III. Appealing the Guilty Plea

A. Appellate Rights

The Supreme Court has never expressly recognized a constitutional right to appeal in criminal or civil cases.[61] The

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Rule 11 requirements).

58. *See* ERWIN CHEMERINKSY & LAURIE L. LEVENSON, CRIMINAL PROCEDURE 666 (2008) ("Federal Rule of Criminal Procedure 11 is designed to accomplish this goal.").

59. *Id.* Of all the advisements in Rule 11, these eight advisements are the most relevant for the scope of a defendant's appeal and the discussion in this Note.

60. *See id.* (analyzing the Rule 11 procedure for colloquy to accept the guilty plea in open court).

61. *See* Cassandra Burke Robertson, *The Right to Appeal*, 91 N.C. L. REV. 1219, 1222 (2013) (discussing the Supreme Court's avoidance of ruling on the constitutional requirements for appellate rights). Furthermore, the Court has stated in dicta that there is no due process requirement that the states or the federal government must provide for a right of appeal. *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 751 (1983) ("[T]here is of course no constitutional right to appeal . . . ."); Griffin v. Illinois, 351 U.S. 12, 18 (1956) ("It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."); Reetz v. Michigan, 188 U.S. 505, 508 (1903) ("Neither is the right of appeal essential to due process of law."); McKane v. Durston, 153 U.S. 684, 687 (1894) (ruling that due process does not require access to appeal).

Court's avoidance is in part due to the fact that the federal courts and almost every state court system provide for some level of appeal as of right.[62] Despite the Supreme Court's refusal to recognize a constitutional requirement for appellate rights, the Court has opined on the degree of due process required when a statute or state constitution set forth an appeals process.[63] The Supreme Court's attention to the prophylactic role of the right to appeal reveals that it is an essential element of the modern American justice system within the constitutional purview of due process.[64]

Appeals may arise from various procedural postures and causes of action after a criminal conviction. Defendants can file for appeal regarding issues from trial that resulted in conviction;[65] the sufficiency of the evidence;[66] the enforceability of a guilty plea;[67]

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62. *See* Robertson, *supra* note 61, at 1222 n.8 (noting that at least the states of New Hampshire, West Virginia, and Virginia do not require automatic appeals as a matter of right for certain defendants). In most states and the federal court system, appeals are provided under state constitutional or statutory requirements. *See id.* at 1222.

63. *See infra* notes 250–252 and accompanying text (claiming that although the Court has ruled there is no due process guarantee to access the appellate process, due process does guarantee certain aspects of an appeal if one is provided, including the right to effective assistance of counsel and appointment of counsel for direct appeal).

64. *See* discussion *infra* Part V (arguing that the modern American court system places heavy importance on the right to appeal and has shaped itself according to the premise that a defendant has access to the appellate process).

65. A defendant can appeal a multitude of issues if they were raised or argued at the trial level, including but not limited to allegations of Fourth Amendment violations committed by the state to obtain evidence; Sixth Amendment challenges regarding the right to confrontation of witnesses; challenges to discrimination during jury selection; and violations of disclosure requirements of discovery material. *See generally* CHEMERINKSY & LEVENSON, *supra* note 58 (presenting the legal foundation for appealable issues in investigating and adjudicating criminal cases).

66. On appeal, a defendant may argue that the evidence was insufficient to support his conviction and that the prosecution did not carry its burden of proving guilt beyond a reasonable doubt. *See, e.g.*, Jackson v. Virginia, 443 U.S. 307, 319 (1979) (stating the inquiry for sufficiency of the evidence is "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt").

67. *See* discussion *infra* Part IV (presenting the different approaches of the federal circuits when deciding whether to enforce appellate waiver in a

the defendant's sentence;[68] and habeas corpus and post-conviction ("collateral attack") relief.[69] Each of these paths has varying effects on an appeal because the underlying issues may require shifts in the burden framework or reliance on different presumptions.[70]

The effect of a guilty plea on a defendant's ability to appeal is generally that it bars the defendant from raising constitutional

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defendant's appeal from a guilty plea).

68. A defendant can also appeal his sentence under the Federal Sentencing Guidelines if he believes the court miscalculated his guideline range based on factors influencing his offense level, including his criminal history, or if he can show that the judge exceeded the maximum range in the guidelines without cause. *See* CHEMERINKSY & LEVENSON, *supra* note 58, at 817 (discussing the revolution of federal sentencing under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), and its progeny).

69. A defendant may file a petition for a writ of habeas corpus after he has been convicted of a crime and exhausted all other possible appellate routes. *Id.* at 921. Historically, a writ of habeas corpus is a mechanism for releasing a prisoner from unlawful detention by the state. *See* LARRY W. YACKLE, FEDERAL COURTS 571–73 (3d ed. 2009) (noting that if the court grants the writ, the state must release the defendant from custody). Defendants that file for habeas corpus relief are often already incarcerated and petition the court to show there is no "lawful basis for depriving the prisoner of liberty." *See id.* at 571 ("[T]he federal court focuses exclusively on the legal validity of the prisoner's current detention."). Because federal courts lack the jurisdictional grant to directly review state cases, a petition for a writ of federal habeas corpus is a separate civil suit for "collateral relief." *See id.* at 572 (illuminating the technical language surrounding habeas corpus and collateral review). The federal courts can also entertain motions from federal prisoners under 28 U.S.C. § 2255, which is almost the only route for a federal prisoner to pursue collateral review. *See id.* at 572–73 (claiming that today, the "only practical difference" posed by Section 2255 is that a federal prisoner files his petition in the sentencing court, as opposed to the district court closest to the penitentiary).

70. *See id.* at 572–73 (noting that the most prevalent distinction in the types of appeals is the difference between direct review (often of sentencing) and collateral relief). For the purposes of the ongoing discussion, these paths to appeal will be treated the same because this Note focuses on the standard of review once the appeal has been granted. Whether the appeal is founded in direct review, collateral relief, or Section 2255 is immaterial because this Note proposes a standard of review applicable to any of these procedural postures when the defendant challenges his appeal waiver. *See* Parts IV & V (noting when procedural posture is inconsequential). Footnotes will denote when it is necessary to distinguish the procedural history that led to an appeal and why such a distinction is required (e.g., when the court distinguished the petitioner's case because it arose from a habeas corpus petition, as opposed to a direct appeal of conviction or sentencing).

issues that he may have successfully appealed after conviction at trial.[71] In *McMann v. Richardson*,[72] the Court ruled that the defendants could not appeal constitutional issues not raised at trial.[73] Because the defendants admitted their guilt in open court, they were convicted based upon their admissions, not their coerced confessions.[74] The Court carved out an exception to this rule in *Blackledge v. Perry*[75] and determined that a prosecutor's abuse of discretion in charging a defendant could be raised after the defendant entered a guilty plea.[76] The effects of the *McMann* and *Blackledge* lines of cases are still disputed.[77] It is essential,

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71. *See* LAFAVE ET AL., *supra* note 2, at 1063 (describing the consequences of a guilty plea on the defendant's right to appeal constitutional issues).

72. 397 U.S. 759 (1970).

73. *See id.* at 773 (rejecting the defendants' constitutional claims).

74. *See id.* (deciding that the defendants were not entitled to relief because their coerced confessions were never submitted to a jury and were, therefore, "not the basis for the judgment"); *see also* Tollett v. Henderson, 411 U.S. 258, 267 (1973) ("When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea.").

75. *See* Blackledge v. Perry, 417 U.S. 21, 29 (1974) ("Due process of law requires that such a potential for vindictiveness must not enter into North Carolina's two-tiered appellate process."). In *Blackledge*, the defendant was convicted in the district court of a misdemeanor and appealed his sentence to the superior court. *Id.* at 22. Under North Carolina law, a defendant could appeal his district court conviction and receive a trial de novo in the superior court. *Id.* After the defendant filed the notice of appeal, the prosecutor obtained a grand jury indictment for felony charges based on the same conduct for which the defendant was convicted in the district court. *Id.* at 23. The Court agreed that if the "prosecutor has the means readily at hand to discourage such appeals—by 'upping the ante' through a felony indictment whenever a convicted misdemeanant pursues his statutory appellate remedy—the State can insure that only the most hardy defendants will brave the hazards of a de novo trial." *Id.* at 27–28.

76. *See id.* at 28 ("A person convicted of an offense is entitled to pursue his statutory right to a trial de novo, without apprehension that the State will retaliate by substituting a more serious charge for the original one, thus subjecting him to a significantly increased potential period of incarceration."); discussion *infra* Part V (discussing Supreme Court precedent establishing due process rights in the appeals process, despite the Court's refusal to acknowledge a due process right to appeal).

77. *See* LAFAVE ET AL., *supra* note 2, at 1064 (discussing subsequent cases in which the Court evaluated whether a defendant could pursue his appeal on constitutional grounds).

however, to note that constitutional issues arising after the defendant enters a guilty plea are distinguishable from "defects in the procedure by which the plea was received or circumstances making the plea other than voluntary, knowing, and intelligent."[78] Therefore, while a defendant's guilty plea may generally bar constitutional issues from appeal, courts examine procedural issues affecting the validity of the guilty plea under a different standard of review on appeal.[79]

B. Appellate Waivers

Appeal waivers are express provisions in plea agreements that require the defendant to waive his right to future appeal for issues that arose at trial or for review of sentencing.[80] Federal circuits, and even district courts, differ when considering which terms are standard for plea deals and what requirements are included in an appeal waiver.[81] The debate over the increased popularity and use of appellate waivers in guilty pleas involves weighing norms of the American justice system; most importantly, this includes balancing efficiency and fairness.[82] Appeal waivers have been uniformly upheld as constitutional by all of the circuits;[83] in cases in which a court struck down an

78. *See id.* at 1067 (noting the differences between constitutional and procedural grounds for appeal).

79. *See* discussion *infra* Part III.C (providing the foundation of plain error review of Rule 11 errors during guilty plea colloquy).

80. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 211 (2005) (presenting the appeal waiver as a method of regulating sentencing in the post-*Booker* and *Blakeley* guidelines framework, which made the U.S. Federal Sentencing Guidelines advisory).

81. *See id.* at 211 ("Scholars and litigants disagree about what is waived, by whom, at what price, and how often.").

82. *See* LAFAVE ET AL., *supra* note 2, at 1002 ("[A] concern expressed about the plea negotiation system is that, by its nature, it is likely to produce unfair or inaccurate results.").

83. *See* Cook, *supra* note 40, at 629 (noting that every circuit has upheld the validity of appellate waivers); *see also* Michael O'Shaughnessy, *Appellate Review of Sentences*, 88 GEO. L.J. 1637, 1637–38 (2000) (discussing the circuits that affirm the constitutionality of the appeal waivers).

appeal waiver, the court typically found the waiver unenforceable for a specific reason.[84]

Historically, the debate over the benefits and costs of enforcing appellate waivers intensified under the Sentencing Reform Act of 1984 (the Act)[85] because appellate review "emerged as the primary enforcement mechanism for sentencing reform in federal courts."[86] In particular, the practice of "fact bargaining" escalated under the Act, in which prosecutors and defendants negotiate stipulations about the facts of a case or the defendant's criminal history that the court would usually determine.[87] The purpose of the stipulations is for the court to use them to sentence the defendant under the Federal Sentencing Guidelines ("the Guidelines").[88] However, the prosecution often requires the defendant to waive his appellate rights in return for beneficial

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84. *See* discussion *infra* Part IV (detailing the circumstances under which federal circuits have found appellate waivers unenforceable).

85. Sentencing Reform Act of 1984, 18 U.S.C. § 3551 (1984) (Added Pub.L. 98-473, Title II, § 212(a)(2), Oct. 12, 1984, 98 Stat. 1988; amended Pub.L. 101-647, Title XVI, § 1602, Nov. 29, 1990, 104 Stat. 4843; codified as amended at 18 U.S.C. §3551(2012)).

86. *See* King & O'Neill, *supra* note 80, at 214 (arguing that the appeals process for guilty pleas is the "glue holding these new presumptive sentencing systems together" under the sentencing reform movement). For a discussion of sentencing reform in the United States, see William W. Wilkins, Jr. & John R. Steer, *The Role of Sentencing Guideline Amendments in Reducing Unwarranted Sentencing Disparity*, 50 WASH. & LEE L. REV. 63, 64 (1993) ("Congress was motivated by several primary objectives in enacting sentencing reform legislation, but none was more important than increasing fairness and uniformity in sentencing."). From the sentencing reform movement, defendants gained the opportunity to raise various sentencing issues on appeal, including the factors upon which the judge relied in sentencing. *See* King & O'Neill, *supra* note 80, at 220–21 (analyzing some of these factors). Prosecutors and courts responded by advocating appellate waivers in an effort to conserve resources and promote efficiency in sentencing. *See* discussion *infra* Part V (elaborating on the effects that appeal waivers have on efficiency and fairness in the criminal justice system).

87. *See* King & O'Neill, *supra* note 80, at 215–16 (detailing the process of fact bargaining in guilty pleas and the concessions the defendant makes).

