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## Waivering About the Dirty Business of Plea Bargains—A Comment

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# Waivering About the Dirty Business of Plea Bargains—A Comment

Jonathan Shapiro\*

Praise to Leanna Minix for untangling the twisted paths federal courts have blazed, which all lead to the same dead end. Ms. Minix hacked through the undergrowth of Federal Rule of Criminal Procedure 11<sup>1</sup>—the rule governing what judges must do to ensure that a defendant’s guilty plea will survive later scrutiny—and shined a light on the ways different circuits have chosen to accomplish that task. As she has convincingly demonstrated, most circuits employ overly narrow tests for evaluating claimed violations of one of the most controversial, yet now “standard” provisions in federal plea bargains—waiver of the right to appeal.<sup>2</sup>

The federal courts have made quick work of most attempts by defendants to review the results of plea bargains that turned out to be no bargain. This is most frequently the case when the sentence a defendant fully and justifiably believed he would get turns out to have been just a fond wish. Courts are able to evade a higher level of scrutiny on review because of the restrictive *Dominguez-Benitez* test,<sup>3</sup> which holds that a defendant who failed to object to a faulty Rule 11 colloquy is barred from appealing unless he shows “a reasonable probability that, but for the error, he would not have entered the plea.”<sup>4</sup>

Use of this test is particularly troubling when the bargain requires the defendant to waive his appeal rights, which in the context of a guilty plea boils down to a single right—the statutory right to have an appellate court review the propriety of the

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1. FED. R. CRIM. P. 11.
2. *Id.* 11(b)(1)(N).
3. *United States v. Dominguez Benitez*, 542 U.S. 74 (2004).
4. *Id.* at 83.

sentence, within strict limits.<sup>5</sup> There is no appeal from any other aspect of the prosecution (e.g. bad searches, bad wire-taps, bad interrogations). All other claims are automatically waived once the defendant pleads guilty. Nevertheless, as Ms. Minix notes, all the circuits have held allegedly “bargained-for” appellate waivers constitutional, and Rule 11(b)(1)(N) “green-lights” the practice by requiring that the court specifically address that waiver in the plea colloquy. When a defendant waives appellate rights, there is no relief when the court imposes an unexpected sentence. But taken to its extreme, a valid appellate waiver might even bar claims that the plea was not voluntarily and intelligently made, which is a constitutional baseline in the world of guilty plea jurisprudence.<sup>6</sup>

Given this sorry state of affairs, Ms. Minix’s suggestion that the courts explicitly adopt an expanded test for reviewing a

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5. This right is codified at 18 U.S.C. § 3742 (2016) as a part of the Sentencing Reform Act of 1984. The provision states, in pertinent part:

(a) Appeal by a defendant. A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release than the maximum established in the guideline range, or includes a more limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) [18 USCS § 3563(b)(6) or (b)(11)] than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

Section 3742 allows the government to appeal a sentence, and further allows defendants to appeal when the sentence imposed exceeded a specific sentence set out in the plea agreement under Rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure. *Id.* §§ 3742(b)–(c).

6. See *United States v. Mutschler*, 152 F. Supp. 3d 1332, 1337 (W.D. Wash. 2016) (“Almost all of the circuits have concluded that, absent some *egregious circumstance or a miscarriage of justice*, a unilateral waiver of the right to appeal is enforceable . . .” (emphasis added)); see, e.g., *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) (noting that a waiver is invalid if the district court “utterly fails” to apply proper sentencing factors, if the sentence exceeds the statutory maximum, or if the sentence was based on race or religion).

defendant's un-objected-to failure of the trial court to ensure the defendant understands he is giving up his right to appeal is, in a word, appealing. Her test adds to the *Dominguez-Benitez* test by requiring appellate courts ensure the defendant's waiver is voluntarily and intelligently made.

