
BARGAIN FOR JUSTICE OR FACE THE PRISON OF
PRIVILEGES? THE ETHICAL DILEMMA IN PLEA BARGAIN
WAIVERS OF COLLATERAL RELIEF*

ABSTRACT

It is common for federal defendants to prospectively waive a broad swath of appellate rights when agreeing to the terms of a plea bargain, including any claims of ineffective assistance that may arise from their attorneys' conduct at a future sentencing hearing. However, the argument has developed in recent years that such an agreement may present a defense attorney with an impermissible conflict of interest, which in turn prevents the attorney from providing reliable counsel to the client with regard to the agreement's terms in violation of the client's Sixth Amendment rights. In essence, this attorney is being asked to counsel the client as to the quality of his own future conduct. As such, many state ethics boards have concluded that these prospective waivers violate one or more rules of professional conduct designed to preserve a defendant's right to reliable and unconflicted advice. In contrast, all federal circuits continue to enforce the validity of these waivers, as virtually any right may be knowingly and voluntarily foregone in a criminal prosecution. However, no federal circuit court has fully considered what effect this alleged conflict of interest may have on the agreement's enforceability. This Comment asserts that federal courts must thoroughly assess the alleged conflict under the existing framework of conflict-of-interest law in the criminal context and ensure that these waivers are executed in an ethical and professional manner so that defendants' Sixth Amendment rights are upheld in all instances.

I. INTRODUCTION

The federal criminal justice system handles close to 100,000 cases a year, and almost all of these cases are resolved by a guilty plea.¹ In a recent Supreme Court opinion, Justice Kennedy reaffirmed the importance of a defendant's substantive rights

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1. U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS ONLINE tbl. 5.22.2010 (2010), <http://www.albany.edu/sourcebook/pdf/t5222010.pdf>. Although this Comment focuses on guilty plea waivers of postconviction collateral relief in federal criminal proceedings, the principles advocated for can and should be readily applied to identical concerns found at the state level.

during the plea process, while noting that ninety-seven percent of all federal convictions are secured by the defendant's own admission of guilt.² Accordingly, it is widely accepted that pleas are an essential part of the criminal justice system and should be encouraged where appropriate.³ Plea bargaining in turn helps to encourage this outcome, by encouraging a guilty party to accept responsibility for his crime in order to secure a benefit, such as a reduced sentence, in return for waiving his constitutional right to a jury trial.⁴

However, these agreements have grown increasingly complex,⁵ and it is now common for a defendant to waive the right to appeal his sentence before he knows what that sentence may be.⁶ This complexity began with the creation of the Federal Sentencing Guidelines (Guidelines), as Congress sought to alleviate disparities by bringing transparency, consistency, and fairness to sentencing calculations.⁷ The Guidelines were initially mandatory,⁸ and the multitude of considerations that they imposed on sentencing courts created hundreds of new and complex appealable issues.⁹ As the volume and complexity of sentencing appeals grew, prosecutors asked defendants to waive more of their appellate rights as part of plea bargains.¹⁰ In return, defense counsel sought to maximize the benefits received for such broad waivers.¹¹

2. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012).

3. *See Santobello v. New York*, 404 U.S. 257, 260–61 (1971) (noting pleas lead to final disposition, avoid idle pretrial confinement for those denied release pending trial, protect the public from crime-prone individuals, shorten time between charge and disposition, and enhance the rehabilitative process).

4. *See* Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1933–34 (1992) (reasoning that a world without plea bargains—and therefore with more trials—would exacerbate the deficiencies in quality of counsel already experienced by indigent defendants and could even lead to more wrongful convictions, as the safeguards afforded by the trial process become more casual). *See infra* Part II.B.1 for a discussion of the contract theory of plea bargaining.

5. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 219–20, 231 (2005) (discussing the extreme growth in complexity of waiver provisions starting in the 1990s and subsequently finding that 65.2% of plea agreements surveyed by the authors included some kind of appellate waiver clause).

6. The Federal Rules of Criminal Procedure prevent almost any criminal defendant from knowing with certainty what his sentence may be when he pleads guilty because the court that ultimately decides his sentence is explicitly forbidden from participating in plea agreement negotiations. FED. R. CRIM. P. 11(c)(1). Accordingly, a court may accept a defendant's guilty plea but defer acceptance of any plea agreement recommendations until after it considers the applicable sentencing guidelines. *United States v. Hyde*, 520 U.S. 670, 674 (1997).

7. 28 U.S.C. § 991(b)(1)(B) (2012); *see also* Marvin E. Frankel & Leonard Orland, *Sentencing Commissions and Guidelines*, 73 GEO. L.J. 225, 226–28 (1984) (providing a historical overview of Congress's goals in enacting the Sentencing Reform Act of 1984).

8. *See* 18 U.S.C. § 3553(b)(1) (2012) (stating that the sentencing court "shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission" when determining an appropriate sentence). The mandatory aspects of this section were later held to be unconstitutional. *United States v. Booker*, 543 U.S. 220, 249–50 (2005).

9. *See* King & O'Neill, *supra* note 5, at 231 n.83 (describing the bargaining power possessed by defendants as a result of the significant number of appealable issues that arise at sentencing).

10. *Id.* at 230.

11. *See id.* at 239 (finding that the increased use of waivers led to the increased use of factual stipulations because defendants demanded certainty for sentencing considerations that would not be reviewable because of a waiver).

With such a large majority of criminal cases being resolved through closed-door bargaining, this system of “horse trading,” as it has been called, is “not some adjunct to the criminal justice system; it *is* the criminal justice system.”¹²

Many plea bargains have also required defendants to forgo their right to relief under 28 U.S.C. § 2255. This statute allows a prisoner held in federal custody to challenge his incarceration on the grounds that the court imposed a sentence in violation of the Constitution or federal law and is also known as the pursuit of *collateral relief*.¹³ As such, § 2255 is “a surrogate for the historic writ of habeas corpus.”¹⁴ Accordingly, a criminal defendant may seek relief under this statute if he was denied effective legal counsel as required by the Sixth Amendment,¹⁵ and it is common for a defendant to challenge the terms of his sentence by asserting a claim that he received such ineffective assistance at his sentencing hearing.¹⁶ However, a defendant who has prospectively waived postconviction claims of collateral relief in a plea agreement will almost certainly have relinquished his right to bring this challenge.¹⁷

Additionally, defendants now face greater uncertainty at sentencing after the Supreme Court ruled in 2005 that the once-mandatory Guidelines could no longer bind courts’ sentencing calculations.¹⁸ As criminal defendants are able to freely bargain away the rights granted for their own protection even as they face such uncertainty, it is clear why so many commentators remain troubled by the very idea of plea bargaining itself.¹⁹ Commentators have asserted that appellate waivers are inherently blind-faith

12. Scott & Stuntz, *supra* note 4, at 1912; *see also* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *FORDHAM L. REV.* 2117, 2118 (1998) (positing that the U.S. adversarial system of criminal justice has transformed into a largely administrative system).

13. 28 U.S.C. § 2255 (2012).

14. *Ellis v. United States*, 313 F.3d 636, 641 (1st Cir. 2002); *see also* NANCY J. KING & JOSEPH L. HOFFMAN, *HABEAS FOR THE TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT* 110 (2011) (noting that § 2255 is a habeas substitute).

15. *See Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938) (finding that a criminal defendant’s Sixth Amendment guarantee to effective assistance of counsel “is an essential jurisdictional prerequisite to a federal court’s authority to deprive an accused of his life or liberty”); *DeRoo v. United States*, 223 F.3d 919, 923–24 (8th Cir. 2000) (considering the claim of a defendant who alleged that deficient counsel led him to enter a plea agreement without full knowledge of its terms).

16. *See, e.g., United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001) (stating that a defendant who is “unfettered by a waiver agreement[] is quite likely to appeal on a wing and a prayer”).

17. *See, e.g., King & O’Neill, supra* note 5, at 244 (finding that only 28.6% of surveyed appellate waivers explicitly reserved the right to bring claims of ineffective counsel).

18. *United States v. Booker*, 543 U.S. 220, 249–50 (2005); *see also* King & O’Neill, *supra* note 5, at 224 (concluding that the number of above-Guidelines sentences imposed grew after the Court’s sentencing decisions).

19. Some authorities have concluded that plea bargaining must be banned altogether. *See, e.g.,* Albert W. Alschuler, *Taking the Stand: Getting Shortchanged in the Bargain*, 3 *COMPLEAT LAW.*, Winter 1986, at 27, 27, 56 (arguing that plea bargaining is inherently antithetical to our notions of justice because it amounts to a finding of “half guilty” or punishes a defendant for merely demanding that the evidence against him be presented in court); Stephen J. Schulhofer, *Is Plea Bargaining Inevitable?*, 97 *HARV. L. REV.* 1037, 1037–38 (1984) (arguing for an alternative system to plea bargaining of scaled-down bench trials to promote adjudication and adversarial fact finding rather than negotiation). However, many commentators have concluded that plea bargaining should be more tightly regulated to preserve its beneficial aspects and mitigate potential harms. *See, e.g.,* Oren Gazal-Ayal, *Partial Ban on Plea Bargains*, 27 *CARDOZO L. REV.* 2295, 2313

agreements,²⁰ are contracts of adhesion,²¹ may provide cover for attorney misconduct,²² may encourage unusual or even illegal sentences,²³ and will ultimately run counter to the policy goals of sentencing consistency and fairness sought by Congress when it imposed the original Guidelines by preventing appellate review.²⁴

Recently, the argument has developed that a defendant cannot ethically forgo his § 2255 postconviction rights as to the effectiveness of counsel in a prospective plea bargain waiver.²⁵ This waiver is alleged to present the defendant's attorney with an impermissible conflict of interest, which therefore renders his advice constitutionally ineffective per se.²⁶ In this situation, an attorney is being asked to counsel a client as to the constitutional effectiveness of his own future conduct and possibly encourage the client to sign an agreement that waives any claim to challenge that conduct.²⁷ Proponents argue that this theoretical conflict taints the advice of even a well-meaning attorney, as "every defendant has a constitutional right to 'the assistance of an attorney unhindered by a conflict of interests.'"²⁸ Such an agreement may also violate most states' rules of professional conduct.²⁹ In particular, these agreements may constitute explicit violations of ethics rules forbidding agreements that prospectively limit a lawyer's liability to a client for civil malpractice claims.³⁰

(2006) (concluding that judges should not accept "exceedingly lenient bargains" because steep government concessions indicate that a case is weak and a high likelihood of acquittal); Scott & Stuntz, *supra* note 4, at 1909, 1965 (determining that plea bargains are beneficial as value-maximizing bargains but that innocent defendants may ultimately suffer as undesirably weak cases are pursued through the fault of overly broad criminal statutes).

20. See David S. Rudolf & Gordon Widenhouse, *Renewing the Challenge to Provisions Waiving the Right to Appeal*, CHAMPION, Mar. 22, 1998, at 51 (arguing that a criminal defendant cannot knowingly consent to the effects of as-yet-unknown sentencing decisions).

21. See David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1029 (1999) (finding that plea agreements should be void because "[t]he government possesses all of the power").

22. See King & O'Neill, *supra* note 5, at 245–48 (stating that waivers that forfeit collateral review "allow attorneys to insulate themselves from potential claims for misconduct").

