

## COMMENT

### Challenging Appeal Waivers

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#### INTRODUCTION

The United States Constitution guarantees all criminal defendants the right to a trial by jury.<sup>1</sup> However, as Justice Kennedy famously remarked, “criminal justice today is for the most part a system of pleas, not a system of trials.”<sup>2</sup> Ninety-seven percent of all convictions in federal court are the result of guilty pleas.<sup>3</sup> Plea bargaining “is not some adjunct to the criminal justice system; it *is* the criminal justice system.”<sup>4</sup> The prosecution and defense, rather than

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1. U.S. CONST. amend. VI.

2. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012); see also Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES, July 7, 2012, at A24, available at [http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?\\_r=0](http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?_r=0) (citing *Lafler*, but erroneously substituting “cases” for “convictions”).

3. Editorial, *Trial Judge to Appeals Court: Review Me*, *supra* note 2, at A24.

4. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)).

the jury, determine who goes to jail.<sup>5</sup> Widespread fact bargaining, where the parties stipulate to facts in the plea agreement,<sup>6</sup> often robs judges of a meaningful role in sentencing, confining them to the negotiated sentence range.<sup>7</sup> “To the extent judges actually participate in the criminal process,” they are relegated to “approving or disapproving proposed plea bargains.”<sup>8</sup>

In *United States v. Wiggins*, the Fourth Circuit upheld a new kind of plea agreement whereby the defendant, in exchange for having one of the charges against him dropped, waived his right to appeal his sentence “on any ground,” including for errors at sentencing or constitutional violations.<sup>9</sup> Since *Wiggins*, every circuit court of appeals except the D.C. Circuit has upheld the use of appeal waivers,<sup>10</sup> even while they have expanded to preclude defendants from collaterally attacking their sentences for errors of constitutional magnitude.<sup>11</sup> Despite this wide acceptance, the Supreme Court has yet to rule on the validity of appeal waivers.<sup>12</sup>

Appeal waivers caught on because they appear to benefit all of the parties involved.<sup>13</sup> Prosecutors believe that they reduce the number of appeals that need to be handled.<sup>14</sup> Judges approve them out of a desire to preserve

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5. *Id.* (“To a large extent . . . horse trading between prosecutor and defense counsel determines who goes to jail and for how long.”) (alteration in original).

6. Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 215-16 (2005).

7. *See id.* at 216 n.25.

8. *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012).

9. *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990).

10. King & O’Neill, *supra* note 6, at 224.

11. *See id.* at 221 (providing examples of collateral attacks barred by appeal waivers, including claims for ineffective assistance of counsel and failure to disclose exculpatory evidence).

12. *See* Jesse Davis, Comment, *Texas Law Rides to the Rescue: A Lone Star Solution for Dubious Federal Presentence Appeal Waivers*, 63 BAYLOR L. REV. 250, 254 (2011).

13. King & O’Neill, *supra* note 6, at 220-21.

14. *Id.*

scarce resources and to prevent their decisions from being reversed.<sup>15</sup> Defense attorneys favor them because waiving the right to appeal can be used to gain concessions from the prosecution.<sup>16</sup>

A recent decision from a district court in Colorado gained wide media attention when it challenged and ultimately rejected the criminal justice system's reliance on appeal waivers.<sup>17</sup> In *United States v. Vanderwerff*, the defendant was indicted on three charges relating to the possession of child pornography.<sup>18</sup> The statutory sentencing range on these charges was five to twenty years of imprisonment.<sup>19</sup> In a proposed plea agreement, the prosecution agreed to dismiss two of the charges if the defendant pled guilty and waived his right to appeal "any matter in connection with [the] prosecution."<sup>20</sup> This would reduce the potential sentence to probation to ten years of imprisonment.<sup>21</sup>

District Judge John Kane rejected the plea agreement, reasoning that "[i]ndiscriminate 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."<sup>22</sup> In August of 2012, Judge Kane accepted a new plea agreement with a recommended sentence of no more than

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15. *Id.* at 222 n.54.

16. *See id.* at 231 n.83 (quoting a defense attorney who uses appeal waivers to gain "acceptance of responsibility" credit for his clients at sentencing).

17. *See, e.g.,* Editorial, *Trial Judge to Appeals Court: Review Me, supra* note 2.

18. *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*1 (D. Colo. June 28, 2012).

19. *Id.* at \*6.

20. *Id.* at \*1.

21. *Id.* at \*6 (noting, however, that even though the statutory minimum was zero years of incarceration, the defendant agreed not to seek a sentence lower than five years).

22. *Id.* at \*5.

twelve years.<sup>23</sup> The new agreement did not contain an appeal waiver.<sup>24</sup>

The appeal waiver debate has been going on for the better part of three decades,<sup>25</sup> and judging by the near-uniform acceptance appeal waivers enjoy in federal courts,<sup>26</sup> it would seem that proponents have already won the argument. However, many of the justifications for appeal waivers fail under close scrutiny. In Part I of this paper, I lay out the history and significance of appeal waivers. In Part II, I challenge the arguments traditionally advanced in their favor and provide empirical data undermining a core pillar of the appeal waiver edifice. In Part III, I lay out stand-alone criticisms of appeal waivers. In Part IV, I show how the circuit courts have addressed some of the concerns expressed over appeal waivers by making various exceptions to them. In Part V, I propose that federal judges should adopt the solution advanced in *United States v. Vanderwerff* and reject plea agreements that contain an appeal waiver, or as an alternative, that appeals courts should review waivers less deferentially.

## I. SENTENCING APPEALS AND THE EMERGENCE OF WAIVERS

The right to appeal a sentence in federal court is statutory and relatively new.<sup>27</sup> Prior to the enactment of the Sentencing Reform Act of 1984, judges held wide discretion

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23. See Plea Agreement and Statement of Facts Relevant to Sentencing at 18, *United States v. Vanderwerff*, 2012 WL 2514933 (D. Colo. June 28, 2012) (No. 12-cr-00069).

24. See *id.*

25. See, e.g., D. Randall Johnson, *Giving Trial Judges the Final Word: Waiving the Right to Appeal Sentences Imposed Under the Sentencing Reform Act*, 71 NEB. L. REV. 694, 698-701 (1992).

26. King & O'Neill, *supra* note 6, at 224.

27. See 18 U.S.C. § 3742(a) (2012) ("A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if . . ."); see also King & O'Neill, *supra* note 6, at 213 ("Appellate review became part of modern sentencing policy in the 1970s and 1980s.").

in sentencing a criminal defendant.<sup>28</sup> Sentences imposed by the district courts were rarely reviewed at the appellate level and then mainly for issues of constitutional magnitude.<sup>29</sup> This lack of appellate review stemmed from the vague nature of sentencing laws, which instructed lower-court judges to consider a variety of factors in sentencing including the defendant's "life, character, and background."<sup>30</sup> Absent clear statutory criteria, there was no legal standard that could be tested by the appeals courts on review.<sup>31</sup> Thus, the sentence a defendant received was primarily determined by which judge was assigned to the case.<sup>32</sup> The only check on this authority was the Parole Commission, which could release prisoners based on a number of discretionary criteria.<sup>33</sup>

As crime increased in the 1960s and 70s, reformers sought to limit judicial discretion in sentencing.<sup>34</sup> They succeeded at the federal and state levels in enacting determinate sentencing systems, under which a defendant would receive a specific sentence in a narrowly defined range depending on various factors.<sup>35</sup> These efforts culminated in the enactment of the Sentencing Reform Act of 1984.<sup>36</sup> The Sentencing Reform Act abolished parole<sup>37</sup> and

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28. David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1020 (1999).

29. Kevin R. Reitz, *Sentencing Guideline Systems and Sentence Appeals: A Comparison of Federal and State Experiences*, 91 NW. U. L. REV. 1441, 1443 (1997).

30. *Id.* at 1445.

31. *Id.*

32. See King & O'Neill, *supra* note 6, at 214 n.12 (citing a mock sentencing study demonstrating that a defendant could receive a sentence of up to twenty years greater depending on which judge handled the case).

33. See S. REP. NO. 98-225, at 46 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3229.

34. King & O'Neill, *supra* note 6, at 213-14.

35. *Id.* at 214.

36. See Carney, *supra* note 28, at 1021.

37. S. REP. NO. 98-225, at 66 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3248.

created the United States Sentencing Commission (“the Commission”) to provide “certainty and fairness in sentencing and reduc[e] unwarranted sentence disparities.”<sup>38</sup> The Commission’s primary duty was, and continues to be, the development of the federal sentencing guidelines.<sup>39</sup>

Appeal waivers emerged as early as 1989, a mere two years after the sentencing guidelines took effect.<sup>40</sup> In the early to mid-1990s, prosecutors began using them to speed the conclusion of alien illegal-reentry cases.<sup>41</sup> A typical appeal waiver reads:

After consultation with counsel, and in exchange for the concessions made by this Office in this plea agreement, **your client voluntarily and knowingly waives the right to appeal any sentence** within the maximum provided in the statute(s) of conviction, or the manner in which that sentence was determined, on the grounds set forth in Title 18, United States Code, Section 3742 **or on any ground whatever**. Your client also voluntarily and knowingly waives your client’s right to challenge the sentence or the manner in which it was determined in **any collateral attack**, including but not limited to a motion brought under Title 28, United States Code, Section 2255. Your client further acknowledges and agrees that this agreement does not limit the Government’s right to appeal a sentence, as set forth in Title 18, United States Code, Section 3742(b).<sup>42</sup>

By 1996, eight circuits had upheld the use of appeal waivers in plea agreements outside of the immigration context.<sup>43</sup> In 1999, amendments to the Federal Rules of

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38. 28 U.S.C. § 994(f) (2006).

39. United States Sentencing Comm’n, *An Overview of the United States Sentencing Commission*, USSC.GOV, 1, [http://www.ussc.gov/About\\_the\\_Commission/Overview\\_of\\_the\\_USSC/USSC\\_Overview.pdf](http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf) (last visited Sept. 20, 2013).

40. *See id.* at 2 (“The resulting sentencing guidelines went into effect November 1, 1987.”); *see also* United States v. Wiggins, 905 F.2d 51, 52 (4th Cir. 1990) (describing how the defendant had agreed to an appeal waiver in 1989).

41. *See* King & O’Neill, *supra* note 6, at 220.

42. United States v. Raynor, 989 F. Supp. 43, 43 (D.D.C. 1997) (emphasis added).

43. *See* United States v. Schmidt, 47 F.3d 188, 190-91 (7th Cir. 1995); United States v. Ashe, 47 F.3d 770, 775 (6th Cir. 1995); United States v. Bushert, 997

Criminal Procedure took effect which formally legitimized appeal waivers by requiring judges to discuss them with defendants prior to accepting the plea agreement.<sup>44</sup> Appeal waivers have now been upheld by every circuit but the D.C. Circuit, which has yet to rule on them.<sup>45</sup> The Supreme Court has never ruled on the validity of appeal waivers, although it has had a number of opportunities to do so.<sup>46</sup>

Although most circuits utilize appeal waivers, some do so more than others.<sup>47</sup> In the Ninth Circuit, ninety percent of plea agreements contain an appeal waiver clause.<sup>48</sup> They are found in seventy-six percent of plea agreements in the Second Circuit.<sup>49</sup> On the other hand, appeal waivers are used in only nine percent of plea agreements in the First Circuit and not at all in the D.C. Circuit.<sup>50</sup>

Thus, in the past twenty-five years, practically every jurisdiction in the United States has adopted a process which denies some or nearly all criminal defendants effective appellate review of their sentence. Because the courts have acquiesced to or even actively encouraged the

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F.2d 1343, 1350 (11th Cir. 1993); *United States v. Melancon*, 972 F.2d 566, 567-68 (5th Cir. 1992); *United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829-30 (8th Cir. 1992), *overruled in part* by *United States v. Andis*, 333 F.3d 886 (8th Cir. 2003); *United States v. Navarro-Botello*, 912 F.2d 318, 320-21 (9th Cir. 1990); *United States v. Wiggins*, 905 F.2d 51, 52 (4th Cir. 1990).

