Giving Trial Judges the Final Word: Waiving the Right to Appeal Sentences Imposed under the Sentencing Reform Act

D. Randall Johnson
Chicago-Kent College of Law, Illinois Institute of Technology, randy@randalljohnsonlaw.com

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Available at: https://digitalcommons.unl.edu/nlr/vol71/iss3/3
D. Randall Johnson*

Giving Trial Judges the Final Word: Waiving the Right to Appeal Sentences Imposed Under the Sentencing Reform Act

TABLE OF CONTENTS

I. Introduction .............................................. 695
II. Background ............................................... 698
   A. The Sentencing Reform Act of 1984 and Appellate Review of Sentences ..................... 698
   B. Waiver of the Newly-created Right to Appellate Review of Sentences ..................... 700
   A. Due Process .......................................... 703
   B. Public Policy ........................................ 703
IV. Appeal-of-Sentence Waivers and Due Process ............ 705
   A. Inherent Involuntariness ............................ 705
   B. Case-By-Case Determination ......................... 707
V. Appeal-of-Sentence Waivers and Public Policy .......... 709
   A. Finality of Judgments and Sentences ................. 709
   B. Reduction of Appellate Workload ..................... 710
   C. Parties' Ability to Enter into an Enforceable Bargain that Both Believe will Promote Their Self-Interest.. 712
VI. Limited Enforceability of Appeal-of-Sentence Waivers: Effectuating the Purposes Underlying the New Right to Appellate Review of Sentences ......................... 715
   A. Importance of Fashioning a Rule Consistent with the Purposes Underlying the New Right to Appellate Review of Sentences ............................................ 715
   B. Limited Enforcement of Appeal-of-Sentence Waivers ............................................ 716

* Visiting Assistant Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology.
I. INTRODUCTION

Under the Sentencing Reform Act of 1984, defendants convicted of federal offenses may challenge the validity of their sentences by way of appeal. Recently, some federal prosecutors have begun requiring criminal defendants to waive this right as a condition of entering into a plea agreement. In May 1990, in United States v. Wiggins, the


Although the Sentencing Reform Act of 1984 created a right to appellate review of sentences, it was not the first federal Act to do so. On March 3, 1879, Congress enacted "An Act to give circuit courts appellate jurisdiction in certain criminal cases." Chap. 176, 20 Stat. 354 (1879). The 1879 Act provided, inter alia, that "[i]n case of an affirmance of the judgment of the district court, the circuit court shall proceed to pronounce final sentence and to award execution thereon ...." Id., § 3. Pursuant to this provision, the then-existing circuit courts exercised plenary power to revise sentences imposed by the district court as they deemed just. E.g., United States v. Wynn, 11 F. 57, 58 (C.C.E.D. Mo. 1882) (circuit court adjusted district court's sentence of one year imprisonment downwards to eight months); Bates v. United States, 10 F. 92, 96 (C.C.N.D. Ill. 1881) (circuit court concluded that, notwithstanding sentence imposed by district court, it would "pronounce final sentence ... in conformity with its own opinion as to the degree of punishment which should be imposed upon the party convicted."). This right to appellate review of sentences existed until 1891, when Congress created the new Courts of Appeals, vested them with appellate jurisdiction over final decisions of the district courts, and eliminated the appellate jurisdiction that the circuit courts had previously exercised over district court sentencing decisions. Chap. 517, 26 Stat. 826-30 (1891). Because the new Courts of Appeals were not given any plenary right to review sentences similar to that which the 1879 Act had given to the circuit courts, the right to appellate review of sentences disappeared and did not surface again until the enactment of the Sentencing Reform Act of 1984. See Peterson v. United States, 246 F. 118, 119 (4th Cir. 1917), cert. denied, 246 U.S. 661 (1918); Wallace v. United States, 247 F. 390, 310 (7th Cir.), cert. denied, 245 U.S. 650 (1917); Freeman v. United States, 243 F. 353, 357 (9th Cir. 1917).


3. A typical provision of this type reads "[the defendant] expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742." United States v. Wiggins, 905 F.2d 51, 52 (4th Cir. 1990).

4. 905 F.2d 51 (4th Cir. 1990).
a panel of the Fourth Circuit recognized the enforceability of these waivers, and shortly thereafter, in *United States v. Navarro-Botello*, a panel of the Ninth Circuit followed. In the wake of these two decisions, the Fourth and Ninth Circuits have refused to address several sentence appeals by defendants on their merits.6

A more recent Fourth Circuit decision has, in all likelihood, dampened the enthusiasm of federal prosecutors for appeal-of-sentence waivers. In *United States v. Guevara*, the trial judge sentenced the defendant, after a plea of guilty, to twenty-eight months imprisonment, three years supervised release, and the forfeiture of her home and other property. The government appealed the sentence on the ground that it was excessively lenient. However, a Fourth Circuit panel sua sponte dismissed the government's appeal because the plea agreement contained an express appeal-of-sentence waiver by the defendant. In refusing to address the government's appeal on its merits, the panel stated:

> [In *Wiggins* we] gave as a reason for our decision that "[t]he government has added the waiver language to its standard plea precisely because it preserves the finality of judgments and sentences imposed pursuant to valid pleas of guilty." The finality of judgments and sentences imposed is no more preserved by appeals by the government than by appeals by the defendant, and it strikes us as far too one-sided to construe the plea agreement to permit an appeal by the government for a fancied mistake by the district court, as here, but not to permit an appeal on similar grounds by the defendant, which *Wiggins* held to be precluded. That being the case, we are of opinion that such a provision against appeals must also be enforced against the government, which must be held to have implicitly cast its lot with the district court, as the defendant explicitly did.8

On petition for rehearing en banc, the full Court of Appeals for the

5. 912 F.2d 318 (9th Cir. 1990), *cert. denied*, 112 S.Ct. 1488 (1992). More recently, in *United States v. Rutan*, 956 F.2d 827 (8th Cir. 1992), the Eighth Circuit also recognized the enforceability of appeal-of-sentence waivers. In so holding, the panel relied almost exclusively on the rationale of the *Wiggins* and *Navarro-Botello* cases.


7. 941 F.2d 1299 (4th Cir. 1991).

8. *Id.* at 1299-1300 (citation omitted).
Fourth Circuit upheld the panel’s decision without comment.⁹

This Article analyzes the enforceability of appeal-of-sentence waivers in terms of due process and public policy. The Article identifies the applicable standards for determining the enforceability of waivers of federal rights, and then applies those standards to waivers of the right to appellate review of criminal sentences. The Article first examines the due process concerns raised by appeal-of-sentence waivers and concludes that, while appeal-of-sentence waivers should be examined on a case-by-case basis to ensure they are voluntary, deliberate, and informed decisions of the defendant, a per se rule barring their enforceability on due process grounds is not warranted. The Article then examines the public policy concerns raised by appeal-of-sentence waivers. Should the parties to a federal criminal action be allowed to “cast their lot” with the trial judge, thus making the trial judge the final arbiter of law and fact with respect to the sentencing decision? How are relevant policy interests, including the purposes underlying the new right to appellate review of sentences, affected by enforcement of appeal-of-sentence waivers? If appeal-of-sentence waivers should be enforced, what limitations should be placed on their enforcement? The Article concludes that limited enforcement of appeal-of-sentence waivers is justified. As a general matter, voluntary, deliberate, and informed appeal-of-sentence waivers should be enforced except when enforcement will preclude review of claims that (1) a sentence was imposed in violation of the underlying substantive criminal statute, (2) in imposing sentence the trial judge considered factors that may not lawfully be considered, and (3) the trial judge committed “plain error” in imposing sentence in violation of the Sentencing Reform Act. Finally, the Article asks whether an additional need exists for a Guevara-type “mutuality” requirement: Should appeal-of-sentence waivers be enforced when only one party has waived the right to appeal? The Article concludes that appeal-of-sentence waivers should not be enforced against either party unless both parties have explicitly waived their right to appeal.¹⁰

---


¹⁰. The article thus agrees with the basic theme of Guevara that enforcement of an appeal-of-sentence waiver against a particular defendant is unfair if the government is not subject to a similar bar in the same case. However, the article disagrees with the precise holding of Guevara that a waiver by the defendant constitutes an implicit waiver by the government. The preferred solution is that neither party should be barred from an appeal unless both have explicitly waived that right. See infra part V.C-4.
II. BACKGROUND