Of course, a quick review of the cases shows what should be no surprise. Courts are extremely hostile to efforts to undo guilty pleas. Expanding the test governing un-objected-to, faulty colloquies about appellate waiver will bring needed uniformity, as Ms. Minix argues, but may still not lead to relief for an aggrieved defendant. The larger problem is the gross unfairness of modern federal plea bargaining itself.

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How is it that the plea-bargaining industry is so unfair? And why is it that forcing a defendant to waive her rights to appeal a sentence is so unjust? The thoughts in this Comment are not intended to thoroughly address what I perceive to be the underlying problems with plea bargaining as it exists today. Rather, they reflect my quick take on the issue based on my own experience as a lawyer who has spent the past forty-two years representing those charged with federal offenses and negotiating with federal prosecutors. Others have written extensively on the legal underpinnings of plea bargaining in the modern age, and I recommend their works to you.<sup>7</sup>

As preface, it is my belief—a belief shared by many criminal defense lawyers—that in the modern era, plea bargaining is a sham. Bargaining implies that the parties come to the table operating with the same set of rules. Each side may have

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7. See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2465 (2004) (arguing that the common justification for plea bargaining, the “shadow-of-trial model is, however, far too simplistic”); Richard Stephen J. Schulhofer, *Plea Bargaining as Disaster*, 101 YALE L.J. 1979, 1980 (1992) (arguing that “the structural flaws [of the plea bargaining system] impair both due process and crime control values”); Ken Strutin, *Truth, Justice, and the American Style Plea Bargain*, 77 ALB. L. REV. 825, 829 (2014) (examining “Supreme Court plea bargaining decisions” and “their implications for the competing goals of truth versus process”); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1967 (1992) (“Though it has long been understood that plea bargaining is a species of contract, the debate about it has been framed not in the language of bargains, but chiefly the language of rights.”).

certain factual, legal, or moral advantages that may sway the other's position. But the framework for negotiation is neutral. That is not the case in the federal criminal justice system.

It is probably old news that the Sentencing Reform Act of 1984<sup>8</sup> drastically changed the playing field for defense lawyers, and with it the landscape for citizens charged with federal offenses.<sup>9</sup> Before that law ushered in the era of determinate sentencing, judges were free to sentence as they deemed proper anywhere within the upper and lower penalty limits established by Congress. Sentencing hearings could take hours or a full day as defense lawyers called family members, neighbors, school teachers, co-workers, doctors, and others to testify about the defendant's background, good works, and prospects. Sentencing experts offered sentencing plans involving community service, restitution, alternative incarceration, and any number of creative alternatives to a lengthy prison term. Because of the great discretion available to judges, the pressure to plead guilty was reduced. It is true that there were incentives to avoid trial, and that most defendants did end up negotiating some sort of plea bargain. But it was also true that in many cases, there was little to be lost by going to trial. If found guilty, a defendant could still make the arguments that he would have made at trial and that the sentencing judge would have *considered* after a plea of guilty.

The sentencing guidelines swept all that aside. The infamous Sentencing Table<sup>10</sup> and the command of the Sentencing Reform Act of 1984 made judges largely irrelevant because, with extremely minor exceptions, a sentence falls within a particular range based on a mechanical calculus of sentencing factors.<sup>11</sup> At

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8. 18 U.S.C. § 3551 (2016).

9. See generally Kate Stith & Steve Y. Koh, *The Politics of Sentencing Reform: The Legislative History of the Federal Sentencing Guidelines*, 28 WAKE FOREST L. REV. 223 (1993); Stanley A. Weigel, *The Sentencing Reform Act of 1984: A Practical Appraisal*, 36 UCLA L. REV. 83 (1988).

10. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2016).