88. *See id.* at 215 ("[P]arties have manipulated the application of the Guidelines through stipulations, expressly resolving sentencing facts and Guidelines 'scoring' questions as part of the plea agreement."); *id.* at 216 (noting a benefit to fact bargaining is the higher degree of certainty that results from nailing down facts "to obtain specific sentence reductions").

stipulations under the Guidelines.[89] Concerns about stipulations arise from the argument that "[t]he increased use of stipulations, combined with waiver of review, increases the risk that sentences not in compliance with the law will proliferate without scrutiny."[90] Moreover, the legal exemptions from review of certain discretionary decisions by prosecutors have further deteriorated the role of appellate review as anticipated by the sentencing reform movement.[91]

Prosecutors and courts expressed support for appeal waivers as the popularity and use of waivers escalated in the 1990s.[92] In response, Congress amended Rule 11 in 1999 to include a

89. *See id.* at 235–36 tbls. 1, 2, 3, 4, 5 & 6 ("Specifically, as shown in Tables 2 and 3, those who waived appeal were more likely than nonwaiving defendants to receive a promise by the government to seek a safety valve reduction (applicable in drug cases only), as well as to actually receive downward departures."). In their study, King and O'Neill conducted interviews with various federal prosecutors, defenders, and defendants about appellate waivers. *See id.* at 209–10, 225 (detailing the sampling from which the authors conducted their analysis). They also examined data collected from 971 random cases sentenced under the federal guidelines. *Id.* at 209–210. Tables 1–6 show their analyses for the types of departures and assistance that benefited defendants under the federal guidelines and whether the defendant had waived his appellate rights or not. *Id.* at 235–38. While some of the analysis showed no real variance in the defendants' sentences, the results tended to show that in more than one out of five waiver cases, a defendant received a downward departure (other than substantial assistance). *Id.* at 238. Only one out of ten nonwaiver defendants received the same treatment, reflecting a double rate of assistance for waiving defendants. *Id.*

90. *See id.* at 213 (echoing opponents' concerns about widespread use of blanket waivers).

91. *See id.* at 218 (claiming federal laws that prevent review of discretionary decisions has weakened appellate review). Specifically, the inability to review prosecutorial discretion includes: downward departures for a defendant's cooperation (*see id.* at 218 n.38 (citing U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004))), safety valve motions for imposing a sentence below the minimum (*see id.* at 218 n.39 (citing 18 U.S.C. § 3553(e)–(f) (2000))), reduction under Rule 35 for substantial assistance (*see id.* at 218 n.40 (citing FED. R. CRIM. P. 35(b))), and reduction for accepting responsibility (*see id.* at 218 n.41 (citing U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2004))).

92. *See id.* at 221–24 (noting that in a Federal Judicial Center survey, over 60% of responding circuit and district federal judges advocated using appeal waivers "more frequently") (citing MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUD. CTR., THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY 22 tbl.14 (1997), http://www2.fjc.gov/sites/default/files/2012/gssurvey.pdf).

requirement for the court to discuss appeal waivers when accepting a guilty plea.[93] The amendment arguably sanctioned the use of appeal waivers in plea agreements by giving "the green light" for widespread use of such waivers.[94] Today, prosecutors frequently include appeal waivers in guilty pleas, and many public defenders fight tooth and nail to refuse the waiver unless the client receives a heavy concession.[95] Still, the popularity of appeal waivers cannot be denied and their effects on sentencing have a heavy influence on sentencing policy in our justice system.[96]

C. Plain Error Review: Affecting Substantial Rights

The contemporaneous objection rule demands that the defendant object at the trial level to preserve his argument for appeal.[97] Under this requirement, if the defendant "fail[s] to make timely assertion of the right," he forfeits the ability to make that argument on appeal.[98] The purpose of the rule is to allow the court to correct errors on the record at the time they are made

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93. *See id.* at 224 n.63 (citing H.R. DOC. NO. 106-55, at 13 (1999) (Conf. Rep.)). The Advisory Committee on the Rules of Criminal Procedure believed it was appropriate to recognize what was apparently already taking place in a number of jurisdictions and to formally require trial judges in those jurisdictions to question the defendant about whether his or her waiver was made knowingly, voluntarily, and intelligently. Additional amendments were adopted by the Court by order dated April 26, 1999, transmitted to Congress by the Chief Justice on the same day (526 U.S. 1189; Cong. Rec., vol. 145, pt. 6, p. 7907, Ex. Comm. 1788; H. Doc. 106–55), and became effective December 1, 1999. The amendments affected Rules 6, 11, 24, and 54. *Id.*

94. *See* King & O'Neill, *supra* note 80, at 224 ("[W]hen the amendment went into effect in 1999, it was the green light some prosecutors and judges had been waiting for.").

95. *See id.* at 233–34 nn.84–90 (describing the types of concessions public defenders demand from prosecutors).

96. *See* discussion *infra* Part V (examining the policy consequences of enforcing an appellate waiver despite the defendant's lack of understanding about its effects on his sentence).

97. *See* United States v. Young, 470 U.S. 1, 15 (1985) (requiring the defendant preserve his issue by timely objecting).

98. *See* Yakus v. United States, 321 U.S. 414, 444 (1944) (providing for the timely objection requirement).

and to prevent "sandbagging."[99] On appeal, a federal court may consider a defendant's unpreserved objection if the court finds that the error at the trial level constituted "plain error."[100] In *United States v. Olano*,[101] the Court established a four-prong test for plain error review.[102] First, there must be an error, which is "[d]eviation from a legal rule . . . unless the rule has been waived."[103] Second, the error must also be "plain," where "[p]lain is synonymous with 'clear' or, equivalently, 'obvious.'"[104] The third limitation on review is that the error must "affect substantial rights," meaning "in most cases . . . that the error must have been

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99. *See* DRESSLER, *supra* note 2, at 384. The rule aims to prevent the defense tactic of "sandbagging," in which

> defense counsel could choose not to object to an error during the trial and thereby achieve a no-lose situation: If the client was acquitted despite the error, the Double Jeopardy Clause would assure that he could not be retried; if the client was convicted, he could raise the error on appeal to gain a new trial.

Id. The implications from sandbagging run further afoul in appellate review of unpreserved errors because without plain error review, the presumption is always on the government to prove there was no prejudice. *See* United States v. Vonn, 535 U.S. 55, 73 (2002)

> [A] defendant could choose to say nothing about a judge's plain lapse under Rule 11 until the moment of taking a direct appeal, at which time the burden would always fall on the Government to prove harmlessness. A defendant could simply relax and wait to see if the sentence later struck him as satisfactory; if not, his Rule 11 silence would have left him with clear but uncorrected Rule 11 error to place on the Government's shoulders.

100. FED. R. CRIM. P. 52(b). Rule 52(b) governs unpreserved errors on appeal; it states that "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

101. 507 U.S. 725 (1993). In *Olano*, the Court stated that Rule 24(c) was meant to protect the intrusion principle, which is that a jury's deliberations should be conducted in secrecy to prevent any outside influence on its decision. *Id.* at 738. There was insufficient evidence for the Court to find that the presence of the alternate jurors prejudiced the defendant's outcome under Rule 24(c) and the intrusion doctrine. *Id.* at 739. The Court determined that, although the presence of alternate jurors during jury deliberations was a deviation from Rule 24(c), the defendant did not meet his burden of demonstrating that the error affected his substantial rights under the four-prong test. *Id.* at 741.

102. *See id.* 736–37 (summarizing the purpose of the four-prong test).

103. *Id.* at 732–33.

104. *Id.* at 734.

prejudicial: It must have affected the outcome of the district court proceedings."[105] Finally, the "court of appeals should correct a plain forfeited error affecting substantial rights if the error seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."[106] Much of the Court's jurisprudence involving the *Olano* test for plain error focuses on the third prong of "affecting substantial rights" because this step requires the defendant to bear the burden of showing why he was prejudiced by the error.[107] In *United States v. Vonn*,[108] the Court applied the

105. *Id.*

106. *Id.* at 736 (internal quotation marks omitted). The fourth prong illuminates the permissive, not mandatory, nature of plain error. A court may correct plain error if it satisfies the test, but it is not required to do so. *See id.* at 736–37 (noting that while "[a]n error may seriously affect the fairness, integrity or public reputation of judicial proceedings independent of the defendant's innocence," a court retains discretion over correcting the error on appeal (internal quotation marks omitted)).

107. *See id.* at 735 ("Normally, although perhaps not in every case, the defendant must make a specific showing of prejudice to satisfy the 'affecting substantial rights' prong of Rule 52(b)."). The Court noted that "[i]t is the defendant rather than the Government who bears the burden of persuasion with respect to prejudice. In most cases, a court of appeals cannot correct the forfeited error unless the defendant shows that the error was prejudicial." *Id.* at 734. The Court compared the burden shifting to the standard of harmless error under Rule 52(a), which applies when the defendant preserved the error through timely objection. *See id.* at 734 ("When the defendant has made a timely objection to an error and Rule 52(a) applies, a court of appeals normally engages in a specific analysis of the district court record—a so-called 'harmless error' inquiry—to determine whether the error was prejudicial.").

108. *See* United States v. Vonn, 535 U.S. 55, 66 (2002) (ruling that Rule 11 errors are subject to review under the plain error standard articulated in *Olano* and under Rule 52(b)). In *Vonn*, the defendant did not object at the guilty plea hearing when the judge failed to advise him that he had a right to an attorney if he chose to go to trial, violating Rule 11. *Id.* at 60. On appeal from his guilty plea, the defendant asked the court to set aside his convictions. *Id.* at 61. Rule 11(h) states that "any variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." FED. R. CRIM. P. 11(h). The Court determined that while Rule 11(h) echoed the Rule 52(a) standard for harmless error, the fact that Congress did not give Rule 11(h) a counterpart similar to that of Rule 52(b) did not implicate that Rule 11 was not subject to plain error review. *Vonn*, 535 U.S. at 66. Additionally, the Court ruled that when conducting plain error review, an appellate court may examine the entire record to determine whether the error affected the defendant's substantial rights. *Id.* at 74. There was evidence on the record that Vonn affirmed in at least two other proceedings that he understood his rights and even signed a statement admitting as much, satisfying the Court that the defendant

four-prong test for plain error to Rule 11 error when the defendant or his counsel did not object at the hearing.[109] *Vonn* confirmed that plain error review under *Olano* and Rule 52(b) applied to Rule 11 errors in general;[110] still, it left unanswered questions about prejudice and substantial rights in the Rule 11 context of appeal of guilty pleas with appellate waivers.

D. United States v. Dominguez Benitez*: Rule 11 and the Objective Test*

In *United States v. Dominguez Benitez*,[111] the Court attempted to confront the issues left open in *Vonn* about plain error review of unpreserved Rule 11 violations.[112] In *Dominguez Benitez*, the defendant entered a plea deal in which he pleaded guilty to conspiracy to possess more than 500 grams of methamphetamine, and the government dismissed a charge for possession of methamphetamine.[113] The parties also agreed that Dominguez would receive a safety valve reduction in sentencing, which authorized a sentence below the statutory minimum.[114] For the court to give the defendant the safety valve reduction, the judge had to find that the defendant satisfied five factors regarding the defendant and his history.[115] The agreement further stated that the trial court was not bound to the plea

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understood his right to counsel at trial. *Id*. at 75.

109. *See Vonn*, 535 U.S. at 66 (applying the four-prong plain error review standard to determine that the defendant was not prejudiced by the Rule 11 error).

110. *See id.* at 63 (rejecting the defendant's argument that plain error review is inapplicable to Rule 11 errors because Congress did not intend to eliminate the contemporaneous objection requirement).

111. 542 U.S. 74 (2004).

112. *See id.* at 81–82 (performing the objective analysis under the reasonable probability standard and concluding that the defendant would not have changed his guilty plea had the court advised him on the record that it did not have to adhere to the sentencing guidelines).

113. *Id.* at 77; *see also supra* note 2 and accompanying text (providing background on the types of charges and sentencing bargaining frequently used by both parties to accomplish a plea deal).

114. *Dominguez Benitez*, 542 U.S. at 77.

115. *Id.* at 78.

deal.[116] Without the safety valve reduction, Dominguez faced a mandatory minimum sentence of ten years and a maximum sentence of life in prison.[117] At the guilty plea hearing, the trial court gave all of the Rule 11 advisements except it failed to advise the defendant under Rule 11(c)(3)(B) that he could not withdraw his plea if the court did not accept the government's sentencing recommendation.[118] The defendant did not make a timely Rule 11 objection to the colloquy error.[119]

When the probation officer reviewed the presentence report, it revealed that Dominguez had not disclosed all of his convictions and was subsequently ineligible for the safety valve reduction in sentencing.[120] The trial court sentenced the defendant to the mandatory minimum of ten years.[121] Dominguez appealed and argued that, under *Vonn*, the Rule 11 error affected his substantial rights.[122] The Ninth Circuit required Dominguez to "prove that the court's error was not minor or technical and that he did not understand the rights at issue when he entered his guilty plea."[123] The circuit court considered Dominguez's inability to speak English and the assurances of both the prosecutor and his own counsel that he would probably receive the safety-valve reduction as persuasive evidence that the defendant's substantial rights were affected.[124]

On appeal, the Supreme Court considered the narrow question of "what showing must thus be made to obtain relief for

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116. *Id.*

117. *Id.*

118. *Id.* at 76; *see* FED. R. CRIM. P. 11(c)(3)(B) ("To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request."); *see also* United States v. Booker, 543 U.S. 220, 259 (2005) (ruling that the Federal Sentencing Guidelines are not mandatory and a judge is not required to follow them for sentencing).