A. The Sentencing Reform Act of 1984 and Appellate Review of Sentences

The Sentencing Reform Act of 1984 was enacted in response to growing criticism of the largely unregulated nature of the federal criminal sentencing process. Previously, trial judges had wide discretion to sentence a convicted defendant to any term of imprisonment from the statutory minimum to the statutory maximum.1 The virtual absolute nature of this discretion, as well as the absence of any normative sentencing standards to guide trial judges in the exercise of this discretion, resulted in wide disparities in the lengths of sentences imposed for similar offenders committing similar offenses.2 These disparities in the length of sentences imposed did not translate fully to disparities in time served, however, because the trial judge's power to determine the actual length of time a convicted defendant served was shared with the United States Parole Commission.3 The Parole Commission was vested with responsibility for releasing prisoners prior to the expiration of the term set by the trial judge upon a determination that the prisoner was "rehabilitated."4 Under this indeterminate sentencing system, trial judges and the Parole Commission acted as checks on each other, with trial judges setting the outer boundaries for the length of sentences and the Parole Commission determining the actual period of time that offenders served within these boundaries.5 Nonetheless, because each actor exercised virtually unfettered discretion within its own sphere of sentencing responsibility, serious disparities were common in the actual length of time served by similarly-situated offenders.6

The Sentencing Reform Act replaced this indeterminate-sentencing scheme with a new determinate sentencing system. With limited exceptions, convicted defendants in the federal system can now expect to serve the full time for which they are sentenced.7 The Parole Commission has been abolished and the power it previously shared with trial judges has been consolidated and vested in the United States Sentencing Commission, a newly-created independent agency of the judicial branch.8 The Sentencing Commission is charged with estab-

12. Id.
16. Id.
17. One exception is that convicted offenders may receive up to fifty-four days good time credit for each year served. 18 U.S.C.A. § 3624(b)(West Supp. 1992).
lishing detailed sentencing guidelines and policies for the federal criminal justice system. The first edition of the sentencing guidelines became effective on November 1, 1987. With only limited exceptions, the Commission's guidelines are mandatory: Trial judges must sentence a convicted offender to a term of imprisonment that falls within the range specified in the guidelines for the type of offense committed and the offender's criminal history category unless reasons exist for departing from the guidelines range. Guideline ranges must be narrow; their maximum cannot exceed their minimum by more than the greater of twenty-five percent or six months. Theoretically, under the new federal sentencing system a criminal defendant can predict with reasonable specificity the actual length of time the defendant will serve if convicted. This is in dramatic contrast to the old system in which "a defendant who [came] up for sentencing [had] no way of knowing or reliably predicting whether he [would] walk out of the courtroom on probation, or be locked up for a term of years that [might] consume the rest of his life, or something in between."

To ensure compliance with the new normative standards governing the trial judge's sentencing decision under the guidelines, and to provide case law development of the appropriate reasons for sentencing outside the guidelines, the Sentencing Reform Act provides for appellate oversight of criminal sentences. Both the defendant and the government may appeal sentences that have been imposed in violation of law or as a result of an incorrect application of the guidelines. Both parties also may appeal sentences imposed for offenses for which there are no applicable guidelines and that are plainly unreasonable. The defendant also may appeal a sentence imposed as a result of an upward departure from the applicable guideline range, while the government may appeal a sentence imposed as a result of a downward departure from the applicable guideline range.

The Act limits appellate review of sentences in which no applicable guideline exists to whether or not the sentence imposed is "plainly unreasonable." Review of departure sentences is limited to whether

26. Id. § 3742(a)(1)-(2) and (b)(1)-(2).
27. Id. § 3742(a)(4) and (b)(4).
28. Id. § 3742(a)(3).
29. Id. § 3742(b)(3).
or not the departure was "unreasonable." The Act further provides that the appellate courts:

- shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

B. Waiver of the Newly-created Right to Appellate Review of Sentences

Neither the Sentencing Reform Act nor any edition of the sentencing guidelines to date address whether or not waivers of the new right to appellate review of sentences are enforceable. This issue, of course, is the main subject of this article. Before analyzing the issue, however, it is helpful to illustrate the potential effect that indiscriminate enforcement of such waivers could have on the time served by convicted defendants.

As a practical matter, enforcing an appeal-of-sentence waiver against a party to a criminal action has the same effect as though the party against whom it is enforced did not file an appeal at all. 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. In most cases, of course, the enforcement of an appeal-of-sentence waiver will have no effect on the sentence a defendant ultimately receives. It can be assumed that most trial judges reach correct findings of fact and conclusions of law and do not otherwise act unlawfully when imposing sentences.

Nonetheless, trial judges are not infallible and it is not difficult to imagine sentencing "horror" stories that could occur if appeal-of-sentence waivers are enforced indiscriminately. Suppose, for example, that a first-time offender agrees to plead guilty to money laundering in violation of section 1956(a)(1)(B) of title 18, United States Code, an offense that carries a maximum statutory penalty of twenty years imprisonment. The written plea agreement makes no specific sentence recommendation and explicitly states that "[the defendant] expressly waives the right to appeal his sentence on any ground, including any appeal right conferred by 18 U.S.C. § 3742." Although the defendant is specifically aware of this provision, the defendant accepts it to expedite the case and because counsel has informed the defendant that a "worst-case" application of the sentencing guidelines to the defendant's case would result in a maximum period of imprisonment of fifty-

31. Id. § 3742(e)(3).
32. Id. § 3742(e).
34. See United States v. Wiggins, 905 F.2d 51, 52 (4th Cir. 1990).
one months. Nonetheless, the trial judge correctly determines that the applicable sentencing guideline range is 33-41 months. Thereafter, at sentencing, the trial judge correctly determines that the applicable sentencing guideline range is 33-41 months. Nonetheless, the trial judge decides to "depart" from the applicable guideline range and sentence the defendant to the twenty-year maximum period allowed under the underlying substantive statute. The trial judge does so solely upon the personal belief that the punishment meted out by the guidelines is too low for the type of offense committed. An appellate court considering this sentencing decision on its merits would probably hold that the trial judge vastly exceeded the judge's lawful sentencing authority under the Sentencing Reform Act, and would remand for resentencing. If the appellate court enforces the waiver, however, it would not reach the issue of the merits of the defendant's sentence. The twenty-year sentence would stand and the defendant would remain in prison for 199-207 months (sixteen to seventeen years) longer than authorized under the Sentencing Reform Act.

As the above hypothetical illustrates, the indiscriminate enforcement of appeal-of-sentence waivers could have devastating consequences to criminal defendants. One need look no further than the Fourth Circuit's en banc disposition of United States v. Guevara, however, to realize that the indiscriminate enforcement of appeal-of-sentence waivers against the government could also have negative consequences in terms of the public's interest in ensuring that convicted offenders serve their sentences as provided for by law. The en banc Fourth Circuit upheld the panel's decision without comment, despite the dissent's forceful contention that a correct application of sentencing law would have yielded a guidelines range of 51-60 months.

35. The base offense level for a violation of section 1956(a)(1)(B) is 20. U.S.S.G. § 2S1.1(a)(2)(West 1991). For the purposes of this hypothetical, it is assumed that the funds involved in the money laundering transaction at issue were not proceeds of an unlawful activity involving the manufacture, importation, or distribution of narcotics or other controlled substances and were of less than $100,000 in value. Consequently, no specific offense enhancement could be warranted. See id. § 2S1.1(b). It is also assumed that the maximum conceivable upward adjustment under U.S.S.G. § 3B1.1(c) for the defendant's role in the offense is two levels. Defense counsel assumes that his client will not receive a two-level reduction for acceptance of responsibility. Id. § 3E1.1. Under this hypothetical, therefore, a "worst-case" adjusted offense-level is twenty-two. For a first-time offender, this results in a "worst-case" guidelines range of 41-51 months. Id. ch. 5, pt. A.

36. For the purposes of argument, it will be assumed that the trial judge correctly determined and expressly stated on the record that no adjustments to the base offense level were warranted.

37. See, e.g., United States v. Lopez, 875 F.2d 1124, 1126-27 (5th Cir. 1989)(trial judge's personal belief that punishment meted out by the guidelines is too "low" is not proper grounds for upward departure).

38. 949 F.2d 706 (4th Cir. 1991)(en banc).
some 23-32 months longer than the sentence actually imposed.\textsuperscript{39} If the dissent's resolution of the merits of the government's claim is correct, the enforcement of an "implicit" waiver against the government means a convicted criminal will be set free approximately two to three years earlier than authorized by the Sentencing Reform Act.