11. Indeed, the harshness of the sentencing guidelines led at least one federal judge to resign. See *Criticizing Sentencing Rules, U.S. Judge Resigns*, N.Y. TIMES (Sept. 30, 1990), <http://www.nytimes.com/1990/09/30/us/criticizing-sentencing-rules-us-judge-resigns.html> (last visited Feb. 3, 2017) (quoting U.S. District Judge J. Lawrence Irving as saying, "If I remain on the bench I have no choice but to follow the law . . . I just can't, in good conscience, continue to do

the same time, it made federal prosecutors extraordinarily powerful in dictating what sentence a defendant would receive, by way of unreviewable charging decisions.<sup>12</sup> The guidelines specifically removed from consideration many of the factors that had been the centerpiece of pre-guidelines sentencing arguments.<sup>13</sup> I have often heard judges rue the sentence they were forced to impose, call it irrational or unjust, then direct that the nineteen-year-old, non-violent, first-offender crack defendant who stood before the court serve 240 months in prison.<sup>14</sup>

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this”) (on file with the Washington and Lee Law Review). Other judges simply refused to impose the required sentence. *See, e.g.*, Timothy Williams, *Judge Refuses to Set Sentence for Ex-Crack Dealer*, L.A. TIMES (Mar. 19, 1996), [http://articles.latimes.com/1996-03-19/local/me-48652\\_1\\_sentencing-guidelines](http://articles.latimes.com/1996-03-19/local/me-48652_1_sentencing-guidelines) (last visited Feb. 3, 2017) (describing U.S. District Court Judge Terry J. Hatter of the Central District of California as declaring, “I will not be a party to this injustice . . . Congress cannot make me do this; the president cannot make me do this”) (on file with the Washington and Lee Law Review).

12. As noted by U.S. District Judge John Coughenour of the Western District of Washington: “So much of sentencing discretion is vested now in the U.S. Attorney’s Office. By their charging decisions, they can tie the hands of the sentencing judge, particularly on mandatory minimums. And [prosecutors’] discretion, by the way, is exercised in darkness . . . In fact, we are precluded from reviewing those charging decisions.” Matthew Van Meter, *One Judge Makes the Case for Judgment*, THE ATLANTIC (Feb. 25, 2016), <http://www.theatlantic.com/politics/archive/2016/02/one-judge-makes-the-case-for-judgment/463380/> (last visited Feb. 3, 2017) (on file with the Washington and Lee Law Review). The prosecution does not deny this reality. *The Atlantic* article continues: “Mark Osler, a law professor who worked as a prosecutor in Detroit in the 1990s, says: ‘I had all the power. It was about whether I filed a notice of enhancement or gave points for acceptance of responsibility. It’s not reviewable. It’s within the discretion of the prosecutor.’” *Id.*

13. Guidelines Chapter 5, Part H, titled “Specific Offender Characteristics”, places limits on, and in some cases bars consideration of, many traditional sentencing factors such as education, vocational skills, employment record, family ties and responsibilities, community ties, age, mental and emotional conditions, physical condition, drug or alcohol dependence or abuse, gambling addiction, military, civic, charitable, or public service, employment-related contributions, or record of prior good works. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. H (U.S. SENTENCING COMM’N 2016).

14. I particularly recall the pained face of the Honorable Albert V. Bryan, Jr., of the Eastern District of Virginia, after calculating a young defendant’s sentencing guidelines and arriving at a horribly inappropriate yet mandated sentencing range. The judge then said, “With that as bleak background, I’ll hear what you have to say, Mr. Shapiro, as to where within the range the sentence ought to fall.”

The harsh Sentencing Table and uncompromising sentencing enhancements did not work the sea change in criminal justice alone. They were aided and abetted by two other changes in the law that conspire by vastly increasing the pressure to waive trial and plead guilty. Those changes were Congress's imposition of extreme mandatory minimum sentences<sup>15</sup> and Section 5K1.1 of the Sentencing Guidelines.<sup>16</sup> Together, they are the one-two punch (more accurately, a punch and a push) that knocks a defense attorney out of the ring.