119. United States v. Dominguez Benitez, 542 U.S. 74, 78 (2004).

120. *Id.*

121. *Id.*

122. *Id.* at 79.

123. *Id.* (quoting United States v. Benitez, 310 F.3d 1221, 1225 (9th Cir. 2002)).

124. *Id.*

an unpreserved Rule 11 failing."[125] In response, the Court held that a "defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea."[126] Under the plain error relief rule, "a defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding."[127] This showing satisfied the requirement that the defendant prove that the Rule 11 error affected his substantial rights by demonstrating that the error was prejudicial to the outcome of his case.[128] The Court determined that the trial court's Rule 11 error did not affect the outcome because the written plea agreement warned the defendant that he could not withdraw his plea if the court refused the government's recommendation, the defendant signed the written agreement, and there was evidence the court informed the defendant at least twice of his right to counsel at trial.[129] The Court noted, however, that

> when the record of a criminal conviction obtained by guilty plea contains no evidence that a defendant knew of the rights he was putatively waiving, the conviction must be reversed. *Boykin v. Alabama*, 395 U.S. 238 (1969). We do not suggest that such a conviction could be saved even by overwhelming evidence that the defendant would have pleaded guilty regardless.[130]

While this ruling stated the standard of review for a procedural claim of error under Rule 11, Footnote 10 opened the door to an appeal based on *Boykin*. In light of Footnote 10, a defendant could argue that he entered his guilty plea involuntarily and

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125. *Id.* at 76.

126. *Id.* at 83.

127. *Id.* (internal citation and quotation marks omitted).

128. *Id.* at 81–82.

129. *Id.* at 85.

130. *See id.* at 84 n.10 (acknowledging the voluntariness and intelligence requirements for a defendant entering a guilty plea).

unintelligently because of a deviation from a Rule 11 advisement about the rights he waived.

IV. Federal Courts of Appeals' Application of Dominguez Benitez *to Rule 11(b)(1)(N) Errors: Where the Confusion Arises*

Rule 11 has broad implications as a constitutional and procedural safeguard because its requirements span from advising the defendant that he is waiving constitutional rights[131] to ensuring that he comprehends the role of statutory sentencing.[132] Since the Supreme Court decided *Dominguez Benitez*, the federal circuit courts have not consistently established how the plain error review of a Rule 11(b)(1)(N)[133] error fits with the requirement that the defendant intelligently and voluntarily entered the guilty plea.[134] Under *Olano*[135] and *Vonn*,[136] all of the federal circuit courts are bound to apply the reasonable probability standard for plain error review of Rule 11

131. The judge must advise the defendant of the waiver of constitutional rights upon entering a guilty plea. *See* FED. R. CRIM. P. 11(b)(1)(C) (providing waiver of right to a jury trial); FED. R. CRIM. P. 11(b)(1)(E) (detailing waiver of right against compelled self-incrimination); FED. R. CRIM. P. 11(b)(1)(E) (presenting waiver of right to confront witnesses); discussion *supra* Part II.B (examining the role of Rule 11 as a procedural safeguard).

132. The judge must advise the defendant of certain sentencing requirements, including mandatory minimum and possible maximums. *See* FED. R. CRIM. P. 11(b)(1)(H) (advising the defendant of the maximum possible penalty); FED. R. CRIM. P. 11(b)(1)(I) (advising the defendant of the mandatory minimum penalty).

133. *See* FED. R. CRIM. P. 11(b)(1)(N) (requiring that "[b]efore the court accepts a plea of guilty . . . , the court must address the defendant personally in open court," and further "inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence").

134. *See* Tellado v. United States, 799 F. Supp. 2d 156, 175 (D. Conn. 2011) ("[I]t appears that there is no consensus about how the Rule 11 plain error inquiry interacts with the requirement that a waiver of appeal or collateral attack rights be knowing and voluntary in the context of challenges under Rule 11(b)(1)(N)."), *aff'd*, 745 F.3d 48 (2d Cir. 2014).

135. *See supra* notes 101–107 and accompanying text (discussing *Olano* and the four-prong test for plain error review).

136. *See supra* notes 108–110 and accompanying text (applying plain error review to Rule 11 error in *Vonn*).

violations,[137] which the Court further developed in *Dominguez Benitez*.[138]

A split of authority among the U.S. courts of appeals arises because some reference only the reasonable probability standard in the substantial rights analysis of plain error review of Rule 11(b)(1)(N) errors.[139] Other circuits conduct a voluntariness and intelligence inquiry that either stands alone as the only standard of review or functions in addition to the objective examination.[140] Consequently, the type of Rule 11 error at issue appears to be a distinguishing factor for plain error review because, as some circuit courts argue, it may make the *Dominguez Benitez* objective standard insufficient for Rule 11(b)(1)(N) error review.[141] These circuits reason that Rule 11(b)(1)(N) violations

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137. *See* United States v. Vonn, 535 U.S. 55, 66 (2002) (ruling that plain error review is applicable for Rule 11 errors and that the defendant bears the burden of showing that prejudice resulted from the judge's error); United States v. Olano, 507 U.S. 725, 732 (1993) (stating the four-part test for review of plain error).

138. *See* United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004)

> We hold, therefore, that a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea. A defendant must thus satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is "sufficient to undermine confidence in the outcome" of the proceeding.

(quoting Strickland v. Washington, 466 U.S. 668, 669 (1984)); discussion *supra* Part III.D (detailing the objective standard for plain error review articulated in *Dominguez Benitez*).

139. *See, e.g.*, United States v. Oliver, 630 F.3d 397, 412 (5th Cir. 2011) ("[T]o justify reversal for a district court's error in a Rule 11 admonishment, the defendant 'must show a reasonable probability that, but for the error, he would not have entered the plea.'" (citing *Dominguez Benitez*, 542 U.S. at 83)).

140. *See* discussion *infra* Parts IV.B–C (analyzing federal circuit courts' implied or express applications of a voluntary and intelligence inquiry for review of Rule 11(b)(1)(N) errors); *see, e.g.*, United States v. Goodson, 544 F.3d 529, 540 (3d Cir. 2008)

> Our inquiry is not limited, however, to whether there was a technical violation of Rule 11. Rather, we must determine whether . . . the deficient colloquy affected [the defendant's] substantial rights by precluding him from knowing of and understanding the significance of the binding appellate waiver in the plea agreement.

141. *See, e.g.*, Tellado v. United States, 799 F. Supp. 2d 156, 175 (D. Conn.

are distinguishable from other Rule 11 errors because enforcing an appellate waiver based upon a record that does not establish the voluntariness and intelligence of a guilty plea defeats the purpose of Rule 11.[142] The circuit split ultimately hinges on different inquiries: whether the defendant would have pleaded guilty if the judge had not erred during the colloquy or whether the defendant understood that he waived the right to appeal.[143] Including an intelligence inquiry alongside or instead of the reasonable probability standard for plain error review of a Rule 11(b)(1)(N) error is a divisive issue among the circuits that creates a variance in outcomes when a court must determine the enforceability of an appellate waiver.[144]

2011) (distinguishing *Dominguez Benitez* by noting that there are "reasons to believe that application of the Rule 11 plain error standard to alleged violations of Rule 11(b)(1)(N) might not be straightforward"), *aff'd*, 745 F.3d 48 (2d Cir. 2014). The scope of this Note focuses on the interaction between the voluntary and intelligent requirement and Rule 11(b)(1)(N) violations. The argument that *Dominguez Benitez* is distinguishable from Rule 11(b)(1)(N) errors does not extend to the extreme conclusion that *Dominguez Benitez* is only applicable to Rule 11(c)(3)(B) errors. *See* discussion *infra* Part V (elaborating on why Rule 11(b)(1)(N) errors are distinguishable from other types of Rule 11 errors).

142. *See* United States v. Sura, 511 F.3d 654, 660 (7th Cir. 2007) ("[The defendant] must show that his guilty plea was involuntary and that he would not have entered it on the basis of the record as a whole . . . .").

143. *See* discussion *infra* Parts IV.B, IV.C (comparing the roots of the different inquiries).

144. *See* discussion *infra* Part IV.C (demonstrating the disparity in enforcing appellate waivers when courts adopt the secondary voluntary and intelligence inquiry). The Tenth, Eleventh, and Federal Circuits have not issued binding opinions on review of Rule 11(b)(1)(N) errors after *Dominguez Benitez*. *See infra* Part V (presenting the recent decisions in the Tenth Circuit that reflect disagreement about review of appellate waiver and noting that the Tenth Circuit affirms the use of appellate waiver in general). In 2004, the Ninth Circuit amended its 2003 opinion from *United States v. Arellano-Gallegos*. 387 F.3d 794 (2004). For the purposes of the circuit discussion in this Note, the Ninth Circuit has not issued a sufficient number of opinions to facilitate an independent discussion. *See, e.g.*, United States v. Smith, 389 F.3d 944, 953 (9th Cir. 2004) (noting the court "review[s] de novo the question of whether an appellant has waived his right to appeal" and finding the appellate waiver enforceable (citing United States v. Shimoda, 334 F.3d 846, 848 (9th Cir. 2003)); United States v. Alarid, 123 Fed. App'x 294, 295 (9th Cir. 2005) (concluding that the defendant's waiver was unenforceable after de novo review of the record because the trial court "failed to discuss the specific terms of the waiver and ensure Alarid's understanding as required by Fed. R. Crim. P. 11(b)(1)(N)"). The lack of Ninth Circuit case law on this narrow issue should not undercut the

A. Circuits that Apply Only the Objective Test

The Fifth Circuit alone is faithful to strict application of the reasonable probability standard from *Dominguez Benitez* when determining the enforceability of an appellate waiver.[145] While the Fifth Circuit may engage in a limited fact-specific analysis, it systematically evaluates the substance of the plea colloquy only to the extent that is required to confirm that the petitioner's substantial rights were not violated.[146] In various appeals, the court found that sufficient evidence for this level of inquiry included that the defendant read the agreement, stated he understood the agreement, and signed the agreement.[147] If there is sufficient evidence on the record that the defendant would not have pleaded guilty but for the error, the court does not inquire into the voluntariness and intelligence of the plea.[148] The Fifth

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guidance in *Arellano-Gallegos*, which merits attention from other circuits for its analysis of the defendant's substantial rights. *See infra* note 230 (discussing the value of the *Arellano-Gallegos* voluntariness and intelligence inquiry). This Note discusses the Ninth Circuit's decision as other circuits reference it in their opinions.

145. *See* United States v. Oliver, 630 F.3d 397, 412 (5th Cir. 2011) ("Moreover, to justify reversal for a district court's error in a Rule 11 admonishment, the defendant 'must show a reasonable probability that, but for the error, he would not have entered the plea.'" (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004))); *see also* United States v. Alvarado-Casas, 715 F.3d 945, 955 (5th Cir. 2013) (ruling that it is sufficient under Rule 11 for the trial court to review the plea agreement with the defendant and confirm his voluntary signature).

146. *See* United States v. Narvaez, 452 Fed. App'x 488, 493 (5th Cir. 2011) (per curiam) (unpublished) ("Taken together, the questions asked and information provided are sufficient for us to conclude that Narvaez has not shown that his substantial rights were violated."); *id.* at 493 n.5 (noting that had the petitioner raised an involuntariness claim, "such an argument would ring hollow" in light of the defendant's graduate degree and effective counsel).

147. *See, e.g.*, United States v. Tydus, 574 Fed. App'x 294, 295 (5th Cir. 2014) (per curiam) (unpublished) ("[The defendant] demonstrated at the re-arraignment hearing that he had read and understood the plea agreement, which included the appeal waiver, and raised no question regarding that provision; therefore, the waiver is valid."); *Oliver*, 630 F.3d at 412 (concluding that, although the judge did not clarify the context of the appeal waiver under the "limited circumstances" in the plea agreement, the colloquy was adequate because the defendant indicated he understood and had opportunity to inquire further about the provisions in the paragraphs).

148. *See Narvaez*, 452 Fed. App'x at 492–93 (rejecting petitioner's claim

Circuit's approach to Rule 11(b)(1)(N) plain error review is therefore the prototype of the pure harmless error standard articulated in *Dominguez Benitez* because it applies solely the objective standard.[149]

B. Circuits that Claim to Apply Only the Objective Test

The First, Fourth, and Eighth Circuits claim to apply only the *Dominguez Benitez* reasonable probability test to all Rule 11 violations, including Rule 11(b)(1)(N) errors on appeal from a guilty plea.[150] However, these circuits frequently include a voluntariness and intelligence inquiry under the guise of the procedural analysis that *Dominguez Benitez* requires.[151]

In *United States v. Borrero-Acevedo*,[152] the First Circuit determined in a case of first impression that the *Dominguez Benitez* standard for Rule 11 plain error review was directly applicable to Rule 11(b)(1)(N) errors.[153] The court declined to analyze the voluntary and intelligent nature of the plea and

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because it "rests solely upon the district court's alleged failure to sufficiently ensure that his waiver was informed and voluntary during the plea colloquy"). The court noted that when a defendant "claims that he was misled or coerced into entering the [plea] agreement, or that he was incompetent when he signed the waiver, [he] challenges the validity of the waiver itself, not the Rule 11 colloquy." *Id.* at 491 n.3 (citing United States v. Goodson, 544 F.3d 529, 540 n.9 (3d. Cir. 2008)). The distinction in the Fifth Circuit is that the Fifth Circuit does not identify a Rule 11(b)(1)(N) error as constituting grounds to challenge the validity of the waiver. *Id.* (rejecting the defendant's voluntariness and intelligence argument because Rule 11(b)(1)(N) error was subject to plain error review).