23. King & O'Neill, *supra* note 5, at 222–23.

24. *Id.*; Graham C. Mullen, *Preface to the Annual Review of Criminal Procedure*, 33 GEO. L.J. ANN. REV. CRIM. PROC. i, i–ii (2004).

25. See Douglas A. Morris, *Waiving an Ineffective Assistance of Counsel Claim: An Ethical Conundrum*, CHAMPION, Dec. 27, 2003, at 35 (concluding that a conflict undoubtedly exists between an attorney's advice to a client on waiver of the right to appeal and that attorney's interest in avoiding a malpractice claim or a finding of having rendered ineffective assistance).

26. See, e.g., *United States v. DeLuca*, No. 08-108, 2012 WL 5902555, at *10 (E.D. Pa. Nov. 26, 2012) (finding that the ineffective assistance claim lacked merit but declining to rule whether defendant's waiver was tainted by a conflict of interest).

27. Morris, *supra* note 25, at 35–36.

28. *Cuyler v. Sullivan*, 446 U.S. 335, 355 (1980) (Marshall, J., concurring in part and dissenting in part) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483 n.5 (1978)).

29. Morris, *supra* note 25, at 35–36. See also *infra* Section III for a discussion of ethics board opinions regarding this type of alleged conflict of interest.

30. E.g., MODEL RULES OF PROF'L CONDUCT R. 1.8(h) (stating that a lawyer shall not make an agreement with his client that prospectively limits his liability for malpractice).

In recent years, this argument has gained support, as several state ethics boards have condemned the practice of prospective waivers of ineffective counsel claims.³¹ However, every federal circuit continues to enforce the validity of these prospective waivers on the basis that a defendant should be free to bargain for a lesser sentence by waiving the rights and protections provided for him.³² Courts are also apprehensive to second-guess a defendant's decisions as to how to conduct his own best criminal defense,³³ and it has therefore been accepted that the criminal justice system cannot simply "imprison a man in his privileges and call it the Constitution."³⁴ Still very few courts have yet to explicitly address what legal significance this particular type of conflict of interest may have on these waivers' legal effectiveness or ethical reliability.³⁵ However, defendants have raised this argument in collateral proceedings in recent years,³⁶ and U.S. Attorneys in at least one state have joined to petition for review of an ethical opinion, stating that its decision conflicts with controlling federal law and impinges on a defendant's Sixth Amendment rights.³⁷

This conflict between the opinions of the state ethics boards and the federal courts is the focus of this Comment. Section II presents the opinions of the federal courts and describes the rationale employed to uphold almost all prospective waivers, including those that waive a defendant's claims to postconviction collateral relief. Section III presents the contrasting opinions of the state ethics boards that have addressed this particular alleged conflict of interest. Section IV describes the framework of law that federal courts use to assess the legal effect of other conflicts of interest and also describes the few court opinions that have considered the particular conflict of interest at hand.

Finally, Section V examines whether there is an inherent conflict of interest in these prospective waivers, and if so, whether it should prevent their execution or enforcement. This Comment further explains why courts must address the challenge of this important and timely issue by applying the existing theories of conflict-of-interest law. Under these considerations, courts must ultimately conclude that these waivers should not be precluded where only a *theoretical* conflict of interest is found to exist.

However, courts must also ensure that these agreements are executed in a manner that is not only knowing and voluntary but is also ethically and professionally sound in every instance. As such, this Comment asserts that courts should adopt the duty articulated by the Eighth Circuit: that a court retains the power to reject a plea

31. See *infra* Section III for a discussion of state ethics board opinions that have considered this practice.

32. See *infra* Part II.A for a discussion of federal courts' treatment of waivers of the right to appeal.

33. See *infra* Part II.B for a discussion of criminal defendants' autonomy in choosing whether to exercise their fundamental rights.

34. *Adams v. United States ex rel. McCann*, 317 U.S. 269, 280 (1942).

35. See *infra* Part IV.C for a discussion of court opinions that have analyzed or expressed a desire to have parties present arguments on this particular alleged conflict of interest.

36. See *infra* Part IV.C for a discussion of court opinions that address parties' arguments on the alleged conflict of interest related to a defendant waiving any claims for ineffective counsel.

37. See Brief of United States in Support of Motion for Review of Ethics Opinion at 1–2, *United States v. Ky. Bar Ass'n*, No. 2013-SC-270 (Ky. Apr. 29, 2013) (arguing that Ky. State Bar Ethics Comm., Advisory Op. KBA E-435 (2012), should be vacated).

agreement that it finds “inequitable or otherwise objectionable.”³⁸ In consideration of this duty, courts should assure that the defendant has an explicit understanding of the concession given in exchange for his waiver of appellate rights and that the defendant has knowingly consented to his attorney’s potential conflict of interest where he chooses to prospectively waive claims of postconviction collateral relief. By adopting these simple practices, courts can effectively preserve the benefits of appellate waivers while mitigating most of their potentially destructive effects. These reforms will also create a more informed marketplace of plea bargain participants, who will more frequently arrive at equitable agreements without coercion or advocacy by courts.

II. WAIVERS OF APPELLATE RIGHTS IN FEDERAL COURTS

All federal circuits agree that a criminal defendant may knowingly and voluntarily waive his statutory right to appeal in a plea bargain and that a valid waiver of such rights will be strictly construed.³⁹ In some cases, the waiver of appellate rights may form a central piece of a plea bargain between the government and a defendant, and it is well established that the criminal justice system relies in large part on these agreements in order to function in its current form.⁴⁰ In embracing the validity of appellate waivers contained therein, courts have relied on two primary rationales. First, the Supreme Court has articulated a presumption of waivability, as virtually any statutory or constitutional right may be foregone.⁴¹ And second, a criminal defendant should retain his right to freely bargain for the most favorable outcome available to him using all of the tools at his disposal.⁴² Courts have also noted that the use of appellate waivers will promote expediency, efficiency, and finality of judgment in the criminal justice process.⁴³

A. *The Presumption of Waivability*

The concept of waiver pervades American jurisprudence, and the ability of a defendant to waive his right to an appeal is securely grounded in the premise that a “party may waive any provision, either of a contract or of a statute, intended for his

38. *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003).

39. Consideration of appellate waivers varies little among the circuits, as all have affirmed their use on almost identical grounds. *E.g.*, *United States v. Guillen*, 561 F.3d 527, 529–30 (D.C. Cir. 2009); *United States v. Hahn*, 359 F.3d 1315, 1329–30 (10th Cir. 2004); *United States v. Teeter*, 257 F.3d 14, 21–23 (1st Cir. 2001); *United States v. Khattak*, 273 F.3d 557, 560–61 (3d Cir. 2001); *United States v. Fleming*, 239 F.3d 761, 763–64 (6th Cir. 2001); *United States v. Jemison*, 237 F.3d 911, 916 (7th Cir. 2001); *United States v. Estrada-Bahena*, 201 F.3d 1070, 1071 (8th Cir. 2000); *United States v. Fisher*, 232 F.3d 301, 303 (2d Cir. 2000); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000); *United States v. Branam*, 231 F.3d 931, 932–33 (5th Cir. 2000); *United States v. Nguyen*, 235 F.3d 1179, 1184 (9th Cir. 2000); *United States v. Howle*, 166 F.3d 1166, 1168–69 (11th Cir. 1999).

40. *See United States v. Mezzanatto*, 513 U.S. 196, 213 (1995) (Souter, J., dissenting) (stating that the federal system “could not possibly litigate every civil and criminal case filed in the courts”).

41. *See infra* Part II.A for a discussion of the presumption that criminal defendants may waive those rights provided for their own benefit.

42. *See infra* Part II.B for a discussion of criminal defendants’ freedom to engage in plea bargaining by waiving rights provided for their own benefit.

43. *See infra* notes 101–06 for a discussion of the potential benefits of waiving appellate rights.

benefit.”⁴⁴ Prospective waivers of rights are especially common in criminal proceedings, and it is well established that a criminal defendant may waive many of the most fundamental protections granted by the Constitution if the defendant does so in a knowing and voluntary manner.⁴⁵ Additionally, courts have reasoned that the possibility of a specific harm should not preclude the execution of a particular type of waiver in all circumstances, as each instance should be evaluated on an individual basis.⁴⁶

1. The Permissibility of Waiver in General

Criminal defendants can never be fully certain of the consequences of waiving their rights, but do so in order to favorably narrow the range of outcomes that may result from the charges against them.⁴⁷ For instance, a defendant waives many essential rights (in addition to the right to a jury trial) simply by choosing to plead guilty,⁴⁸ based on the informed belief that the sentence he will receive is more desirable than facing the greater uncertainty of outcomes resulting from a jury trial.⁴⁹ While any possibility of being acquitted is, of course, extinguished by a guilty plea, the possibility of receiving the harshest possible penalty is generally removed as well.⁵⁰

2. *Newton v. Rumery* and the Controversy of Release-Dismissal Agreements

In an especially contentious ruling, the Supreme Court in *Newton v. Rumery*⁵¹ narrowly upheld the validity of release-dismissal agreements, reasoning that per se rules banning particular types of waivers are inappropriate and that each instance

44. *Shutte v. Thompson*, 82 U.S. 151, 159 (1872).

45. *See Peretz v. United States*, 501 U.S. 923, 936–37 (1991) (“The most basic rights of criminal defendants are similarly subject to waiver. . . . [T]he Constitution affords no protection to a defendant who waives these fundamental rights.”); *United States v. Teeter*, 257 F.3d 14, 22–23 (1st Cir. 2001) (discussing the “widespread acceptance” of presentence waivers of appellate rights in criminal proceedings); *see also Ricketts v. Adamson*, 483 U.S. 1, 10 (1987) (permitting waiver of double jeopardy protections); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973) (permitting defendant to consent to an illegal search); *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938) (permitting defendants to waive Sixth Amendment right to counsel).

46. *United States v. Mezzanatto*, 513 U.S. 196, 210 (1995).

47. *See United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009) (noting that whether a defendant is pleading guilty or waiving a constitutional right, he is limiting the possible penalties assessed against him).

48. *See United States v. Ruiz*, 536 U.S. 622, 628–29 (2002) (discussing the rights a defendant gives up when he pleads guilty and making special mention of his right to jury trial); *Brady v. United States*, 397 U.S. 742, 748 (1970) (discussing the solemn and grave nature of a guilty plea, particularly because the defendant has given up his right to a trial by judge or jury); *Boykin v. Alabama*, 395 U.S. 238, 243 (1969) (noting that a guilty plea serves as an automatic waiver of the right against self-incrimination and the right to confront and cross-examine witnesses). The defendant also may not raise any independent claim related to the deprivation of constitutional rights that occurred prior to the plea. *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *see also United States v. Clark*, 459 F.2d 977, 978 (8th Cir. 1972) (providing that “a plea of guilty, waives all nonjurisdictional defects, including allegedly illegal searches and seizures”).

49. *See Guillen*, 561 F.3d at 530 (stating that regardless of the type of constitutional right a defendant chooses to waive, he must always “evaluate the possibilities open to him and their associated probabilities and, with the help of counsel, choose the most favorable alternative”).

50. *See id.* (stating that a defendant who pleads guilty “believes the sentence he is likely to receive as a result (with credit for accepting responsibility) is more attractive than . . . the maximum sentence”).