44. See 1999 Amendments, Fed. R. Crim. P. 11(c) ("Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights."); see also *King & O'Neill*, *supra* note 6, at 222, 224 (so long as the judge made sure the defendant was aware of what he was waiving, the appeal waiver would be valid).

45. *King & O'Neill*, *supra* note 6, at 224.

46. *Davis*, *supra* note 12, at 254 n.29 (citing two appeal waiver cases where certiorari has been denied: *United States v. Porter*, 405 F.3d 1136 (10th Cir. 2005), *cert. denied*, 546 U.S. 980 (2005); *United States v. Joyce*, 357 F.3d 921 (9th Cir. 2004), *cert. denied*, 543 U.S. 915 (2004)).

47. See *King & O'Neill*, *supra* note 6, at 231.

48. *Id.* at 232 fig.7.

49. *Id.*

50. *Id.*

adoption of appeal waivers,<sup>51</sup> it falls to legal scholars to examine and challenge the justifications advanced in support of this system.

## II. CHALLENGING THE ARGUMENTS FOR APPEAL WAIVERS

Prosecutors, judges, and some legal commentators justify the use of appeal waivers on three grounds: (A) as a legal matter, the right to appeal, like most rights, may be waived by plea agreement;<sup>52</sup> (B) appeal waivers preserve scarce resources by reducing the number of appeals;<sup>53</sup> and (C) appeal waivers are valid contracts that provide benefits to criminal defendants.<sup>54</sup> In this section, I will describe and challenge each of these justifications.

### A. *The Right to Appeal, Like Most Rights, May Be Waived by Plea Agreement*

Waiver of the right to appeal is not, as proponents suggest, equivalent to waiver of other rights. Proponents argue, and the courts have accepted, that the right to appeal is waivable like any other right.<sup>55</sup> The courts reason that because the right to appeal is statutory,<sup>56</sup> it must be waivable since even constitutional rights may be negotiated

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51. *See id.* at 221-22 (citing a survey of more than 1,100 federal judges, where 62 percent of circuit judges and 67 percent of district judges agreed that “waivers of appeal should be used *more* frequently”). King and O’Neill relied on data reported in MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, FED. JUDICIAL CTR., THE U.S. SENTENCING GUIDELINES, RESULTS OF THE FEDERAL JUDICIAL CENTER’S 1996 SURVEY, REPORT TO THE COMMITTEE ON CRIMINAL LAW OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 22 tbl. 14 (1997).

52. *See, e.g.*, *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992).

53. *See* King & O’Neill, *supra* note 6, at 227 (arguing that appeal waivers lower appeal rates, saving government resources).

54. *See, e.g.*, Johnson, *supra* note 25, at 713-14.

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

56. 18 U.S.C. § 3742 (2012); *Abney v. United States*, 431 U.S. 651, 656 (1977) (“[I]t is well settled that there is no constitutional right to an appeal.”).



away by plea agreement.<sup>57</sup> If a defendant can waive the right to a trial by jury and the right to counsel, surely he can waive the right to appeal his sentence.<sup>58</sup>

There is a crucial difference, however, between waivers of the right to appeal and other rights. Appeal waivers are formulated between the defense and prosecution before any appealable issues might arise.<sup>59</sup> The judge will approve the appeal waiver and accept the guilty plea prior to sentencing.<sup>60</sup> At sentencing, the judge might make erroneous factual findings, incorrectly apply the sentencing guidelines, or impose an unreasonable or unlawful sentence.<sup>61</sup> An appeal waiver renders these errors unreviewable.

This is the opposite of what occurs when other rights are waived.<sup>62</sup> If a defendant wishes to waive his right to a trial by jury, he does so simultaneously to the establishment of guilt by plea.<sup>63</sup> In a concurring opinion, Judge Parker of the Fifth Circuit noted, “[i]n the typical waiver cases, the act of waiving the right occurs at the moment the waiver is executed . . . . The situation is completely different when one waives the right to appeal . . . .”<sup>64</sup> In essence, when other rights are waived, the defendant knows exactly “what is being yielded up.”<sup>65</sup> When the right to appeal is waived, the same level of foresight is impossible.<sup>66</sup>

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57. See, e.g., *United States v. Ashe*, 47 F.3d 770, 775-76 (6th Cir. 1995); *Melancon*, 972 F.2d at 566-67.

58. See *Wiggins*, 905 F.2d at 53.

59. See *Davis*, *supra* note 12, at 256.

60. See *id.* at 256-57 (citing FED. R. CRIM. P. 11, 23, 31, 32).

61. See *United States v. Raynor*, 989 F. Supp. 43, 46 (D.D.C. 1997).

62. *Davis*, *supra* note 12, at 256.

63. See *id.* at 256-57 (citing FED. R. CRIM. P. 11, 23, 31, 32).

64. *United States v. Melancon*, 972 F.2d 566, 571-72 (5th Cir. 1992) (Parker, J., concurring).

65. *Id.* at 572.

66. See *id.*

This consideration leads many scholars<sup>67</sup> and a few courts<sup>68</sup> to question whether appeal waivers are compatible with Supreme Court precedents. In *Boykin v. Alabama*, the Supreme Court held that a guilty plea, which waives the rights to a trial by jury, to confront one's accusers, and against self-incrimination, would only be valid if it were made knowingly and voluntarily.<sup>69</sup> In the same vein, the Court held in *Town of Newton v. Rumery* and *United States v. Mezzanato* that a defendant may surrender other rights through plea agreement, so long as he does so knowingly and voluntarily.<sup>70</sup> Appeal waivers, it is argued, can never be made knowingly because they encompass future conduct.<sup>71</sup>

This reasoning has motivated two district courts to reject appeal waivers outright. In *United States v. Johnson*, District Judge Harold Greene rejected a plea agreement with a provision stating, "defendant 'voluntarily and knowingly waives the right to appeal any sentence within the maximum . . . on any ground whatever. [The defendant] also voluntarily and knowingly waives . . . any collateral attack . . .'"<sup>72</sup> The Court reasoned that unlike the waiver of other rights, "waiver of the right to appeal an unconstitutional or otherwise illegal sentence is 'inherently uninformed and unintelligent.'"<sup>73</sup> Later that year, in *United States v. Raynor*, District Judge Paul Friedman also rejected an appeal waiver on "knowing and voluntary"

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67. See, e.g., Carney, *supra* note 28, at 1031; Davis, *supra* note 12, at 256-57; Johnson, *supra* note 25, at 705-06; Alexandra Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C. L. REV. 871, 880-81 (2010).

68. See *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*5 (D. Colo. June 28, 2012); *United States v. Johnson*, 992 F. Supp. 437, 438 (D.D.C. 1997); *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) ("It is this Court's view that a defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed."); see also *Melancon*, 972 F.2d at 572.

69. See *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

70. *Town of Newton v. Rumery*, 480 U.S. 386, 398 (1987); *United States v. Mezzanato*, 513 U.S. 196, 210 (1995).

71. *Raynor*, 989 F. Supp. at 44.

72. *Johnson*, 992 F. Supp. at 438 (quoting the plea agreement).

73. *Id.* at 439 (citing *Melancon*, 972 F.2d at 571 (Parker, J., concurring)).

grounds stating, “[i]t is this Court’s view that a defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed.”<sup>74</sup>

The circuit courts consistently gloss over the concern that appeal waivers are inherently unknowing. In *United States v. Khattak*, the Third Circuit declined to attribute any special significance to the prospective nature of appeal waivers stating, “[w]aivers of the legal consequences of unknown future events are commonplace. A defendant waiving a right to trial by jury, for example, waives a procedural protection that might result in a favorable verdict.”<sup>75</sup> Similarly, in *United States v. Hahn*, the Tenth Circuit wrote, “[i]t is true that when a defendant waives his right to appeal, he does not know with specificity what claims of error, if any, he is foregoing. Nevertheless . . . this fact has never rendered a defendant’s guilty plea unknowing or involuntary.”<sup>76</sup>

It stands to reason that no defendant would knowingly or voluntarily agree to receive an erroneous and unexpectedly long prison sentence.<sup>77</sup> Yet the circuit courts routinely dismiss, on waiver grounds, appeals from defendants claiming the sentencing guidelines were misapplied, or that they misunderstood the terms of the plea agreement.<sup>78</sup> Given the large volume of appeal waivers each year,<sup>79</sup> it is inevitable that some of these claims have merit and that serious errors at trial are going unreviewed. Reformers must ask whether it’s worth denying appellate

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74. *Raynor*, 989 F. Supp. at 44.

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

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

77. *See Carney*, *supra* note 28, at 1031.

78. *See, e.g., United States v. Polly*, 630 F.3d 991, 1000-02 (10th Cir. 2011) (denying appeal on waiver grounds over defendant’s argument that recent changes to the sentencing guidelines had not been considered in sentencing); *United States v. Triplett*, 402 F. App’x 344, 346 (10th Cir. 2010) (denying an appeal even though defendant argued that he misunderstood the rule 11 colloquy).

79. King & O’Neill, *supra* note 6, at 231 (estimating that 65% of plea agreements contain an appeal waiver).

review of these errors simply to maintain a strained analogy to waiver of other rights.

B. *Appeal Waivers Have Not Reduced the Criminal Appeals Rate*

Appeal waivers have not reduced the rate of criminal appeals even though defense attorneys, prosecutors, and judges have long supported them for this reason.<sup>80</sup> Professors King and O'Neill, in an empirical analysis of appeal waivers, interviewed a number of prosecutors and defense attorneys by telephone.<sup>81</sup> They found that some prosecutors viewed appeal waivers as “a very effective thing to cut down on what they saw were frivolous appeals.”<sup>82</sup> By insulating convictions from appeal, prosecutors felt they could divert appeal-level resources to trial-level work.<sup>83</sup> Public defenders also view appeal waivers as a cost saving measure, with one office going so far as to develop a rule requiring defenders to write their own appeals if they failed to include a waiver in a plea agreement.<sup>84</sup>

Likewise, many federal judges uphold appeal waivers at least in part because of their perceived effectiveness in reducing costs by lowering the appeals rate.<sup>85</sup> The Eighth Circuit views “speed” and “economy” as “chief virtues” of appeal waivers.<sup>86</sup> The Ninth Circuit holds that public policy

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80. *See id.* at 227.

81. *See id.* at 221 n.49.

82. *Id.*

83. *See id.*

84. *Id.*

85. *See id.* at 221-22 n.53 (quoting *United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005) (“The Court and the parties have unnecessarily devoted substantial time and resources on this appeal . . . [W]e strongly encourage the government to promptly file a motion to dismiss . . . where the defendant waived his appellate rights as part of a plea agreement . . .”)); *see also* Carney, *supra* note 28, at 1037 (“These agreements save the courts untold hours of work, and waivers of appellate rights would further reduce the load on an already taxed judiciary.”).

86. *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003) (quoting *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992)).

“strongly supports” plea agreements which contain appeal waivers because they “[save] the state time and money.”<sup>87</sup> Thus, in a survey of more than 1,100 federal judges, more than sixty percent of respondents agreed that “[w]aivers of appeal should be used *more* frequently.”<sup>88</sup>

It is far from established, however, that appeal waivers actually reduce the number of appeals. After reviewing sentencing data from the Bureau of Justice Statistics, professors King and O’Neill argued that enforcement of appeal waivers “have probably” had the effect of slowing the rate of appeals.<sup>89</sup> Although Professors King and O’Neill’s study should be lauded for its empirical survey of prosecutors and judges, the conclusions the authors draw from the sentencing data are erroneous. The authors state that the appeals rate has “consistently declined” since 1987,<sup>90</sup> however, their own figures clearly illustrate that the criminal appeals rate leveled off and began to increase beginning in 1999.<sup>91</sup>

Since King and O’Neill concluded their 2004 study, new data have emerged showing that the number of criminal appeals is increasing. From 2001 to 2010, the number of criminal appeals nationally increased from 11,116 to 13,065.<sup>92</sup> Every circuit except the Ninth experienced a net increase in the number of criminal appeals filed.<sup>93</sup> The year after the King and O’Neill study, criminal appeals jumped by thirteen percent.<sup>94</sup> In fairness to their findings, this

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87. *United States v. Navarro-Botello*, 912 F.2d 318, 321-22 (9th Cir. 1992) (citing *Town of Newton v. Rumery*, 480 U.S. 386, 393 n.3 (1987)).