149. *See Oliver*, 630 F.3d at 412 (stating the *Dominguez Benitez* standard).

150. *See infra* notes 153, 167, 175 and accompanying text (adopting the *Dominguez Benitez* standard for demonstrating prejudice).

151. *See infra* notes 154, 170, 178 and accompanying text (elaborating on the voluntariness and intelligence inquiry).

152. 533 F.3d 11 (1st Cir. 2008).

153. *See id.* at 13 ("We apply, for the first time, the Supreme Court's recent plain error decisions to a defendant's unpreserved claim of Rule 11(b)(1)(N) error as to a waiver of appeal clause at the change-of-plea hearing."); *id.* at 18 ("It is defendant's burden to show that the waiver of appellate rights was deficient and that he would otherwise not have pled guilty. If the record contains no evidence in defendant's favor, his claim fails." (citing United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004))).

stated that "[i]t is not enough to ask whether the defendant understood the rights at issue when he entered his guilty plea; courts must consider the effect of an omitted warning on the defendant's decision to plead guilty."[154] Relevant factors to whether the defendant's substantial rights were affected included "the clarity of the plea agreement itself, defendant's signature on the agreement and his attestations, defendant's statements at the change-of-plea hearing, statements by counsel for both the defendant and the government at the hearing, and the nature of the questioning done by the judge at the hearing."[155] The First Circuit importantly attempted to distinguish its ruling from cases in the Sixth[156] and Ninth[157] Circuits by noting that those circuits' interpretations were inconsistent with *Vonn* and *Dominguez Benitez*.[158] Although the court stated its position clearly, it also strived to distinguish the facts of *Borrero-Acevedo* from the facts of *United States v. Sura*.[159] In *Sura*, the Seventh Circuit fell on the opposite side of the question of applying *Dominguez Benitez* to Rule 11(b)(1)(N) errors.[160] When describing the factual variances

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154. *See id.* at 16 (echoing the reasonable probability standard).

155. *See id.* at 17 (relying on these factors to determine prejudice to the defendant).

156. *See* United States v. Murdock, 398 F.3d 491 (6th Cir. 2005) (declining to enforce the defendant's appellate waiver after a Rule 11(b)(1)(N) error because the record did not demonstrate that he voluntarily and intelligently entered the plea agreement); *infra* notes 209–218 and accompanying text (discussing the precedential value of *Murdock* for plain error review of Rule 11(b)(1)(N) violations).

157. *See* United States v. Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004) (establishing the Ninth Circuit's approach to plain error review of Rule 11(b)(1)(N) violations under the voluntariness and intelligence inquiry); *see also infra* note 230 (describing the importance of the Ninth Circuit's ruling).

158. *See* United States v. Borrero-Acevedo, 533 F.3d 11, 18 (1st Cir. 2008)

> Some courts have held that where there is no discussion of an appellate waiver clause at the plea hearing and there is an absence of "any indication on the record that the defendant understood that he had a right to appeal and he was giving up that right," that will suffice to satisfy the third prong of the plain error test. This view is, we think, inconsistent with both *Vonn* and *Dominguez Benitez*.

(citing *Murdock*, 398 F.3d at 497; *Arellano-Gallegos*, 387 F.3d at 797).

159. 511 F.3d 654 (7th Cir. 2007).

160. *See* discussion *infra* notes 223–229 and accompanying text (discussing the Seventh Circuit's adoption of the voluntariness and intelligence inquiry as

between the cases,[161] the court noted that "Borrero has not shown that he did not know or understand that he had waived his appellate rights *or* that he would not have pled guilty had he realized he was waiving his appellate rights."[162] This statement illuminates, unintentionally on the court's part, the judicial instinct to engage in the two-part inquiry, even upon express rejection of such an analysis a paragraph earlier.[163] The First Circuit reiterated the position that the *Dominguez Benitez* standard applies directly to Rule 11(b)(1)(N) errors in *United States v. Sotirion*.[164] But, in that case too, the court again blurred the application of the reasonable probability test with a voluntariness and intelligence inquiry for the procedural violation under Rule 11(b)(1)(N).[165]

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complementary to the objective standard).

161. *See Borrero-Acevedo*, 533 F.3d at 18 (noting that the relevant factors in *Sura* included the petitioner's old age, diminished mental capacity, labored responses to the court's questions, and current treatment for mental illness, and further stating that in the case of *Borrero-Acevedo*, "[n]othing of the sort exists here").

162. *Id.* (emphasis added).

163. *See id.* (rejecting the voluntary and intelligent analysis adopted in the Sixth and Ninth Circuits).

164. *See* United States v. Sotirion, 617 F.3d 27, 34 (1st Cir. 2010) (describing the holding in *Borrero-Acevedo* as establishing the reasonable probability standard, which was not "by its terms restricted to particular types of Rule 11 errors").

165. *See id.* at 34 ("[T]o establish that the Rule 11(b)(1)(N) error affected his substantial rights under the third prong of the plain error test, the defendant must show a reasonable probability that he would not have entered the plea had the error not been made." (internal citation and quotation marks omitted)). The court attempted to clarify that the defendant can make a voluntary and intelligent claim outside of raising a Rule 11(b)(1)(N) violation on appeal under constitutional principles. *See id.* at 33 ("First, we require that the defendant enter into the waiver 'knowingly and voluntarily.'"); *id.* at 34 n.6 ("Plain error review would not apply if the defendant challenged the knowing and voluntary nature of his appellate waiver on grounds independent of the district court's compliance with Rule 11(b)(1)(N)."). The court noted, however, that during the Rule 11-required colloquy, "the court's inquiry 'should be specific enough to confirm the defendant's understanding of the waiver and [his] acquiescence in the relinquishment of rights that it betokens.'" *Id.* at 35 (quoting United States v. Teeter, 257 F.3d 14, 24 n.7 (1st Cir. 2001)). This statement tends to support the two-part inquiry that the First Circuit claimed to reject because it melds the voluntariness and intelligence inquiry from *Boykin* with the objective analysis of *Dominguez Benitez*.

Most recently, the Fourth Circuit emphasized its agreement with the First Circuit by applying the reasonable probability test to Rule 11(b)(1)(N) error in *United States v. Murraye*.[166] Citing the rule from *Dominguez Benitez*, the court found that the appellant had not satisfied his burden of establishing that the Rule 11(b)(1)(N) error affected his substantial rights.[167] Still, the court ruled that, based on the appellant's limited education and the court's failure to ensure the defendant's understanding of the plea, the waiver was unenforceable because it was not voluntary and intelligent.[168] Although intended to take place outside of the scope of the plain error review,[169] the court's voluntariness and

166. *See* United States v. Murraye, 596 Fed. App'x 219, 220 (4th Cir. 2015) (per curiam) (unpublished) (concluding that the defendant did not meet the required showing under *Dominguez Benitez*, but still denying the Government's motion to dismiss the appeal because the appellate waiver was not voluntary and intelligent).

167. *See id.* at 227 ("Appellant bears the final burden of showing that the plain error in this case affected his substantial rights."). The court emphasized that there were "no statements on the record, at any stage of the trial proceedings, demonstrating that Appellant wished to withdraw his guilty plea or would have gone to trial but for the errors." *Id.* at 228; *see also* United States v. Martinez, 277 F.3d 517, 531 (4th Cir. 2002) (requiring the defendant to "demonstrate that, absent the Rule 11 errors, he would not have entered into his plea agreement with the Government").

168. *See Murraye*, 596 Fed. App'x at 227 ("We must evaluate this issue by reference to the totality of the circumstances, including the experience and conduct of the accused, as well as the accused's educational background and familiarity with the terms of the plea agreement." (internal quotation marks omitted) (citing United States v. General, 278 F.3d 389, 400 (4th Cir. 2002))). The court specifically noted the defendant's "limited educational background and . . . enroll[ment] in special education classes" in its analysis of the circumstances. *Id.*

169. *See id.* (indicating the totality of the circumstances standard). The court's use of the "totality of the circumstances" context suggests that the voluntariness and intelligence inquiry could have been on constitutional grounds instead of procedural. *See id.* (separating the analysis of Rule 11 errors under the reasonable probability standard from the discussion of the Government's motion to dismiss based on the enforceability of the appellate waiver); s*ee also* United States v. Manigan, 592 F.3d 621, 627 (4th Cir. 2010) ("Whether a defendant knowingly and intelligently agreed to waive his right of appeal must be evaluated by reference to the totality of the circumstances." (internal quotation marks and citation omitted)); discussion *supra* Part II.A (discussing *Boykin v. Alabama*, which allows a defendant to raise the argument that his plea was neither voluntary nor intelligent on constitutional grounds, independent of procedural error).

intelligence inquiry occurred under the Rule 11(b)(1)(N) review.[170] The court unified the constitutional and procedural inquiries when it stated that "[a]n appellate waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver."[171] Because the court refused to enforce the waiver given the evidence of the defendant's delayed mental development, it based its decision to overturn the conviction on the defendant's understanding of the plea, not the probability of whether the defendant would have pleaded differently but for the error.[172] Before *Murraye*, the Fourth Circuit inconsistently approached Rule 11(b)(1)(N) violations by claiming to apply the objective test, but then analyzing the totality of the circumstances to determine whether the record established that the defendant entered the appellate waiver voluntarily and intelligently.[173]

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170. *See Murraye*, 596 Fed. App'x at 229 ("The district court also never asked specifically whether Appellant understood the waiver of his appeal rights. Considering the totality of the circumstances, we conclude Appellant's waiver was neither knowing nor intelligent." (citing *Manigan*, 592 F.3d at 627)). By including the failure to inquire about appellate waiver as a factor of the totality of the circumstances, the court blends the constitutional and procedural inquiries to conclude that the waiver is unenforceable. *See id.* at 223 (noting the absence of colloquy about the waiver).

171. *See id.* at 229 (citing *Manigan*, 592 U.S. at 627) (demonstrating the court's reliance on determining whether the defendant actually understood the appellate waiver, as opposed to looking at evidence of whether he would have pleaded differently but for the errors).

172. *See id.* at 227–29 (ruling that although the defendant did not satisfy the *Dominguez Benitez* showing of a reasonable probability that he would have pleaded differently but for the error, the appeal waiver was unenforceable because it was not voluntary and intelligently made).

173. *See Manigan*, 592 F.3d at 627 ("[A] waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver." (internal citation and quotation marks omitted)). The court noted that "[w]hether a defendant knowingly and intelligently agreed to waive his right of appeal must be evaluated by reference to the totality of the circumstances" and that "[a]n important factor in such an evaluation is whether the district court sufficiently explained the waiver to the

In *United States v. Frook*,[174] the Eighth Circuit engaged in analysis similar to that of the First and Fourth Circuits' analyses by stating that *Dominguez Benitez* controls the plain error review standard with the objective reasonable probability test.[175] But the court further engaged in fact-specific inquiry that implicated voluntary and intelligence constitutional grounds.[176] Even as the court ruled to uphold the appellate waiver,[177] it cautioned that

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defendant during the Federal Rule of Criminal Procedure 11 plea colloquy." *Id.* *Compare* United States v. Dickerson, 410 Fed. App'x 635, 638 (4th Cir. 2011) (per curiam) (unpublished) (upholding the appellate waiver because there was insufficient evidence that the defendant would have pleaded differently had the judge not erred during the Rule 11 hearing, but still conducting a factual review of the "totality of the circumstances"), *with* United States v. Johnson, 368 Fed. App'x 419, 421–22 (4th Cir. 2010) (per curiam) (unpublished) (ruling that the deficiencies in the Rule 11 colloquy were sufficient to make the defendant's appellate waiver unenforceable because it could not be considered voluntary and intelligent).

174. 616 F.3d 773 (8th Cir. 2010).

175. *Compare id.* at 775 ("[W]hen a defendant pleads guilty without proper advice under Rule 11, he may appeal the conviction under *at least* a plain error standard, with relief potentially available where the defendant can show a reasonable probability that, but for the error, he would not have entered the plea." (emphasis added) (citing United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004))), *with id.* ("[W]e see no good reason to treat alleged violations of Rule 11(b)(1)—concerning advise [sic] and questioning of the defendant—differently from alleged violations of Rule 11(b)(3)—concerning adequacy of a factual basis—when considering the availability of appellate review.").

176. *See id.* at 777 (describing the colloquy that took place at the plea hearing and other circumstances, including the defendant's education). This analysis of "other circumstances" that were on the record but that were not reflective of the Rule 11(b)(1)(N) error itself indicates the blending of the objective plain error analysis with constitutional grounds for appeal under *Boykin*. *See also* United States v. Sotirion, 617 F.3d 27, 34 n.6 (1st Cir. 2010) ("Plain error review would not apply if the defendant challenged the knowing and voluntary nature of his appellate waiver on grounds independent of the district court's compliance with Rule 11(b)(1)(N) . . . ."); United States v. Goodson, 544 F.3d 529, 539 n.9 (3d Cir. 2008) ("[A] defendant who claims that he was misled or coerced into entering the agreement, or that he was incompetent when he signed the waiver, challenges the validity of the waiver itself, not the Rule 11 colloquy. Such a challenge would receive *de novo* review . . . .").