51. 480 U.S. 386 (1987).

should be evaluated on its particular facts.⁵² The Court found that the plaintiff, Bernard Rumery, had knowingly chosen the certain benefit of escaping criminal prosecution in return for forgoing the speculative benefit associated with his own civil rights claim against the arresting authority.⁵³ The opinion supported the permissibility of waiver in general and disagreed with the First Circuit's holding that release-dismissal agreements were per se unenforceable as inherently coercive and always destructive of public policy goals.⁵⁴ The Court instead concluded that Rumery's decision to waive his claim was a highly rational and informed judgment executed by a sophisticated party.⁵⁵

The Court also considered the potential greater social harms posed by such agreements and acknowledged that some agreements may potentially infringe on important interests of criminal defendants and society as a whole.⁵⁶ However, the discreet possibility of harm to those interests did not call for a per se rule banning all release-dismissal agreements.⁵⁷ The mere possibility of *some* waiver agreements being the product of an uninformed decision does "not justify invalidating *all* such agreements."⁵⁸ Expressing the opinion of a plurality of the Court, Justice Powell reasoned that because Congress had chosen to vest the victim's right to bring a civil rights suit in the victim himself, rather than in the public at large, it would be a mistake to "elevate more diffused public interests above Rumery's considered decision."⁵⁹

Ultimately, the Court found that the agreement at issue in *Rumery* had actually served the public good by quickly and efficiently resolving two actions—both of which were likely to offend worthwhile public interests.⁶⁰ Justice O'Connor also reasoned in a concurring opinion that the agreement had spared "the local community the expense of litigation associated with some minor crime[]." ⁶¹ Justice O'Connor considered this to be a worthwhile objective of release-dismissal agreements in general that could justify their use in appropriate cases.⁶² However, *Rumery* did not convince all authorities that release-dismissal agreements were worthwhile vehicles for the furtherance of justice.⁶³

52. *Rumery*, 480 U.S. at 397–98. A release dismissal agreement is one "in which a criminal defendant releases his right to file an action under 42 U.S.C. § 1983 in return for a prosecutor's dismissal of pending criminal charges." *Id.* at 389.

53. *Id.* at 394.

54. *Id.* at 395–97.

55. *See id.* at 394 (finding that Rumery was an intelligent businessman who was represented by counsel who had drafted the agreement at issue and had been given ample time to consider his options before finally signing).

56. *Id.* at 394–95.

57. *Id.* at 392, 397.

58. *Id.* at 393.

59. *Id.* at 395; *see also* *United States v. Mezzanatto*, 513 U.S. 196, 211–13 (1995) (Souter, J., dissenting) (considering whether a civil right should be waivable at all, as the right itself is motivated by important congressional policy goals).

60. *Rumery*, 480 U.S. at 397–98 (indicating that prosecutors had reasonably sought to spare a necessary and fragile witness the burden of testifying in Rumery's criminal and civil matters).

61. *Id.* at 399–400 (O'Connor, J., concurring).

62. *Id.* at 399 (concurring in the judgment but writing separately to elaborate that future release-dismissal agreements should be considered coercive unless otherwise proven by the facts—rather than vice versa).

63. *See, e.g.,* *Cowles v. Brownell*, 538 N.E.2d 325, 326–27 (N.Y. 1989) (refusing to enforce a particular

After the Court's controversial decision, courts and ethics boards in several states took affirmative steps to limit the use of release-dismissal agreements. The New York Court of Appeals distinguished *Rumery* in finding that a particular release-dismissal agreement would not serve *any* attendant public interest.⁶⁴ Additionally, state ethics boards issued conflicting opinions,⁶⁵ as some compared such agreements to extortion, concluding that the government may not use the threat of criminal charges to gain leverage in a parallel civil dispute.⁶⁶ However, others concluded that release-dismissal agreements may be ethically conducted, as criminal charges are not being *threatened*, but the dismissal of *pending* charges is instead offered with a condition.⁶⁷ Placing limits on their use, these authorities have reasoned that each release-dismissal agreement must be examined on a case-by-case basis.⁶⁸

3. Waiver of Rights and Guilty Pleas

It is common for a defendant to waive additional rights as part of a plea bargain, and courts must confirm that these waivers (as well as the plea itself) are both knowing and voluntary.⁶⁹ Because the defendant negotiates with the prosecutor outside of

release-dismissal agreement and finding that such agreements inherently involve prosecutors in a conflict of interest and create the appearance of professional impropriety).

64. *Id.* (reasoning that an agreement that appeared to accomplish nothing more than insulate the police from civil liability was outside the scope of the prosecutor's authority and could only harm society's interests).

65. Compare Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1989-106 (1989) (concluding that offering the dismissal of criminal charges conditional on a release from civil liability constitutes a threat used to obtain an advantage in a civil dispute akin to extortion), with Or. State Bar Legal Ethics Comm., Formal Op. 2005-113 (2005) (finding that release-dismissal agreements are allowable because criminal charges are not being *threatened*—the dismissal of already pending charges is offered with a condition).

66. See, e.g., Cal. State Bar Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 1989-106 (determining that release-dismissal agreements are an abuse of the judicial system and that the civil system of justice must remain on a "parallel and independent course" from the criminal justice system in order to uphold public confidence in its fairness); Ind. State Bar Ass'n Legal Ethics Comm., Advisory Op. 2 (2005) (finding that release-dismissal agreements interfere with the administration of justice because the prosecutor is using criminal charges to force a defendant to release a civil right); N.J. Advisory Comm. on Prof'l Ethics, Op. 714 (2008) (concluding that release-dismissal agreements allow for prosecutors to threaten continued criminal prosecution in exchange for protection from civil liability and are prohibited in all situations); S.C. Bar Ethics Advisory Comm., Advisory Op. 05-17 (2005) (concluding that a solicitor cannot use the criminal process to obtain a favorable result in any civil action).

67. See, e.g., Ill. State Bar Ass'n, Advisory Op. 89-16 (1990) (ruling that a release-dismissal agreement can be offered as part of a first-time DUI plea agreement); Or. State Bar Legal Ethics Comm., Formal Op. 2005-113 (finding that the rule against threatening criminal charges does not apply and that release-dismissal agreements are not prejudicial to the administration of justice per se).

68. See, e.g., Colo. Bar Ass'n Ethics Comm., Formal Op. 62-Rev. (1982) (providing six requirements for judicially approved release-dismissal agreements); Conn. Bar Ass'n Comm. on Prof'l Ethics, Informal Op. 00-24 (2000) (concluding that "a prosecutor may not condition an offer to dismiss [criminal charges] upon . . . defendant's release or agreement to release civil claims against [the government]" if the prosecutor's primary reason for proceeding with the prosecution is for the purpose of seeking a civil release); Oh. Bd. of Comm'rs on Grievances & Discipline, Op. 94-10 (1994) (finding that a release-dismissal agreement is improper if the prosecutor has already determined that the pending criminal charges are without merit, as a prosecutor already possesses an ethical duty to dismiss the charges).

69. FED. R. CRIM. P. 11(b)(1), (2).

court,⁷⁰ the court will conduct a verbal plea colloquy in accordance with Rule 11 of the Federal Rules of Criminal Procedure.⁷¹ The court must address the sworn defendant personally to ensure that he understands the nature of the charges that he is pleading to, the rights that he is relinquishing, any applicable punishments that he could face, and the specific terms of any plea agreement provision that waives his right to appeal.⁷² Courts have reasoned that adherence to Rule 11's requirements is crucial because a failure to do so could undermine the enforceability of plea agreements and potentially deter defendants from entering such bargains in the future.⁷³ A court may therefore refuse to accept a defendant's plea if it finds that the defendant has been inadequately counseled or that he does not understand some aspect of the agreement.⁷⁴ Accordingly, this Rule 11 plea colloquy is crucial to preserving the effectiveness of any waiver provision's terms by assuring that the defendant's waiver is knowing, voluntary, and enforceable.⁷⁵ Likewise, "if the waiver is valid . . . a court cannot grant habeas relief 'without making a mockery of the waiver [Defendant] signed.'"⁷⁶

Rule 11's procedure not only ensures that the defendant understands the bargain—it also provides an avenue for disclosure of the agreement in open court.⁷⁷ Congress saw public disclosure as an essential part of a fair system of plea bargaining and theorized in the amendments to Rule 11 that "it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge."⁷⁸ Although the court has no obligation to accept such a plea agreement, it is generally likely to follow the parties'

70. *Id.* 11(c)(1); *see also* *United States v. Daigle*, 63 F.3d 346, 348 (5th Cir. 1995) (explaining that the prohibition on court participation assures that the court will serve as an independent arbiter rather than as an advocate for the agreement). The prosecutor therefore cannot guarantee a specific disposition but may agree to dismiss other criminal charges, recommend a particular sentencing range to the court, or stipulate that particular sentencing factors should apply. FED. R. CRIM. P. 11(c)(1)(A)–(C); *see also* *United States v. Miles*, 10 F.3d 1135, 1139 (5th Cir. 1993) (finding that the court must not be involved in plea discussions but is always free to reject an agreement).

71. FED. R. CRIM. P. 11(b)(1).

72. *See id.* 11(b)(1)(A)–(O) (listing the circumstances of fact and law of which the court must affirm that the defendant is aware before it can accept a guilty plea).

73. *See* *United States v. Ortiz-García*, 665 F.3d 279, 288 (1st Cir. 2011) (finding that a defendant had not been informed at the plea colloquy of the maximum sentence that could be imposed). When the government lapses in its duty to properly inform a defendant who chooses to plead guilty, it could "chip away at the essential presumption that prosecutors can be relied on to perform their official duties properly." *Moreno-Espada v. United States*, 666 F.3d 60, 67 (1st Cir. 2012) (quoting *Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006) (denying relief to a similarly situated defendant whose plea agreement and colloquy had understated his potential sentencing exposure)).

74. *See* FED. R. CRIM. P. 11(c)(3); *cf.* *McCarthy v. United States*, 394 U.S. 459, 463–64 (1969) (holding that a defendant must be allowed to withdraw his plea if it was accepted in a colloquy in which the court did not comply with the requirements of Rule 11).

75. *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007) (holding that if a defendant knowingly and voluntarily waives his right to appeal, the waiver is enforceable and will only be reviewed on its merits if it results in a "miscarriage of justice").

76. *Miraglia v. United States*, No. 08-5181 (JAG), 2010 WL 1009796, at *2 (D.N.J. Mar. 15, 2010) (alteration in original) (quoting *United States v. Robinson*, 244 F. App'x 501, 503 (3d Cir. 2007)). *See also infra* Part I.L.C for a description of limitations placed on the enforcement of appellate waivers.