88. King & O’Neill, *supra* note 6, at 222 (quoting Johnson & Gilbert, *supra* note 51).

89. King & O’Neill, *supra* note 6, at 227-28.

90. *Id.* at 227.

91. *See id.* at 228-29 figs.4 & 5 (showing an increase in the criminal appeals rate from 1999 to 2004, the last year of the study).

92. United States Courts, Federal Judicial Caseload Statistics (2001-10), available at [http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics\\_Archive.aspx](http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics_Archive.aspx); *see infra* Figure 1.

93. *See infra* Figures 2, 3, 4, and 5.

94. *See infra* Figure 1.

increase is largely attributable to the Supreme Court's decision in *United States v. Booker*, in which the Court held that the sentencing guidelines should no longer be considered mandatory.<sup>95</sup> Still, according to the Administrative Office of the United States Courts, the criminal appeals rate had already been increasing dramatically each year by the time *Booker* was decided.<sup>96</sup> Now that the dust of *Booker* has settled, criminal appeals are still significantly more prevalent than ten years ago.<sup>97</sup> Thus, King and O'Neill's conclusion that appeal waivers have slowed the rate of appeals is difficult to verify.

The following figures illustrate steady growth in the number of criminal appeals filed. From 2001 through 2010, the D.C. Circuit's number of criminal appeals increased from 83 to 112; the First Circuit's rose from 510 to 551; and the Second Circuit's rose from 818 to 885.<sup>98</sup> The Third Circuit's number of appeals increased from 563 to 789; the Fourth Circuit's rose from 956 to 1,417; and the Fifth Circuit's rose from 2,111 to 2,397.<sup>99</sup> The Sixth Circuit's number of appeals increased from 887 to 1,228; the Seventh Circuit's rose from 542 to 618; and the Eighth Circuit's rose from 585 to 960.<sup>100</sup> The Ninth Circuit's number of appeals decreased from 1,947 to 1,634; the Tenth Circuit's rose from 505 to 554; and the Eleventh Circuit's rose from 1,609 to 1,920.<sup>101</sup>

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95. *United States v. Booker*, 543 U.S. 220, 227, 245-46 (2005); see United States Courts, *A Decade of Change in the Federal Courts Caseload: Fiscal Years 1997-2006*, THIRD BRANCH NEWS (Jan. 16, 2012 12:35 PM), [http://www.uscourts.gov/News/TheThirdBranch/07-11-01/A\\_Decade\\_of\\_Change\\_in\\_the\\_Federal\\_Courts\\_Caseload\\_Fiscal\\_Years\\_1997-2006.aspx](http://www.uscourts.gov/News/TheThirdBranch/07-11-01/A_Decade_of_Change_in_the_Federal_Courts_Caseload_Fiscal_Years_1997-2006.aspx).

96. United States Courts, *supra* note 95 ("Between [fiscal year] 1997 and [fiscal year] 2004, the number of criminal appeals had climbed 19 percent.").

97. See *infra* Appendix A.

98. See *infra* Figure 2.

99. See *infra* Figure 3.

100. See *infra* Figure 4.

101. See *infra* Figure 5.

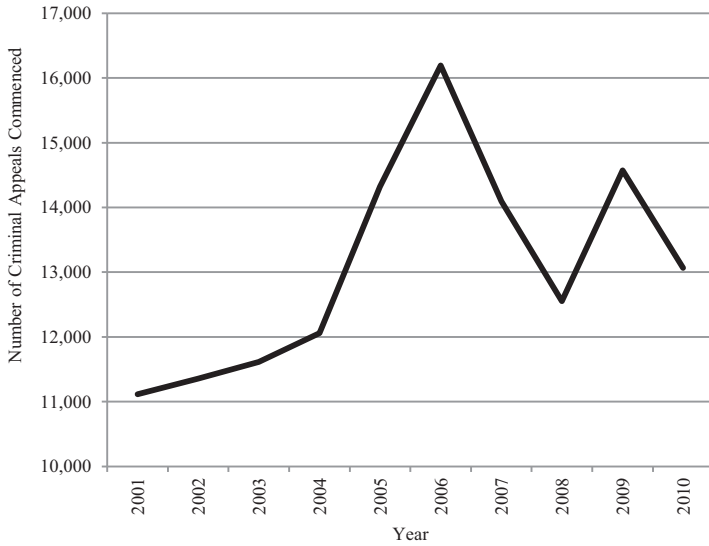


Figure 1: New Criminal Appeals All Circuits 2001-2010

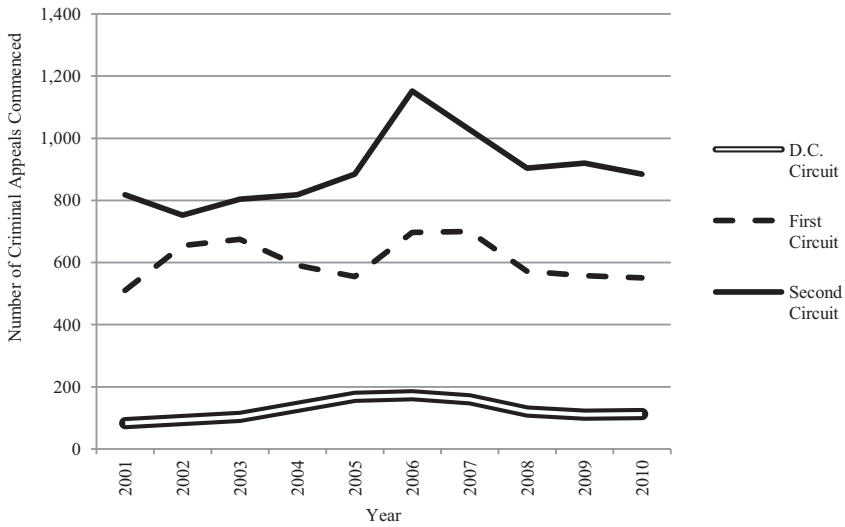


Figure 2: New Criminal Appeals in the D.C., First, and Second Circuits 2001-2010<sup>102</sup>

102. Figures 2 through 5 show new appeals in each circuit. The Circuits are listed sequentially in groups of three. As the Circuits vary in size, the scale on

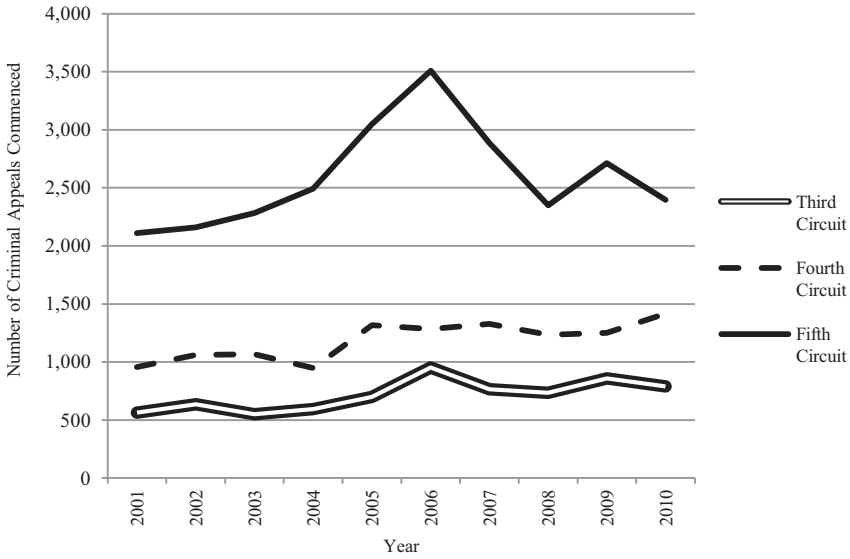


Figure 3: New Criminal Appeals in the Third, Fourth, and Fifth Circuits 2001-2010

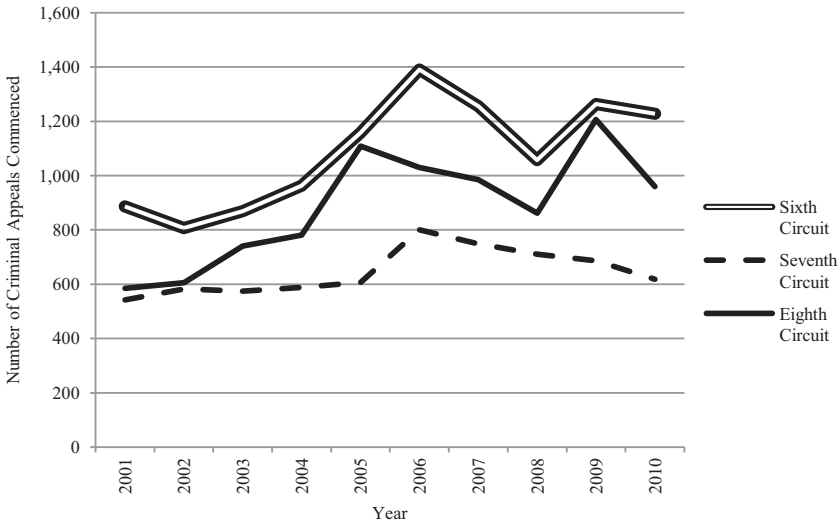


Figure 4: New Criminal Appeals in the Sixth, Seventh, and Eighth Circuits 2001-2010

the vertical axis varies for each Figure. Therefore, the reader should pay close attention to the data labels on the vertical axis.





Figure 5: New Criminal Appeals in the Ninth, Tenth, and Eleventh Circuits 2001-2010

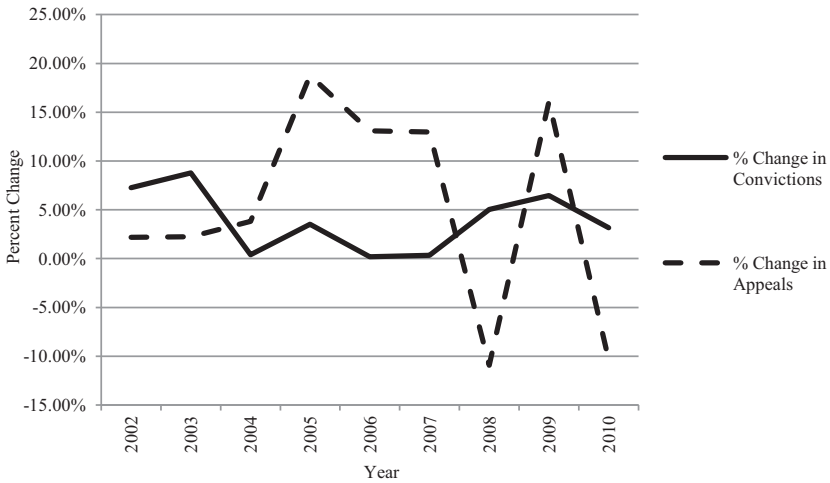


Figure 6: Percentage Change in Convictions (all Circuits) vs. Percentage Change in Appeals (all Circuits)

Comparisons between circuits further illustrate the ineffectiveness of appeal waivers in slowing the growth of criminal appeals. Arguably, circuits that use appeal waivers more would see a decrease in the percentage of new criminal appeals filed each year. Likewise, circuits that use appeal waivers less would see an increase in the percentage of new criminal appeals filed each year. However, the data do not support this hypothesis.<sup>103</sup> In the Fourth Circuit, seventy percent of plea agreements contain appeal waivers.<sup>104</sup> Yet from 2001 through 2010, the Fourth Circuit experienced an increase in the number of criminal appeals averaging 5.3 percent annually.<sup>105</sup> In the same period, the First Circuit, which uses appeal waivers in only nine percent of plea agreements,<sup>106</sup> saw average growth of 1.89 percent annually.<sup>107</sup> Although the data are insufficient to infer a negative correlation between appeal waivers and the growth of criminal appeals,<sup>108</sup> they demonstrate that appeal waivers have been ineffective in reducing the number of new criminal appeals commenced each year.