The “punch” is the advent of mandatory minimum sentences. There is recognition today from all corners that many of the

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15. Mandatory minimum sentences are established by Congress, not the Sentencing Commission. HISTORY OF MANDATORY MINIMUM PENALTIES AND STATUTORY RELIEF MECHANISMS 1, 29, UNITED STATES SENTENCING COMMISSION, [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter\\_02.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/mandatory-minimum-penalties/20111031-rtc-pdf/Chapter_02.pdf) (describing Congress's authority to mandate minimum sentences as dating back to 1790 and still in effect); see also Justin Sink, *Obama Calls on Congress to Overhaul Mandatory Minimum Sentences*, BLOOMBERG (July 14, 2015, 6:22 PM), <https://www.bloomberg.com/news/articles/2015-07-14/obama-calls-on-congress-to-overhaul-mandatory-minimum-sentences> (last visited Feb. 3, 2017) (describing the president's call to Congress to minimize heavy sentencing for non-violent drug offenders) (on file with the Washington and Lee Law Review).

16. Section 5K1.1 of the Sentencing Guidelines, titled “Substantial Assistance to Authorities” states:

Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.

(a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:

- (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
- (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
- (3) the nature and extent of the defendant's assistance;
- (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
- (5) the timeliness of the defendant's assistance.

mandatory minimum sentences enacted by Congress were wildly harsh. For years, the Sentencing Commission itself urged Congress to repeal the mandatory minimum drug laws, arguing that they hindered application of the sentencing guidelines approach.<sup>17</sup> Today, even traditional law-and-order voices in Congress and elsewhere have come to understand that change is required.<sup>18</sup> Still, though progress has been made, thousands of low-level, non-violent drug offenders caught up in the old system wait for the president to grant them relief by way of pardon.

While the mandatory minimum sentence is often severe, it is often not the only bad news for the defendant. The Sentencing Guidelines require upward adjustment of sentencing ranges based upon a number of factors.<sup>19</sup> For example, in drug cases, as the total weight of the drug increases, so does the guideline range.<sup>20</sup> In addition, if the judge finds that the defendant played more than a minor role in the scheme, the guidelines may increase. If the defendant obstructed justice in any of the myriad ways recognized by the guidelines—for example, urging a co-conspirator not to talk or disposing of drug debt notes—the guidelines may increase. If the defendant possessed a firearm,

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17. See, e.g., Hearing Before the H. Comm. on the Judiciary Subcomm. on Crime, Terrorism, and Homeland Security, 111th Cong. 16 (2009) (Statement of Ricardo H. Hinojosa, Acting Chair, United States Sentencing Commission), [http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20090521\\_Hinojosa\\_Testimony.pdf](http://www.ussc.gov/sites/default/files/pdf/news/congressional-testimony-and-reports/testimony/20090521_Hinojosa_Testimony.pdf) (urging reduction of the mandatory minimum sentence structure relating to crack cocaine).

18. See *Criminal Justice Reform*, WHITEHOUSE.GOV, <https://www.whitehouse.gov/issues/criminal-justice-reform> (last visited Dec. 28, 2016) (detailing the White House's policy position on "making our criminal justice system more fair") (on file with the Washington and Lee Law Review); Alex Altman, *Koch Brother Teams Up With Liberals on Criminal Justice Reform*, TIME (Jan. 29, 2015), <http://time.com/3686797/charles-koch-criminal-justice/?iid=sr-link1> (last visited Feb. 3 2017) (reporting on bipartisan cooperation for criminal justice reform) (on file with the Washington and Lee Law Review).

19. U.S. SENTENCING GUIDELINES MANUAL ch. 3–5 (U.S. SENTENCING COMM'N 2016).

20. Law enforcement agents, well aware of the increased sentences available based on the total weight of drugs sold during the scheme, often make multiple buys from a defendant for the sole purpose of raising the eventual sentence. Courts often reject defense claims that this is improper "sentencing entrapment." See *United States v. Watkins*, 179 F.3d 489, 503 n.14 (6th Cir. 1999) ("We note that this court has yet to acknowledge that sentencing entrapment, even if proven, constitutes a valid basis for a downward departure.").



the guidelines increase. A prior record causes the guidelines to increase, as does the fact that a defendant committed the crime within a certain period of time after release from prison.<sup>21</sup>

The mandatory minimum sentence, which often increases based on factors like those outlined above, then sets the stage for plea bargaining. Faced with a harsh sentence that the defendant cannot avoid if he is convicted at trial, defendants—particularly young defendants faced with ten year minimums, or even greater sentences—face tremendous pressure to plead guilty if there is any way that such a plea could somehow reduce prison time.