77. FED. R. CRIM. P. 11(c)(2).

78. FED. R. CRIM. P. 11 advisory committee's note.

recommendations.⁷⁹

Because the choice of whether to exercise a right is ultimately vested in the individual rather than the general public,⁸⁰ a criminal defendant may prospectively forgo almost all of the protections afforded by statutes and the Constitution.⁸¹ Accordingly, courts have embraced the philosophy that a person may forgo such rights in a guilty plea.⁸² Although the discreet possibility of harm will not prevent the execution of a waiver, all waivers contained in a guilty plea must always be executed in a knowing and voluntary manner.⁸³ At a minimum, the defendant must have affirmed in the colloquy that the bargain he struck with the government was knowing and voluntary, so as to ensure that the defendant was free to bargain for the best possible outcome.⁸⁴

B. The Autonomy of a Criminal Defendant and the Freedom to Bargain

Courts have also relied on the notion of autonomy in recognizing the enforceability of appellate waiver provisions. Criminal defendants are given a great deal of deference in deciding how to conduct their defense, and a plea bargain may be the most desirable means by which a guilty defendant can control his course through the criminal justice system.⁸⁵ This mutual exchange of benefits formed a crucial part of the Supreme Court's reasoning in upholding the constitutionality of plea agreements.⁸⁶ When such a defendant pleads guilty, he makes a choice in his own self-interest to

79. See *Santobello v. New York*, 404 U.S. 257, 260 (1971) (finding that courts will encourage an efficient system of plea bargaining because it allows courts to devote more time and resources to deciding actual, live controversies); *United States v. Granik*, 386 F.3d 404, 413 (2d Cir. 2004) (stating that courts will generally observe the parties' factual stipulations presented in a plea agreement); *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (finding that the "[the court's] authority to reject a plea agreement, if it is inequitable or otherwise objectionable, operates as a further check on either party's over-reaching"); MOLLY TREADWAY JOHNSON & SCOTT A. GILBERT, *THE U.S. SENTENCING GUIDELINES: RESULTS OF THE FEDERAL JUDICIAL CENTER'S 1996 SURVEY* 22 tbl.14 (1997) (finding that 67.2% of district court judges responded in favor of using appellate waivers more frequently and 83.1% of appeals court judges felt that sentences contained in plea agreements should be binding and nonreviewable).

80. See *supra* note 59 and accompanying text for the impact of the Court's recognition of the individual right to bring a personal civil rights claim on the personal nature of a criminal defendant's choice to waive a right.

81. See *supra* note 45 and accompanying text for the acknowledgement that the waiver of constitutional and statutory rights is not only common but also well established in criminal proceedings.

82. See *supra* note 45 and accompanying text for a list of precedent in which criminal defendants waived constitutional rights, reflecting courts' acceptance of a defendant's right to do so.

83. See *supra* notes 69–79 and accompanying text for a discussion of the Court's requirement that all waivers be executed by a defendant who is aware of the consequences and voluntarily chooses the waiver.

84. See *infra* notes 95–100 and accompanying text for a discussion of how the plea bargaining process as a whole is akin to contract formation, including the ways in which waivers are analogous to consideration.

85. See *infra* note 92 and accompanying text for a discussion of the idea that criminal defendants' freedom during the bargaining process ultimately serves the goals of the criminal justice system.

86. See *Brady v. United States*, 397 U.S. 742, 752–53 (1970) ("For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. . . . [W]e cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State.").

trade some of his rights for the benefits conferred by the plea.⁸⁷ Additionally, courts have noted that the use of appellate waivers may reduce the volume of meritless appeals, promote the speed and economy that is provided by guilty pleas, and therefore allow the court to spend more of its time deciding actual, live controversies.⁸⁸ Plea agreements are therefore commonly viewed as bargains and are governed by the rules of contract.⁸⁹

1. Plea Bargains as Contracts

Criminal defendants are given great freedom in conducting their defense,⁹⁰ and courts have therefore reasoned that it is best for them to freely bargain with all of the tools available at their disposal.⁹¹ Accordingly, a defendant's ability to waive certain rights as entitlements is viewed as his most significant bargaining chip in the plea negotiation process.⁹² A defendant may decide that he is better served by retaining the option to exercise a right, or he may exchange it for something holding greater personal value—such as a favorable sentencing recommendation from the prosecutor.⁹³ By extension, waivers of postconviction collateral relief are included in the plea bargaining

87. See *infra* notes 101–06 and accompanying text for a discussion of the benefits, including a sentence reduction, that the criminal defendant typically receives by making a plea bargain.

88. See *United States v. Ortiz-García*, 665 F.3d 279, 288 (1st Cir. 2011) (finding that appellate waivers “conserve judicial resources”); *United States v. Andis*, 333 F.3d 886, 889 (8th Cir. 2003) (finding that the merits of appellate waivers include “speed, economy, and finality” (quoting *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992)); *United States v. Teeter*, 257 F.3d 14, 22 (1st Cir. 2001) (“Reducing the number of baseless appeals promotes both efficiency and finality in the adjudication of criminal cases.”).

89. *Puckett v. United States*, 556 U.S. 129, 137 (2009); *United States v. Williams*, 510 F.3d 416, 422 (3d Cir. 2007).

90. *Newton v. Rumery*, 480 U.S. 386, 394 (1987) (“Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose.” (quoting *McGautha v. California*, 402 U.S. 183, 213 (1971), *reh'g granted and judgment vacated sub nom. Crampton v. Ohio*, 408 U.S. 941 (1972)); *United States v. Andrews*, 895 F.2d 406, 409 (7th Cir. 1990) (finding that a court should not declare a mistrial over the objections of the defendant). Where a defendant's right to a fair trial conflicts with his desire to determine his own fate at the trial of his choice, the defendant's desire will control “unless there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated.” *Id.* (quoting *United States v. Perez*, 22 U.S. 579 (1924)) (internal quotation mark omitted).

91. See *United States v. Mezzanatto*, 513 U.S. 196, 205–07 (1995) (finding that Congress enacted certain evidentiary rules specifically to facilitate open and honest bargaining in the practice of plea bargaining); *United States v. Guillen*, 561 F.3d 527, 530 (D.C. Cir. 2009) (explaining that allowing a defendant to waive his appellate rights will increase the likelihood that he will successfully negotiate a satisfactory plea bargain); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1972 (1992) (stating that the plea bargaining process is at least as effective at separating the innocent from the guilty as is a full trial).

92. See *Blackledge v. Allison*, 431 U.S. 63, 71 (1977) (describing guilty plea benefits such as avoiding the “anxieties and uncertainties of a trial”); *United States v. Michelsen*, 141 F.3d 867, 873 (8th Cir. 1998) (discussing the potential value of appellate waivers to defendants in the bargaining process); *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995) (stating that “[r]ight holders are better off if they can choose between exercising the right and exchanging that right for something they value more highly”).

93. See *Michelsen*, 141 F.3d at 873 (stating that defendants are vested with the power to exercise rights or exchange them for more lenient sentences); *Teeter*, 257 F.3d at 22 (“Allowing a criminal defendant to agree to a waiver of appeal gives her an additional bargaining chip in negotiations with the prosecution; she may, for example, be able to exchange this waiver for the government's assent to the dismissal of other charges.”).

process, as they have been found to increase the likelihood of the parties reaching a favorable agreement.⁹⁴

As with other contracts, the enforcement of a waiver provision relies on the support of valuable consideration.⁹⁵ A defendant's bargaining power comes directly from the value that an appellate waiver may present to prosecutors, and it is only by enforcing presently executed waivers that their value can be preserved for future defendants.⁹⁶ A defendant must be held to the "self-imposed burden[]" of an appellate waiver after enjoying the benefit of the bargain's sentence-reducing provisions,⁹⁷ and courts have noted that allowing even meritorious appeals would "eliminate one of the primary incentives the government has for negotiating plea agreements."⁹⁸

Similarly, appellate waivers must be written broadly to retain their benefit because exempting particular claims from the waiver—such as ineffective assistance of counsel—would provide an avenue through which all defendants may attempt to pursue their appeals.⁹⁹ A defendant who is unburdened by a waiver agreement, represented by court-appointed counsel, and has nothing left to lose "is quite likely to appeal on a wing and a prayer."¹⁰⁰

2. Defendants Receive More than Theoretical Benefits from Appellate Waivers

There is also empirical evidence to suggest that defendants generally gain a concrete benefit from waiving the right to postconviction relief.¹⁰¹ In a widely cited article, Professors Nancy J. King and Michael E. O'Neill studied a sample of plea agreements and interviewed practitioners to examine the impact of widespread plea

94. *See Teeter*, 257 F.3d at 23 (explaining that "the more options that both sides have, the more likely it is that they will reach an accord").

95. *United States v. Brunetti*, 376 F.3d 93, 95 (2d Cir. 2004); *see also Puckett v. United States*, 556 U.S. 129, 137 (2009) (explaining that the exchanges between the defendant and the government in a plea agreement constitute consideration). A defendant is entitled to seek a proper remedy in the event of the government's breach, which may include taking back "the consideration he has furnished" or seeking "specific performance of the contract." *Id.*

96. *See, e.g., United States v. Elliott*, 264 F.3d 1171, 1174 (10th Cir. 2001) (asserting that appellate waivers must be enforced to retain their value to prosecutors and defendants); *Wenger*, 58 F.3d at 283 (finding that "[d]efendants must take the bitter with the sweet" and any other outcome besides enforcement of all waivers would be "most destructive of the plea agreement process").

97. *United States v. Khattak*, 273 F.3d 557, 561 (3d Cir. 2001). Similarly, a plea agreement inherently limits the parties' ability to capitalize on subsequent developments, as both parties forgo these rights in exchange for the certainty of the agreed-upon terms. *See United States v. Bownes*, 405 F.3d 634, 636–38 (7th Cir. 2005) (concluding that a defendant who had negotiated his plea and was sentenced under the mandatory Guidelines should not be resentenced post-*Booker*).

98. *United States v. Michelsen*, 141 F.3d 867, 873 (8th Cir. 1998); *see also Teeter*, 257 F.3d at 22 (reasoning that, in some cases, the government may not be willing to bargain at all if there is no possibility of an appellate waiver).

99. *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (finding that if an exception were created for ineffective assistance claims, a defendant could easily circumvent his waiver by simply "recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless").

100. *Teeter*, 257 F.3d at 22.

101. King & O'Neill, *supra* note 5, at 209–10 (finding through an empirical study that a defendant who executed an appellate waiver provision was more likely to receive a lower sentence).

agreements with appellate waivers.¹⁰² The authors concluded that plea agreements with appellate waivers are not contracts of adhesion, even as many defendants are perceived to possess a lack of bargaining power when facing criminal charges.¹⁰³ To the contrary, the authors found that many defendants were able to extract significant concessions from government prosecutors in return for their waivers¹⁰⁴ or could alternatively avoid an agreement with an undesirable waiver altogether.¹⁰⁵ Accordingly, the authors found that a judge who refuses to affirm a plea agreement containing a waiver provision may actually harm a defendant by denying him the benefit of the government's concessions.¹⁰⁶

However, the article concludes that appellate waivers could ultimately promote inconsistent sentencing and impede Congress's goal of standardizing the sentences given to similar defendants.¹⁰⁷ In this way, waivers of postconviction relief may exacerbate sentencing inconsistencies by allowing parties to freely bargain over factual stipulations and could even license misconduct (or lack of care) by foreclosing any possibility of appellate review.¹⁰⁸ The article ultimately concludes that the continued use of appellate waivers favors the preferences of individual parties at a cost to the policy goals associated with sentencing reform.¹⁰⁹

C. *Limitations on Appellate Waivers*

While all federal circuits have enforced waivers of postconviction relief, they have done so with explicit reservations meant to preserve the fundamental right of a criminal defendant to a fair and balanced process.¹¹⁰ As such, a guilty plea and its attendant waivers are limited by the requirement that they must be entered in a knowing and voluntary manner.¹¹¹ Additionally, any plea agreement waiver provision will be strictly limited to the terms contained therein, and any ambiguity will be interpreted against the government.¹¹² Finally, an appellate court retains jurisdiction to consider the merits of a defendant's appeal notwithstanding a valid appellate waiver, and a waiver

102. *Id.* at 209.