Criminal appeal waivers failed to slow new appeals even when we consider the number of convictions each year. In a year where convictions increased we would expect the number of appeals to increase by roughly the same amount. If convictions increased while appeals decreased, King and O'Neill's prediction might hold true. However, between 2001 and 2010, convictions nationwide increased by an average of 3.49 percent each year.<sup>109</sup> In the same period, appeals nationwide increased by an average of 5.32 percent each year.<sup>110</sup> Granted, these numbers are skewed by the

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103. See *supra* Figures 2-5.

104. King & O'Neill, *supra* note 6, at 232.

105. See *infra* Appendix B.

106. King & O'Neill, *supra* note 6, at 232.

107. See *infra* Appendix B.

108. See *id.* It is impossible to tell how much of the growth is attributable solely to appeal waivers, or other factors.

109. See *infra* Appendix D.

110. See *infra* Appendix B.

landmark Supreme Court cases of the time.<sup>111</sup> Still, in the ten year period studied, five years saw appeals increase by a greater percentage than convictions.<sup>112</sup>

To be fair, it is impossible to know whether the appeals rate would have been higher had appeal waivers never taken hold. Moreover, the personalities of the different circuits must play some role in how rigidly appeal waivers are applied. Indeed, in Part IV of this article, I explore how the circuits have coalesced into three broad groups treating appeal waivers with various levels of deference.<sup>113</sup> Interestingly, the Fifth, Sixth, Seventh, and Eleventh Circuits, which uphold appeal waivers rigidly,<sup>114</sup> have all seen increases in the criminal appeals rate.<sup>115</sup>

As the tables in the Appendices illustrate, appeal waivers have been ineffective in reducing the criminal appeals rate. The number of appeals continues to rise, and in many years the increase in appeals exceeds the increase in convictions. Thus, federal judges should assess whether their faith in appeal waivers as a means of reducing costs is justified. When appeal waivers can no longer be defended on efficiency grounds, many decisions lose their public-policy footing.<sup>116</sup>

### C. *Appeal Waivers Fail as Contracts*

Appeal waivers make for bad contracts. Proponents of appeal waivers analogize the plea agreement to a contract between the prosecution and defense,<sup>117</sup> with both having an

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111. See *supra* Figure 6 (showing spikes in the appeals rate in beginning in 2004 and 2005, the same years *Blakely v. Washington*, 542 U.S. 296 (2004) and *United States v. Booker*, 543 U.S. 220 (2005) were decided).

112. Compare *infra* Appendix B (specifically, see the “total” row) with *infra* Appendix D (see the “total” row).

113. See *infra* Part IV.

114. See *infra* Part IV.C.

115. See *infra* Appendices A and B.

116. See, e.g., *United States v. McGilvery*, 403 F.3d 361, 363 (6th Cir. 2005) (arguing for appeal waivers as a means to reduce future waste).

117. See *United States v. Serrano-Lara*, 698 F.3d 841, 844 (5th Cir. 2012); *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999).

interest in reaching a bargain.<sup>118</sup> The defendant has an interest in receiving the least punishment possible.<sup>119</sup> The prosecution has an interest in minimizing the resources and effort expended to secure a conviction.<sup>120</sup> Appeal waivers, as a component of the plea agreement, serve as a bargaining chip that both parties leverage to secure better terms.<sup>121</sup> However, if the contractual view were adhered to rigidly, many appeal waivers would fail because of: (1) unequal bargaining power between the parties; and (2) lack of consideration.

1. *Appeal Waivers Are Contracts by Adhesion.* If the contract-view were rigidly applied, many appeal waivers would fail because of bargaining disparity between the defense and prosecution. The prosecution and defense have vastly unequal powers when it comes to plea bargaining.<sup>122</sup> This inequality begins at indictment, where the prosecution will overcharge the defendant in an effort to increase the odds of securing a plea agreement.<sup>123</sup> Any reasonable defendant facing multiple counts and lengthy maximum sentences will decide early on that going to trial would be too risky.<sup>124</sup> Knowing this, the prosecution will augment its superior bargaining position by drafting the plea agreement

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118. See Carney, *supra* note 28, at 1027-28.

119. *Id.* at 1027.

120. *Id.*

121. See *United States v. Granik*, 386 F.3d 404, 412 (2d Cir. 2004) (“Like appellate waivers, factual stipulations are bargaining chips in the hands of defendants. Indeed, virtually every provision of a plea agreement—agreements not to argue for a downward or upward departure, to drop charges, to concede the defendant’s role in the offense—is a bargaining chip in the hands of either the government or the defendant.”).

122. See *United States v. Johnson*, 992 F. Supp. 437, 439-40 (D.D.C. 1997).

123. H. Mitchell Caldwell, *Coercive Plea Bargaining: The Unrecognized Scourge of the Justice System*, 61 CATH. U. L. REV. 63, 84 (2011).

124. See *Lafler v. Cooper*, 132 S. Ct. 1376, 1397 (2012) (Scalia, J., dissenting) (“In the United States, we have plea bargaining a-plenty, but until today it has been regarded as a necessary evil. It presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense . . .”).

in its favor.<sup>125</sup> Thus, the prosecution achieves the drafter's advantage, allowing it to include only the provisions it finds advantageous.<sup>126</sup> In many cases, the prosecution will then make the appeal waiver one sided, prohibiting only the defendant from appealing the sentence received while preserving its right to challenge an unfavorable sentence.<sup>127</sup> The prosecution's power culminates when it presents the appeal waiver to the defendant on a "take it or leave it basis," refusing to negotiate other elements of the plea unless the defendant first agrees to the waiver.<sup>128</sup>

The lack of bargaining equality between the defense and prosecution has led some judges to reject appeal waivers as contracts by adhesion.<sup>129</sup> Because conditioning the plea agreement on acceptance of an appeal waiver skews the balance so far in the prosecution's favor, the defendant has no hope at achieving equal bargaining power.<sup>130</sup> This renders the contract unconscionable.<sup>131</sup>

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125. See Michael Zachary, *Interpretation of Problematic Federal Criminal Appeal Waivers*, 28 VT. L. REV. 149, 153 (2003) ("since, among other things, the Government is usually the party that drafted the agreement . . . it 'ordinarily has certain awesome advantages in bargaining power.'" (quoting *United States v. Ready*, 82 F.3d 551, 559 (2d Cir. 1996))).

126. See *id.*

127. See *United States v. Raynor*, 989 F. Supp. 43, 43. The appeal waiver at issue stated, "client voluntarily and knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction . . . and agrees that this agreement does not limit the Government's right to appeal." *Id.*

128. See Carney, *supra* note 28, at 1003 (waiver "is not a bargaining chip in a poker game, but the ante required to sit even at the table."); see also King & O'Neill, *supra* note 6, at 245 n.111 (quoting a defense attorney saying "[a]lthough courts have touted appellate waivers as providing additional bargaining power for defendants during plea negotiations, the reality is that defendants have little power to refuse prosecutors' demands for appellate waivers").

129. *Raynor*, 989 F. Supp. at 49 ("The condition sought to be imposed by the government is inherently unfair; it is a one-sided contract of adhesion . . .").

130. See *United States v. Johnson*, 992 F. Supp. 437, 439-40 (D.D.C. 1997) ("[T]he government has bargaining power utterly superior to that of the average defendant . . . . 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.").

131. See *id.*

2. *Appeal Waivers Would Sometimes Fail for Lack of Consideration.* If appeal waivers were actual contracts, they would require consideration. The Restatement (Second) of Contracts provides that, with rare exceptions, contracts must be supported by consideration<sup>132</sup>—defined as receiving what was bargained for.<sup>133</sup> In the appeal waiver context, the defendant agrees to the appeal waiver in exchange for sentencing concessions from the prosecution.<sup>134</sup> Indeed, a number of circuits require that plea agreements offer some value to the defendant.<sup>135</sup> Concessions may include: the dismissal of some, or even a majority, of the charges in the indictment;<sup>136</sup> recommending a downward departure in sentencing for acceptance of responsibility;<sup>137</sup> use of a “C plea,” where both parties agree to a sentence recommendation that is binding on the judge if the plea agreement is accepted;<sup>138</sup> and filing a safety-valve motion.<sup>139</sup>

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132. RESTATEMENT (SECOND) OF CONTRACTS § 17(a) (1981) (“[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.”).

133. *Id.* at § 81 cmt. a.

134. King & O’Neill, *supra* note 6, at 241 (“Prosecutors agreed that in return for appeal waivers defendants ‘are looking for stipulations . . . for role reductions.’” (quoting an anonymous source from a telephone survey)).

135. *See* United States v. Hahn, 359 F.3d 1315, 1335 (10th Cir. 2004) (“A waiver of appellate rights is a contract between the defendant and the government, for due consideration, to either completely or partially settle all sentencing matters by submission to the district court for a final, binding determination.”); United States v. Andis, 333 F.3d 886, 894 (8th Cir. 2003) (Arnold, J., concurring) (“[W]hile the court professes loyalty to the idea that ordinary principles of contract law ought to apply to plea agreements, it refuses to adhere, again without explanation, to the most fundamental contract principle of all, namely, that agreements supported by consideration ought to be enforced absent fraud, duress, mistake, or some other disabling circumstance.”).

136. *See* United States v. Teeter, 257 F.3d 14, 20 (1st Cir. 2001) (the prosecution agreed to dismiss three out of ten counts); United States v. Vanderwerff, No. 12-cr-00069, 2012 WL 2514933, at \*1 (D. Colo. June 28, 2012). (agreeing to drop two out of three charges contained in the indictment in exchange for a guilty plea with an appeal waiver).

137. *See, e.g.,* United States v. Akers, 317 F. App’x 798, 803 (10th Cir. 2009).

138. *See* King & O’Neill, *supra* note 6, at 212, 242.

139. *See id.* at 212, 235-36, 238.

The courts point to these concessions in upholding appeal waivers, reasoning that under contract law principles, it would be unfair to allow the defendant to receive the benefits of the bargain while nonetheless going on to attack the sentence.<sup>140</sup> Courts that share this view predict that allowing even rare exceptions to binding appeal waivers will undermine their attractiveness to prosecutors.<sup>141</sup>

Not all defendants who sign appeal waivers, however, receive concessions from the government. In their empirical survey, Professors King and O'Neill found that "in some districts the concessions given in exchange for a defendant's waiver were negligible, and the waivers were sweeping."<sup>142</sup> Some prosecutors reported giving no concessions for the appeal waiver stating, "[i]t's our way or the highway."<sup>143</sup> At least some defendants are giving up a right of substantial value, the right to appeal, without receiving anything in exchange.<sup>144</sup> It would then stand to reason that appeal waivers in these cases would be invalidated for lack of consideration.

Despite this observation, an appeal waiver agreement has never been invalidated for lack of consideration. In *United States v. Reap*, the appellant argued that his appeal waiver was invalid because the plea agreement "lack[ed] . . . concessions from the government."<sup>145</sup> The Second Circuit disagreed, holding that all guilty pleas carry "built-in benefits," especially the avoidance of the risks associated with trial which are sufficient to fulfill the consideration requirement.<sup>146</sup> Likewise, the Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits have all rejected claims from

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140. See, e.g., *United States v. Corso*, 549 F.3d 921, 927 (3d Cir. 2008).

141. See *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995) ("Although any given defendant would like to obtain the concession and exercise the right as well, prosecutors cannot be fooled in the long run.").

142. King & O'Neill, *supra* note 6, at 244.

143. *Id.* at 245.

144. See *id.* at 244-45.

145. *United States v. Reap*, 391 F. App'x 99, 101 (2d Cir. 2010).

146. See *id.* at 102.

defendants arguing that the plea bargain and appeal waiver they agreed to were invalid for lack of consideration.<sup>147</sup>

Courts around the country liken plea agreements and the appeal waivers they contain to valid and binding contracts.<sup>148</sup> However, contract-based justifications of appeal waivers ultimately fail because modern plea bargaining is clearly one-sided, and defendants often do not receive sufficient consideration for waiving the substantial right to appeal. If courts continue to recognize appeal waivers as contracts, they should at least carry this view to its logical conclusion and reject them where there is unequal bargaining power or insufficient consideration.