III. STANDARDS FOR DETERMINING THE ENFORCEABILITY OF WAIVERS OF FEDERAL RIGHTS: \textit{TOWN OF NEWTON V. RUMERY}

A recent Supreme Court case addressing the enforceability of waivers of federal rights is \textit{Town of Newton v. Rumery}.\textsuperscript{40} The respondent, Bernard Rumery, was arrested by the chief of police of Newton, New Hampshire, for tampering with a witness.\textsuperscript{41} The arrest followed a complaint that Rumery had threatened to kill a woman if she proceeded with sexual assault charges made against one of Rumery's friends.\textsuperscript{42} After his arrest, Rumery retained an experienced criminal defense attorney who negotiated an agreement with the county prosecutor that provided for dismissal of the charges against Rumery in exchange for his agreement not to sue the town, its officials, or the complainant.\textsuperscript{43} The agreement was committed to writing.\textsuperscript{44} In a one-hour meeting, Rumery's counsel discussed the agreement with his client and explained that Rumery would forgo all civil actions by signing the agreement.\textsuperscript{45} Rumery returned to his counsel's office three days later and signed the agreement.\textsuperscript{46} As a result, the criminal charges were dropped. Nonetheless, ten months later Rumery filed an action against the town and its officials under section 1983 of title 42, United States Code.\textsuperscript{47}

The district court dismissed Rumery's suit after concluding that Rumery's decision to sign the release was voluntary, deliberate, and informed.\textsuperscript{48} The Court of Appeals for the First Circuit reversed. The court concluded that a per se rule invalidating release-dismissal agreements was necessary because enforcement of such agreements "'would tempt prosecutors to trump up charges in reaction to a defendant's civil rights claim, suppress evidence of police misconduct, and leave unremedied deprivations of constitutional rights.'"\textsuperscript{49}

\begin{thebibliography}{9}
\footnotesize
\bibitem{39} Id. at 707 (Wilkens, J., dissenting).
\bibitem{40} 480 U.S. 386 (1987).
\bibitem{41} Id. at 389-90.
\bibitem{42} Id.
\bibitem{43} Id. at 390.
\bibitem{44} Id.
\bibitem{45} Id. at 390-91.
\bibitem{46} Id. at 391.
\bibitem{47} Id.
\bibitem{48} Id.
\bibitem{49} Id. (quoting Rumery v. Town of Newton, 778 F.2d 66, 69 (1st Cir. 1985)).
\end{thebibliography}
The Supreme Court reversed. Justice Powell began the Court's opinion by noting the agreement at issue purported to waive a right to sue conferred by a federal statute, and therefore the enforceability of the agreement was governed by federal law. Justice Powell then undertook a two-part inquiry. First, he examined the waiver to determine whether or not it was a voluntary and informed act on the part of the respondent. Second, he evaluated the interests promoted by enforcing the waiver against those harmed by enforcing the waiver.

A. Due Process

Writing for a five-justice majority, Justice Powell first rejected Rumery's contention that release-dismissal agreements are inherently coercive. After citing precedent upholding the waiver of important constitutional rights in plea bargains, Justice Powell concluded:

We see no reason to believe that release-dismissal agreements pose a more coercive choice than other situations we have accepted. . . .

In many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action.

Justice Powell then concluded that entering into the particular release-dismissal agreement at issue was a voluntary and informed act by Rumery. Justice Powell noted, among other things, that Rumery was a sophisticated businessman, had been represented by an experienced lawyer during the transaction, considered the agreement for three days before signing it, and received consideration for the agreement in the form of immunity from prosecution. The dissent agreed with this conclusion.

B. Public Policy

Justice Powell then asked whether or not the release-dismissal agreement offended public policy: "The relevant principle is well-established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." Applying this standard, Justice Pow-

51. Id. at 393-94 (citations omitted).
52. Id. at 394.
53. Justice Stephens, writing for four dissenting justices, concluded that "it is unquestionably true that [Rumery's] decision to sign the release-dismissal agreement was . . . voluntary, deliberate, and informed." Id. at 408 (Stephens, J., dissenting) (quoting majority opinion). However, Justice Stephens and the other dissenting justices disagreed with the majority's overall conclusion that the release-dismissal agreement was enforceable.
54. Id. at 392 & n.2 (citing, inter alia, Restatement (Second) of Contracts § 178 (1981)).
ell concluded, for a four-justice plurality, that the policy interests promoted by enforcing the release agreement outweighed those harmed by enforcing the agreement. Justice Powell acknowledged that section 1983 actions further the significant public interest of vindicating civil rights, and that enforcement of release-dismissal agreements may tempt prosecutors to bring frivolous charges or dismiss meritorious charges to protect the interests of other officials. However, Justice Powell concluded that promotion of these interests does not justify a per se rule against the enforceability of release-dismissal agreements. Justice Powell noted that enforcement of release-dismissal agreements promotes the public interest of protecting public officials from the burdens of defending against frivolous section 1983 claims, as well as the parties' interest in negotiating enforceable bargains that both believe promote their self-interest.

Finally, Justice Powell noted, the prosecutor in the specific case before the Court had an independent, legitimate reason for making the agreement that was directly related to his prosecutorial responsibilities: sparing the complaining witness from the embarrassment and public scrutiny of testifying against Rumery at a public trial.

A fifth member of the Court, Justice O'Connor, joined the judgment of the Court but wrote separately with respect to the public policy question to emphasize that the burden of proving the enforceability of a release-dismissal agreement should rest with the state. Justice O'Connor nevertheless concluded that the state had met its burden in the specific case before the Court because "[a]gainst the convincing evidence that Rumery voluntarily entered into the agreement and that it served the public interest, there is only Rumery's blanket claim that agreements such as this one are inherently coercive."

Justice Stevens and three other members of the Court disagreed with the majority's holding that the release-dismissal agreement at issue did not offend public policy. Although Justice Stevens was "hesitant to adopt an absolute rule invalidating all such agreements," he concluded that "federal policies reflected in the enactment and enforcement of § 1983 mandate a strong presumption against the enforceability of such agreements and that the presumption is not overcome in this case by the facts or by any of the policy concerns discussed by the plurality." Justice Stevens' chief concern was the

57. Id. at 398.
58. Id. at 399-403 (O'Connor, J., concurring).
59. Id. at 403.
60. Id. at 417 (Stevens, J., dissenting).
61. Id. at 418.
absence of any connection between the purpose of release-dismissal agreements and the promotion of legitimate prosecutorial objectives. Unlike a plea bargain, in which the waiver of important rights is tolerated because "an admitted wrongdoer is punished," release-dismissal agreements are sought by prosecutors for purposes wholly unrelated to legitimate prosecutorial objectives. In fact, according to Justice Stevens, release-dismissal agreements serve to promote the very opposite of legitimate prosecutorial objectives: They encourage the filing of trumped-up charges against innocent defendants while simultaneously encouraging the complete exoneration of guilty defendants.

Although in Rumery the members of the Court split on the ultimate question of whether or not the release-dismissal agreement at issue was enforceable, all nine justices appeared to agree on the line of analysis that should be undertaken in evaluating the enforceability of waivers of federal rights. First, each case must be examined on its particular facts to ensure that the defendant's waiver decision was voluntary, deliberate, and informed. Rarely, however, will a per se rule be justified that such waivers are inherently involuntary. Second, waivers will not be enforced unless the relevant policy interests promoted by enforcing the waiver outweigh those interests harmed by enforcing the waiver. In contrast to the resolution of the due process question, resolution of the public policy question will generally be dominated by consideration of non-case specific factors, although factors particular to the case before the court may have some bearing.

IV. APPEAL-OF-SENTENCE WAIVERS AND DUE PROCESS

A. Inherent Involuntariness

Some argue that all plea agreements in which the defendant waives the right to appeal are inherently coercive, and, consequently, any waiver of the right to appeal in plea agreements should be considered inherently involuntary. In Navarro-Botello, however, the court rejected this contention on the ground that the right to appellate review of sentences is of statutory origin. The court reasoned:

The Supreme Court has found that knowing and voluntary constitutional waivers do not violate due process. Accordingly, if it is not a due process violation for a defendant to waive constitutional rights as part of a plea bargain, then a defendant's waiver of a nonconstitutional right, such as the statutory right to appeal a sentence, is also waivable.