103. *Id.* at 230.

104. *Id.* at 236–38 & tbls.1–6.

105. *See id.* at 233 (discovering anecdotal evidence that “the government backed down in a hurry” from an appellate waiver when faced with the possibility of going to trial).

106. *See id.* at 232 (“The judges realized there was a problem, that they were hurting some defendants by refusing these [waivers].” (alteration in original)).

107. *See id.* at 252–53 (stating that waivers hide violations of certain rules and “skew[] appellate lawmaking”).

108. *Id.* at 239–48.

109. *Id.* at 258. Sentencing reformists widely rely on the merits of appellate review as a means to ensure uniformity in sentencing. Mullen, *supra* note 24, at i–ii.

110. *See, e.g.,* *United States v. Andis*, 333 F.3d 886, 889–90 (8th Cir. 2003) (conditioning the validity of waivers on whether they were entered into in a knowing and voluntary manner and noting that some waivers may still be unenforceable if their enforcement would work a miscarriage of justice).

111. *See supra* Part II.A.3 for a discussion of plea-colloquy procedure requiring that plea bargain waivers be both knowing and voluntary.

112. *Andis*, 333 F.3d at 890.

provision will not be enforced if it would “work a miscarriage of justice.”¹¹³

1. Appellate Waivers Are Strictly Limited to Their Language and Construed Against the Government

A defendant’s waiver of postconviction relief will be strictly limited to those claims that are expressly waived in the plea agreement, as a guilty plea and any attendant waivers are bound by the requirement that they be entered into knowingly and voluntarily.¹¹⁴ Therefore, a defendant may not waive postconviction claims that challenge the knowing and voluntary nature of the waiver, including claims that challenge the constitutional sufficiency of counsel provided in regards to the plea and waiver itself.¹¹⁵ Finally, a waiver will not bar a claim that falls outside the clearly defined scope of the waiver.¹¹⁶

The particular scope of each appellate waiver depends upon the narrow application of the precise language used,¹¹⁷ and any ambiguity will be interpreted against the government.¹¹⁸ An enforceable waiver must contain “a clear statement elucidating the waiver and delineating its scope.”¹¹⁹ If there is any ambiguity in the agreement’s language, it “should be resolved in favor of allowing the appeal to proceed.”¹²⁰ As such, a claim will be allowed to proceed if it is not explicitly barred in the plea agreement’s appellate waiver.¹²¹ If a waiver is made conditional on a future event, the waiver will not be enforced if that condition is not met.¹²² Finally, an appellate waiver will not be enforced if the government breaches its own obligations

113. *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007).

114. See *supra* Part II.A.3 for a discussion of plea colloquy procedure requiring that plea bargain waivers be both knowing and voluntary.

115. *DeRoo v. United States*, 223 F.3d 919, 924 (8th Cir. 2000). A claim of ineffective counsel at the plea stage is distinguishable from a claim of ineffective counsel at sentencing because the claim at the plea stage may call into question the knowing and voluntary nature of the waiver or the entire plea agreement itself. *United States v. Shedrick*, 493 F.3d 292, 298 (3d Cir. 2007). *But see* Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance—Waiving Padilla and Frye*, 51 DUQ. L. REV. 647, 660 (2013) (highlighting that “a defendant’s waiver of the right to any assistance of counsel, as well as the right to of [sic] conflict-free representation, can be knowing and voluntary even without the separate advice of competent counsel” but ultimately arguing that courts should not routinely enforce such waivers).

116. See, e.g., *Andis*, 333 F.3d at 890 (stating that plea agreements will be strictly construed).

117. *Id.*

118. *United States v. Ríos-Hernández*, 645 F.3d 456, 461 (1st Cir. 2011); *Andis*, 333 F.3d at 890.

119. *United States v. Teeter*, 257 F.3d 14, 24 (1st Cir. 2001).

120. *Ríos-Hernández*, 645 F.3d at 461; see also, e.g., *United States v. Irvin*, 429 F. App’x 182, 186 (3d Cir. 2011) (finding that it was an abuse of discretion to deny defendant’s motion for a new attorney “[w]ithout making any inquiry of [defendant] as to why he felt his lawyer could not adequately represent him at sentencing”).

121. See, e.g., *United States v. Roberts*, No. 08-151-JJF, 2010 WL 3021513, at *2 (D. Del. July 29, 2010) (considering the merits of defendant’s § 2255 claim because it was not barred by the plea agreement but denying a certificate of appealability because the defendant failed to adequately show the denial of a constitutional right).

122. See *United States v. Fernández-Cabrera*, 625 F.3d 48, 51 (1st Cir. 2010) (finding that an appeal could proceed where the district court chose not to follow the parties’ joint sentencing recommendation on which waiver was conditioned).

under the plea agreement.¹²³

2. The Potential for a Miscarriage of Justice Will Allow an Appeal to Proceed

Additionally, an appellate waiver will not bar a defendant's appeal if the waiver's enforcement would "work a miscarriage of justice."¹²⁴ Plea agreements are subject to more stringent public policy constraints than other kinds of contracts, and courts have recognized that "a defendant who waives his right to appeal does not subject himself to being sentenced entirely at the whim of the district court."¹²⁵ The First Circuit cautioned that "such waivers are meant to bring finality to proceedings conducted in the ordinary course, not to leave acquiescent defendants totally exposed to future vagaries."¹²⁶

Accordingly, courts have chosen not to identify specific circumstances where a valid appellate waiver may be set aside to prevent a miscarriage of justice and have instead reviewed appellate waivers in light of their relevant facts on a case-by-case basis.¹²⁷ However, it is universally accepted that an appellate waiver will not bar the appeal of an illegal sentence.¹²⁸ A sentence is illegal when the sentence imposed is greater than the law allows or is grounded in a constitutionally impermissible factor such as race.¹²⁹ A miscarriage of justice may also occur where an otherwise valid appellate waiver would enact a result that could "seriously affect the fairness, integrity or public reputation of judicial proceedings."¹³⁰ However, the appellant has the burden of establishing that enforcement of the waiver will result in a manifest injustice¹³¹ and must show a strong possibility of "innocence, unfairness, or the like" if the waiver were to be enforced.¹³²

123. *United States v. Schwartz*, 511 F.3d 403, 405 (3d Cir. 2008). However, the remedy granted for a breach will vary from case to case. *Compare* *United States v. Moscahlaidis*, 868 F.2d 1357, 1363 (3d Cir. 1989) (finding that defendant's case should be remanded to determine whether to grant specific performance or allow withdrawal of the plea), *with* *United States v. Pressley*, 865 F. Supp. 2d 606, 616 (D.N.J. 2012) (finding that the proper remedy for the government's breach in filing additional charges against the defendant was to dismiss the second indictment without prejudice).

124. *United States v. Gwinnett*, 483 F.3d 200, 203 (3d Cir. 2007).

125. *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

126. *United States v. Teeter*, 257 F.3d 14, 25 (1st Cir. 2001).

127. *United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001) (citing *Teeter*, 257 F.3d at 25–26).

128. *See* *United States v. Greatwalker*, 285 F.3d 727, 729–30 (8th Cir. 2002).

129. *See, e.g.,* *United States v. Kaba*, 480 F.3d 152, 157–58 (2d Cir. 2007) (vacating sentence based in part on the defendant's status as a member of the West African immigrant community); *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (adopting the holding that an appellate waiver does not prevent an appeal if the sentence exceeds the maximum penalty or was grounded on an unconstitutional factor); *United States v. Jacobson*, 15 F.3d 19, 22–23 (2d Cir. 1994) (allowing defendant's appeal to proceed where he asserted that he was sentenced to a harsher degree than his co-conspirators based on his status as a naturalized citizen).

130. *United States v. Hahn*, 359 F.3d 1315, 1329 (10th Cir. 2004).

131. *See* *United States v. Castro*, 704 F.3d 125, 138 (3d Cir. 2013) (stating that the appellant has the burden of showing that the government could not prove every element of the crime and therefore enforcement of the waiver would result in manifest injustice); *United States v. Gwinnett*, 483 F.3d 200, 206 (3d Cir. 2007) (determining the defendant waived her right to appeal because she failed to prove that injustice would result from enforcing the waiver).

132. *United States v. Torres-Oliveras*, 583 F.3d 37, 43 (1st Cir. 2009) (quoting *United States v.*

3. Other Restrictions on the Use of Appellate Waivers

The improper use or abuse of appellate waivers could also undermine the integrity of the judicial system, and courts have stated that appellate waivers should be scrutinized to protect the integrity of the courts and prosecutors.¹³³ As such, the Department of Justice has directed its attorneys to use caution when implementing appellate waivers.¹³⁴ The United States Attorneys' Manual warns that abuse of appellate waivers could lead to sentencing consistently outside of the Guidelines or could even "encourage a lawless district court to impose sentences in violation of the guidelines."¹³⁵ Therefore, the Manual encourages prosecutors to voluntarily disregard a waiver provision in these situations or others where its enforcement might result in a miscarriage of justice.¹³⁶ Additionally, a small number of lower courts have chosen to invalidate these waivers on grounds of public policy.¹³⁷

Accordingly, a defendant who executes an appellate waiver is not left wholly exposed to any unjust outcome. Courts have specifically stated that appellate waivers cannot bar claims that challenge the knowing and voluntary nature of the waiver itself or a claim that the sentence was based on an illegal factor such as race.¹³⁸ However, other authorities have evaluated these agreements based on their potential to cause inadvertent violations of state rules of professional responsibility.

Gil-Quezada, 445 F.3d 33, 37 (1st Cir. 2006)). Such a circumstance may also occur in a situation where the defendant's counsel negligently failed to file an appeal that was *not* barred by the appellate waiver. *See* Snell v. United States, No. 10-2072 (GEB), 2011 WL 149868, at *8 (D.N.J. Jan. 14, 2011) (finding that defendant must show that counsel disregarded a specific, explicit request to appeal before defendant can be allowed to proceed with his § 2255 claim). This may occur where the defendant was wrongfully denied the right to withdraw his guilty plea. *United States v. Wilson*, 429 F.3d 455, 458 (3d Cir. 2005) (asserting that the enforcement of a guilty plea would be unjust if the defendant should have been able to withdraw his plea); *see also* FED. R. CRIM. P. 11(d)(2)(B) (stating that a defendant will be allowed to withdraw a guilty plea prior to sentencing if the defendant "can show a fair and just reason for requesting the withdrawal").

133. *See* *Moreno-Espada v. United States*, 666 F.3d 60, 68 (1st Cir. 2012) (stating that the prosecutor's "neglectful lapses" could "chip away at the essential presumption that prosecutors can be relied on to perform their official duties properly" (quoting *Ferrara v. United States*, 456 F.3d 278, 293 (1st Cir. 2006) (internal quotation mark omitted))); *see also* *United States v. Harvey*, 791 F.2d 294, 300 (4th Cir. 1986) (stating that courts should be concerned "for the honor of the government, public confidence in the fair administration of justice, and the effective administration of justice in a federal scheme of government" in deciding whether to enforce appellate waivers (quoting *United States v. Carter*, 454 F.2d 426, 428 (4th Cir. 1972) (internal quotation mark omitted))).

134. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' CRIMINAL RESOURCE MANUAL § 626 (1997), http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm.