### III. INDEPENDENT CRITICISMS OF APPEAL WAIVERS

Appeal waivers are vulnerable in their own right. As I have argued, the rationales advanced in favor of appeal waivers fail under close examination.<sup>149</sup> However, critics have raised independent arguments that undermine appeal waivers on policy grounds; these are: (A) that appeal waivers undermine the Sentencing Reform Act of 1984,<sup>150</sup> and (B) that appeal waivers create conflicts of interests by insulating professional misconduct from review.<sup>151</sup> These policy arguments deserve full treatment because they provide additional and independent footing on which to challenge appeal waivers.

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147. See, e.g., *United States v. Araromi*, 477 F. App'x 157, 159 (5th Cir. 2012); *United States v. Miracle*, 461 F. App'x 362, 363 (4th Cir. 2012), *cert. denied*, 132 S. Ct. 1767 (2012); *United States v. Hunter*, 316 F. App'x 470, 473 (6th Cir. 2009); *United States v. Pliego-Duarte*, 265 F. App'x 861, 865 n.4 (11th Cir. 2008); *United States v. Isobe*, 143 F. App'x 46, 47 (9th Cir. 2005); *United States v. Hernandez*, 134 F.3d 1435, 1437 (10th Cir. 1998).

148. See, e.g., *United States v. Corso*, 549 F.3d 921, 927 (3d Cir. 2008); *United States v. Wenger*, 58 F.3d 280, 282-83 (7th Cir. 1995).

149. See *supra* Part II.

150. See, e.g., *Johnson*, *supra* note 25, at 699-700.

151. See, e.g., *King & O'Neill*, *supra* note 6, at 245-48.



A. *Appeal Waivers Undermine the Sentencing Reform Act of 1984*

Appeal waivers undermine the primary goals of the Sentencing Reform Act of 1984, which were to remove “unfettered” discretion from sentencing, eliminate sentencing disparities, and create a more meaningful role for the appellate courts.<sup>152</sup>

1. *Appeal Waivers Contribute to Sentencing Discretion and Disparities.* Appeal waivers have played a significant role in the rise of judicial discretion and sentencing disparities. Under the previous sentencing regime, judges held “virtual[ly] absolute” discretion at sentencing<sup>153</sup> and could impose any sentence up to the statutory maximum.<sup>154</sup> Once a defendant’s sentence began, this discretion passed to the Parole Commission, which could release or refuse to release the prisoner based on a number of discretionary factors.<sup>155</sup> As a result, “[s]erious disparities in sentences . . . were common.”<sup>156</sup> The punishment defendants actually received for crimes varied wildly—in 1974, the average federal sentence for bank robbery was eleven years but in some districts was as low as five and a half years.<sup>157</sup>

In order to eliminate such disparities, Congress enacted the Sentencing Reform Act of 1984, which created the determinate sentencing regime that remains on the books today.<sup>158</sup> At the same time, Congress also abolished parole.<sup>159</sup>

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152. See 18 U.S.C. § 3742 (2012) (providing for appellate review); *Mistretta v. United States*, 488 U.S. 361, 367-68 (1989) (explaining the purposes of the Sentencing Reform Act); S. REP. NO. 98-225, at 38-39 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3222.

153. Johnson, *supra* note 25, at 698.

154. See S. REP. NO. 98-225, at 38 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3222.

155. See *id.* at 46.

156. *Mistretta*, 488 U.S. at 365.

157. See S. REP. NO. 98-225, at 41 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3222.

158. See *Mistretta*, 488 U.S. at 367; see also 18 U.S.C. §§ 3553, 3624 (2012).

159. See *Mistretta*, 488 U.S. at 367.

It established the United States Sentencing Commission and tasked it with formulating mandatory sentencing guidelines for all federal crimes.<sup>160</sup> Under the new system, federal judges were tasked with faithful, some would say mechanical,<sup>161</sup> application of the guidelines with departure allowed only in narrow circumstances.<sup>162</sup> A prisoner would only be released at the end of his sentence with minor allowances for good behavior.<sup>163</sup> Discretion over sentencing policy was reserved for the Sentencing Commission.<sup>164</sup>

Appeal waivers restore sentencing discretion to the trial courts by shielding non-guideline or erroneous sentences from appellate review.<sup>165</sup> This discretion has been substantially augmented by the Supreme Court's decision in *Booker*, which rendered the sentencing guidelines advisory.<sup>166</sup> It is difficult to measure the extent appeal waivers interact with *Booker* to increase judicial discretion. They are clearly a factor because a defendant who accepts the government-offered appeal waiver stands a far better chance of receiving sentencing concessions than one who rejects it and "pleads open" without an agreement.<sup>167</sup>

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160. *Id.* at 361.

161. *See* *United States v. Jackson*, 30 F.3d 199, 201 (1st Cir. 1994) ("[I]t is only in the extraordinary case . . . that the district court may abandon the guideline sentencing range and impose a sentence different from the sentence indicated by mechanical application of the guidelines.").

162. *See* *Carney*, *supra* note 28, at 1022.

163. *See* *Mistretta*, 488 U.S. at 367.

164. *See* 18 U.S.C. § 3742(a) (2012); 28 U.S.C. § 994(a) (2012); *see also* S. REP. NO. 98-225, at 79 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3262 ("The committee rejected an amendment . . . which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. . . . The Committee resisted this attempt to make the sentencing guidelines more voluntary than mandatory . . .").

165. *See* *Johnson*, *supra* note 25, at 700-01 ("The trial judge's factual findings, conclusions of law, and discretionary decisions with respect to the defendant's sentence become final, regardless of whether they are erroneous or would have been reversed by an appellate court if considered on their merits.").

166. Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 13 (2010).

167. King & O'Neill, *supra* note 6, at 235.

In an empirical analysis of sentencing disparities, Professor Ryan Scott demonstrated that judicial discretion in sentencing has increased dramatically in recent years.<sup>168</sup> Following the implementation of the sentencing guidelines, the individual judge mattered very little to the sentence given.<sup>169</sup> Since then, the identity of the judge has become at least three times as important to the sentence a defendant receives.<sup>170</sup> This discretion has led to substantial sentencing disparities.<sup>171</sup> In federal courts in Massachusetts, judges cluster into two groups, one of which gives out 55 percent higher sentences than the other.<sup>172</sup> Indeed, the sentence a defendant receives for some crimes depends almost exclusively on the judge handling the case.<sup>173</sup>

Appeal waivers have played a significant role in this recorded rise in judicial discretion. Because 97 percent of all federal convictions are made pursuant to plea agreements<sup>174</sup> and 65 percent of all plea agreements contain an appeal waiver,<sup>175</sup> the recorded increases in judicial discretion and sentencing disparities must be attributable in some part to the rise in appeal waivers.

It would be hard to argue that the pre-*Booker* sentencing regime, with its emphasis on strict sentencing ranges, was good for defendants. Regardless, reformers and the judiciary must acknowledge that the Sentencing Reform Act of 1984 expressly sought to eliminate trial judge discretion at sentencing<sup>176</sup> and to confer this discretion on

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168. Scott, *supra* note 166, at 1-2.

169. *Id.* at 40.

170. *See id.*

171. *Id.* at 1.

172. *See id.* at 32.

173. *See id.* at 52 (“In cases not governed by a mandatory minimum, drawing one of the court’s more severe judges, rather than its more lenient judges, means an average difference of more than two years in prison.”).

174. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

175. *King & O’Neill, supra* note 6, at 231.

176. *See* S. REP. NO. 98-225, at 79 (1984), *reprinted in* 1984 U.S.C.A.N. 3182, 3262.

the appeals courts and the Sentencing Commission.<sup>177</sup> Appeal waivers, by denying appellate review of sentences, subvert this purpose by returning discretion to the trial courts. The typical district judge, however, would be surprised to learn that she has discretion at the sentencing phase.<sup>178</sup> Instead, she would point to the prosecutor, who drafts the plea agreements that govern the vast majority of criminal prosecutions in this country.<sup>179</sup> Thus, appeal waivers strip discretion from the appellate courts, and this discretion falls on federal prosecutors. This is an outcome that Congress certainly never intended.

2. *Appeal Waivers Eliminate Any Meaningful Appellate Role in Sentencing.* Appeal waivers undermine the second primary goal of the Sentencing Reform Act, which was to create a more meaningful appellate role in sentencing.<sup>180</sup> To ensure the guidelines would be faithfully applied, Congress created a statutory right to appeal an illegal, erroneous, or unreasonable sentence.<sup>181</sup> In the years following enactment of the Sentencing Reform Act, appellate review became instrumental to defining the new sentencing regime's full

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177. See *id.* (“The committee rejected an amendment . . . which would have expanded significantly the circumstances under which judges could depart from the sentencing guidelines in a particular case. . . . The Committee resisted this attempt to make the sentencing guidelines more voluntary than mandatory . . .”).

178. See, e.g., *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012) (“The act of judging, once central to the determination of guilt or innocence, has been shunted to the margins. A defendant’s ‘guilt’ is, more often than not, preordained by the grand jury’s indictment.”).

179. See *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012) (“To a large extent . . . horse trading between prosecutor and defense counsel determines who goes to jail and for how long.” (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992))).

180. See S. REP. NO. 98-225, at 86 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3269.

181. See 18 U.S.C. § 3742(a) (2012); see also S. REP. NO. 98-225, at 86 (1984), reprinted in 1984 U.S.C.C.A.N. 3182, 3269 (“[A]ppellate judicial review of sentences in section 3742 are designed to reduce materially any remaining unwarranted disparities by giving the right to appeal a sentence outside the guidelines and by providing a mechanism to assure that sentences inside the guidelines are based on correct application of the guidelines.”).

contours.<sup>182</sup> Through thousands of decisions, the appeals courts and the Supreme Court settled disputes over the meaning and application of the sentencing guidelines.<sup>183</sup> Moreover, appellate judges assisted the Sentencing Commission in developing new versions of the guidelines.<sup>184</sup> The result was a system that relied on appellate review to both enforce and contribute to the development of sentencing policy.<sup>185</sup>

Appeal waivers eliminate any meaningful appellate role in the development of sentencing policy. Because most criminal convictions are secured by plea agreement<sup>186</sup> and most plea agreements contain appeal waivers,<sup>187</sup> the appeals courts are relegated to deciding whether an appellant's waiver was valid without touching his underlying claims of sentencing error.<sup>188</sup> In such cases, the appeal will be summarily dismissed.<sup>189</sup> Thus, in the aggregate, appeal waivers subvert the Congressional goal of providing for a meaningful appellate role in sentencing.

Granted, the Supreme Court's decisions in *Kimbrough v. United States* and *Gall v. United States* have also played a role in reducing the appellate role in sentencing.<sup>190</sup> In *Kimbrough*, the Court allowed district judges to question whether the now advisory sentencing guidelines appropriately reflected the purposes of sentencing.<sup>191</sup> In

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182. King & O'Neill, *supra* note 6, at 214-15.

183. *Id.* at 215.

184. *Id.*

185. *Id.*

186. *Lafler v. Cooper*, 132 S. Ct. 1376, 1388 (2012).

187. King & O'Neill, *supra* note 6, at 231.

188. *See, e.g., United States v. Hahn*, 359 F.3d 1315, 1325-26 (2004) (testing only whether the appeal waiver was knowing and voluntary, then dismissing).

189. *See, e.g., id.* at 1328 ("If the panel finds that the plea agreement is enforceable, it will summarily dismiss the appeal.")

190. *See* Stephanos Bibas & Susan Klein, *The Sixth Amendment and Criminal Sentencing*, 30 CARDOZO L. REV. 775, 777-78 (2008).

191. *See Kimbrough v. United States*, 552 U.S. 85, 89 (2007) ("[T]he Commission's recommendation of a sentencing range will 'reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives.' The

*Gall*, the Court required that the appellate courts exercise the deferential “abuse of discretion” standard in reviewing the trial court’s consideration of sentencing factors.<sup>192</sup> Both of these cases have diminished the appellate judiciary’s role in sentencing.