62. Id. at 410.
63. Id. at 409.
65. United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990)(citing Town of
Similarly, in *Wiggins* the court reasoned *a fortiori* that "'[i]f defendants can waive fundamental constitutional rights such as the right to counsel, or the right to a jury trial, surely they are not precluded from waiving procedural rights granted by statute.'"66

In the author's view, the *Wiggins* and *Navarro-Botello* courts reached the correct result but relied on faulty reasoning. Whether a particular right is characterized as "constitutional" or "statutory" has, at most, marginal relevance to whether or not a per se rule of involuntariness is justified with respect to waiver of that right. The right at issue in *Town of Newton v. Rumery* was of statutory origin, yet nowhere in that opinion does the Supreme Court suggest that this factor was significant to its due process analysis. The more germane due process inquiry focuses on the circumstances in which the right is waived. Are coercive factors such as the opportunity for prosecutorial overreaching so inherent in these circumstances that an irrebuttable presumption is justified that all such waivers are either uninformed or not the product of the defendant's free will? If the answer to this question is yes, it matters little whether the right is characterized as "constitutional" or merely "statutory"; a per se rule against enforceability on due process grounds should be adopted.

The circumstances in which appeal-of-sentence waivers are given, however, do not fall into that category. Appeal-of-sentence waivers are normally incorporated into written plea agreements and, therefore, are subject to judicial oversight during plea hearings under Rule 11 of the Federal Rules of Criminal Procedure. The personal examination of the defendant by the trial judge just prior to, and at the very time when, the agreement becomes final is a substantial safeguard for ensuring that the defendant *in fact* fully understands the nature of the agreement and agrees to it.67 Because the Rule 11 hearing occurs in the presence of the trial judge and the defendant's attorney, the possibility of prosecutorial overreaching is minimal. Certainly, Rule 11's mandate of a contemporaneous judicial inquiry into the defendant's understanding of, and agreement to, the appeal-of-sentence waiver—while the defendant still has the opportunity to withdraw from the agreement—is a vastly superior method for resolving this issue than are the post-hoc inquiries that judges typically must under-

---


take to resolve similar "state-of-mind" issues concerning the waiver of rights.68

It also has been argued that "[b]y providing coercive incentives to waive the right to appeal, the prosecution, in effect, penalizes the election to appeal."69 The Supreme Court, however, has repeatedly rejected the argument that plea agreements in which constitutional rights are waived are inherently coercive simply because the waiver is given in exchange for reduced charges, more lenient sentences, or other favorable action with respect to a criminal prosecution. In Bordenkircher v. Hayes,70 the Court summarized its position in this respect:

Plea bargaining flows from "the mutuality of advantage" to defendants and prosecutors, each with his own reasons for wanting to avoid trial. Defendants advised by competent counsel and protected by other procedural safeguards are presumptively capable of intelligent choice in response to prosecutorial persuasion, and unlikely to be driven to false self-condemnation. Indeed, acceptance of the basic legitimacy of plea bargaining necessarily implies rejection of any notion that a guilty plea is involuntary in a constitutional sense simply because it is the end result of the bargaining process. By hypothesis, the plea may have been induced by promises of a recommendation of a lenient sentence or a reduction of charges, and thus by fear of the possibility of a greater penalty upon conviction after a trial.71

In Brady v. United States,72 the Court went so far as to hold that a plea agreement is valid even if the defendant entered into it to avoid the death penalty. There simply is no reason to believe the Court is inclined to revisit this issue anytime soon.

B. Case-By-Case Determination

It bears emphasis that the rejection of a per se rule of involuntariness with respect to appeal-of-sentence waivers does not end the due process inquiry. Due process always requires that, before the waiver of a federal right may be enforced in any specific case, the government

68. Indeed, this is exactly what the district court in Rumery was forced to do in that case. The majority in Rumery upheld the enforceability of the release-dismissal agreement at issue even though it had not been the subject of judicial oversight at the time it became final. Town of Newton v. Rumery, 480 U.S. 386, 393 (1987). Nonetheless, the majority recognized that judicial oversight of waiver agreements was a significant factor favoring the conclusion that a waiver agreement does not violate due process. Id. at n.3 ("[T]he analogy between plea bargains and release-dismissal agreements is not complete. The former are subject to judicial oversight."). Justice O'Connor, concurring with the majority, acknowledged that "it would have been preferable, and made this an easier case, had the release-dismissal agreement been concluded under some form of judicial supervision." Id. at 403, (O'Connor, J., concurring).

69. Dyer and Judge, supra note 64, at 657.
70. 434 U.S. 357 (1978).
71. Id. at 363.
must have established as a factual matter that the waiver was a voluntary, deliberate, and informed decision on the part of the defendant. A strong presumption exists against waiver; the record must affirmatively show that the defendant voluntarily and intelligently waived the right. Normally, the relevant record for determining the voluntariness of an appeal-of-sentence waiver is the plea agreement and the transcript of the plea hearing held under Rule 11. Before enforcing any appeal-of-sentence waiver, the appellate court should be convinced that the trial judge meticulously complied with the requirements of Rule 11 in accepting the guilty plea. The record should affirmatively show the defendant understood the nature of the right to appeal the sentence, and voluntarily agreed to waive that right. The appellate panels in Wiggins and Navarro-Botello appear to have followed these requirements. In Wiggins, the court of appeals noted that it had examined the transcript of the defendant's Rule 11 plea hearing and that on two separate occasions the district court reminded the defendant that he was waiving the right to appeal his sentence. Similarly, in Navarro-Botello the court of appeals noted that it had examined the defendant's Rule 11 plea hearing and that "the district judge carefully summarized the provisions of the plea agreement ... . Navarro-Botello indicated that he understood." Finally, in no instance should an appeal-of-sentence waiver preclude a claim that the trial judge's sentence violated the terms of the plea agreement, or that the government failed to fulfill its obligations under the plea agreement. Moreover, even if the Rule 11 hearing record affirmatively reflects that the defendant understood the nature of the right to appeal and voluntarily agreed to waive that right, the waiver is nonetheless unenforceable if the waiver was in fact involuntary or misinformed. Normally, however, this claim must first be raised with the trial court by a motion to set aside the plea or by a motion to vacate the sentence under section 2255 of title 28.

74. McCarthy v. United States, 394 U.S. 459 (1969) (noncompliance with Rule 11's procedural safeguards results in presumption that plea was involuntary).
77. United States v. Bolinger, 940 F.2d 478, 480 (9th Cir. 1991); United States v. Navarro-Botello, 912 F.2d 318, 321 (9th Cir. 1990).
79. Fontaine v. United States, 411 U.S. 213, 215 (1973) (defendant's motion under 28 U.S.C. § 2255 to vacate his sentence on the grounds that his plea of guilty had been induced by a combination of fear, coercive police tactics, and illness (including mental illness) required an evidentiary hearing, notwithstanding full compliance with Rule 11, unless "the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief.")(quoting 28 U.S.C. § 2255).
United States Code. Only through these procedural devices can an adequate evidentiary record be developed to determine the factual validity of the claim.

V. APPEAL-OF-SENTENCE WAIVERS AND PUBLIC POLICY

Under Rumery, even if the waiver of a federal right is voluntary, deliberate, and informed, one still must ask whether enforcement of the waiver is justifiable in terms of public policy. This part considers the extent to which each of the following is affected by the enforcement of appeal-of-sentence waivers and, to the extent each is so affected, whether public policy is advanced or harmed thereby: (1) the "finality" of judgments and sentences, (2) the workload of the appellate courts, and (3) the parties' ability to create enforceable bargains with respect to the sentence that both believe will promote their self-interest. Because the extent to which enforcement of appeal-of-sentence waivers is consistent or inconsistent with the purposes underlying the new right to appellate review of sentences is a question of overriding importance, that issue is considered separately in the next part.