135. *Id.*

136. *See id.* (stating that a prosecutor should not argue for enforcement of a waiver that could lead to a miscarriage of justice because it may lead a court of appeals to reconsider the validity of waiver provisions).

137. *See, e.g.,* *United States v. Perez*, 46 F. Supp. 2d 59, 64–67 (D. Mass. 1999) (finding the right to appeal protects a "fundamental interest in liberty"); *United States v. Raynor*, 989 F. Supp. 43, 44 (D.D.C. 1997) (noting that an appeal waiver can never be entered into knowingly and voluntarily); *In re* Plea Agreements in Cases Pending Before Chief Judge Mullen, No 3:03-MC-67-MU, 2003 WL 22203475, at *1 (W.D.N.C. Sept. 22, 2003) (stating that any future appellate waivers will not be accepted by the court unless they contain explicit exceptions for ineffective counsel, prosecutorial misconduct, or a misapplied Guidelines issue that had been stipulated to in the plea agreement).

138. *See supra* Part I.I.C.2 for a discussion of appellate waivers that do not bar a defendant's right to appeal because enforcement of the appeal would constitute a miscarriage of justice.

III. STATE ETHICS BOARD OPINIONS

Several states' ethics authorities have considered the consequences of plea bargains that ask a criminal defendant to prospectively waive claims of constitutionally effective counsel in a waiver of postconviction collateral relief, and each have found serious ethical problems with these agreements. Most ethics boards have concluded that these waivers conflict with the Model Rules of Professional Conduct (Model Rules). The ethics boards concluded that these waivers cannot be executed in an ethical manner, as an attorney is theoretically forced to either provide counsel that may be tainted by his conflicting interests or provide no counsel at all regarding the waiver of ineffective assistance claims.¹³⁹ Therefore, the opinion is now widespread that waivers of postconviction collateral relief inherently violate three distinct rules of professional ethics.

Several ethics boards have applied straightforward reasoning to find that waivers of ineffective counsel claims present impermissible conflicts of interest that could compromise the quality of counsel given to defendants.¹⁴⁰ This prohibition is expressed by Model Rule 1.7, which prevents an attorney from representing a client if the representation could be materially limited by the attorney's own interests.¹⁴¹ These ethics authorities have therefore reasoned that attorneys cannot counsel their clients to waive future ineffective assistance claims because attorneys could never counsel their clients to waive pending claims against them.¹⁴² Accordingly, the opinion is widespread that this particular type of waiver simply cannot be executed without appearing to serve a lawyer's own interests over those of the criminal defendant.¹⁴³

139. Both circumstances may impinge on a defendant's Sixth Amendment right to effective counsel. *See Missouri v. Frye*, 132 S. Ct. 1399, 1407–08 (2012) (finding that defendants have a right to effective counsel at the plea bargaining stage of prosecution). See *infra* Section IV for a discussion of the legal considerations applied by courts to various types of conflicts of interest.

140. *See, e.g.*, Ala. State Bar Office of Gen. Counsel, Formal Op. 2011-02 (2011) (determining that waivers of claims of ineffective counsel violate several Alabama ethics rules); Ky. Bar Ass'n, Advisory Op. KBA E-435 (2013) (stating that neither a criminal defense lawyer nor a prosecutor may advise or propose that defendants accept plea agreements waiving claims of ineffective assistance of counsel); Advisory Comm. of the Supreme Court of Mo., Formal Op. 126 (2009) (finding that waivers of claims of ineffective counsel violate three of that state's ethics rules); Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. 12-02 (2012) (advising that attorneys cannot advise a client on or propose a plea agreement including a waiver to claims of ineffective counsel); Vt. Bar Ass'n, Advisory Op. 95-04 (1995) (stating that an attorney may not recommend that a defendant enter a plea agreement containing provisions that waive claims of ineffective assistance of counsel or prosecutorial misconduct).

141. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (2012).

142. *See, e.g.*, Ala. State Bar Office of Gen. Counsel, Formal Op. 2011-02 (noting that it would be "hard to conceive of a situation where it would be in the interests of a lawyer for his client to file an ineffective assistance of counsel claim"); State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 48 (2011) (providing that "[a]n attorney should not be in a position to make a decision as to the effectiveness of his own representation, particularly when, as here, the decision will be final and unreviewable").

143. This line of reasoning has also been employed by the state ethics boards in Alabama, Virginia, Vermont, Nevada, Missouri, Florida, North Carolina, Kentucky, and Utah, as well as the National Association of Criminal Defense Lawyers, which have all found that the presence of this conflict of interest would negatively impact the quality of representation received by defendants. Ala. State Bar Office of Gen. Counsel, Formal Op. 2011-02; Prof'l Ethics of the Fla. Bar, Op. 12-1 (2012); Ky. Bar Ass'n, Advisory Op. KBA E-435;

Several state ethics boards have also found that these agreements may violate rules that prevent an attorney from prospectively limiting his liability to a client for malpractice,¹⁴⁴ as expressed in Model Rule 1.8(h)(1).¹⁴⁵ Although the text of this provision explicitly refers to malpractice, a majority of ethics boards have drawn sufficient connections to a claim of ineffective assistance of counsel.¹⁴⁶ A defendant's inability to secure a reversal of the underlying conviction through a claim alleging constitutional ineffectiveness could eliminate the defendant's ability to establish proximate cause in a legal malpractice claim.¹⁴⁷ Accordingly, these authorities have reasoned that such agreements should be prohibited because they will *always* appear to be unethical from an outside perspective.¹⁴⁸ Additionally, these authorities have reasoned that criminal defendants should not suffer from lesser protections "simply because they usually seek habeas corpus relief rather than malpractice damage awards."¹⁴⁹

However, the alternative opinion states that defense attorneys must be trusted to use their own judgment as to whether a particular instance presents an irreconcilable conflict of interest.¹⁵⁰ As such, the Supreme Court of Texas Professional Ethics Committee reasoned that a criminal defense lawyer must consider the application of ethical rules in each case involving a postconviction waiver of collateral relief.¹⁵¹ Likewise, other authorities have disagreed that a waiver of the right to collateral relief

Advisory Comm. of the Supreme Court of Mo., Formal Op. 126; Nat'l Ass'n of Criminal Def. Lawyers Ethics Advisory Comm., Formal Op. 12-02; State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 48; N.C. State Bar, Op. RPC 129 (1993); Va. State Bar, Op. 1857 (2011); Utah State Bar, Advisory Op. 13-04 (2013); Vt. Bar Ass'n, Advisory Op. 95-04.

144. See Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Informal Op. 2001-06 (2001) (finding that a waiver of ineffective assistance claims could function as a waiver of malpractice claims by destroying the defendant's ability to establish proximate cause); Vt. Bar Ass'n, Advisory Op. 95-04 (concluding that language that waives a defendant's right to bring collateral attacks based on his attorney's errors may function as a waiver of malpractice claims).

145. MODEL RULES OF PROF'L CONDUCT R. 1.8(h).

146. See *supra* note 144 for a list of opinions that have found that these agreements appear to serve the lawyer's interests over the client's.

147. See Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Informal Op. 2001-06 (noting that the underlying facts necessary to establish a claim of ineffective assistance may be identical to the facts necessary to establish a malpractice claim).

148. See, e.g., Prof'l Ethics of the Fla. Bar, Op. 12-1 (2012) (stating that a "disinterested lawyer would be unlikely to reach the conclusion that the criminal defense lawyer could give objective advice about that lawyer's own performance").

149. See State Bar of Ariz., Op. 95-08 (1995) (dissenting opinion) (disagreeing with majority opinion that plea agreements waiving future claims of ineffective assistance do not violate rule prohibiting prospective limitation of malpractice liability); Ohio Supreme Court Bd. of Comm'rs on Grievances & Discipline, Informal Op. 2001-06 (determining that a waiver of ineffective counsel claims constitutes an attempt to limit malpractice liability because of the necessary elements to prove malpractice). Florida, Alabama, Vermont, Nevada, and Kentucky have all agreed with this reasoning and concluded that prospective waivers of ineffective counsel claims violate their state's version of Model Rule 1.8(h). Ala. State Bar Office of Gen. Counsel, Formal Op. 2011-02 (2011); Prof'l Ethics of the Fla. Bar, Op. 12-1 (2012); Ky. Bar Ass'n, Advisory Op. KBA E-435 (2013); State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 48 (2011); Vt. Bar Ass'n, Advisory Op. 95-04 (1995).

150. Supreme Court of Tex. Prof'l Ethics Comm., Op. 571 (2006).

151. *Id.*

is sufficiently similar to malpractice to trigger Model Rule 1.8's prohibition. The authorities have reasoned that the defendant is not executing an agreement with his attorney, as the rule contemplates, but instead is executing an agreement with the government that is not intended to limit liability for malpractice in any way.¹⁵² Finally, these agreements have been compared to a standard settlement agreement executed in a civil case, where both parties waive any claims related to the litigation being settled.¹⁵³ As such, a reasonable court would not allow an appellate waiver executed for the benefit of the government to preclude a malpractice claim against a defendant's former attorney.¹⁵⁴

Although a majority of ethics boards have found that waivers of postconviction collateral relief are not permissible under current ethical guidelines, the authorities remain split. Furthermore, these ethical opinions are not binding in any legal proceeding,¹⁵⁵ but they do, however, represent the primary guidelines of professional conduct for practicing attorneys and provide guidance for courts' legal consideration of effective attorney conduct.¹⁵⁶

IV. CONFLICTS OF INTEREST AND PLEA BARGAINS IN FEDERAL COURTS

There are many instances in the course of a criminal defense where the possibility of a conflict of interest could arise, and federal courts will examine each conflict in light of its effect on a defendant's right to effective counsel. As the right to conflict-free counsel is considered to be correlative of a defendant's Sixth Amendment rights,¹⁵⁷ it is well established that legal assistance given under conflicting interests does not satisfy this right.¹⁵⁸ However, not all conflicts of interests have the same potential to affect a

152. See, e.g., State Bar of Ariz., Op. 95-08 (finding that the purpose of the agreement is for the government to limit its appellate burden "as part of the quid pro quo for the plea of guilty to a lesser charge"); Va. State Bar, Op. 1857 (2011) (reasoning that the claims are distinguished by their parties and the remedy sought).

153. See State Bar of Ariz., Op. 95-08 (finding that in such cases a lawyer "is not violating [Rule] 1.8(h) because he is not entering into an agreement in which he is prospectively limiting his liability to his client for malpractice").

154. See Supreme Court of Tex. Prof'l Ethics Comm., Op. 571 (finding that, "upon a consideration of the relevant public policy concerns arising from the circumstances surrounding plea agreements . . . a court . . . would not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim"); see also, e.g., *Bailey v. Tucker*, 621 A.2d 108, 115 (Pa. 1993) (stating that a criminal defendant may admit into evidence the outcome of any available appellate procedure when pursuing a civil malpractice claim, but that the results of those claims will not be dispositive of establishing culpable conduct in his action for malpractice).

155. See State Bar of Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 48 (2011) (finding that the "Rules of Professional Conduct . . . proscribe unethical conduct regardless of the potential existence of a legal remedy"); N.C. State Bar, Ethics Op. RPC 129 (1993) ("Whether a plea agreement is constitutional and otherwise lawful is a question to be determined by the courts. Whether the conduct of attorneys with respect to a plea agreement is ethical is a question addressed concurrently to the courts and the State Bar.").