After the “punch” comes the “push,” because there *is* a way to avoid the harshest sentence. Section 5K1.1 of the Sentencing Guidelines dangles a life-preserver in front of the defendant. This provision allows the defendant to avoid any mandatory minimum sentence and to avoid the effect of the guideline’s sentencing calculations, in return for “substantial assistance” to the government in its investigation of others.<sup>22</sup> If the defendant agrees to cooperate by telling the government everything he knows concerning the crime with which he is charged, as well as all unrelated criminal activity, the government may file papers asking the judge to sentence him below what would otherwise be required, *even below the otherwise mandatory minimum sentence*.

The prospect of relief from harsh mandatory minimums and multiple enhancements under the Sentencing Guidelines proves too much for most defendants to walk away from. Quite the opposite. There is often a race to the prosecutor’s office once word hits the street that an investigation is under way. Prosecutors make it quite clear that the first in line will receive the largest reward, and that the benefit to each subsequent cooperator will diminish, then vanish.

The race to the prosecutor has had a major effect on the role of defense attorneys in at least three ways. First, required investigation and discovery take a back seat to the need to get in

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21. The sentencing guidelines are much more Byzantine than these few examples illustrate. They also allow for reductions in the sentencing range based on certain factors. But in many cases, even if the calculation yields a sentencing range below the mandatory minimum, the court has no authority to ignore that minimum.

22. See *supra* note 16 and accompanying text (detailing the substantial assistance provision of the Sentencing Guidelines).

early. Even when a plea bargain rather than trial is the overwhelmingly correct choice to make, it is elementary that an attorney armed with knowledge of all the facts—the strengths and weaknesses of the evidence, of the witnesses, of the legal basis for the charge—is in the best position to reach the best deal. Knowledge is power. And as they say, you do not want to go to a gun fight with a knife. But in the rush to get in early, all that is pushed to the side. Taking time to investigate the government's case means that some other defendant will be sitting with the prosecutor first.

Second, defense attorneys become advocates for the government. Fear of the horrendous result that can flow from moving cautiously, investigating, and preparing (not to mention going to trial), pushes attorneys to push their clients to cooperate. Attorneys often may not give their clients comprehensive advice about the trial option, in many cases because the defense attorney does not even have the facts upon which to base a competent assessment.

Third, defense attorneys are often forced to push their clients to the limit in their cooperation with the government. Here is a common situation: the defendant and his attorney sit with the prosecutor and the FBI agent who headed up the investigation. The defendant tells them what he knows. Either because he believes (perhaps incorrectly) that the defendant is holding back information, or because it is a ploy, the agent declares that the defendant is not revealing everything, or that what the defendant has told him does not square with the facts that the government already knows. The defense attorney asks to speak with her client alone. The attorney reminds the client that unless the government believes he has revealed all he knows, there will be no deal. The attorney asks, "Is it possible that the package weighed two kilos, like the agent says, rather than one?" The defendant says that yes, it is possible. When questioning begins again, the defendant says, "Well, it likely was two kilos—I was mistaken about that."

The intense pressure to please the government flows from the provision in Section 5K1.1 that ties sentencing relief to a request from the government. That is, unless the government, in its sole discretion, asks the court to give the defendant the benefit of Section 5K1.1, the defendant will get no benefit. The defense

has no power to even make the request. It is also true that even when the defendant cooperated fully and told the government truthfully everything he knows, the government is never obligated to seek sentencing relief for him. The government may say, “Thanks for your information. We believe you told us everything you know. But, your information is not particularly useful to us. Have a nice day.”