177. *See Frook*, 616 F.3d at 777 ("[The defendant] has not demonstrated that the district court's failure to advise him of terms in the plea agreement waiving the right to appeal, as required by Rule 11(b)(1)(N), affected his decision to plead guilty."). The court examined the defendant's claim that the district court "bullied" him with its "colorful banter" regarding the apparent "tension between

"Rule 11 is meant to ensure that a guilty plea is knowing and voluntary, and the district court must follow a certain protocol designed to achieve that end."[178] Among the U.S. courts of appeals that claim to not conduct a complementary voluntariness and intelligence inquiry upon a Rule 11(b)(1)(N) violation, the Eighth Circuit presides as the court that consistently delves deeply into such an inquiry.[179] The muddling of the voluntary and intelligent requirement with plain error review of the Rule 11(b)(1)(N) procedural error reflects both the complexity of Rule 11 as a safeguard for appellate waiver and the obscurity of the rationale *Dominguez Benitez* as courts attempt to apply its objective standard to carefully guarded appellate rights.[180]

In sum, the First, Fourth, and Eighth Circuits frequently include a voluntariness and intelligence inquiry in the plain error review of Rule 11(b)(1)(N) errors.[181] The inconsistent application

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Frook's extensive educational background and his asserted ignorance" about the requisite intent for the charge to which he pleaded guilty. *Id.* at 776–77. Noting that "the colloquy simply forced Frook to make a definitive statement about whether or not he committed the offense," the Eighth Circuit ruled that the district court colloquy allowed the defendant "ample opportunity to refrain from pleading guilty and to proceed to trial if he so desired." *Id.* at 777.

178. *Id.* at 775 (internal citation and quotation marks omitted); *see id.* ("A valid guilty plea that waives non-jurisdictional defects, in other words, must be knowing and voluntary." (internal quotation marks omitted)).

179. The Eighth Circuit has endeavored to be aggressive in its non-explicit evaluation of voluntariness and intelligence of appellate waiver. *See, e.g.*, United States v. Slaughter, 407 F. App'x 83, 83 (8th Cir. 2011) (per curiam) (unpublished) (refusing to uphold appellate waiver because of the "minimal discussion of the plea agreement and waiver at the plea hearing"); United States v. Rojas-Coria, 401 F.3d 871, 872 n.2 (8th Cir. 2005) (ruling appellate waiver unenforceable because of inadequate colloquy); *see also* United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003) ("[A] defendant may knowingly and voluntarily enter into a plea agreement waiving the right to a jury trial, but nonetheless fail to have knowingly and voluntarily waived other rights—including appellate rights.").

180. *See* United States v. Frook, 616 F.3d 773, 775 (8th Cir. 2010) ("[A] district court's failure to comply with Rule 11 calls into question the knowing and voluntary nature of a plea, and thus its validity."); *see also* Andis, 333 F.3d at 891 ("[B]ecause . . . failure to make a determination as required under Fed. R. Crim. P. 11(b)(1)(N)[] can create potential error, a district court should endeavor to correctly address any waiver in a plea agreement and ascertain that a defendant has knowingly and voluntarily waived the rights addressed by the agreement.").

181. *See supra* notes 161–163, 170–172, 178–179 and accompanying text

of this secondary analysis alongside the *Dominguez Benitez* harmless error standard results in unpredictable outcomes for defendants appealing from guilty pleas.[182] Due to lacking case law and confusion about how far *Dominguez Benitez* extends in general to Rule 11 errors, these circuits claim to apply one analysis while actually engaging in another. Their inclusion of the secondary inquiry makes it evident that many courts find a voluntariness and intelligence requirement at the core of Rule 11(b)(1)(N) error review.[183]

C. Circuits that Apply a Voluntariness and Intelligence Inquiry

The federal circuit courts that use the additional voluntariness and intelligence test for Rule 11(b)(1)(N) plain error review are the Second, Third, Sixth, Seventh, and Ninth Circuits.[184] These circuits add the examination into the voluntariness and intelligence of a defendant's appellate waiver because Rule 11(b)(1)(N) errors are distinguishable from the Rule 11(c)(3)(B)[185] error in *Dominguez Benitez*.[186] Therefore, the objective standard articulated in *Dominguez Benitez* is insufficient alone to review the fundamental nature of an appellate waiver.[187]

(elaborating on the First, Fourth, and Eighth Circuits' application of the two tests upon plain error review of Rule 11(b)(1)(N) errors).

182. *See* discussion *infra* Part V (arguing that inconsistent review by the circuits impacts the enforcement of the appellate waivers).

183. *See* discussion *infra* Part V (arguing that the voluntariness and intelligence inquiry should be added alongside the *Dominguez Benitez* standard because most of the circuits already engage in the analysis).

184. *See* discussion *infra* Part IV.C (describing the circuits that apply a voluntary and intelligent inquiry to their Rule 11(b)(1)(N) plain error review).

185. *See* FED. R. CRIM. P. 11(c)(3)(B) ("To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.").

186. *See* discussion *supra* Part III.D (presenting the *Dominguez Benitez* standard that a defendant can only show that his substantial rights were violated in a Rule 11(b)(1)(N) error if he can demonstrate that had the judge not erred, he would not have pleaded guilty).

187. *See* discussion *infra* Part V (advocating for the adoption of the voluntariness and intelligence inquiry).

Most recently, the Second Circuit clearly established the two-part framework for a Rule 11(b)(1)(N) error in *United States v. Cook*.[188] In *Cook*, the court initially stated that *United States v. Vonn*[189] controls the plain error review standard for all Rule 11 errors including Rule 11(b)(1)(N).[190] However, the court further determined that the standard under *United States v. Ready*[191] was not inconsistent with the *Vonn* requirements, even though the standard under *Ready* probed the defendant's understanding of the guilty plea.[192] By embracing the *Ready* standard under the prejudice prong of *Vonn*, the Second Circuit expressed favor of the additional analysis regarding the defendant's understanding of appellate waiver.[193] In *Cook*, the court reviewed the plea hearing colloquy and concluded that the colloquy was sufficient because "under the circumstances, there was no realistic possibility that

188. *See* United States v. Cook, 722 F.3d 477, 482 (2d Cir. 2013) (concluding that the defendant did not establish a "realistic possibility that [he] might have misunderstood the nature or source of the waiver" (internal citation omitted)). The court noted that the defendant "also fail[ed] to establish plain error for a second, alternative reason: he has not shown a reasonable probability that, but for the error, he would not have entered the plea." *Id.* at 482–83 (internal citation omitted).

189. 535 U.S. 55 (2002); *see* discussion *supra* Part III.C (establishing the four-prong test for plain error review).

190. *See Cook*, 722 F.3d at 481 ("We are bound by *Vonn*, which governs all Rule 11 appeals, subsection (b)(1)(N) included."). The court reiterated the four-part test for plain error and further noted that "[a]dditionally, to show that a Rule 11 violation was plain error, the defendant must demonstrate that there is a reasonable probability that, but for the error, he would not have entered the plea." *Id.*

191. 82 F.3d 551 (2d Cir. 1996).

192. *See Cook*, 722 F.3d at 481 ("In any event, *Ready*'s 'knowing and voluntary' test is not at all inconsistent with plain error review: 'Rule 11 is designed to assist district courts in ensuring that a defendant's guilty plea is knowing and voluntary.'" (quoting United States v. Mercado, 349 F.3d 708, 711 (2d Cir. 2003))). The standard under *Ready* is whether "the record clearly demonstrates that the waiver was both knowing (in the sense that the defendant fully understood the potential consequences of his waiver) and voluntary." *Id.* (quotation marks omitted). Therefore, although *Ready* was decided before *Vonn*, *Ready*'s query into the defendant's understanding of the guilty plea does not conflict with plain error review of Rule 11(b)(1)(N). *See id.* (acknowledging that the two standards do not clash).

193. *See id*. at 482–83 (analyzing whether the defendant understood he waived his right to appeal or collaterally attack his conviction upon a guilty plea, except to appeal a sentence that exceeded sixty months).

[the defendant] might have misunderstood the nature or source of the waiver."[194] Under this framework, the analysis hinged on whether the defendant understood the appellate waiver, not whether he showed a reasonable probability that, but for the error, he would not have entered the plea.[195]

In *United States v. Goodson*,[196] the Third Circuit noted that the analysis of the Rule 11(b)(1)(N) error was not limited to whether there was a technical violation, but also encompassed the defendant's understanding of the rights he waived in the guilty plea.[197] The court stated that it could not "ignore that there was no effort to verify that Goodson understood the breadth of the waiver" and that such deficiency constituted error.[198] "[I]nquiry is not limited, however, to whether there was a technical violation of Rule 11[,]"[199] and the panel continued its analysis to determine whether the defendant had shown that he did not understand the rights he waived by entering the guilty plea.[200] The court pushed its review past the harmless error

194. *See id.* at 481–82 (stating that the defendant had not shown he would not have entered the plea but for the error, yet continuing the analysis as a fact-specific inquiry into the colloquy). Notably, the court did not reference *Dominguez Benitez* in its opinion.

195. *See id.* at 481 (addressing the defendant's complaint that "the judge failed to advise him of the 'heart' of the appeal waiver"); *see also* Tellado v. United States, 799 F. Supp. 2d 156, 175–78 (D. Conn. 2011) (conducting a detailed survey of the U.S. appeals courts' application of *Dominguez Benitez* to Rule 11(b)(1)(N) errors and concluding that the Second Circuit would safely fall within the circuits that elect to apply the voluntariness and intelligence inquiry), *aff'd*, 745 F.3d 48 (2d Cir. 2014).

196. 544 F.3d 529 (3d Cir. 2008).

197. *Id.* at 540 (determining whether defendant understood the appeal waiver, despite the insufficient colloquy).

198. *See id.* at 540 (discussing how the prosecutor's description of the terms of the plea agreement in open court was insufficient under Rule 11(b)(1)(N) because the court should have asked the defendant "personally whether he understood that he had given up substantial appellate rights . . . .").

199. *Id.*

200. *See id.* ("[W]e must determine whether Goodson, who bears the burden of persuasion, has demonstrated that the deficient colloquy affected his substantial rights by precluding him from knowing of and understanding the significance of the binding appellate waiver in the plea agreement." (citing United States v. Olano, 507 U.S. 725, 734 (1993))). This statement adds the objective standard under *Dominguez Benitez* to the voluntariness and intelligence inquiry because the court expressly attempted to discern the

review of Rule 11(b)(1)(N) and found that the defendant entered the appellate waiver intelligently and knowingly by conducting a fact-specific examination of the colloquy.[201]

The Third Circuit faced a more deviant colloquy in *United States v. Corso*,[202] in which the trial court's failure to advise the defendant about his appellate waiver affirmatively affected the defendant's substantial rights under plain error review.[203] Although the court restated the reasonable probability standard as articulated in *Dominguez Benitez*,[204] it did not analyze whether the defendant demonstrated that he would not have entered the plea but for the Rule 11(b)(1)(N) error.[205] Instead, the court engaged in a fact-specific inquiry based on evidence on the record[206] that examined the defendant's depth of understanding

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defendant's actual understanding of the appellate waiver in light of the Rule 11(b)(1)(N) error.

201. *See id.* at 540–41 (detailing the colloquy, which included discussion of the limited circumstances under which the defendant could appeal, the defendant's acknowledgement of the contents of the plea agreement, and the prosecutor's statements about the appellate waiver). The court also noted the defendant's college education and that he successfully committed wire fraud, which indicated the defendant possessed a high degree of sophistication and intellect. *Id.*

202. 549 F.3d 921 (3d Cir. 2008).

203. *See id.* at 931 (finding that the "near-total deviation" from Rule 11(b)(1)(N)'s procedural requirements satisfied a showing of prejudice).

204. *See id.* at 929 (providing that, for a defendant to show his substantial rights were affected, "a defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea" (quoting United States v. Dominguez Benitez, 542 U.S. 74, 83 (2004))).

205. *See id.* (explaining that the defendant "is obliged to show a reasonable probability that the Rule 11 error 'precluded him from understanding that he had a right to appeal and that he had substantially agreed to give up that right'" (quoting United States v. Goodson, 544 F.3d 529, 541 (3d Cir. 2008))). This standard as stated in *Corso* conflates the *Dominguez Benitez* test with the two-part analysis for voluntariness and intelligence, again indicating that the inquiry is laden with misperception about the what the Supreme Court intended the standard to be for Rule 11(b)(1)(N) errors given Footnote 10. *See supra* text accompanying note 130 (citing United States v. Dominguez Benitez, 542 U.S. 74, 84 n.10 (2004)).