A. Finality of Judgments and Sentences

In upholding the enforcement of appeal-of-sentence waivers, the Wiggins and Navarro-Botello courts emphasized that the enforcement of such waivers promotes the "finality of judgments and sentences."\(^{80}\) The Wiggins court noted that the "’chief virtues of the plea system [are] speed, economy, and finality.’"\(^{81}\) Similarly, the Navarro-Botello court stated: "[P]erhaps the most important benefit of plea bargaining[] is the finality that results. Under Rule 11, a plea of guilty and resulting judgment of conviction ‘comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence.’\(^{82}\) Both courts cited Supreme Court precedent upholding the validity of plea bargaining for this proposition.\(^{83}\)

The Wiggins and Navarro-Botello courts are indeed correct that the enforcement of appeal-of-sentence waivers tends to promote the "finality of judgments and sentences"; however, they are incorrect to the extent their opinions suggest that this consequence is necessarily

\(^{80}\) United States v. Wiggins, 905 F.2d 51, 54 (4th Cir. 1990); accord, United States v. Navarro-Botello, 912 F.2d 318, 322 (9th Cir. 1990).


favorable in terms of public policy. There is little doubt that for policy reasons we sometimes refuse to allow challenges to a judgment even though there is cause to believe that the judgment may be inaccurate. Time limits on filing appeals and seeking post-judgment relief at the trial court level, the doctrine of res judicata, and even restricting appellate review to a finite number of levels are all doctrines or devices which in part reflect policy judgments that at some point the values promoted by accuracy in judgments are outweighed by other values, such as certainty in dispute resolution. None of these devices or doctrines, however, purport to insulate a judgment from further review at the very moment the judgment is entered. This is precisely the effect that the indiscriminate enforcement of appeal-of-sentence waivers would have. At such an early stage, the interests of having a “final” sentence cannot be said to outweigh, or indeed even approach, the interests of having a legally and factually accurate sentence. This is particularly true given that Congress, by establishing the new right to appellate review of sentences, has expressed a legislative policy judgment that at this early stage the value of having an accurate sentence outweighs the value of having a final sentence. The citation of the Wiggins and Navarro-Botello courts to Supreme Court precedent upholding the validity of plea bargaining is simply misplaced. Appellate claims related to factual guilt are disallowed after a plea of guilty only because the guilty plea constitutes “an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.” Because a defendant is in a unique position to certify the “correctness” of a judgment of factual guilt, wholesale elimination of the right to assert appellate claims related to factual guilt upon entry of the guilty plea achieves finality without expense to accuracy. Nothing the defendant could say or do, however, could serve to certify the “correctness” of the trial court’s sentencing decision. While the wholesale enforcement of appeal-of-sentence waivers would achieve sentence finality, it would do so only at unwarranted expense to sentencing accuracy. In sum, the “finality” achieved by the indiscriminate enforcement of an appeal-of-sentence waiver is a consequence that should be viewed negatively in terms of public policy.

B. Reduction of Appellate Workload

One commentator has noted that the newly-created right to appeal sentences has more than doubled the criminal appellate workload of

---

84. Indeed, in some European countries such as Spain the doctrine of res judicata is considered of such importance that trial judges are required to raise the issue sua sponte. See Ferreres Comella, El Tratamiento Procesal de la Cosa Juzgada en la Reciente Jurisprudencia Española, 1990 JUSTICIA 927.

the federal courts.\textsuperscript{86} Without doubt, widespread use and enforcement of appeal-of-sentence waivers promises to reduce this workload. It is commonly known that a large percentage of criminal cases are disposed of by plea bargaining.\textsuperscript{87} Since the defendant's sentence is normally the only appealable issue remaining after a case is resolved by plea bargaining,\textsuperscript{88} recognizing a procedural mechanism that eliminates the right to merit review of the defendant's sentence in a substantial number of plea-bargained cases should result in a considerable reduction in the appellate workload. Some sentence appeals that would have been filed absent waiver might not be filed at all, while others might be more speedily dismissed by the appellate court.

Few would argue that public policy would not be furthered if enforcement of appeal-of-sentence waivers results in the elimination or quicker disposition of frivolous appellate sentencing claims. Indeed, the plurality in \textit{Rumery} considered a similar factor as favoring the enforceability of the release-dismissal agreement at issue in that case:

> The vindication of constitutional rights and the exposure of official misconduct are not the only concerns implicated by § 1983 suits. No one suggests that all such suits are meritorious. Many are marginal and some are frivolous. Yet even when the risk of ultimate liability is negligible, the burden of defending such lawsuits is substantial. Counsel may be retained by the official, as well as the governmental entity. Preparation for trial, and the trial itself, will require the time and attention of the defendant officials, to the detriment of their public duties. In some cases litigation will extend over a period of years.\textsuperscript{89}

While the burden imposed on prosecutors, the judiciary, and the public by processing frivolous sentence appeals is not insignificant, this burden should not be overstated. In terms of the demands on the public fisc, as well as the time of prosecutors and appellate judges, the processing of sentence appeals is generally less costly than the processing of other types of appeals. Unlike the resolution of appeals after a full trial, the resolution of sentence appeals after plea bargaining typically requires no elaborate record to transcribe, collate, and analyze. Moreover, the extent to which the enforcement of appeal-of-sentence waivers will discourage the actual filing of appeals, as opposed to simply eliminating merit review of the defendant's sentence


\textsuperscript{89} Town of Newton v. Rumery, 480 U.S. 386, 395-96 (1987).
after the appeal is filed, is uncertain. Clearly, the burden that frivolous sentence appeals impose on the public is substantially less onerous than that imposed on the public by frivolous section 1983 suits. The resources expended by the public in resolving sentence appeals can hardly be compared to the extensive resources expended by the public in conducting trial litigation.

It must be remembered that the enforcement of appeal-of-sentence waivers will not only prevent merit review of many frivolous appellate claims, but will prevent merit review of many colorable appellate claims as well. The question of whether a particular appellate claim is frivolous or colorable cannot be determined without first reviewing the claim on its merits. One could argue that, because resources are ostensibly saved whenever any appellate claim is not considered on its merits, public policy is advanced even when merit review of colorable appellate claims is curtailed. This argument fails in its entirety. No public policy objective is served by the consideration of frivolous appellate sentencing claims. In contrast, the consideration of colorable appellate sentencing claims encourages a more rational sentencing system through, among other things, (1) richer case law development with respect to sentencing and (2) the correction of unlawful, and more importantly unjust, sentences. As long ago as 1973, Judge Marvin Frankel articulated the appropriate response to the argument that the consideration of colorable sentencing claims is simply a waste of appellate resources: "[This argument does not] warrant much discussion. Considering all the things on which appellate judges ponder, the effort to make sentences more rational and just would hardly seem unworthy of their labors." In Rumery, after noting that Congress had confined the decision to bring section 1983 actions to injured individuals, not the public at large, the plurality concluded:

\[\text{90. FRANKEL, supra note 23, at 78.}\]
"[W]e hesitate to elevate more diffused public interests above Rumery's considered decision that he would benefit personally from the agreement."91 Indeed, the importance of taking a non-paternalistic approach to the strategic litigation decisions of criminal defendants is of such significance that a defendant's choice of strategies is often given effect even if few objective observers would recommend such a course. Thus, in the landmark case of Faretta v. California,92 the Supreme Court held that a criminal defendant has a constitutional right to self-representation even while expressly acknowledging that in the vast majority of criminal cases the better course is representation by counsel:

Personal liberties are not rooted in the law of averages. The right to defend is personal. The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction. It is the defendant, therefore, who must be free personally to decide whether in his particular case counsel is to his advantage.93

The defendant's interest in the ability to enter into enforceable bargains in which the right to appellate review of the sentence is waived can be illustrated by the following hypothetical. Suppose that a criminal defendant is charged, in a jurisdiction that upholds appeal-of-sentence waivers, with one count of criminal copyright infringement in violation of section 2319(b)(1)(B) of title 18, United States Code. The charged offense is a felony carrying a maximum statutory penalty of five years imprisonment, a $250,000 fine, or both.94 The evidence of the defendant's guilt is strong. Plea negotiations, however, result in the prosecutor's offer to move for dismissal of the felony charge in exchange for the defendant's agreement to plead guilty to a lesser offense under subsection (b)(3) of section 2319, a misdemeanor carrying a maximum statutory penalty of one year imprisonment, a $25,000 fine, or both.95 The proposed agreement contains the prosecutor's pledge to recommend a sentence of probation, but also contains an express appeal-of-sentence waiver by the defendant. One of the prosecutor's motivations for offering such an exceptionally "good deal" is to clear the case from the prosecutor's heavy docket as quickly as possible. The prosecutor makes it clear, therefore, that the defendant's refusal to accept the waiver provision will result in "no deal."