This too may have an unfortunate effect. Understanding that unless they have information that will actually help the government, cooperating defendants may yield to the pressure and “enhance” the facts to secure a sentencing benefit. Indeed, in 1998, a panel of the Tenth Circuit held that government offers to reduce a cooperating witness’s sentence in return for testimony amounted to bribery, in violation of 18 U.S.C. § 201(c)(2).<sup>23</sup> The en banc Tenth Circuit reversed the panel’s decision<sup>24</sup> and no circuit has adopted the original panel’s conclusions—but the logic of panel’s view, if not the legal basis, is weighty. And every defense attorney I have ever spoken to about the process understands this powerful incentive to bend the truth.

Further compounding the troubling effect of this type of testimony is the fact that the government will never agree in advance to reward the cooperating defendant with a request for a lower sentence. Rather, the government waits until after the

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23. See *United States v. Singleton*, 144 F.3d 1343, 1350 (10th Cir. 1998)

The obvious purpose of the government’s promised actions was to reduce [the defendant’s] jail time, and it is difficult to imagine anything more valuable than personal physical freedom . . . . Our basis for determining these promises were of value is that the record indicates [the defendant] subjectively valued them. They were all he bargained for in return for his testimony and guilty plea.

*rev’d en banc*, 165 F.3d 1297 (10th Cir. 1999). Section 201(c)(2) provides in pertinent part:

Whoever directly or indirectly, gives, offers or promises anything of value to any person, for or because of the testimony under oath or affirmation given or to be given by such person as a witness upon a trial, hearing, or other proceeding, before any court . . . shall be fined under this title or imprisoned for not more than two years, or both.

18 U.S.C. § 201(c)(2) (2016).

24. See *United States v. Singleton*, 165 F.3d 1297, 1298 (1999) (en banc) (“We now hold 18 U.S.C. § 201(c)(2) does not apply to the United States or an Assistant United States Attorney functioning within the official scope of the office.”).

cooperator has pleaded guilty and testified. This puts additional pressure on the testifying cooperator to please the government.

The unbalanced bargaining table is tilted yet further, as mentioned before, by the fact that the prosecutor holds enormous power to shape the battleground before the fight even starts. The prosecution may select the most punitive of available charges and threaten further sentencing increases with claims of gun possession, inflated drug weights, or alleged acts of obstruction. Factors such as these can greatly impact the sentencing range under the guidelines.<sup>25</sup>

These pressures are in the great number of cases too much to bear, particularly when the defendant is young and scared. Better to take the plea and hope the government rewards the defendant with a request for a sentence reduction or with some other concession concerning sentencing factors. This is the point when appeal waiver provisions come into play.

The vast number of plea bargains in the federal system are known as “non-binding.”<sup>26</sup> This means that even when the parties

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25. It must be noted that in *United States v. Booker*, the Supreme Court ruled that the mandatory nature of the Sentencing Guidelines was unconstitutional under the Sixth Amendment. *See United States v. Booker*, 543 U.S. 220, 266 (2005) (ruling that the Sentencing Guidelines are advisory). While this was a welcomed change, the guidelines still exist and are still the required framework for devising a sentence, but they are no longer mandatory. Judges must still compute a defendant’s guidelines. Judges are free, however, to sentence above or below the guidelines (called a “variance” from the guidelines). But in practice, most judges still sentence within the guidelines range. All the ways the charging decision and application of various sentencing factors can shape the sentence still exist, as does Section 5K1.1 (the “substantial assistance” provision). *See supra* note 16 and accompanying discussion (outlining factors the court may take into consideration when departing from the guidelines).

26. For example, Rule 11(c)(1)(B) of Federal Rules of Criminal Procedure states that in the plea agreement the prosecution may:

recommend, or agree not to oppose the defendant’s request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court) . . .