206. *See Corso*, 549 F.3d at 929 ("We may consult the entire record, and not simply the record of the plea colloquy, when considering the effect of the Rule 11 error." (citing United States v. Vonn, 535 U.S. 55, 59 (2002))).

about the appellate waiver.[207] Notably, although the court determined that the appellate waiver was still enforceable under the fourth prong of plain error review, the court found that the defendant carried his burden to show his substantial rights were prejudiced under the third prong.[208]

Following the Second and Third Circuits, the Sixth Circuit determined that the defendant's substantial rights were prejudiced in *United States v. Murdock*[209] because there was no evidence that the defendant understood the role of the appellate waiver in his guilty plea.[210] Turning to facts similar to those relied upon by the Second and Third Circuits,[211] the Sixth Circuit

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207. *See id.* at 930 ("[T]he point of Rule 11(b)(1)(N) is that a signed piece of paper is not enough." (quoting United States v. Sura, 511 F.3d 654, 662 (7th Cir. 2007))). The Third Circuit noted that in its previous ruling in *Goodson*, it "addressed some of the considerations that inform our inquiry into whether an inadequate Rule 11 colloquy affected a defendant's substantial rights." *Id.* (citing United States v. Goodson, 544 F.3d 529, 541 (3d Cir. 2008)). Compared to *Goodson*, the district court in *Corso* "made no effort to determine that Corso, whose education [was] limited to a GED diploma, understood the effect of his waiver on his right to appeal, or even whether he had discussed the waiver with his attorney." *Id.* Furthermore, the prosecutor's "fleeting reference" to the standard terms of a guilty plea could "hardly be deemed a 'discussion' of the terms of Corso's appellate waiver, much less an adequate substitute for the missing safeguards of Rule 11(b)(1)(N)." *Id.* at 930–31.

208. *See id.* at 931–32 (finding the appellate waiver enforceable because the defendant did not demonstrate that the "District Court's deficient colloquy seriously affected the fairness, integrity, or public reputation of the judicial proceedings[,]" and therefore failed the fourth prong of the plain error review test). The defendant did not carry his burden under the fourth prong of plain error review because he did not show that leaving the error uncorrected was an offense against the justice system. *See id.* ("Although the right to appeal is one of critical importance to a criminal defendant, we are unconvinced, on the record here, that enforcing the appellate waiver in Corso's plea agreement would result in a miscarriage of justice." (internal citation and quotation marks omitted)). For a discussion of the standards for the fourth prong of plain error review, see Edward Goolsby, Comment, *Why So Serious? Taking the Word "Seriously" More Seriously in Plain Error Review of Federal Sentencing Appeals*, 51 HOUS. L. REV. 1449, 1451 (2014) (advocating three new criteria for the fourth prong, to foster "a more consistent application of plain error review that will benefit both defendants and federal circuit judges").

209. 398 F.3d 491 (6th Cir. 2005).

210. *See id.* at 499 (ruling that the appellate waiver was unenforceable).

211. *See id.* at 498 ("[T]he record shows that the judge failed in his duty to discuss the meaning of the appellate waiver provision with Murdock, that the waiver provision was never mentioned in open court, and there is no evidence

noted that the trial judge did not personally determine whether the defendant had discussed the agreement with his attorney or whether he understood the terms of the appellate waiver.[212] The court emphasized that the technical violation of Rule 11(b)(1)(N) alone was insufficient if there was evidence on the record of a "functional substitute for that safeguard," but that no such alternative occurred.[213] The allusion to an alternative procedural safeguard was a strong indication that the court aimed to gauge the defendant's understanding of his plea, instead of whether there was a reasonable probability that he would have entered the guilty plea but for the error.[214] Most importantly, the court expressly declined to apply the reasonable probability standard from *Dominguez Benitez*.[215] By stating that it would "instead"

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that Murdock discussed any provisions of the plea agreement with his attorney.").

212. *See id.* at 497 ("[A] defendant's substantial rights are affected by the 'wholesale omission' of the Rule 11-required inquiry, coupled with the absence of any indication on the record that the defendant understood that he had a right to appeal and that he was giving up that right." (citing United States v. Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004))). Neither the prosecutor nor the judge referenced the appellate waiver during the plea colloquy, which resulted in the court's complete failure to determine whether the defendant even knew the appellate waiver was part of the plea agreement. *Id.* at 494.

213. *See id.* at 498 (explaining that "some other event could suffice to insure that Defendant's waiver was knowing and voluntary," such as the prosecutor adequately addressing the waiver provision). The court further stated that "[i]n the absence of a discussion of the appellate waiver provision in open court, we will not rely on a defendant's self-assessment of his understanding of a plea agreement in determining the knowingness of that plea . . . ." *Id.* The insufficiency of the defendant's self-assessment stands in stark contrast to other circuits that rely on the testimony of the defendant that he understood the consequences of the plea, even to uphold the voluntariness and intelligence of the guilty plea.

214. *See id.* at 497–98 (noting that in the absence of any open discussion of the appellate waiver, the court would not accept the defendant's self-assessment of understanding or the signed statement that he understood the agreement as sufficient under Rule 11(b)(1)(N)).

215. *See id.* at 496 (stating that the court "[i]nstead" adheres to the *Vonn* four-prong test). Notably, the Sixth Circuit rejected outright the government's argument that *Dominguez Benitez* applies to the appellate waiver here. *See id.* ("We decline to adopt the government's view of this issue, and instead conclude that *Dominguez Benitez* is inapplicable here . . . ."). The court noted that it considered the defendant's appeal of his sentence and not his conviction a factor in declining to apply *Dominguez Benitez*. *Id.*; *see infra* note 217 and

adhere to the plain error review standard articulated in *United States v. Vonn*,[216] the court drew attention to the confusion surrounding the line of cases about Rule 11 errors.[217] Still, the Sixth Circuit's denunciation of the *Dominguez Benitez* standard implied that it instead adopted a voluntary and intelligent inquiry for plain error review of Rule 11(b)(1)(N) errors.[218]

The Sixth Circuit again focused on the presence of an alternative procedural safeguard in *United States v. Robinson*.[219] In *Robinson*, the court determined that there was a functional equivalent for the Rule 11 advisement because the prosecutor referred to the appellate waiver in open court and the defendant confirmed he discussed the terms of the plea with his attorney.[220]

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accompanying text (discussing the reasons a defendant may appeal a conviction).

216. *See* discussion *supra* Part III.C (detailing the review standard from *Vonn* for Rule 11 violations).

217. The court pointed to the distinction between a defendant appealing for the purpose of reversing his conviction (as in *Dominguez Benitez*) and a defendant appealing for the purpose of contesting his sentence term (as in *Murdock*). *See* United States v. Murdock, 398 F.3d 491, 496 (6th Cir. 2005) ("Instead, we adhere to the rule set forth in *United States v. Vonn*, which instructs us to review violations of Rule 11 for plain error if the defendant did not object before the district court."). While the distinction the Sixth Circuit attempted to draw was imprecise and arguably irrelevant, the rejection of the *Dominguez Benitez* standard was expressly apparent. *See id.* (declining to apply *Dominguez Benitez*); *infra note* 227 and accompanying text (claiming that the distinction between a defendant seeking reversal of his conviction upon a guilty plea and a defendant appealing his sentence is not a dispositive factor in plain error review of Rule 11(b)(1)(N) errors).

218. *See Murdock*, 398 F.3d at 497 ("[A] defendant's substantial rights are affected by the 'wholesale omission' of the Rule 11-required inquiry, coupled with the absence of any indication on the record that the defendant understood that he had a right to appeal and that he was giving up that right." (citing United States v. Arellano-Gallegos, 387 F.3d 794, 797 (9th Cir. 2004))); *see also* discussion *infra* note 230 (noting the importance of *Arellano-Gallegos* in influencing later cases).

219. 455 F.3d 602 (6th Cir. 2006).

220. *See id.* at 610 ("[W]here the defendant states that he had reviewed the plea agreement with his attorney . . . or where the prosecutor refers to the waiver provision in summarizing the terms of the plea agreement, this may be sufficient to insure that the waiver was knowing and voluntary."). *Robinson* also involved a defendant appealing his sentence from a guilty plea. *Id.* at 609; *see also* United States v. Sharp, 442 F.3d 946, 951 (6th Cir. 2006) ("[I]n the absence of such an inquiry by the district court, a prosecutor's summary of the key elements of the plea agreement can be sufficient to prove that the defendant's

Referencing a Rule 11 alternative was evidence that the court considered the voluntary and intelligent inquiry a better standard of review for Rule 11(b)(1)(N) errors than the reasonable probability standard.[221] The court upheld the appellate waiver because the Rule 11 equivalent (i.e., the prosecutor's statements on the record) ensured that the defendant entered the plea voluntarily and intelligently, not because the defendant did not demonstrate that he would not have pleaded guilty had the judge not erred.[222]

In a seminal and precedential case, the Seventh Circuit relied heavily on *Murdock* to determine that the district court's failure to address appellate waiver violated the defendant's substantial rights in *United States v. Sura*.[223] Involving facts

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waiver was knowing and voluntary."); United States v. Wilson, 438 F.3d 672, 674 (6th Cir. 2006) (finding the plea agreement voluntary and intelligent because "the judge, while directly addressing defendant, instructed the United States Attorney to explain to defendant the details of the plea agreement").

221. *See Robinson*, 455 F.3d at 610 ("Thus, the substitutes for Rule 11 compliance noted in *Murdock* are present in this case. The failure of the district court to specifically address defendant concerning the waiver provision did not affect his substantial rights.").

222. Again, it is noteworthy that the Sixth Circuit panel did not reference *Dominguez Benitez* at all in *Robinson*, confirming its statement in *Murdock* that it rejected the application of only the objective plain error standard for Rule 11(b)(1)(N) errors. *See id.* (citing *Murdock*'s plain error review analysis).

223. *See* United States v. Sura, 511 F.3d 654, 662 (7th Cir. 2007) ("We conclude that Sura's waiver of his appellate rights was not knowing and voluntary."). The facts in *Sura* are an exceptional illustration of the importance of the voluntary and intelligent test, which is perhaps a reason why the Seventh Circuit seized upon this case to delve into appellate waiver. The defendant, a convicted felon, was charged as a felon in unlawful possession of a firearm, a World War II Beretta pistol that he kept as a memento from a friend. *Id.* at 655–56. Sura pleaded guilty to the charge, stating "I do have a conviction of a felony on my record, I was in possession of the Beretta, so I have to plead guilty." *Id.* at 656. The district court declined to apply a sentencing reduction for the fact that Sura did not possess any ammunition and had never unlawfully discharged the weapon. *Id.* In ruling to vacate the appellate waiver, the Seventh Circuit found these facts to be relevant because

> [w]e think it likely that [Sura] would have assessed his strategic position differently had he realized that he was losing the chance to challenge the district court's sentencing decision, which was based primarily on crimes unrelated to the crime of conviction and gave little weight to Sura's individual circumstances.

Id. at 662.

similar to those in *Murdock*, the court pointed to the absence of any mention of the appellate waiver on the record from either the judge or the prosecutor as constituting plain error.[224] Echoing *Murdock*,[225] the lack of any alternative procedural safeguard prevented the appellate court from affirming that the defendant's admission of understanding was sufficient under Rule 11(b)(1)(N).[226] The court explained that a voluntariness and intelligence analysis was part of determining whether the defendant had satisfied the substantial rights prong of plain error review under *Dominguez Benitez*.[227] However, the court hardly

224. *See id.* (describing the thoroughness of the colloquy, but noting that there was no evidence on the record that the defendant was informed of and understood the appellate waiver). The court focused on the facts that the judge did not address the waiver in open court or ask the defendant whether his attorney advised him of the waiver. *Id.*

225. *See id.* (mimicking *Murdock*'s language that "[i]f the safeguard required by Rule 11 is missing, the record must reveal an adequate substitute for it, and the defendant must show why the omission made a difference to him").

226. *See id.* ("Sura's explanation for why he accepted the plea agreement gives no assurance that he understood this aspect of the deal . . . ."). The court went on to state that based on Sura's interaction with the judge during the colloquy, "he may mistakenly have thought that he had to accept the agreement because he was willing to admit to his guilt, when in fact he could have pleaded guilty without a plea agreement." *Id.*; *see* United States v. Murdock, 398 F.3d 491, 498 (6th Cir. 2005) (describing the effects of a "wholesale omission" of Rule 11(b)(1)(N)).

227. *See Sura*, 511 F.3d at 662 ("One step (although not the only step) along the way to the defendant's demonstration that the error affected his decision to plead guilty is to look at whether the defendant understood his plea agreement."). The Seventh Circuit's inquiry contrasts the Sixth Circuit's rejection of *Dominguez Benitez* because Sura, like Murdock, appealed his sentence term, but the Seventh Circuit did not find the sentencing appeal to be a dispositive factor. *See id.* at 655–56 ("Sura now wants to challenge that sentence, but in order to do so, he first must convince us that his appeal waiver should be set aside."). Sura in turn requested his plea be entirely vacated on direct appeal, instead of only challenging his sentence, and the court conceded that the nature of the entire plea agreement was at issue. *See id.* ("[W]e conclude that Sura has shown that he did not knowingly and voluntarily accept the plea (including its waiver of his appellate rights) and thus that the district court plainly erred when it accepted the plea."). This outcome illuminates the ambiguity of the Sixth Circuit's ruling in *Murdock*, because *Murdock* rejected *Dominguez Benitez*, but both the Sixth and Seventh Circuits ruled to set aside the appeal waiver. *Compare id.* at 655–66 (noting that Sura's plea to set aside the appellate waiver arose from his attempt to appeal his sentence), *with Murdock*, 398 F.3d at 496 ("We decline to adopt the government's view of this issue, and instead conclude that *Dominguez Benitez* is inapplicable here because

returned to the reasonable probability test after mentioning it, instead concentrating on the totality of the circumstances of the colloquy.[228] *Sura* established critical precedent regarding appellate waiver because the court emphasized the practical importance of the colloquy as a safeguard for criminal appellate rights, a function that many judges gloss over to preserve the finality of a guilty plea.[229]

In summary, the Second, Third, Sixth, and Seventh Circuits expressly incorporated the voluntary and intelligence inquiry into plain error review of Rule 11(b)(1)(N) errors.[230] In particular, the

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Murdock is not seeking to reverse his conviction, but merely to void the appellate waiver provision in order to challenge his sentence.").