These Supreme Court decisions, however, do not in any way diminish Congress’s expressed intentions in creating an appellate role in the sentencing process. Indeed, appellate review of sentencing has achieved some of the most dramatic advances in criminal justice of the past decade.<sup>193</sup> Since the Supreme Court has used appellate review to address the most unforgiving aspects of the Sentencing Reform Act,<sup>194</sup> it is inconceivable that the Court would embrace a system that stifles almost all appellate review of federal sentences. This is why appeal waivers are so dangerous. As Judge Kane recently noted, “appellate waivers would have insulated from review the underlying convictions in some of the most notable criminal decisions in the Supreme Court’s recent history” including *Apprendi v. New Jersey*, *Blakely v. Washington*, and *United States v. Booker*.<sup>195</sup> Thus, even though the Sentencing Reform Act of 1984 had substantial flaws, creating a meaningful role for the appeals courts in sentencing wasn’t one of them.

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sentencing judge, on the other hand, is ‘in a superior position to find facts and judge their import under § 3553(a) in each particular case.’” (quoting *Rita v. United States*, 551 U.S. 338, 350 (2007); *Gall v. United States*, 552 U.S. 38, 51 (2007)).

192. Scott, *supra* note 166, at 3 (citing *Gall v. United States*, 552 U.S. 38, 38 (2007)).

193. See *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*5 (D. Colo. June 28, 2012).

194. See, e.g., *United States v. Booker*, 543 U.S. 220, 260-62 (2005) (making the sentencing guidelines advisory).

195. *Vanderwerff*, 2012 WL 2514933 at \*5 (citing *United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Apprendi v. New Jersey*, 530 U.S. 466 (2000)).

B. *Appeal Waivers Create Conflicts of Interest by Insulating Professional Misconduct from Review*

Appeal waivers invite unethical behavior by insulating the actions of defense attorneys, prosecutors, and judges from review. The Constitution requires that criminal defendants receive “effective, conflict-free legal representation at every stage of prosecution.”<sup>196</sup> A typical appeal waiver, however, requires the defendant to waive his right to appeal or file for habeas relief under any circumstances.<sup>197</sup> Thus, in encouraging the defendant to sign an appeal waiver, defense counsel shields itself from claims of ineffective assistance of counsel.<sup>198</sup> This is clearly a conflict of interest akin “to a doctor handing a patient a liability waiver just as the patient is being wheeled into surgery.”<sup>199</sup> Likewise, prosecutors are put in the position of encouraging the defendant to sign a waiver that precludes an appeal being brought for prosecutorial misconduct.<sup>200</sup>

Appeal waivers also create a conflict of interest for judges. It has been noted that “[j]udges do not like to be reversed.”<sup>201</sup> In approving the appeal waiver, the judge shields his sentencing decisions and any errors that may have occurred from appellate review.<sup>202</sup> Thus, judges have a personal interest in approving appeal waivers.<sup>203</sup> Some defense attorneys even worry that this leads judges to “cut corners.”<sup>204</sup> However, the significance of this interest is

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196. Alan Ellis & Todd Bussert, *Stemming the Tide of Postconviction Waivers*, CRIM. JUST., Spring 2010, at 29.

197. *See, e.g.*, *United States v. Raynor*, 989 F. Supp. 43, 43 (D.D.C. 1997).

198. Ellis & Bussert, *supra* note 196, at 29.

199. *Id.*

200. *See id.* at 29-30.

201. Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. CHI. L. REV. 1, 37 (1990).

202. King & O'Neill, *supra* note 6, at 248 (quoting a defense attorney as saying “[l]et’s face it, judges didn’t want to be reversed, and these waivers gave them a level of comfort.” (alteration in original)).

203. *See id.*

204. *Id.* at 247.

unclear. Commentators find it unlikely that judges make avoiding reversal their priority.<sup>205</sup> Indeed, in many non-waiver criminal cases, judges intentionally preserve the reviewability of their decisions in the interests of justice.<sup>206</sup> Thus, many federal judges actually encourage reversal to promote the development of fair sentencing policy.<sup>207</sup>

It is clear that prosecutors and defense attorneys have a personal interest in ensuring that the defendant signs away the right to appeal for prosecutorial misconduct and ineffective assistance of counsel. The extent to which appeal waivers motivate judges to accept plea agreements is more arguable. Nonetheless, by creating a very real potential for conflicts of interest, appeal waivers undermine the defendants' right to conflict-free legal representation. Thus, reformers should challenge appeal waivers because of their potential for abuse and the creation of conflicts of interest.

#### IV. COMPROMISING APPEAL WAIVERS: APPROACHES BY CIRCUIT

There is an inherent tension to appellate review of appeal waivers. Appeal waivers, by design, are intended to bring finality to the trial court's decision.<sup>208</sup> For an appeals court to entertain an appeal despite the existence of a waiver would seem to defeat the purpose entirely.<sup>209</sup> However, recognizing the weightiness of the defendant's interests, the circuits have made some compromises to strict

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205. See Stith, *supra* note 201, at 37-38 (“[T]he trial court’s own conception of its role as a tribunal bound by appellate law, its desire for fairness or justice in particular cases, and, ultimately, the fear of disciplinary action or removal make indulgence in such an extreme practice unlikely.”).

206. *Id.* at 37-39.

207. *See id.*

208. *See United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001); *see also United States v. Hahn*, 359 F.3d 1315, 1328 (10th Cir. 2004).

209. *See United States v. Wiggins*, 905 F.2d 51, 53 (4th Cir. 1990) (“Accordingly, we hold that a defendant who pleads guilty, and expressly waives the statutory right to raise objections to a sentence, may not then seek to appeal the very sentence which itself was part of the agreement.”).



enforcement of appeal waivers, allowing for limited appellate review in some circumstances.<sup>210</sup>

Every circuit that has ruled on the issue will test an appeal waiver to ensure that it was made “knowingly” and “voluntarily.”<sup>211</sup> Many circuits will also review a sentence if the trial judge failed to discuss the appeal waiver with the defendant as required by Federal Rule of Criminal Procedure 11(b)(1)(N).<sup>212</sup> Every circuit also requires the appeal waiver to be clearly written in the plea agreement.<sup>213</sup> Beyond these basic safeguards, the amount of deference given to appeal waivers varies by circuit and can be classified into three broad categories: (A) miscarriage of justice; (B) quasi-miscarriage of justice; and (C) strict adherence.

#### A. *Four Circuits Utilize the Miscarriage of Justice Test*

The First, Third, Eighth, and Tenth Circuits refuse to enforce an appeal waiver if doing so would result in a miscarriage of justice.<sup>214</sup> These circuits will consider the clarity of the error claimed, its gravity, character, impact on the defendant and government, and the defendant’s acquiescence in the result.<sup>215</sup> Examples of a miscarriage of justice include when race or ethnicity was a factor in the sentence received, the defendant received ineffective assistance of counsel, if the sentence exceeded the maximum imposed by law, or where the sentence clearly violated a term of the plea agreement.<sup>216</sup> The Eighth and Tenth Circuits also provide that “[p]lea agreements will be

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210. *See, e.g., Hahn*, 359 F.3d at 1343; *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003).

211. *See, e.g., Wiggins*, 905 F.2d at 53.

212. *See, e.g., United States v. Chavez-Salais*, 337 F.3d 1170, 1173-74 (10th Cir. 2003).

213. *See, e.g., Sotirion v. United States*, 617 F.3d 27, 33 (1st Cir. 2010).

214. *See id.* at 36; *United States v. Akers*, 317 F. App’x 798, 800 (10th Cir. 2009); *United States v. Mabry*, 536 F.3d 231, 237 (3d Cir. 2008); *Andis*, 333 F.3d at 890.

215. *See, e.g., United States v. Teeter*, 257 F.3d 14, 26 (1st Cir. 2001).

216. *Id.* at 25 nn.9-10.

strictly construed and any ambiguities in these agreements will be read against the Government and in favor of a defendant's appellate rights."<sup>217</sup>

B. *Three Circuits Use a Quasi-Miscarriage of Justice Standard*

The Second, Fourth, and Ninth Circuits, while not adopting a miscarriage of justice standard, will still hear an appeal in certain circumstances. The Second Circuit will ensure that the appeal waiver conforms to traditional contract law principles<sup>218</sup> and will invalidate the waiver if the government breached the plea agreement.<sup>219</sup> Moreover, it will allow review if the sentence was affected by racial or ethnic bias.<sup>220</sup> The Fourth Circuit will hear the appeal if the government breached its side of the plea agreement,<sup>221</sup> where the sentence was motivated by racial bias,<sup>222</sup> or if the record conclusively shows ineffective assistance of counsel.<sup>223</sup> The Ninth Circuit will hear the appeal if the government breached its side of the plea agreement.<sup>224</sup>

C. *Four Circuits Practice Strict Adherence to Appeal Waivers*

The Fifth, Sixth, Seventh, and Eleventh Circuits enforce appeal waivers vigorously unless the waiver can be shown to be unknowing or involuntary.<sup>225</sup> The Fifth and Sixth

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217. *Andis*, 333 F.3d at 890; *United States v. Hahn*, 359 F.3d 1315, 1343 (10th Cir. 2004)

218. *See United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996).

219. *See United States v. Rosa*, 123 F.3d 94, 98 (2d Cir. 1997).

220. *See United States v. Roque*, 421 F.3d 118, 123 (2d Cir. 2005).

221. *See United States v. Bowe*, 257 F.3d 336, 342 (4th Cir. 2001).

222. *See United States v. Gamboa-Felix*, 18 F. App'x 204, 208 (4th Cir. 2001).

223. *Id.* at 209.

224. *See United States v. McFadden*, 378 F. App'x 699, 699 (9th Cir. 2010).

225. *See United States v. Murphy*, No. 12-10042, 2012 WL 6699102, at \*1 (11th Cir. Dec. 21, 2012); *United States v. Chapa*, 602 F.3d 865, 868 (7th Cir. 2010); *United States v. Stark*, 307 F. App'x 935, 938 (6th Cir. 2009); *United States v. Burns*, 433 F.3d 442, 451 (5th Cir. 2005).

Circuits will countenance an ineffective assistance of counsel argument only “when the claimed assistance directly affected the validity of that waiver or the plea itself.”<sup>226</sup> The Seventh Circuit will assess the waiver to see if it covers the appellant’s claims and if so, dismiss the appeal.<sup>227</sup>

Because most appeals courts have shown some willingness to examine appeal waivers at least superficially, reformers should focus their efforts on persuading them to adopt the less deferential forms of review. Thus, the four circuits that practice strict adherence to appeal waivers should be persuaded to adopt a miscarriage of justice standard. This will ensure that even if appeal waivers continue to be widely accepted, the most egregious claims will still have some chance of vindication at the appellate level.

It is clear that appeal waivers need reform. First, appeal waivers have not slowed the criminal appeals rate. In fact, criminal appeals have increased dramatically since appeal waivers first appeared.<sup>228</sup> Even in circuits that enforce waivers strictly, defendants still bring frequent appeals,<sup>229</sup> but appeals courts simply dismiss them without touching the merits.<sup>230</sup> Second, the arguments advanced in favor of appeal waivers fail under close scrutiny.<sup>231</sup> Moreover, appeal waivers undermine the purposes of the Sentencing Reform Act of 1984 and would have shielded from review the most significant advances in criminal justice of the past decade.<sup>232</sup> Finally, the circuits have

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226. *United States v. White*, 307 F.3d 336, 343 (5th Cir. 2002); *Davila v. United States*, 258 F.3d 448, 451 (6th Cir. 2001).

227. *See Chapa*, 602 F.3d at 868-69.

228. *See supra* Part II.B.

229. *See, e.g., United States v. Grinard-Henry*, 399 F.3d 1294, 1297 (11th Cir. 2005); *see also* *Carney*, *supra* note 28, at 1041.

230. *See Carney*, *supra* note 28, at 1052; *see also* *King & O’Neill*, *supra* note 6, at 248-49.

231. *See supra* Part II.A.