The defendant is elated when counsel communicates the prosecutor's offer. Defense counsel's research has revealed that a proper application of sentencing law to the defendant's case will probably result in a guidelines range of 0-6 months. Therefore, the proposed agreement presents the strong possibility that the defendant will serve no

92. 422 U.S. 806 (1975).
93. Id. at 834.
95. Id. § 2319(b)(3).
prison time. Moreover, the proposed agreement offers the opportunity for the defendant to escape the significant collateral consequences of a felony conviction.\(^6\) The only drawback is the presence of the appeal-of-sentence waiver. What if the trial judge misapplies the guidelines and sentences the defendant to a full year in prison? The prospect that this potentiality may actually occur is not reassuring to the defendant; nonetheless, because the beneficial aspects of the agreement outweigh this speculative drawback, the defendant accepts the agreement. Fortunately for the defendant, the district court applies the guidelines correctly and, furthermore, follows the prosecutor's recommendation to sentence the defendant to probation. Had a per se rule existed that appeal-of-sentence waivers were unenforceable, the same bargain might not have been offered to the defendant. The final result might have been markedly less favorable to the defendant.

The plurality in *Rumery* also considered that public policy is advanced when prosecutors are allowed to enter into enforceable bargains that they believe will advance the public's interest in crime control.\(^7\) The above scenario shows that in some situations the existence of a rule upholding the enforceability of appeal-of-sentence waivers can inure to the benefit of the defendant. It is somewhat more difficult to see how the existence of such a rule could further the public's interest in crime control. To some, a prosecutor's offer to reduce charges for the purpose of "clearing the prosecutor's heavy docket of a case" may seem to be an illegitimate exercise of prosecutorial discretion. Nonetheless, courts have traditionally deferred to and upheld prosecutorial decisions based on reasons of this type. The *Rumery* plurality articulated the rationale for doing so:

The reasons for judicial deference are well known. Prosecutorial charging decisions are rarely simple. In addition to assessing the strength and importance of a case, prosecutors also must consider other tangible and intangible factors, such as government enforcement priorities. Finally, they also must decide how best to allocate the scarce resources of a criminal justice system that simply cannot accommodate the litigation of every serious criminal charge.\(^8\)

---

96. If the defendant is an alien, for example, a felony conviction could prevent the defendant from subsequently visiting or immigrating to the United States. See 8 U.S.C.A. § 1182(a)(West Supp. 1992)(aliens with criminal histories are ineligible to receive visas and are excludable from admission into the United States unless, *inter alia*, the maximum penalty for the crime of conviction did not exceed one year and the alien's actual sentence was for a term of imprisonment of six months or less).


98. *Id.* at 396.
VI. LIMITED ENFORCEABILITY OF APPEAL-OF-SENTENCE WAIVERS: EFFECTUATING THE PURPOSES UNDERLYING THE NEW RIGHT TO APPELLATE REVIEW OF SENTENCES

A. Importance of Fashioning a Rule Consistent with the Purposes Underlying the New Right to Appellate Review of Sentences

The most important public policy question to answer when addressing the enforceability of the waiver of a federal right is whether enforcement of the waiver is consistent with the purposes for which the right being waived was established. Neither the Sentencing Reform Act nor any edition of the sentencing guidelines to date provide a simple answer to this question. The legislative history of the Sentencing Reform Act does indicate that trial judges are expected to "examine plea agreements to make certain that prosecutors have not used plea bargaining to undermine the sentencing guidelines."99 Likewise, the text of the Act charges the United States Sentencing Commission with establishing non-binding policy statements to effectuate this goal.100 In turn, the Sentencing Commission has issued policy statements indicating that trial judges should impose a sentence as recommended or agreed to in a plea bargain only if the recommended or agreed sentence falls within the applicable guideline range or represents a justifiable departure from the applicable guideline range.101 This guidance with respect to sentences recommended or agreed to in plea bargains, however, simply reinforces the inherent conclusion that no plea agreement, or any provision of a plea agreement, can "authorize" a trial judge to disregard the Sentencing Reform Act (or any other law for that matter) when imposing sentence. Neither the Sentencing Reform Act nor any edition of the Sentencing Guidelines to date have addressed the enforceability of a waiver that, although purporting to eliminate the right to appellate correction of a sentencing error by the trial judge if such error happens to occur, does not purport to authorize the trial judge to ignore the law or otherwise intentionally "make error" when imposing sentence.102

One might first ask how the waiver of any right can ever be consistent with the purposes underlying the right itself. After all, by definition "waiver" removes from the case the very procedure guaranteed by the right being waived—a procedure that would not have been es-

102. In this regard, it is unclear whether or not the United States Sentencing Commission has statutory authority to provide guidance to the appellate courts with respect to the issue of the enforceability of appeal-of-sentence waivers. *See* 28 U.S.C.A. §§ 991-998 (West Cum. Supp. 1992).
tablished had it not been thought would accomplish salutary objectives. Nonetheless, it is now well-established that a criminal defendant may voluntarily waive many procedural safeguards, even though they are considered the normal or preferable modes to follow for most cases. This principle was firmly established in *Patton v. United States*,103 in which the Supreme Court held for the first time that a defendant may, with the consent of the government and the trial judge, waive the right to jury trial in serious criminal cases. It is difficult to believe, however, that the Court would have reached this result if it had not been confident that the elimination of jury trial in particular cases could be accompanied by adequate reasons for believing the purposes underlying jury trial would be furthered notwithstanding its removal. A criminal defendant may waive the right to jury trial in only two specific instances: (1) when the defendant pleads guilty or nolo contendere,104 and (2) when the defendant elects a bench trial.105 In neither instance is jury trial eliminated to the detriment of the primary purpose of jury trial—to protect the defendant from an unjust conviction. When jury trial is waived pursuant to a plea of guilty or a plea of nolo contendere, the need for trial by jury as a safeguard against an unjust conviction is obviated by a factual admission—the plea itself—considered so reliable that the issue of factual guilt is removed from the case.106 When jury trial is waived through election of bench trial, the defendant's selection of trial by the court provides the defendant with procedural safeguards against an unjust conviction that adequately substitutes for trial by jury. Enforcing waivers of the right to jury trial in these limited circumstances accomplishes salutary objectives, *e.g.*, speed, economy, the finality of judgments, promotion of the defendant's interest in self-determination, but does so without subverting the purposes for which the right to jury trial was established.

B. Limited Enforcement of Appeal-of-Sentence Waivers

The question, therefore, is whether appeal-of-sentence waivers can be enforced in a manner that allows the restriction or elimination of appellate review of sentences in particular cases only when sound reasons exist for believing the purposes underlying the right to appellate review will be served. No federal court to date has attempted to answer this question.107 However, in *Ballweber v. State*,108 the Minnesota Court of Appeals considered a similar question with respect to

103. 281 U.S. 276, 312-13 (1930).
107. Neither the *Wiggins* nor the *Navarro-Botello* court addressed this issue.
waivers of the right to appeal sentences imposed under the Minnesota sentencing system, a determinate sentencing scheme in many respects similar to the federal sentencing system. In rejecting the state's contention that the defendant in that case waived the right to appellate review of the sentence, the court simply adopted a per se rule holding such waivers unenforceable:

Minnesota law gives a criminal defendant an unconditional right to appeal from any sentence imposed or stayed. In addition, under the Minnesota Sentencing Guidelines, it is the role of the court to determine the appropriate sentence. Vindication of the Guidelines’ stated goals of establishing “rational and consistent sentencing standards,” of reducing sentencing disparity, and providing uniformity in sentencing requires appellate review of trial court sentencing decisions. The unconditional nature of the statutory right and the importance of judicial determination of sentences under the Minnesota sentencing scheme precludes us from holding that a defendant in Minnesota may waive the right to appeal from a sentence.109

The problem with this approach, at least if taken with respect to the federal system, is that the enforcement of appeal-of-sentence waivers is necessarily an all or nothing question. Without doubt, the indiscriminate enforcement of appeal-of-sentence waivers would be inconsistent with the purposes underlying the new right to appellate review of sentences. The right to appellate review of sentences is designed to further the Sentencing Reform Act’s overall goals of establishing rationality in sentencing and reducing sentencing disparity. Wholesale elimination of the right to appellate review could result in a drastic reduction in appellate case law interpreting the Sentencing Reform Act and sentencing guidelines. If this were to occur, trial judges could expect substantially less guidance when applying sentencing law to particular cases, a development that could increase sentencing disparity and irrationality. Of vastly more important concern, indiscriminate enforcement of appeal-of-sentence waivers would likely result in the failure of the appellate courts to take corrective action with respect to sentences that are unquestionably harsher or more lenient than any sentence authorized under the Sentencing Reform Act. The hypothetical twenty-year sentence described in section B of part II of this Article is but one example. Congress’s overriding purpose in establishing the new right to appellate review of sentences was to prevent manifestly unjust sentences of this type from remaining uncorrected.