FED. R. CRIM. P. 11(c)(1)(B). Compare this with Rule 11(c)(1)(C), which states that the prosecution may:

agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does

agree that a certain sentencing range under the Sentencing Guidelines is the appropriate one, or that certain enhancements like leadership role or obstruction do not apply, the court is not bound by those agreements. If the court concludes, for example, that the defendant is responsible for five kilograms of cocaine rather than the two kilograms to which the government and the defense have agreed, the court will sentence the defendant based on the higher weight. In my experience, if the prosecution and the defense agree on sentencing factors, most courts will abide by that agreement—but not always. It certainly has happened that a defendant who was told he will likely receive a sentence of, say sixty months—a sentence the government and the defense have “agreed upon”—gets a sentence of ninety months instead.

It is often the case as well that the government and the defense will agree to disagree about the application of a particular sentencing factor. The plea bargain will note such a disagreement and that the issue is for the court to resolve. For example, the defendant may claim that his criminal history score is less than what the government believes it is. This is not an uncommon occurrence, both because the rules for determining this score are complex and because the case law interpreting those rules diverges in different directions.<sup>27</sup> In another example, the defense and the prosecution may disagree about whether the sentencing range should increase because the defendant used a “special skill” in committing the crime. Again, the rules can be read in different ways and the cases interpreting those rules have led to varying results.<sup>28</sup>

The sentencing court’s resolution of these disagreements can have a huge impact on a sentence. This is when the unfairness of

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or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

Fed. R. Crim. P. 11(c)(1)(C).

27. See, e.g., Michael Edmund O’Neill, *Abraham’s Legacy: An Empirical Assessment of (Nearly) First-Time Offenders in the Federal System*, 42 B.C. L. REV. 291, 301 (2001) (providing background on the criminal history category system and its role the Sentencing Guidelines).

28. For a general discussion of the developments regarding the role of the criminal history category in the Sentencing Guidelines, see *Sentencing*, 45 GEO. L.J. ANN. REV. CRIM. PROC. 787, 788 n.2121 (presenting a multitude of cases in which defendants disputed the classification and effects of their criminal history categories on appeal).

the plea bargaining process comes home to roost. When a defendant has been coerced into waiving his appellate rights as a result of the government's insistence—backed up by the threat of an enormous sentence if the case is tried, and prodded by the hope of a sentence reduction if there is an agreement—the defendant has no recourse. What may in fact be an illegal sentence, or an inappropriate sentence, will be the final sentence. There will be no review by an appellate court. Case closed.

This result is not what Congress intended. Congress explicitly provided for sentence appeals in 18 U.S.C. § 3742.<sup>29</sup> Section 3742 represents a departure from the longstanding understanding that there is no appeal from a guilty plea. This makes all the sense in the world. As Ms. Minix has noted, the vast number of criminal cases are resolved by guilty pleas. Trials are rare. Indeed, the Supreme Court recently opined about the central role of plea bargaining in today's world when it noted that

[n]inety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours “is for the most part a system of pleas, not a system of trials,” *Lafler v. Cooper*, 566 U.S. 156, 157 (2012), it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. “To a large extent . . . horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it is the criminal justice system.” Scott & Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1912 (1992). See also Barkow, *Separation of Powers and the Criminal Law*, 58 *Stan. L. Rev.* 989, 1034 (2006) (“[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter

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29. See *supra* note 5 and accompanying discussion (detailing the provisions in Section 3742).

sentences than other individuals who are less morally culpable but take a chance and go to trial”). In today’s criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.<sup>30</sup>

This language is a blunt and stunning recognition that plea bargaining is central to our system of justice, and that trials are no longer the backstop against errors in charging a citizen. Particularly chilling is the recognition that “longer sentences exist on the books largely for bargaining purposes.”<sup>31</sup>

It is therefore essential that the appellate courts become the backstop for the plea bargaining process when it has failed the defendant. The obvious and easiest step is to agree that waivers of the right to appeal a sentence ought to be banned. In such a world, the concerns identified by Ms. Minix, as well as her suggested solution—an excellent and required improvement under the current regime—fall by the wayside.