228. *See Sura*, 511 F.3d at 662 (describing "Sura's confused responses to the district judge's questions, his age, and his mental condition" as relevant considerations). The district court determined that the defendant did not feel his medication or psychological treatment would affect his decision and that he was satisfied with his representation, but not that he understood his waiver of appeal. *Id.* at 656; *see also* United States v. Loutos, 383 F.3d 615, 619 (7th Cir. 2004) (noting that the defendant was a practicing attorney with significant experience reading and entering contracts, which satisfied the court that his appellate waiver was voluntary and intelligent despite the technical Rule 11(b)(1)(N) violation by the court). Although *Loutos* involved harmless error, not plain error, the *Sura* court still treated *Loutos* as applicable law, stating that the

> validity of a Rule 11 colloquy is based on the totality of the circumstances, including such factors as the complexity of the charge, the defendant's level of intelligence, age, and education, whether the defendant was represented by counsel, the judge's inquiry during the plea hearing and the defendant's statements, as well as the evidence proffered by the government.

Id. at 659 (internal citation and quotation marks omitted).

229. *See* United States v. Sura, 511 F.3d 654, 662 (7th Cir. 2007) (stating that if the court were to "assume that the waiver was knowing and voluntary based only on the facts that Sura . . . is literate and signed the agreement, we would render meaningless not only Rule 11(b)(1)(N), but also the broader inquiry into prejudice that the Supreme Court requires"). *See* discussion *infra* Part V (discussing constitutional and policy concerns about defendants entering guilty pleas with appellate waivers, specifically in light of the concerns the court expressed in *Sura*).

230. *See supra* notes 195, 201, 213, 228–229 (applying the two-step analysis to ensure the purpose of Rule 11(b)(1)(N) was maintained and the defendant's rights were protected). The Ninth Circuit's ruling in *United States v. Arellano-Gallegos*, 387 F.3d 794 (2004), is also of noteworthy importance for the plain error review of Rule 11(b)(1)(N) errors. *See supra* note 144 (providing background on the lack of case law in the Ninth Circuit on this issue and noting

Sixth and Seventh Circuits established leading cases and clearly articulated the importance of the voluntariness and intelligence inquiry to preserve the safeguard role of Rule 11.[231] Still, the effects and policy behind implementing a voluntariness and intelligence inquiry on a widespread scale have not been adequately explored, even though these circuits present compelling demonstrations of how a lower court can easily neglect a voluntariness and intelligence examination.

V. Argument for Adopting the Two-Part Inquiry: The Purpose of Rule 11(b)(1)(N) and the Effects of Adding the Voluntariness and Intelligence Inquiry

The circuit split forces appellate courts to weigh the efficiency of enforcing a guilty plea, despite a procedural error, against the fairness and accuracy concerns that arise from imposing a defendant's involuntary and unintelligent appeal waiver.[232] This tug-of-war grapples with pertinent issues for a criminal justice system characterized by an overwhelming caseload and high incarceration rate.[233] On the one hand, if

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the value of the ruling in *Arellano-Gallegos*). Various circuits cite to *Arellano-Gallegos* in their analyses under *Dominguez Benitez*. *See supra* notes 157, 158, 212, 218 (citing to *Arellano-Gallegos* and using the voluntariness and intelligence inquiry). The Ninth Circuit refused to enforce the appellate waiver because "[t]he sentencing judge neither 'addressed the defendant personally' regarding the waiver nor 'determined that the defendant understood' the meaning of the waiver." *Arellano-Gallegos*, 387 F.3d at 797. Importantly, the Ninth Circuit used the rhetoric that the other circuits turn to in their post-*Dominguez Benitez* cases. *Id.* ("Because this was *not a technical violation of Rule 11*, but rather a *wholesale omission*, and there is nothing elsewhere in the record to indicate that Arellano understood the right to appeal his sentence, his substantial rights were affected." (emphasis added)).

231. *See supra* notes 212–214, 228–229 and accompanying text (discussing the value of *Sura* and *Murdock* in guiding circuits on thorough voluntariness and intelligence examination).

232. *See* Cook, *supra* note 40, at 638 ("[The] federal plea process . . . too often devalues individual due process in favor of judicial economy.").

233. *See* Judge Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty/?insrc=whc (last visited Mar. 2, 2017) ("[T]he information-deprived defense lawyer, typically within a few days after the arrest, meets with the overconfident prosecutor, who makes clear that, unless

courts apply only the objective standard under *Dominguez Benitez*, the likelihood that an appeal will dismantle a plea agreement decreases, preserving finality of the conviction.[234] On the other hand, enforcing an appellate waiver against a defendant who has a meritorious claim of misunderstanding denies a defendant relief because of an unjust procedural error.[235]

In light of these considerations, there are three significant reasons to add a voluntariness and intelligence inquiry to plain error review of Rule 11(b)(1)(N) errors.[236] The Supreme Court has repeatedly indicated that due process ensures certain aspects of the appeals process for criminal defendants, even if due process does not guarantee the right to appeal itself.[237] Furthermore, Congress passed Rule 11 as a procedural safeguard to ensure the voluntariness and intelligence of a guilty plea in the post-*Boykin* period.[238] If a court neglects the Rule 11(b)(1)(N) advisement, *Boykin* requires that there be some measure, either at the plea hearing or on appeal, to ensure the voluntariness and intelligence

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the case can be promptly resolved by a plea bargain, he intends to charge the defendant with the most severe offenses he can prove.") (on file with the Washington and Lee Law Review).

234. *See* Cook, *supra* note 40, at 639 (discussing the Supreme Court's focus on finality in *United States v. Timmreck*, 441 U.S. 780 (1979), "especially in the context of habeas corpus challenges to the Rule 11 process"); *id.* at 635 (noting that a mere "technical violation of Rule 11, without more, would not warrant collateral relief" (citing *Timmreck*, 441 U.S. at 784)).

235. *See supra* Part III.B (describing the effect of an appellate waiver as severely impairing, if not eliminating, a defendant's opportunity for appeal).

236. The argument in Part V focuses on why adding the voluntariness and intelligence inquiry is pertinent to securing what remains of a defendant's rights after he enters a guilty plea. Importantly, this Note does not argue that *Dominguez Benitez* should not still apply to other Rule 11 errors. For Rule 11(b)(1)(N) errors, *Dominguez Benitez* should apply as a standard for Rule 11(b)(1)(N) errors *alongside* the voluntariness and intelligence inquiry. *See supra* Part IV (detailing the approaches of the circuits and noting that even among the circuits that use a voluntariness and intelligence inquiry, there is no clear consensus on whether such an inquiry is in addition to or in place of the reasonable probability standard from *Dominguez Benitez*).

237. *See infra* notes 251–252 and accompanying text (advocating that some degree of due process is required for the appellate process, although due process does not guarantee the right to access the appellate process itself).

238. *See* discussion *supra* Part II.B (detailing the history of Rule 11 and the purpose behind the amendments).

of the appellate waiver.[239] Finally, adding the voluntariness and intelligence appellate inquiry offers lower courts guidance when administering the Rule 11 colloquy and results in more consistent outcomes for defendants, who can receive contrary results in different circuits.[240] Importantly, many of the circuits already conduct a voluntary and intelligence inquiry, whether express or not, which is evidence that a number of courts do not consider *Dominguez Benitez* to be sufficient for Rule 11(b)(1)(N) plain error review.[241]

Although the right to appeal is entrenched in modern society, its historical role in the United States is limited.[242] Because federal access to review for criminal convictions did not exist until 1879,[243] and states have granted the right to appeal sporadically over the last century,[244] appeals were not an ancient practice in the United States. Dating back to *McKane v. Durston*,[245] the Supreme Court has held that the right to appeal and the terms of any appeal are within the discretion of the

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239. *See infra* notes 253–262 and accompanying text (arguing that Rule 11(b)(1)(N) requires an examination of the voluntariness and intelligence of the appellate waiver, making *Dominguez Benitez* insufficient for review).

240. *See infra* notes 264–269 (discussing the rationale and effects of adding the voluntariness and intelligence inquiry).

241. *See* discussion *supra* Part IV (presenting the different approaches of the circuits, which generally fall into three main categories: circuits that use only the objective test; circuits that claim to only use the objective test, but add a voluntariness and intelligence inquiry; and circuits that acknowledge the voluntariness and intelligence inquiry).

242. *See* YACKLE, *supra* note 69, at 66 (discussing the Article III power of Congress to "ordain and establish" inferior federal courts with appellate jurisdiction, which implies that the founders did not require a federal automatic right of appeal for cases outside the Supreme Court's appellate grant). Additionally, the role of the federal courts of appeals is further restrained by Congress's power to determine the jurisdiction of the circuit courts. *See id.* at 67–79 (detailing the "cases and controversies" for which Congress can control and grant appellate jurisdiction to the inferior federal courts).

243. *See* Harry G. Fins, *Is the Right of Appeal Protected by the Fourteenth Amendment?*, 54 JUDICATURE 296, 296 (1971) ("[F]rom 1789 to 1879, a period of 90 years, a person who was convicted criminally by a federal court had no right of review." (citation omitted)).

244. *See* Robertson, *supra* note 61, at 1222, 1235 (examining states' adoptions of appeals as of right in criminal cases).

245. 153 U.S. 684 (1894).

state.[246] Thus, the argument that access to the appellate process is required by the due process clause fails because the right to appeal is neither a fundamental right nor "deeply rooted" in tradition.[247]

However, even if the right to appeal has not earned its place among due process guarantees because of its absence in the historical narrative of deeply rooted traditions, the Supreme Court has still opined repeatedly that some degree of due process is required when access to appeals exists through state constitution or statute.[248] A defendant pursuing appellate review

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246. *See id.* at 687

> A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.

247. *See, e.g.*, Robertson, *supra* note 61, at 1238 ("This lack of clarity, combined with the Supreme Court's own refusal to extend due process protection to the right of appeal suggests that the Court will be unlikely to locate such a right in an originalist conception of historical practice."); Fins, *supra* note 243, at 296 ("In the light of these historical facts, the earlier holdings of the United States Supreme Court that the right of appeal was not part of 'due process of law' was understandable.").

248. *See* discussion *supra* Part III.A (discussing the appeals process). The Court in *Griffin v. Illinois*, 351 U.S. 12 (1956), ruled that when the state requires a defendant to produce a transcript with his petition for appeal, the state must pay the costs to procure the transcript for an indigent defendant. *See id.* at 19 ("There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."). Furthermore, the Supreme Court found that a state violates due process when it provides a first appeal as of right but only offers appointed counsel if the defendant demonstrates his claim is meritorious. *See* Douglas v. California, 372 U.S. 353, 357 (1963) ("When an indigent is forced to run this gantlet of a preliminary showing of merit, the right to appeal does not comport with fair procedure."). In *Hill v. Lockhart*, 474 U.S. 52 (1985), the Court ruled that ineffective assistance of counsel claims were possible regarding plea bargaining if the defendant demonstrated that his counsel's performance was deficient and that he was prejudiced by the deficiency. *See id.* at 59 (requiring the defendant to show that "there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial"). Recently, the Court issued opinions in *Lafler v. Cooper* and *Frye v. Missouri* that further illuminated a defendant's right to effective assistance of counsel in the plea bargaining process. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1385 (2012) (ruling that a defendant must show the plea deal would have been extended by the prosecution and accepted by the court to demonstrate prejudice for ineffective assistance of counsel during plea bargaining); Frye v. Missouri, 132 S. Ct. 1399,

garners due process protection to some extent, but due process itself does not require access to an appeals process.[249] Notably, the Supreme Court stated in *Evitts v. Lucey*[250] that "[a] system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed."[251] Although the right to appeal is not a constitutional right because "its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct."[252]

The appellate process may exist in a gray area between a constitutional guarantee and a statutory entitlement, but its central role in the criminal justice process still earned it a

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1408 (2012) (deciding that defense counsel has an affirmative obligation to communicate a plea offer to a defendant).

249. *See, e.g.*, Blackledge v. Perry, 417 U.S. 21, 28–29 (1970) (ruling that it was "not constitutionally permissible for the State to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial de novo"). Although access to appellate review may not be required under due process, the Court in *Blackledge* ruled that the defendant's statutory right to seek de novo review was protected by due process. *See id.* at 28 ("[S]ince the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge." (internal quotation omitted)); *see also supra* notes 75–77 (discussing *Blackledge* in the context of constitutional issues that may survive an appellate waiver).

250. 469 U.S. 387 (1985).

251. *See id.* at 399–400. In *Evitts*, the Court ruled that although "the Constitution does not require States to grant appeals as of right to criminal defendants seeking to review alleged trial court errors," a state needed to appoint a lawyer for first appeals as of right if the state has provided for an appellate process at all. *See id.* at 393–94 (stating that the Due Process and Equal Protection clauses of the Constitution require that an indigent defendant receive appointed counsel to prevent an appeal from merely functioning as a "meaningless ritual" (internal citation omitted)). However, in *Ross v. Moffitt*, 417 U.S. 600 (1974), the Court decided that the Constitution did not require the extension of the right to appointed counsel under *Gideon v. Wainwright*, 372 U.S. 335 (1963), to apply to discretionary appeals. *See Ross*, 417 U.S. at 618 (determining that discretionary appeals fall outside the scope of required assistance of counsel).