The adoption of a sweeping prophylactic rule to avoid the drawbacks of appeal-of-sentence waivers, however, should be approached with circumspection. As previously shown, under some circumstances the enforcement of appeal-of-sentence waivers can accomplish salutary objectives, including (1) the elimination of, or at least the quicker disposition of, some frivolous appellate claims, and (2) providing the

109. Id. at 217-18 (citations omitted).
parties with the ability to enter into enforceable bargains believed to be in their best interest. Moreover, under some circumstances enforcing an appeal-of-sentence waiver can actually further the purposes underlying the right to appellate review of sentences. Appellate review is a tricky process, particularly with respect to evaluating the propriety of discretionary decisions by trial judges. Appellate intermeddling with these decisions can sometimes result in more irrationality and disparity in the sentencing process. Professor Daniel Freed argues persuasively that under the new federal sentencing scheme the appellate courts have not given adequate deference to the judgment of the sentencing judges especially when reviewing departures based on offender characteristics. Professor Freed identifies two principal causes for this excessive appellate intermeddling with district court sentencing decisions: (1) the isolation of appellate courts from the sentencing process and their consequent loss of perspective; and (2) appellate misinterpretation of the Sentencing Reform Act, including the statutory principles governing the ability of the sentencing judge to depart from an applicable guideline range. With respect to the first cause, Professor Freed notes:

Appeals court judges are reviewers, opinion writers, and rulemakers. They no longer look defendants in the eye, study presentence reports, or struggle with assessing whether an offender is beginning or ending a criminal career, appears to be dangerous or harmless, is a minnow in a sea of big fish, or has gone astray under unusually stressful circumstances and will not offend again. Appellate judges no longer see large numbers of worried or stunned faces, or multiple defendant cases covering the full range of criminal responsibility. The appeals court is remote from the universe of cases that make equality and proportionality of punishment, across different defendants and crimes, issues of transcendent importance.

Moreover, although the Sentencing Reform Act requires that trial judges state on the record "the specific reason for the imposition of a sentence" departing from the guidelines, few experienced persons would doubt that cases exist in which a trial judge departed from the sentencing guidelines for entirely proper reasons, yet was subsequently reversed by an appellate court simply because the trial judge failed to fully articulate every factor that may have acted on the judge's thought process when imposing sentence—a feat almost impossible to accomplish. Professor Ronald Dworkin captures this point in the following passage from Law's Empire:

They say that judging is an art not a science, that the good judge blends analogy, craft, political wisdom, and a sense of his role into an intuitive decision,

110. Freed, supra note 87, at 1727-40.
111. Id. at 1729 & n.245.
112. Id. at 1728-29.
113. Id. at 1730-1740.
114. Id. at 1728.
that he "sees" law better than he can explain it, so his written opinion, however
carefully reasoned, never captures his full insight.\textsuperscript{116}

There is something to be said for allowing the parties to agree \textit{in
advance} that a particular trial judge's sentencing decision should be
given more deference by appellate courts than might ordinarily be the
case. Effectively, by agreeing to waive the right to appeal, the parties
are communicating to the appellate court that they have more confi-
dence than normal in the judgment and insight of the particular trial
judge imposing sentence.\textsuperscript{117} The appellate courts should not disregard
this guidance lightly.

Undoubtedly, a per se rule of unenforceability with respect to ap-
peal-of-sentence waivers would prevent the negative consequences
that would result from indiscriminate enforcement of such waivers. It
would do so, however, in complete disregard for the positive conse-
quences that enforcement can achieve under some circumstances. In
this author's view, a rule of limited enforceability can be crafted that
allows the salutary objectives outlined above to be achieved without
subverting the purposes of the right to appellate review of sentences.
This rule is set out below.

\section{C. Exceptions to General Rule of Enforceability of Appeal-of-Sentence
Waivers}

The following standard is suggested for the enforcement of appeal-
of-sentence waivers in federal courts: Voluntary, deliberate, and in-
formed appeal-of-sentence waivers should be enforced except when
enforcement will preclude review of claims that (1) sentence was im-
posed in violation of the underlying substantive criminal statute, (2) in
imposing sentence the trial judge considered factors that trial judges
are prohibited by law from considering, and (3) in imposing sentence

\textsuperscript{116} \textsc{Ronald M. Dworkin, Law's Empire 10} (1986).
\textsuperscript{117} Professor John Rawls of Harvard discusses the fairness of rules that are devel-
oped without prior knowledge of the results that will occur when the rules are
applied:

\texttt{In justice as fairness the original position of equality corresponds to
the state of nature in the traditional theory of the social contract \ldots.
Among the essential features of this situation is that no one knows his
place in society, his class position or social status, nor does any one know
his fortune in the distribution of natural assets and abilities, his intelli-
genoe, strength, and the like. I shall even assume that the parties do not
know their conceptions of the good or their special psychological propen-
sities. The principles of justice are chosen behind a veil of ignorance.
John Rawls, A Theory of Justice 12 (1971). Thus, in the case of appeal-of-
sentence waivers, extra legitimacy is given to the argument that the waiver
should be enforced by the fact that the party seeking enforcement of the waiver
(normally the appellee) agreed beforehand—prior to knowing that the sentence
would be \textit{favorable}—that the trial judge's sentencing decision should be given
extra deference by the appellate courts.}
the trial judge committed "plain error" in violation of the Sentencing Reform Act. In addition, an appeal-of-sentence waiver should not be enforced unless the waiver is mutual, i.e., both parties—the defendant and government alike—have expressly agreed to waive their right to appeal the sentence.

1. Violations of the Underlying Substantive Statute

Few would dispute that an appeal-of-sentence waiver should not be enforced to preclude a claim that a sentence was imposed in violation of the underlying substantive statute. No policy justification, for example, would justify enforcing the waiver of an appellate claim that the defendant was sentenced to eight years imprisonment even though the underlying statute only authorized a maximum prison term of five years. Enforcement of an appeal-of-sentence waiver in such an instance would also present significant due process concerns, if for no other reason than that the possibility of such a sentence being imposed could hardly have been within the parties’ contemplation when they entered into the waiver agreement.

2. Trial Judge’s Consideration of Factors that may not Lawfully be Considered

Appeal-of-sentence waivers should not be enforced to preclude review of claims that the trial judge considered impermissible criteria, such as race or religion, in reaching the sentencing decision. Consideration of such criteria would “fatally infect the judgment and destroy its allowable character as an exercise of judicial discretion.”

A related issue is the extent to which trial judges should consider the very presence of an appeal-of-sentence waiver as a factor in imposing sentence. Section 3553 of Title 18, United States Code, sets forth those factors which a trial judge is required to consider in imposing sentence. Nowhere does section 3553 suggest that the defendant’s signing of an appeal-of-sentence waiver is a factor that the trial judge should consider in imposing sentence. The defendant’s signing of an appeal-of-sentence waiver, therefore, is entirely irrelevant to the type of sentence the defendant should receive, and therefore should not be considered by the trial judge when imposing sentence. In fact, evidence that a trial judge considered this factor in imposing sentence would tend to suggest that the trial judge gave less than adequate consideration to those factors which the law requires trial judges to consider. United States v. Bolinger is an example of a case in which this might have occurred. The defendant in Bolinger reached a plea

119. FRANKEL, supra note 23, at 76.
120. 940 F.2d 478 (9th Cir. 1991).
arrangement with the government in which he agreed to plead guilty to possession of a firearm by a convicted felon in exchange for the dismissal of drug-related charges.121 The defendant also waived his right to appeal his sentence providing that the actual sentence imposed fell within a range of zero to thirty-six months.122 At sentencing, the district court first concluded that the applicable guideline range was 21-27 months.123 However, the court decided to depart from the guideline range and imposed a sentence of thirty-six months. The court stated three reasons for so doing: (1) the defendant's criminal history category was underrepresented, (2) the plea agreement provided for a sentence of up to thirty-six months, and (3) the defendant's connection to the drug transaction was a "close question."124 The defendant appealed, claiming among other things that the trial court had misapplied the guidelines and had improperly departed from the guidelines.125 The court of appeals refused to consider these claims on their merits because the defendant had signed an appeal-of-sentence waiver.126