156. See *infra* note 176 and accompanying text for an example of how courts may use ethics boards' opinions in legal proceedings.

157. *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

158. See *United States v. Cronin*, 466 U.S. 648, 658, 661 n.28 (1984) (stating that effective assistance, which is guaranteed by the Sixth Amendment, is presumed to be violated when counsel represents conflicting

defendant's rights,¹⁵⁹ and a conflict that arises from an attorney's personal interests is considered to be much less hazardous than a conflict that arises between multiple clients' interests.¹⁶⁰ However, both of these conflicts may impact the quality of counsel received by a defendant at the plea bargaining stage, and a criminal defendant may therefore allege that his attorney's conflict of interest induced him to enter into an unfavorable plea bargain.¹⁶¹ However, in almost all cases, a defendant may consent to representation that is nonetheless theoretically conflicted.¹⁶²

A. *Multiple Representation*

The most potentially troublesome form of conflict arises where a defense attorney simultaneously represents multiple defendants who are likely to have divergent interests—a situation known as concurrent multiple representation.¹⁶³ Because the jointly represented defendants' interests are likely to diverge at some point during the proceedings,¹⁶⁴ their attorney may not be able to advocate vigorously on behalf of one client without doing harm to the other. Therefore, this type of conflict renders the ensuing disposition fundamentally unreliable.¹⁶⁵ Accordingly, Rule 44 of the Federal Rules of Criminal Procedure places an explicit responsibility on the trial court to investigate any potential conflict of interest in these cases, so as to prevent serious harm to unwitting defendants.¹⁶⁶ A court must promptly inquire into any such potential conflict of interest of which it knows or has a reason to know.¹⁶⁷

interests). Because federal courts must constrain their regulation of attorney conduct to only that which could interfere with a defendant's right to a fair trial, the goal of the inquiry is to ensure that the defendant has received a fair trial rather than to punish unethical attorney conduct. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (stating that federal courts must limit their inquiry into objectively reasonable attorney conduct and take care not to "constitutionalize particular standards of professional conduct").

159. See *Mickens v. Taylor*, 535 U.S. 162, 174–75 (2002) (suggesting that a higher burden of proof should be applied when considering conflicts involving an attorney's personal interests).

160. See *Beets v. Scott*, 65 F.3d 1258, 1270 (5th Cir. 1995) (differentiating conflicts rooted in attorney self-interest from conflicts based on multiple representation and suggesting that the latter constitutes a more serious type of conflict).

161. See, e.g., *Moss v. United States*, 323 F.3d 445, 468 (6th Cir. 2003) (finding that in the absence of a plea the defendant must demonstrate that his attorney's conflict of interest prevented the investigation of plea negotiations); *Thomas v. Foltz*, 818 F.2d 476, 479–80 (6th Cir. 1987) (stating that the court must determine whether the defendant was persuaded to enter a plea agreement based on the advice of conflicted counsel). Advice given by conflicted counsel must be shown to have tainted the defendant's decision to enter the plea agreement itself. See *Hill v. Lockhart*, 474 U.S. 52, 58–59 (1985) (stating that the defendant must prove that there is reasonable probability that without the counsel's ineffectiveness he would have not pleaded guilty).

162. See *infra* notes 168–70 and accompanying text for examples of cases in which the defendant consented to joint representation and the impending likelihood of conflicted counsel.

163. See *Mickens*, 535 U.S. at 168 (concluding that "joint representation of conflicting interests is inherently suspect").

164. See *Cuyler v. Sullivan*, 446 U.S. 335, 348 (1980) (finding that "a possible conflict inheres in almost every instance of multiple representation"); *Beets*, 65 F.3d at 1270 (stating that representation of multiple defendants poses a straightforward danger of conflicts).

165. *Beets*, 65 F.3d at 1270.

166. See FED. R. CRIM. P. 44(c)(2) (articulating the trial court's duty to "promptly inquire about the propriety of joint representation").

167. See, e.g., *United States v. Salado*, 339 F.3d 285, 290–91 (5th Cir. 2003) (remanding case based on

However, concurrent multiple representation does not offend a defendant's Sixth Amendment rights until it gives rise to an *actual* conflict of interest, and a codefendant may waive his right to conflict-free counsel in consenting to the risks of joint representation.¹⁶⁸ As criminal defendants are given great freedom in determining how they may conduct their defense,¹⁶⁹ the Supreme Court has noted that there are circumstances in which it may even be beneficial for multiple defendants to be represented by the same attorney.¹⁷⁰

B. *Personal Conflicts*

In cases where attorneys' personal interests may theoretically conflict with their clients', counselors are presumed to subordinate their pecuniary interests to honor their professional responsibilities to their clients.¹⁷¹ As the fundamental purpose of inquiring into a possible conflict is to determine whether the outcome of the proceeding was reliable, courts have determined that personal conflicts simply do not warrant the same presumption of unreliability granted to conflicts arising from multiple representation.¹⁷²

finding that district court did not conduct a proper Rule 44 hearing); *United States v. Blount*, 291 F.3d 201, 211 (2d Cir. 2002) (stating that in order to protect a criminal defendant's right to conflict-free counsel, an inquiry is required when "the trial court knows or reasonably should know that a particular conflict exists") (quoting *Cuyler*, 446 U.S. at 347)); *United States v. Levy*, 25 F.3d 146, 153 (2d Cir. 1994) (recognizing that a district court has a duty to investigate as to whether the defendant suffers from "an actual conflict, a potential conflict, or no genuine conflict at all").

168. See, e.g., *Mickens*, 535 U.S. at 171 (noting that an actual conflict of interest is one "that affected counsel's performance—as opposed to a mere theoretical division of loyalties"); *United States v. Rico*, 51 F.3d 495, 509–12 (5th Cir. 1995) (finding that knowing and voluntary waiver of right to conflict-free counsel in a case of joint representation is presumptively valid unless the waiver would undermine the integrity of the judicial system).

169. See *supra* notes 90–94 and accompanying text for examples of how criminal defendants are free to conduct their own defenses. A criminal defendant may generally consent to representation that is conflicted; however, a defendant's right to counsel of his choice is not absolute and "must be balanced against the requirements of the fair and proper administration of justice." See *Davis v. Stamler*, 650 F.2d 477, 479–80 (3d Cir. 1981) (concluding that the state trial court judge did not prejudice the defendant's Sixth Amendment rights by denying his choice of counsel whom the court considered to be conflicted).

170. See *Holloway v. Arkansas*, 435 U.S. 475, 482–83 (1978) (stating that "[j]oint representation is a means of insuring against reciprocal recrimination. A common defense often gives strength against a common attack" (quoting *Glasser v. United States*, 315 U.S. 60, 92 (1942) (Frankfurter, J., dissenting))).

171. See *United States v. Mota-Santana*, 391 F.3d 42, 46 (1st Cir. 2004) (citing *Mickens*, 535 U.S. at 174) (reserving a presumption of prejudice for conflicts arising from multiple representation); *United States v. DiCarlo*, 575 F.2d 952, 957 (1st Cir. 1978) (finding that, where personal conflicts are speculative, there is a presumption that the lawyer will prioritize his professional responsibility over his own pecuniary interests); ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION, Standard 4-3.5(a), (b) (Am. Bar Ass'n 3d ed. 1993) [hereinafter STANDARDS FOR CRIMINAL JUSTICE] (stating that defense counsel should not let his professional judgment or obligations be compromised by personal interests and should disclose to his client any potential conflicts).

172. See *Beets v. Scott*, 65 F.3d 1258, 1270–71, 1279 (5th Cir. 1995) (holding that an attorney who had a personal conflict with his client because he obtained the media rights to his client's story was not deficient or prejudicial in his actions). Although the defendant's burden of proof to warrant relief in cases of a personal conflict of interest is subject to a split of opinion in the federal circuits, this Comment will follow the view expressed as dicta by Justice Scalia in *Mickens*, 535 U.S. at 174–76. Justice Scalia suggested that *Cuyler's* presumption of prejudice should not be applied to personal conflicts, or those outside of concurrent multiple representation, but ultimately stated that it represents an "open question." *Id.*; see also *Mota-Santana*, 391 F.3d

Some personal conflicts may be “wholly benign,” yet others may be “devastating” to the fairness of a defendant’s trial.¹⁷³ Therefore, a claimant must demonstrate the presence of a conflict of interest so severe that it would “undermine confidence in the outcome [of the proceeding].”¹⁷⁴

As such, the breach of an ethical standard may not necessarily threaten a defendant’s Sixth Amendment right to counsel.¹⁷⁵ However, when virtually all sources “speak with one voice” as to what may constitute the boundaries of reasonable attorney performance, courts may consider ethical canons and ABA guidelines indicative of what constitutes a deprivation of the Sixth Amendment right to counsel.¹⁷⁶

C. *Litigation of the Conflict Raised by the Ethics Boards*

Few courts have grappled with the issue of whether plea bargain waivers of ineffective assistance claims present a criminal defense attorney with a conflict of interest.¹⁷⁷ However, as the issue has gained attention from state ethics boards, courts have expressed a desire to consider the issue on its legal merit.¹⁷⁸ Defendants who have raised the issue on appeal have asserted that their prospective waiver of ineffective counsel was unknowingly executed because the inherent conflict of interest rendered any counseling on its terms constitutionally ineffective.¹⁷⁹

at 46 (citing *Mickens*, 535 U.S. at 174) (reserving a presumption of prejudice for conflicts arising from multiple representation).

173. See *Beets*, 65 F.3d at 1271 (stating that “[w]hen the duty of loyalty is challenged by an attorney’s self-interest, the range of possible breaches . . . is virtually limitless”); see also *United States v. O’Neil*, 118 F.3d 65, 71–72 (2d Cir. 1997) (finding that where a defendant has failed to pay his attorney, courts will presume that the attorney has continued to execute his professional and ethical duties towards the client unless the client can demonstrate otherwise); *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985) (declining to assume that an attorney who had not yet been paid for his services had acted with the motivation to prevent a second trial); *United States v. Jeffers*, 520 F.2d 1256, 1265 (7th Cir. 1975) (noting that the record in the case supported the presumption that the lawyer will subordinate his pecuniary interests and honor his primary professional responsibility in the matter at hand); STANDARDS FOR CRIMINAL JUSTICE, *supra* note 171, at Standard 4-3.5(a), (b) (stating that defense counsel should not let his professional judgment or obligations be compromised by personal interests and should disclose to his client any potential conflicts).

174. *Nix v. Whiteside*, 475 U.S. 157, 165 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)); see also, e.g., *United States v. Zackson*, 6 F.3d 911, 921 (2d Cir. 1993) (determining that a defense attorney’s conflict of interest stemming from his busy schedule does not render his assistance of counsel deficient).

175. See *Nix*, 475 U.S. at 165 (stating that a “court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct”).

176. *McClure v. Thompson*, 323 F.3d 1233, 1242 (9th Cir. 2003) (quoting *Nix*, 475 U.S. at 166).

177. See *infra* notes 180–83 and accompanying text for examples in which courts have addressed the conflict of interest issues that plea bargain waivers present.

178. See, e.g., *Watson v. United States*, 682 F.3d 740, 744 (8th Cir. 2012) (expressing in dicta a desire to consider the issue raised by state ethics boards but refraining from doing so until it is briefed by the parties in a future case).