232. *See United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*5 (D. Colo. June 28, 2012).

already recognized the need to review appeal waivers to some extent as demonstrated by the varying levels of deference identified above. Thus, any imagined cost-savings have evaporated. For these reasons, appeal waivers create a dilemma that calls for solutions.

## V. SOLVING THE APPEAL WAIVER DILEMMA

Appeal waivers raise serious fairness concerns, especially when one considers their sheer prevalence in plea bargaining today.<sup>233</sup> As more and more defendants waive the right to appeal “on any ground[s] whatever,”<sup>234</sup> serious errors in sentencing will go unaddressed. Moreover, appeal waivers have failed to bring about the promised reduction in the number of new criminal appeals filed each year.<sup>235</sup> In fact, the criminal appeals rate has risen substantially since appeal waivers first took hold.<sup>236</sup> The only difference to the appeals courts has been to dismiss new appeals out of hand rather than reaching the merits.<sup>237</sup> This system might make prosecutors’ work easier, but it does nothing to advance our system of justice.<sup>238</sup> It is clear that reform is needed.

As I have suggested, some of the negative aspects of appeals waivers can be addressed by the appeals courts employing a miscarriage of justice standard of review.<sup>239</sup> Commentators have suggested three additional solutions to the appeal waiver dilemma: (1) the courts could use their discretion and refuse to honor plea agreements containing an appeal waiver; (2) Congress could “prohibit appeal waivers entirely”; or (3) the risk of going to trial could be

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233. See King & O’Neill, *supra* note 6, at 231.

234. *United States v. Raynor*, 989 F. Supp. 43, 43 (D.D.C. 1997).

235. See *supra* Part II.B.

236. See *id.*

237. See King & O’Neill, *supra* note 6, at 248-49; *supra* Part II.

238. See *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012) (“Indeed, appellate waivers would have insulated from review the underlying convictions in some of the most notable criminal decisions in the Supreme Court’s recent history[,]” including *Apprendi*, *Blakely*, and *Booker.*), *appeal dismissed* (Aug. 8, 2012).

239. See *supra* Part IV.

reduced to discourage defendants from accepting plea agreements.<sup>240</sup> To achieve the second and third solutions, reformers would have to persuade Congress to amend federal sentencing law.<sup>241</sup> The first solution, however, presents an immediate and straightforward way to reduce the prevalence of appeal waivers: federal judges should review appeal waivers on a case-by-case basis and reject those that do not meet the interests of justice.

A. *The District Courts Should Reject Most Plea Agreements that Contain an Appeal Waiver*

As a default posture, district court judges should reject most plea agreements that contain an appeal waiver and only allow them in rare circumstances. The district courts clearly have this power. The Federal Rules of Criminal Procedure require the courts to reject plea agreements that are unknowing or involuntary.<sup>242</sup> Moreover, the Federal Rules of Criminal Procedure authorize the courts to reject plea agreements at their discretion.<sup>243</sup> Indeed, “each individual judge is free to decide whether, and to what degree, he will entertain plea bargains.”<sup>244</sup>

The district courts have used this discretion to reject plea agreements in all manner of circumstances, such as when the defendant refused to attend pre-trial drug-screenings,<sup>245</sup> where the judge felt the charges agreed to in the plea would allow “undue leniency,”<sup>246</sup> or similarly, where a defendant accused of more than a million dollars in fraud

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240. King & O'Neill, *supra* note 6, at 257-59.

241. *Id.* at 258-59.

242. See FED. R. CRIM. P. 11(b)(1)-(2) (“[T]he court must . . . determine that the defendant understands . . . [b]efore accepting a plea . . . the court must . . . determine that the plea is voluntary . . .”).

243. See FED. R. CRIM. P. 11(c)(3)(A); see also 22 C.J.S. *Criminal Law* § 492 (2006) (“[A]cceptance or rejection of a plea bargaining agreement is within the court’s discretion . . .”).

244. *United States v. Jackson*, 563 F.2d 1145, 1148 (4th Cir. 1977).

245. *United States v. Nicholson*, 231 F.3d 445, 450-51 (8th Cir. 2000).

246. *United States v. Ajayi*, 935 F. Supp. 90, 95 (D.R.I. 1996).

would receive a mere \$3,000 fine.<sup>247</sup> There is no reason why the courts couldn't use this power to reject plea agreements containing appeal waivers. However, remarkably few judges have done so.<sup>248</sup> In *United States v. Johnson*, Judge Harold Greene, Jr. of the District of Columbia rejected a plea agreement in which the defendant agreed to waive the rights to challenge or collaterally attack the sentence received.<sup>249</sup> Judge Greene reasoned that it would be impossible for any criminal defendant to know what sentencing errors might occur in the future, and thus any plea agreement waiving appeal would be inherently unknowing and involuntary.<sup>250</sup> Moreover, because the Government had preserved a unilateral right to appeal in the plea agreement, Judge Greene said the waiver approached a contract by adhesion.<sup>251</sup>

In *United States v. Raynor*, Judge Paul Friedman, also of the District of Columbia, rejected a plea agreement on knowing and voluntary grounds, stating, “[i]t is this Court’s view that a defendant can never knowingly and intelligently waive the right to appeal or collaterally attack a sentence that has not yet been imposed. Such a waiver is by definition uninformed and unintelligent and cannot be voluntary and knowing.”<sup>252</sup> Judge Friedman went on to challenge the reasoning behind the validation of appeal waivers in the circuit courts, arguing that comparing the right to appeal to other rights is a “faulty syllogism” and that Congress would never have intended a sentencing regime that undermined its creation of the statutory right to appeal.<sup>253</sup>

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247. *United States v. Munroe*, 493 F. Supp. 134, 135-36 (E.D. Tenn. 1980).

248. See *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012); *United States v. Johnson*, 992 F. Supp. 437, 438-39 (D.D.C. 1997); *United States v. Raynor*, 989 F. Supp. 43, 43 (D.D.C. 1997).

249. *Johnson*, 992 F. Supp. at 438.

250. *Id.* at 439.

251. *Id.*

252. *Raynor*, 989 F. Supp. at 44.

253. *Id.* at 48 n.4 (quoting *United States v. Melancon*, 972 F.2d 566 (5th Cir. 1992)).

*Johnson* and *Raynor* were both decided in late 1997, and in the ensuing fourteen years, no district court rejected a plea agreement because of the inclusion of an appeal waiver. In *United States v. Perez*, a district court in Massachusetts relied on those cases to remove an appeal waiver clause from a plea agreement while keeping the other provisions whole.<sup>254</sup> However, *Perez* was decided before the First Circuit had ruled on the validity of appeal waivers and was expressly disapproved of in *United States v. Teeter*.<sup>255</sup> Even though *Perez* has not been overruled, excising an appeal waiver from the plea agreement conflicts with the Federal Rules of Criminal Procedure, which provide that the judge may only accept or reject the proposed agreement<sup>256</sup> and may not participate in plea agreement discussions between the parties.<sup>257</sup>

#### B. *Vanderwerff* as an Example that Should be Followed

By 2012, it appeared that the *Raynor* and *Johnson* decisions were aberrations to the settled question of appeal waiver validity. It came as a surprise to the legal community<sup>258</sup> when a district judge from Colorado sparked new life to the debate and rejected a plea agreement containing an appeal waiver.<sup>259</sup> In *United States v. Vanderwerff*, District Judge John Kane repeated many of the traditional arguments against appeal waivers: that they can never be knowing or voluntary; that they undermine the Sentencing Reform Act of 1984; and that they diminish the role of the appeals courts.<sup>260</sup> Unlike hundreds of judges

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254. *United States v. Perez*, 46 F. Supp. 2d 59, 65, 72 (D. Mass. 1999), disapproved by *United States v. Teeter*, 257 F.3d 14 (1st Cir. 2001).

255. *Teeter*, 257 F.3d at 23 n.6.

256. See FED. R. CRIM. P. 11(c)(1).

257. See FED. R. CRIM. P. 11(c)(3)(A).

258. See *Editorial, Trial Judge to Appeals Court: Review Me*, supra note 2, (“[T]he recent rejection in a federal district court by Judge John Kane of a plea bargain deal between a defendant and federal prosecutors is truly startling.”).

259. See *United States v. Vanderwerff*, No. 12-cr-00069, 2012 WL 2514933, at \*4 (D. Colo. June 28, 2012).

260. *Id.* at \*4-6.

before him, however, Judge Kane rejected the plea agreement.<sup>261</sup>

The Defendant, Timothy Vanderwerff, had been indicted on three counts relating to child pornography with a possible sentence of five to twenty years of imprisonment.<sup>262</sup> The parties agreed to a plea agreement eliminating two of these charges and cutting the possible sentence in half, to five to ten years.<sup>263</sup> Moreover, the plea agreement contained a “waiver of Mr. Vanderwerff’s statutory right to appeal any matter in connection with his prosecution.”<sup>264</sup>

Noting that accepting or rejecting plea agreements is a matter of discretion in federal trial courts, Judge Kane determined that a case-by-case review is necessary to ensure appeal waivers are fair and in the interests of justice.<sup>265</sup> Reviewing the plea agreement, he found that the defendant had not, as both parties claimed in their briefs, accepted responsibility for his actions since he had agreed to waive appeal in exchange for having two substantial criminal charges dropped.<sup>266</sup> Moreover, the appeal waiver was not in the interests of justice because it would dramatically diminish the sentencing range available and would not adequately reflect the purposes of sentencing set in 18 U.S.C. § 3553,<sup>267</sup> which requires that a sentence reflect the seriousness of the offense, adequately deter criminal conduct, prevent future crimes, and rehabilitate defendants.<sup>268</sup>

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261. *Id.* at \*6.

262. *Id.* at \*6.

263. *Id.*

264. *Id.* at \*1.

265. *Id.* at \*4 (“I must conduct a case-specific inquiry which results in a decision based upon what is fair under the circumstances and guided by the rules and principles of law.”).

266. *Id.* at \*6.

267. *Id.*

268. 18 U.S.C. § 3553(a)(2) (2012).



Judge Kane also noted that because *United States v. Booker* has rendered the sentencing guidelines advisory and the trial judge's role at sentencing has become substantially less mechanical, appellate review is more necessary than before to ensure sentencing consistency and fairness.<sup>269</sup> He reasoned that, "[i]n the wake of . . . *Booker* . . . no circuit court has revisited the enforceability of appellate waivers."<sup>270</sup> For all of these reasons, Judge Kane rejected the plea agreement fully expecting the defendant to go to trial.<sup>271</sup> Moreover, he welcomed review by the appeals court stating that, "[t]he interests of justice as I perceive them are best served by permitting the calm and deliberate review by the Court of Appeals of my decision and how it conforms to the requirements of 18 U.S.C. § 3553."<sup>272</sup>

Indeed, Judge Kane stood a serious risk of being reversed by the appellate court. Eight years prior to *Vanderwerff*, the Tenth Circuit had decisively ruled in favor of appeal waivers and provided a framework for assessing them based on contract law principles.<sup>273</sup> Yet neither a full trial, much less appellate intervention, materialized. Rather than go before a jury, the prosecution and the defense simply agreed to a new plea agreement, this time without an appeal waiver.<sup>274</sup> The new plea agreement specifically preserved the defendant's right to appeal.<sup>275</sup> Pursuant to this plea agreement, on May 13, 2013, Judge Kane sentenced Timothy Vanderwerff to 108 months of incarceration.<sup>276</sup>

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269. *Vanderwerff*, 2012 WL 2514933, at \*5.

270. *Id.*

271. *Id.* at \*6 ("The proposed plea bargain is rejected. . . . This case will be set for a trial by jury.").

272. *Id.*

273. See *United States v. Hahn*, 359 F.3d 1315, 1343 (10th Cir. 2004).

274. See *Plea Agreement and Statement of Facts Relevant to Sentencing at 2, United States v. Vanderwerff*, 2012 WL 2514933 (D. Colo. June 28, 2012) (No. 12-cr-00069).