The district court's reference to the plea stipulation as a reason for departing from the guidelines suggests that in imposing sentence the court may have been influenced by the presence of the sentence stipulation and, correspondingly, may have given less than adequate consideration to those factors which the law required the court to consider in imposing sentence. One explanation of the significance of the court's reference to the sentence stipulation is that, absent the stipulation, the court would have sentenced the defendant to more than thirty-six months incarceration, based on the other two stated reasons for departing, but did not do so because of the stipulation's thirty-six month cap. However, another explanation is that, absent the stipulation, the court probably would have departed from the guidelines but would have departed to some period of incarceration less than thirty-six months. If the latter were the case, the court's selection of a thirty-six month sentence was improper. Trial courts simply are not free to select particular sentences for arbitrary or improper reasons. Therefore, they should scrupulously avoid allowing the presence of an appeal-of-sentence waiver to affect the defendant's sentence.127

121. Id. at 479.
122. Id.
123. Id.
124. Id.
125. Id.
126. Id. at 479-80.
127. Whether the Bolinger district court's reference to the plea stipulation should have resulted in a remand for resentencing is an issue that requires consideration of numerous factors that will not be addressed in this article.
The primary method recommended here for allowing appeal-of-sentence waivers to further public policy without subverting it is the recognition of a "plain error" exception to the general rule of enforceability of appeal-of-sentence waivers. The "plain error" doctrine, which normally allows appellate consideration of certain error not properly raised and preserved at the trial level, is described by Professor Wright as follows:

"It is said that 'plain error' means 'error both obvious and substantial,' or 'serious and manifest errors,' or 'seriously prejudicial error,' or 'grave errors which seriously affect substantial rights of the accused.' Perhaps these attempts to define 'plain error' do not harm, but it is doubtful whether they are of much help. The sounder perception is that whether an appellate court should take notice of an error not raised below must be made on the facts of the particular case, and there are no 'hard and fast classifications in either the application of the principle or the use of a descriptive title.' Indeed the cases give the distinct impression that 'plain error' is a concept appellate courts find impossible to define, save that they know it when they see it."

As applied to appeal-of-sentence waivers, recognition of the plain error doctrine would allow appellate courts to examine sentences on a case-by-case basis, despite the presence of waiver, and take corrective action if a sentence is clearly harsher or more lenient than authorized under the Sentencing Reform Act. Under this standard, "balloon" sentences of the type described in section B of part II of this article would not remain insulated from appellate review. In borderline cases, however, such as those involving the propriety of a discretionary sentencing decision, the presence of an appeal-of-sentence waiver would be a factor favoring deference to the trial court's judgment. Recognition of the plain error doctrine can also be expected to discourage the filing of some frivolous appeals, as well as provide the parties with limited ability to inject a measure of flexibility into the sentencing process.

Admittedly, the "plain error" doctrine is somewhat vague. It is doubtful, however, that a more precise standard can be articulated or, indeed, is even particularly needed. Judge Learned Hand expressed this point admirably in the following passage discussing the appropriate burden a defendant should bear in justifying a change of venue in a civil case:

"A defendant must do more than show that the transfer will on the whole make the trial more convenient; it must make the trial markedly more convenient. It does not trouble me that I cannot say how much more that must be; we are often faced with indeterminate and indeterminable standards: reasonable notice, reasonable cause, gross negligence, the requisite proof in fraud or in a criminal prosecution. Much of life depends upon such choices, and he is a
4. The Need for a Guevara-type Mutuality Requirement

In the author's view, *United States v. Guevara* is correct to the extent it suggests that an appeal-of-sentence waiver should not be enforced against a particular defendant if the government is not subject to a similar bar in the same case. A prosecutor who seeks a one-way appeal-of-sentence waiver is effectively saying: "I do not care whether or not the trial judge errs in imposing sentence, so long as the error only harms the defendant." Congress clearly believed that it would be unfair to place the government in such a position. In rejecting the contention that the government should not be allowed to appeal from an excessively lenient sentence, Congress stated:

"[I]t is essential that there be a mechanism to appeal on behalf of the public those sentences which fall below the applicable guidelines. If the defendant alone can appeal, there will be no effective opportunity for the reviewing courts to correct an injustice arising from a sentence that is patently too lenient."130

Conceivably, public policy is furthered, to some extent, by the enforcement of one-way appeal-of-sentence waivers. Some frivolous sentencing appeals would be eliminated, while the defendant would be provided with the ability to enter into an enforceable bargain that could inure to the defendant's benefit. The promotion of these limited interests, however, would be achieved without regard to the purposes underlying right to appellate review itself, to say nothing of basic ideas of fairness.

In an appropriate case, however, a prosecutor could legitimately take the position, and seek an agreement with the defendant, that, to a limited extent, the trial judge's findings of fact, conclusions of law, and discretionary decisions with respect to the pending sentence will be considered final. As stated previously, such an agreement cannot authorize the trial judge to ignore the dictates of the Sentencing Reform Act (or any other law) when imposing sentence. Thus, a prosecutor who seeks a mutual waiver of the right to appeal is effectively saying to the defendant: "I fully expect that the trial judge will follow the dictates of the Sentencing Reform Act in this case. Although the trial court might err, this potentiality is speculative and is simply not worth the trouble to our office—and the possibility of defending against frivolous suits—to provide for standard appellate review of the trial court's sentencing decision. Moreover, the particular trial judge who will impose sentence in this case has a reputation for fairness and sound judgment. Therefore, I think we should both agree that

---

whatever sentence the trial judge imposes, that decision should be
given more than normal deference by the appellate courts.” In the
final analysis, appellate courts can also misinterpret the law or other-
wise commit error and, therefore, even with appellate review, no guar-
antee will exist that a correct sentencing decision will result in any
particular case. Decisions must be made concerning the amount of ju-
dicial resources that will be devoted to the consideration and disposi-
tion of criminal cases. Lines must be drawn somewhere, and no
conceptual reason exists for concluding that in appropriate cases, with
appropriate limitations, the parties should not be allowed to agree that
this line should be drawn at the trial court level.

As a final point, the precise holding of Guevara—that a waiver by
the defendant constitutes an implicit waiver by the government—is
understandable but should not be followed by other circuits. In read-
ing the Guevara decision, one is left with the distinct impression that
the holding in that case reflects an attempt by the panel to “level the
playing field” after United States v. Wiggins. The Guevara panel ap-
ppears to have simply “evened things up” by penalizing the government
for the unfair advantage that, in the panel’s view, it gained in Wiggins.
Unfortunately, this jousting between panels in the Fourth Circuit has
resulted in a rule that is analytically unsound from the standpoint of
the parties’ expectations.131 The preferred solution is that neither
party should be barred from an appeal unless both have explicitly
waived that right.132

VII. CONCLUSION

As shown, the indiscriminate enforcement of appeal-of-sentence
waivers would result in the refusal of appellate courts to take correc-
tive action even though a sentence has been imposed that is clearly
contrary to the letter and spirit of the Sentence Reform Act. On the
other hand, the enforcement of voluntary, deliberate, and informed
appeal-of-sentence waivers, in a limited category of cases, can serve to
promote significant policy interests, including the purposes underlying

131. See United States v. Guevara, 949 F.2d 706, 706-08 (4th Cir. 1991)(Wilkens, J.,
dissenting).

132. In light of United States v. Guevara, from a tactical standpoint federal prosecu-
tors must now think twice before including a one-way waiver in a plea agreement
that ostensibly only eliminates the defendant’s right to appeal the sentence. They
must ask themselves whether inclusion of a provision ostensibly eliminat-
ing the defendant’s ability to challenge an excessively harsh sentence is worth the
risk that the government will lose its ability to challenge an excessively lenient
sentence. Even in jurisdictions other than the Fourth Circuit, the possibility will
exist that, if the need arises for the government to appeal an excessively lenient
sentence, the appellate court will follow the Fourth Circuit precedent and disal-
low the government’s appeal because the defendant signed an agreement waiving
the defendant’s right to appeal the sentence.
the right to appellate review itself. It is therefore suggested that appeal-of-sentence waivers be enforced except when enforcement will preclude review of claims that (1) sentence was imposed in violation of the underlying substantive criminal statute, (2) in imposing sentence the trial judge considered factors that trial judges are prohibited by law from considering, and (3) the sentence constitutes "plain error" in violation of the Sentencing Reform Act. In addition, an appeal-of-sentence waiver should not be enforced unless the waiver is mutual, i.e., both parties—the defendant and government alike—have expressly agreed to waive the right to appeal the sentence. Limitation of the enforcement of appeal-of-sentence waivers in this manner can be expected to advance public policy without also subverting it.