This is not an argument that appellate courts should become an independent sentencing body. Rather, it is only an argument that review of a sentence claimed to be inappropriate, or claimed to be flawed under some provision of the Sentencing Guidelines, ought to be heard by an appellate court (as Congress has already decided) rather than cast aside because of a provision in the plea agreement demanded by the prosecution. Given the vast power of the prosecution, waivers of the right to appeal a sentence are easily seen as contracts of adhesion. Such waivers in the era of plea-bargained justice ought to be banned as contrary to basic fairness. Where plea bargaining is the new trial, the result of that trial ought to be reviewable when a defendant claims it was erroneous.

Several lower courts have already taken a step in this direction. In *United States v. Mutschler*,<sup>32</sup> the court refused to accept a unilateral appellate waiver, finding that it was

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30. See *Missouri v. Frye*, 566 U.S. 134, 143–44 (2012) (ruling that defense counsel has a duty to relay a plea offer to a defendant because of the widespread reliance on plea bargaining).

31. *Id.*

32. 152 F. Supp. 3d 1332 (W.D. Wash. 2016).

unenforceable as contrary to public policy. The court cited *United States v. Ready*<sup>33</sup> and noted

[u]nlike a contemporaneous waiver (for example, the waiver of the right to remain silent that occurs when a defendant speaks, or the waiver of the right to have a jury determine guilt that occurs when a defendant admits guilt), a prospective waiver raises concerns about the facts known to the defendant at the time the waiver is executed. Generally, when a guilty plea is entered and the right to appeal the ensuing sentence is waived, the scope of the record that will be considered at sentencing has not yet been defined, the presentence report has not yet been prepared, the applicable USSG range has not yet been calculated, and the sentence has not yet been imposed. Given the quantum of information usually unavailable at the time of the plea, a prospective waiver of appellate rights might often be unknowing and unintelligent.<sup>34</sup>

The *Mutschler* court went on to note that unilateral appellate waivers distort the process. Courts are not infallible, and, as the court stated, “[t]he criminal justice system is not improved by insulating from review either simple miscalculations or novel questions of law.”<sup>35</sup> Moreover,

[i]n the wake of *Booker*, which rendered the sentencing guidelines merely advisory, we have returned to a sentencing regime with the potential to generate the types of unwarranted disparities that Congress attempted to eradicate in enacting the Sentencing Reform Act of 1984. Only appellate courts have the vantage necessary to assess whether sentences are being imposed in a uniform manner within a circuit or across the country; however, the habitual acceptance and enforcement of unilateral waivers of appellate rights precludes such analysis, and is likely to lead to a wide range of sentences, despite similarities in offense levels and criminal histories. This “systemic distortion” is further intensified by the “asymmetry” in appellate rights, which allows the Government to seek harsher sentences on review, and results

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33. See 82 F.3d 551, 559 (2d Cir. 1996) (“[C]ourts may apply general fairness principles to invalidate particular terms of a plea agreement.”).

34. *Mutschler*, 152 F. Supp. 3d at 1338–39 (quotation marks and citations omitted).

35. *Id.* at 1339.



in jurisprudence necessarily “skewed” toward restricting the ways in which district courts may show leniency.<sup>36</sup>

Likewise, in *United States v. Johnson*,<sup>37</sup> the court refused to accept a unilateral appeal waiver. The court noted that

[a]s a practical matter, the government has bargaining power utterly superior to that of the average defendant if only because the precise charge or charges to be brought—and thus the ultimate sentence to be imposed under the guidelines scheme—is up to the prosecution. To vest in the prosecutor also the power to require the waiver of appeal rights is to add that much more unconstitutional weight to the prosecutor’s side of the balance.<sup>38</sup>

To conclude, the distortions in the criminal justice system caused by the vastly superior bargaining power of the prosecution are further warped by denying the defendant the ability to appeal a flawed or otherwise unexpected sentence. The practice of demanding sentencing appellate waivers is unfair, unwise, and unjust.

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36. *Id.* at 1339–40 (citations omitted).

37. 992 F. Supp. 437 (D.D.C. 1997).

38. *Id.* at 439–40.