275. *Id.*

276. Judgment at 2, *United States v. Vanderwerff*, 2012 WL 2514933 (D. Colo. June 28, 2012) (No. 12-cr-00069).

Federal judges should follow the examples set in *Vanderwerff* and begin conducting a case-by-case review of appeal waivers, rejecting the plea agreement where necessary to ensure fairness or to serve the interests of justice. For almost every federal district court, this will mean contravening settled circuit case law.<sup>277</sup> However, district judges should take note of Judge Kane's recent insight that appeals courts have not yet had the opportunity to revisit appeal waivers since *Booker* was decided.<sup>278</sup> Since *Booker* makes sentencing a far less mechanical exercise, it provides a novel opportunity for trial judges to reassert the necessity of appellate review of federal sentences.

Federal judges should also take comfort in the fact that, as the ultimate disposition of *Vanderwerff* implies, prosecutors will not respond to the rejection of appeal waivers by insisting on going to trial. Rather, consistent with their oft-stated desire to preserve scarce resources,<sup>279</sup> prosecutors will acquiesce and draft plea agreements that do not contain a waiver of the statutory right to appeal,<sup>280</sup> much as they did prior to the Sentencing Reform Act of 1984.

At the very least, federal appeals courts should consider adopting the less deferential standards of review for appeal waivers outlined in Part IV. In this way, many of the most egregious defendant complaints, such as claims of ineffective assistance of counsel, will stand some chance of vindication.

### CONCLUSION

The United States Constitution provides all defendants the right to a trial by jury. This right has come to seem quaint, as over ninety-seven percent of all federal convictions do not involve a jury at all but are secured by

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277. See *supra* Part I.

278. See *Vanderwerff*, 2012 WL 2514933, at \*5.

279. See King & O'Neill, *supra* note 6, at 221.

280. See, e.g., Plea Agreement and Statement of Facts Relevant to Sentencing at 2, *United States v. Vanderwerff*, 2012 WL 2514933 (D. Colo. June 28, 2012) (No. 12-cr-00069).

plea agreement. Plea agreements and the prosecutors who draft them have become the sole determinants of a defendant's prison sentence. They contain all of the relevant sentencing facts almost always designed to trigger an agreed-upon sentencing range. To the extent that federal judges are involved in sentencing at all, they are relegated to approving or disapproving the plea agreement.

When Congress enacted the Sentencing Reform Act of 1984, it intended to remove all discretion from federal sentencing and impose rigid guideline sentences for federal crimes. The only mechanism Congress developed to protect defendants from the harshness of this new system was appellate review. Congress envisioned that the appeals courts would mitigate the new regime's indiscriminate effects, providing for justice where needed. Indeed, appellate review has resulted in the most significant advances in sentencing policy in a generation including *Apprendi*, *Mezzanato*, *Kimbrough*, *Booker*, and *Gall*.

Appellate review, however, is under attack. Appeal waivers, which preclude a defendant from challenging his sentence for any reason, bar the appeals courts from reaching the merits of a defendant's claims. Because of their perceived effectiveness in cutting costs, prosecutors, defense attorneys, and judges have accepted them in almost every federal circuit.

The criminal appeals rate has not, as proponents of appeal waivers argue, gone down. In fact, the criminal appeals rate has risen steadily every year since 2001. Defendants are still bringing appeals, even though two-thirds of plea agreements contain an appeal waiver. These appeals, rather than being considered on the merits, are being mechanically and summarily dismissed.

The arguments put forward to defend appeal waivers fail on close inspection. Appeal waivers can never be made knowingly or voluntarily because the defendant has no way of knowing what errors, and of what magnitude, might occur at sentencing. Moreover, appeal waivers fail as contracts because in most cases there is a significant disparity in bargaining power between the prosecution and defense. In some plea agreements, the concessions given in exchange for the appeal waiver are so minimal, or even

nonexistent, that the contract should be considered invalid for lack of consideration.

Despite these observations, remarkably few federal judges have rejected appeal waivers. These decisions are so rare that when a federal judge in Colorado recently rejected an appeal waiver, the decision made national news. *United States v. Vanderwerff* should serve as a call to action to federal judges everywhere to reevaluate the casual acceptance appeal waivers have gained and begin reviewing them on a case-by-case basis to ensure they meet the interests of justice. As *Vanderwerff* illustrates, federal prosecutors will acquiesce to this new reality by simply removing appeal waivers from plea agreements. At the very least, federal appeals courts should move toward adopting a miscarriage of justice standard and reviewing the most egregious claims.

**Appendix A**  
**Through**  
**Appendix D**

**Appendix A****New Criminal Appeals Commenced by Circuit  
2001–2010<sup>281</sup>**

	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>D.C.</b>	83	93	103	136	168
<b>1st</b>	510	655	675	591	555
<b>2d</b>	818	752	804	818	885
<b>3d</b>	563	637	550	595	700
<b>4th</b>	956	1,062	1,067	949	1,316
<b>5th</b>	2,111	2,159	2,285	2,494	3,050
<b>6th</b>	887	807	869	963	1,157
<b>7th</b>	542	582	574	588	607
<b>8th</b>	585	606	741	781	1,108
<b>9th</b>	1,947	1,831	1,788	1,996	1,996
<b>10th</b>	505	452	491	510	743
<b>11th</b>	1,609	1,722	1,665	1,635	2,034
<b>Total</b>	11,116	11,358	11,612	12,056	14,319

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281. Data compiled from United States Courts, Federal Judicial Caseload Statistics (2001–10), available at [http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics\\_Archive.aspx](http://www.uscourts.gov/Statistics/FederalJudicialCaseloadStatistics/FederalJudicialCaseloadStatistics_Archive.aspx).

<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Change</b>
173	160	120	110	112	29
697	700	572	558	551	41
1,152	1,028	904	920	885	67
951	766	736	859	789	226
1,285	1,328	1,234	1,251	1,417	461
3,509	2,888	2,351	2,713	2,397	286
1,391	1,255	1,057	1,264	1,228	341
801	748	711	686	618	76
1,030	985	862	1,207	960	375
2,554	1,993	1,698	1,709	1,634	-313
768	678	622	620	554	49
1,884	1,566	1,687	2,678	1,920	311
16,195	14,095	12,554	14,575	13,065	1,949

**Appendix B****Percent Change in New Appeals Commenced From  
the Previous Year 2001–2010**

	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>D.C.</b>	-	12.05%	10.75%	32.04%	23.53%
<b>1st</b>	-	28.43%	3.05%	-12.44%	-6.09%
<b>2d</b>	-	-8.07%	6.91%	1.74%	8.19%
<b>3d</b>	-	13.14%	-13.66%	8.18%	17.65%
<b>4th</b>	-	11.09%	0.47%	-11.06%	38.67%
<b>5th</b>	-	2.27%	5.84%	9.15%	22.29%
<b>6th</b>	-	-9.02%	7.68%	10.82%	20.15%
<b>7th</b>	-	7.38%	-1.37%	2.44%	3.23%
<b>8th</b>	-	3.59%	22.28%	5.40%	41.87%
<b>9th</b>	-	-5.96%	-2.35%	11.63%	0.00%
<b>10th</b>	-	-	8.63%	3.87%	45.69%
<b>11th</b>	-	7.02%	-3.31%	-1.80%	24.40%
<b>Total</b>	-	2.18%	2.24%	3.82%	18.77%



<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Avg.</b>
2.98%	-7.51%	-25.00%	-8.33%	1.82%	4.70%
25.59%	0.43%	-18.29%	-2.45%	-1.25%	1.89%
30.17%	-10.76%	-12.06%	1.77%	-3.80%	1.57%
35.86%	-19.45%	-3.92%	16.71%	-8.15%	5.15%
-2.36%	3.35%	-7.08%	1.38%	13.27%	5.30%
15.05%	-17.70%	-18.59%	15.40%	-11.65%	2.45%
20.22%	-9.78%	-15.78%	19.58%	-2.85%	4.56%
31.96%	-6.62%	-4.95%	-3.52%	-9.91%	2.07%
-7.04%	-4.37%	-12.49%	40.02%	-20.46%	7.64%
27.96%	-21.97%	-14.80%	0.65%	-4.39%	-
3.36%	-11.72%	-8.26%	-0.32%	-10.65%	2.23%
-7.37%	-16.88%	7.73%	58.74%	-28.30%	4.47%
13.10%	12.97%	-10.93%	16.10%	-10.36%	5.32%

**Appendix C****Convictions by Circuit 2001–2010**

	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>D.C.</b>	276	420	504	568	529
<b>1st</b>	1,643	2,013	1,886	1,753	1,580
<b>2d</b>	4,151	4,658	5,144	4,535	4,704
<b>3d</b>	2,633	2,761	2,819	2,823	3,222
<b>4th</b>	5,480	5,726	6,363	6,268	6,575
<b>5th</b>	11,538	12,603	13,439	13,749	15,415
<b>6th</b>	4,353	4,731	4,921	4,812	5,352
<b>7th</b>	2,449	2,806	3,119	2,878	2,831
<b>8th</b>	3,556	3,685	4,401	4,801	4,967
<b>9th</b>	13,911	13,852	15,342	15,177	14,452
<b>10th</b>	3,414	4,109	4,714	5,582	5,743
<b>11th</b>	6,258	6,632	6,972	6,965	7,009
<b>Total</b>	59,662	63,996	69,624	69,911	72,379

<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Change</b>
459	450	409	378	394	118
1,635	1,926	1,748	1,782	1,889	246
4,435	4,453	4,607	4,726	4,399	248
3,015	3,099	3,173	3,083	2,954	321
6,698	6,540	7,025	6,874	6,833	1,353
15,749	15,086	17,509	19,506	20,623	9,085
5,220	5,271	5,409	5,235	5,622	1,269
3,078	2,928	3,068	2,927	3,053	604
5,195	5,059	5,428	5,440	4,929	1,373
13,746	14,821	14,621	17,246	19,014	5,103
6,182	5,885	6,140	6,777	6,986	3,572
7,098	7,243	7,290	7,396	7,245	987
72,510	72,761	76,427	81,370	83,941	24,279

**Appendix D****Percent Change in Conviction From the Previous  
Year 2001-2010**

	<b>2001</b>	<b>2002</b>	<b>2003</b>	<b>2004</b>	<b>2005</b>
<b>D.C.</b>	-	52.17%	20.00%	12.70%	-6.87%
<b>1st</b>	-	22.52%	-6.31%	-7.05%	-9.87%
<b>2d</b>	-	12.21%	10.43%	-11.84%	3.73%
<b>3d</b>	-	4.86%	2.10%	0.14%	14.13%
<b>4th</b>	-	4.49%	11.12%	-1.49%	4.90%
<b>5th</b>	-	9.23%	6.63%	2.31%	12.12%
<b>6th</b>	-	8.68%	4.02%	-2.21%	11.22%
<b>7th</b>	-	14.58%	11.15%	-7.73%	-1.63%
<b>8th</b>	-	3.63%	19.43%	9.09%	3.46%
<b>9th</b>	-	-0.42%	10.76%	-1.08%	-4.78%
<b>10th</b>	-	20.36%	14.72%	18.41%	2.88%
<b>11th</b>	-	5.98%	5.13%	-0.10%	0.63%
<b>Total</b>	-	7.26%	8.79%	0.41%	3.53%

<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>2009</b>	<b>2010</b>	<b>Avg.</b>
-13.23%	-1.96%	-9.11%	-7.58%	4.23%	-0.23%
3.48%	17.80%	-9.24%	1.95%	6.00%	-0.41%
-5.72%	0.41%	3.46%	2.58%	-6.92%	-0.48%
-6.42%	2.79%	2.39%	-2.84%	-4.18%	1.01%
1.87%	-2.36%	7.42%	-2.15%	-0.60%	2.34%
2.17%	-4.21%	16.06%	11.41%	5.73%	6.53%
-2.47%	0.98%	2.62%	-3.22%	7.39%	2.29%
8.72%	-4.87%	4.78%	-4.60%	4.30%	1.27%
4.59%	-2.62%	7.29%	0.22%	-9.39%	4.01%
-4.89%	7.82%	-1.35%	17.95%	10.25%	4.34%
7.64%	-4.80%	4.33%	10.37%	3.08%	7.08%
1.27%	2.04%	0.65%	1.45%	-2.04%	1.13%
0.18%	0.35%	5.04%	6.47%	3.16%	3.49%