252. *See* Harlon Leigh Dalton, *Taking the Right to Appeal (More or Less) Seriously*, 95 YALE L.J. 62, 23 (1985) (claiming that the right to appeal is held in a special, mostly untouched, trust in America); *see also* United States v. Murdock, 398 F.3d 491, 498 (6th Cir. 2005) ("The right to appeal, while not of constitutional dimension, is nonetheless of critical importance to a criminal defendant." (citing Abney v. United States, 431 U.S. 651, 656 (1977))).

carefully guarded place in Rule 11.[253] The history of Rule 11 indicates that Congress amended Rule 11 after *Boykin v. Alabama* in an attempt to ensure the voluntariness and intelligence of a guilty plea in general.[254] Even though the constitutional rights to a jury trial, representation by counsel, and privilege against self-incrimination[255] are still prophylactic aspects of due process in criminal proceedings, the increased use of guilty pleas and appellate waivers diminishes the function of these rights.[256] Because appellate waivers have gained popularity in lieu of defendants proceeding to trial,[257] Rule 11 has assumed an especially important role as a safeguard.[258] If the court excludes the Rule 11(b)(1)(N) advisement or a functional equivalent, then there is likely no precaution to ensure the voluntariness and intelligence of the plea and to prevent abuse of the appeal waivers.[259] *Boykin v. Alabama*[260] requires that

253. *See* discussion *supra* Parts II.B (providing the procedural background of Rule 11) and III.B (discussing appellate waiver).

254. *See* discussion *supra* Parts II.A (analyzing the outcome of *Boykin v. Alabama* and its effect on the guilty plea colloquy, which requires that there be an affirmative showing on the record of the defendant's voluntariness and intelligence in entering the guilty plea).

255. *See* discussion *supra* Part II.A (reviewing the constitutional rights at stake in a guilty plea).

256. *See* Dalton, *supra* note 252, at 63 ("[T]he right to appeal has in practice begun to shrink to a mere formality in many jurisdictions as appellate judges severely restrict oral argument, deliberate alone, write skeletal opinions, write unpublished opinions, affirm without opinion, and in some cases rule from the bench.").

257. *See* Cook, *supra* note 40, at 628 ("[I]t is tenable to surmise that most defendants summarily waive their appellate rights with respect to plea and/or sentencing matters without an adequate comprehension of the impact of the waiver.").

258. *See id.* at 632 ("Without more, a meaningful discernment of such waiver provisions, and thus, a knowing and voluntary relinquishment of appellate privileges, cannot be blithely presumed.").

259. *See* United States v. Sura, 511 F.3d 654, 662 (7th Cir. 2007) ("Here, the record does not reveal any substitute for the safeguards of Rule 11 . . . . Rule 11(b)(1)(N), or its equivalent for plain error purposes, exists precisely to ensure that the defendant actually knows what rights he is signing away."); United States v. Murdock, 398 F.3d 491, 497–98 (6th Cir. 2005) ("We emphasize that in the absence of an inquiry into the appellate waiver by the district court as required under the rule, some other event could suffice to insure that Defendant's waiver was knowing and voluntary.").

260. *See* discussion *supra* Part II.A (providing the minimum constitutional requirements for the court to accept a defendant's guilty plea in *Boykin v.*

the court verify the voluntariness and intelligence of the guilty plea, which must be done at the appellate review if the trial court failed to do so.[261] The *Dominguez Benitez* standard of whether the record establishes that the defendant would not have pleaded, but for the error, is too stringent when compared to the constitutional floor required by *Boykin* and Rule 11's role to protect the defendant's appellate access.[262]

Most significantly, defendants may fare differently in various circuits when challenging the enforceability of an appeal waiver. Under the strict approach of the Fifth Circuit, a defendant would likely be held to his appellate waiver despite the lower court's failure to inquire about the defendant's understanding of waiving the right to appeal his conviction or his sentence.[263] Comparatively, under the Seventh Circuit's approach, an appellate court would examine the degree to which the lower court discussed the consequences of the waiver with the defendant, and specifically the inability to appeal.[264] The Second,

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Alabama; specifically, the record must show a positive affirmation of the defendant's voluntariness and intelligence when entering the guilty plea).

261. *See* Cook, *supra* note 40, at 629 (advocating that an "oral explication of what was understood, or, at a minimum, judicial implementation of an alternative method of discerning defendant comprehension and intent" is required to show on the record that the appellate waiver was voluntary and intelligent).

262. *See id.* at 637–38 ("The protective ideals evinced by the Supreme Court in . . . *Boykin*, and the congressional intent underlying the 1975 revision of Rule 11, have been subjected to an array of erosive appellate interpretations."). The reasonable probability inquiry from *Dominguez Benitez* also imposes a circular burden of proof on the defendant because if the record does not contain sufficient evidence to appeal under *Dominguez Benitez*, it is likely because the judge did not conduct a voluntariness and intelligence inquiry on the record.

263. *See* discussion *supra* Part IV.A (developing the stringent objective approach of the Fifth Circuit under *Dominguez Benitez*, in which the Fifth Circuit only searches for evidence that the defendant would not have pleaded guilty had the judge not erred).

264. *See* discussion *supra* Part IV.C (describing the circuits that adopt a voluntariness and intelligence inquiry to satisfy Rule 11 and *Boykin* requirements). Additionally, the First Circuit explicitly acknowledged the potential difference in outcomes in *United States v. Borrero-Acevedo*, 533 F.3d 11 (1st Cir. 2008), in which the court attempted to distinguish the facts of *United States v. Sura*, 511 F.3d 654 (7th Cir. 2007), from its own case. *See supra* notes 159–163 and accompanying text (noting the factual differences between *Borrero-Acevedo* and *Sura*, and implying that there was a set of circumstances

Third, Sixth, and Seventh Circuits' opinions reflect a comprehensive expectation that the lower court endeavor further into colloquy and at minimum discern the defendant's education, family history, and mental stability.[265] These circuits encourage questions that require active participation from the defendant to prevent the colloquy from turning into a sham or farce composed of leading questions.[266] Furthermore, a defendant's admission of guilt at the plea hearing is questionable if the court did not advise him of the waiver, potentially making his own affirmance irrelevant.[267] While lower courts are not required to subscribe to a scripted dialogue, the variations of the standard of review prevent trial judges from having the uniform understanding that

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in which the First Circuit would venture to the degree of the Seventh Circuit's analysis). *See also* United States v. Cook, 722 F.3d 477, 482 (2d Cir. 2013) (analyzing whether there was a "realistic possibility that [the defendant] might have misunderstood the nature or source of the waiver"); United States v. Goodson, 544 F.3d 529, 540 (3d Cir. 2008) (stating the court could not "ignore that there was no effort to verify that Goodson understood the breadth of the waiver"); United States v. Murdock, 398 F.3d 491, 498 (6th Cir. 2005) (rejecting the application of *Dominguez Benitez* to Rule 11(b)(1)(N) error).

265. *See* supra note 228 (providing factors that courts examine when determining voluntariness and intelligence); discussion *supra* Part IV.C (presenting the circuits that incorporate a voluntariness and intelligence inquiry into their Rule 11(b)(1)(N) reviews by examining the transcript of the colloquy and personal factors about the defendant to determine whether he understood the appeal waiver). Furthermore, the First, Fourth, and Eighth Circuits' acknowledgment of the voluntariness and intelligence inquiry indicates that these courts recognize the value of a further inquiry, but have struggled to apply it as expressly as the circuits in Part IV.C. *See* discussion *supra* Part IV.B (noting that the circuits in this category acknowledge and even employ the voluntariness and intelligence inquiry, but that they still explicitly cling only to the *Dominguez Benitez* standard).

266. *See* Wheeler, *supra* note 26, at 317 (articulating "Suggested Questions for the Court to Ask in Taking a Guilty Plea" that require active participation from the defendant); Cook, *supra* note 40, at 615 (recommending judges turn away from leading questions during plea hearing colloquies because of the same concerns that support Federal Rule of Evidence 613).

267. *See* United States v. Murdock, 398 F.3d 491, 498 (6th Cir. 2005)

> In the absence of a discussion of the appellate waiver provision in open court, we will not rely on a defendant's self-assessment of his understanding of a plea agreement in determining the knowingness of that plea, even where, as the government emphasizes is the case here, the defendant is sophisticated or has significant experience with the criminal justice system.

their plea colloquies should garner whether the defendant voluntarily and intelligently waived his access to the appellate process.[268]

In addition to concerns about consistent outcomes, norms of the justice system such as finality, fairness, and accuracy are improved by adopting the voluntariness and intelligence inquiry.[269] Adopting the secondary inquiry for appeal of Rule 11(b)(1)(N) errors will provide the lower courts with guidance to ensure that guilty pleas are not overturned on appeal, thus enhancing finality.[270] Engaging in a deeper colloquy may sacrifice a minimal degree of efficiency at the trial level, but guilty pleas are already the archetype of efficiency in the justice system.[271] By contracting with a defendant to waive his constitutional rights, fairness and accuracy are principles of the justice system that become vulnerable during plea bargaining.[272] The appellate

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268. *See Trial Judge to Appeals Court: Review Me*, *supra* note 5 (discussing the dynamic opinion issued by Judge Kane in *United States v. Vanderwerff*); United States v. Vanderwerff, 2012 U.S. Dist. LEXIS 89812 (D. Colo. June 28, 2012), *rev'd*, 788 F.3d 1266 (10th Cir. 2015). In *Vanderwerff*, the district court rejected the defendant's appeal waiver, despite the defendant's prayer for the court to enforce the waiver to achieve his plea deal. *Id.* at *10. On appeal, the Tenth Circuit ruled that the district court's rejection of the appeal waiver was an abuse of discretion. *Vanderwerff*, 788 F.3d at 1272. Judge Kane elaborates on his adamant rejection of the appellate waiver in *Vanderwerff* in his article about guilty pleas and the modern justice system. *See* Judge John L. Kane, *Plea Bargaining and the Innocent*, MARSHALL PROJECT (Dec. 26. 2014, 1:05 PM), https://www.themarshallproject.org/2014/12/26/plea-bargaining-and-the-innocent#.J0tAIr9bW (last visited Mar. 2, 2017) ("My question then is this: am I and my fellow jurists doing enough each day to replace the mindless practice of assembly-line plea bargaining with a process that is based on integrity and that aspires to justice rather than succumbs to the cynicism of convenience?") (on file with the Washington and Lee Law Review).

269. *See Vanderwerff*, 2012 U.S. Dist. LEXIS 89812, at *8 ("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.").

270. *See* Wheeler, *supra* note 26, at 306 ("A more comprehensive guilty plea inquiry . . . makes good practice from both the defense and prosecution perspectives . . . . Convictions obtained on the basis of such inquiries are more likely to withstand appellate review.").

271. *See* Lafler v. Cooper, 132 S. Ct. 1376, 1388 (2012) ("[C]riminal justice today is for the most part a system of pleas, not a system of trials.").

272. *See id.* at 1397 (Scalia, J. dissenting) (arguing that the plea bargaining process "presents grave risks of prosecutorial overcharging that effectively

process is necessary for preserving accuracy and the ability to recreate results given the amount of discretion awarded to judges in sentencing and prosecutors in charging.[273]

VI. Conclusion

Under the two-part framework that includes *Dominguez Benitez* alongside a voluntariness and intelligence inquiry, the defendant must show evidence that he did not understand his appellate waiver at the time he entered his plea. *Dominguez Benitez* is still useful on appeal because if the defendant satisfies the objective but-for test, he likely also satisfies the voluntary and intelligence examination; however, the same cannot be said if the tests are reversed. Together, the objective test under *Dominguez Benitez* and the voluntariness and intelligence review encourage trial courts to establish detailed records of the colloquy, which is required under *Boykin*. The voluntariness and intelligence inquiry still requires a stringent showing from the defendant that his substantial rights were affected, but it further urges the lower courts to conduct a more thorough colloquy.

The Second, Third, Sixth, and Seventh Circuits present cases in which the two-step inquiry is a workable standard capable of producing different outcomes than review under the purely objective standard.[274] The possible difference in outcomes under the current ambiguity is sufficient to validate due process concerns that unless there is a voluntary and intelligence inquiry at the guilty plea colloquy, there is no mechanism to ensure the defendant's understanding of the appellate waiver. Furthermore, adding a voluntariness and intelligence inquiry alongside the objective standard for review of Rule 11(b)(1)(N) errors resolves the tension between finality, efficiency, and fairness. The

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compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense").

273. *See Trial Judge to Appeals Court: Review Me*, *supra* note 5 ("The defendants must then choose between the risk of being found guilty at trial and getting a longer sentence than the alleged crime would warrant or a guilty plea in exchange for a lighter sentence.").

274. *See supra* Part IV.B (discussing the line of cases that apply the two-step inquiry).

addition of the voluntariness and intelligence inquiry is not overly burdensome on the courts, will not affect finality of guilty pleas negatively, and protects appellate rights as a principal safeguard in the criminal justice system.