179. See, e.g., *United States v. Dorsey*, No. 92-5445, 1993 WL 329985, at *2–3 (4th Cir. Aug. 31, 1993) (finding that the claimant’s appeal was not barred by the waiver but that the conflict of interest did not invalidate the entire plea).

1. The Missouri Supreme Court: A Model for Analysis of the Conflict

A thorough analysis of the conflict can be found in the opinions of the Missouri Supreme Court, in which the court extensively considered the issue of whether a personal conflict of interest arising from a prospective waiver of postconviction collateral relief may invalidate that waiver.¹⁸⁰ In one such case, the court reaffirmed the notion that a defendant may always challenge the effectiveness of counsel in regards to the plea agreement itself¹⁸¹ but denied relief to the claimant as the record clearly refuted his assertions.¹⁸² In dicta, however, the court continued to discuss the cited ethics opinion itself, noting that “a violation of a professional rule of discipline does not equate to a constitutional violation.”¹⁸³

2. Litigation of the Conflict in Federal Courts

Although no federal court of appeals has fully considered the conflict at issue,¹⁸⁴ some courts have expressed skepticism about the efficacy of the defendant’s waiver provision in light of the claimed conflict of interest.¹⁸⁵ In denying relief to an appellant

180. See *Cooper v. State*, 356 S.W.3d 148, 157 (Mo. 2011) (en banc) (finding that defendant must demonstrate that his attorney labored under an actual conflict in order to gain relief from his appellate waiver); *Krupp v. State*, 356 S.W.3d 142, 148 (Mo. 2011) (en banc) (finding that a defendant who alleges an actual conflict amounting to ineffective assistance must prove that something was “done by counsel or something must have been forgone by counsel and lost to the defendant, which was detrimental” (quoting *Cooper*, 356 S.W.3d at 155)). In the preceding cases, both appellants’ claims cited Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri and asserted that each of their attorneys had given counsel to sign the agreement in order to protect their own interests, thereby rendering the attorneys’ assistance ineffective under an actual conflict. *Cooper*, 356 S.W.3d at 153–54; *Krupp*, 356 S.W.3d at 147. See *supra* Section III for a discussion of Formal Opinion 126 of the Advisory Committee of the Supreme Court of Missouri and other state ethics board opinions regarding the claimed conflict of interest.

181. *Cooper*, 356 S.W.3d at 154 (citing *DeRoo v. United States*, 223 F.3d 919, 923–24 (8th Cir. 2000)).

182. See *id.* at 156–57 (citing MO. SUP. CT. R. 24.035(h)) (stating that the defendant had failed to show that his attorney had labored under an actual conflict of interest that would justify a finding of ineffective counsel).

183. *Id.* at 157 (citing *Nix v. Whiteside*, 475 U.S. 157, 165 (1986)). The court noted that, “for unexplained reasons,” the Advisory Committee of the Supreme Court of Missouri had failed to reference or discuss any of the state or federal court decisions that overwhelmingly approved of the waiver of postconviction relief in a plea bargain, that no attorneys had yet to petition the court to review Formal Opinion 126, and that no discipline had been sought against an attorney for violation of the opinion’s ruling. *Id.* at 156–57.

184. See, e.g., *United States v. Mitchell*, 538 F. App’x 201, 202–03 (3d Cir. 2013) (finding that consideration of the ethical issue was barred by waiver on direct appeal); *Washington v. Lampert*, 422 F.3d 864, 873 (9th Cir. 2005) (dismissing the conflict as speculative without considering the reasoning of the state ethics boards); *United States v. Dorsey*, No. 92-5445, 1993 WL 329985, at *2–3 (4th Cir. Aug. 31, 1993) (finding that a conflict of interest did not invalidate an entire plea agreement).

185. See *United States v. Grimes*, 739 F.3d 125, 130 n.3 (3d Cir. 2014) (recognizing the ethical and constitutional issues raised by the defendant and ethics authorities but declining to address the conflict directly on the facts presented); *Watson v. United States*, 682 F.3d 740, 744 (8th Cir. 2012) (expressing a desire to consider the issue in dicta but withholding its opinion until the issue is briefed by the parties in a future case); *United States v. Deluca*, No. 08-108, 2012 WL 5902555, at *10 (E.D. Pa. Nov. 26, 2012) (questioning the government’s suggestion that the conflict is merely theoretical or speculative upon recognizing “an emerging trend” among state ethics boards to recognize the conflict at issue).

who cited Virginia State Bar Legal Ethics Opinion No. 1857,¹⁸⁶ a court dismissed the conflict as merely theoretical and found that there was no evidence to suggest that the claimant's attorney acted unethically or specifically advised his client to plead guilty to protect the attorney against a claim of ineffective assistance.¹⁸⁷ However, a more recent district court opinion noted that many of the other federal decisions dismissing the conflict were decided prior to the release of, or without proper consideration of, the relevant state ethics opinions.¹⁸⁸ In declining the government's suggestion to dismiss the conflict at issue in that case as merely speculative, the court reasoned that "the weight of ethics opinions to the contrary gives this Court pause in doing so."¹⁸⁹

Although most courts have found that a potential conflict of interest in prospective waivers of ineffective counsel claims does not present a great danger to defendants, the issue has not been fully considered. Courts have expressed interest in considering the issue, and recent decisions have cast doubt on the assumption that the conflict at issue may be dismissed as merely theoretical.

V. DISCUSSION

Prospective waivers of collateral relief should remain a part of plea bargaining, so that guilty defendants remain free to trade some of their rights for a more favorable disposition of their cases. However, these waivers require the aid of effective and unconflicted counsel in every instance.¹⁹⁰ Because a defendant's right to an effective attorney may be the most important right that he possesses, any conflict of interest that could potentially undermine this right should be fully scrutinized.¹⁹¹ Therefore, federal courts must take affirmative steps to recognize the conflict presented by the majority of ethics boards. They also must continue to ensure that prospective waivers of postconviction collateral relief "are conducted within the ethical standards of the profession and . . . appear fair to all who observe them."¹⁹² Courts must embrace the duty articulated by the Eighth Circuit: that a court possesses the power to reject a plea that it considers "inequitable or otherwise objectionable."¹⁹³

186. See Va. State Bar, Op. 1857 (2011) (finding that it is a breach of ethics rules for a defense attorney to advise his client to execute a prospective waiver of collateral relief).

187. See *United States v. Stevens*, 813 F. Supp. 2d 758, 770 (W.D. Va. 2011) (determining that it is not unethical for an attorney to advise clients *about* the waiver provision, but it would be unethical for the attorney to advise the clients to accept it).

188. *Deluca*, 2012 WL 5902555, at *10. The court cited several opinions from other circuits. See *Lampert*, 422 F.3d at 873 (dismissing defendant's claim as merely theoretical without considering the possible effect of the ethics board opinions); *United States v. Wells*, No. 95-56595, 1996 WL 553072, at *1 (9th Cir. Sept. 27, 1996) (dismissing defendant's claim as purely speculative and without merit); *Branks v. United States*, No. 8:09-cr-431-T-33TGW, 2012 WL 206969, at *11 (M.D. Fla. Jan. 24, 2012) (finding that defendant could not show that an actual conflict existed or that the conflict affected counsel's performance).

189. *Deluca*, 2012 WL 5902555, at *10.

190. See *supra* Section II for a discussion of prospective waivers of appellate rights.

191. See *supra* notes 166-67 and accompanying text for a description of the importance of the trial court's role in investigating the effects of a known conflict of interest.

192. *Wheat v. United States*, 486 U.S. 153, 160 (1988).

193. See *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (finding that "[the court's] authority to reject a plea agreement, if it is inequitable or otherwise objectionable, operates as a further check on either party's over-reaching").

Under this consideration, courts should require two additional on-the-record plea-colloquy disclosures that are consistent with the goals of Federal Rules of Criminal Procedure 11 and 44.¹⁹⁴ First, the court should require the government to present an alternative plea agreement free from a waiver of postconviction relief, so that the defendant and court can clearly ascertain what specific benefit (if any) the defendant has received for relinquishing this right. Second, the court should gain verbal affirmation from the defendant that he knows of the potential conflict of interest in his attorney's advice, so that no defendant unknowingly consents to counsel that the court has reason to know may have been operating under a conflict of interest.

A. *Prospective Waivers of Postconviction Collateral Relief Do Not Present an Actual Conflict of Interest in All Cases*

Although a majority of authorities have concluded otherwise, prospective waivers of ineffective assistance claims do not present a criminal defense attorney with an actual conflict of interest in all cases. These authorities assert that such an agreement may prevent a defendant from challenging the nature of his underlying conviction and have so misunderstood these agreements' potential legal effect.¹⁹⁵ However, in the interest of preserving every defendant's right to effective counsel, it should be presumed that these agreements may actually present such dangers.

The majority of ethics authorities that have addressed the topic have found that prospective waivers of postconviction collateral relief may present a defense attorney with a conflict of interest.¹⁹⁶ Considering that an attorney cannot normally counsel a client to prospectively waive a civil malpractice claim, many have argued that a waiver of collateral relief may similarly preclude a challenge to the defendant's underlying conviction, and may therefore eliminate a defendant's ability to show proximate cause in such a malpractice claim.¹⁹⁷ However, a defendant who signs an appellate waiver may *always* challenge his underlying guilty plea.¹⁹⁸ Additionally, it is inaccurate to presume that such an agreement would insulate a defense attorney from future civil malpractice liability.¹⁹⁹

Accordingly, other authorities have disagreed that these waivers do present an actual conflict of interest, noting that the attorney is not a party to the contract in a waiver of postconviction relief where the defendant releases his claims against the government.²⁰⁰ Therefore, it is reasonable to believe that a court would not allow such a waiver to preclude a criminal defendant's malpractice case against his attorney, and

194. See *supra* Part II.A.3 for a discussion of Rule 11 plea-colloquy procedure and its policy goals. See *supra* notes 166–67 and accompanying text for a discussion of the requirements of Rule 44.

195. See *supra* notes 144–49 and accompanying text for a discussion of ethics authorities that have found claims of ineffective assistance and legal malpractice to be sufficiently related.

196. See *supra* Part III for a discussion of state ethics board opinions.

197. See *supra* note 147 for an example of when a waiver of collateral relief may eliminate a defendant's inability to show proximate cause in a malpractice claim.

198. See *supra* note 115 for cases illustrating that a defendant cannot waive the right to challenge a guilty plea.

199. See *supra* note 154 for a case stating that the defendant may still pursue a civil malpractice claim.

200. See *supra* notes 150–54 for a discussion of ethics authorities that have concluded that these waivers can be ethically executed.

there is no reason to presume that these waivers would function as a personal release from civil liability—even if defense attorneys *intended* them to function as such.²⁰¹

1. The Presence of a Conflict Should Be Presumed To Ensure Fairness

In the interest of ensuring procedural fairness and promoting professional responsibility, courts should accept the argument that prospective waivers of postconviction collateral relief do present an ethical issue that could jeopardize a defendant's substantive rights. While the Supreme Court has stated that the violation of a singular ethics rule does not necessarily constitute *ineffective* assistance,²⁰² it has suggested that when “virtually all of [those] sources speak with one voice” as to what constitutes reasonable attorney performance, departure from ethical canons and ABA guidelines may constitute a deprivation of the Sixth Amendment right to counsel.²⁰³ To prevent a potential injustice, courts must therefore assess the severity of the conflict at issue in each case, because courts “must indulge every reasonable presumption against the waiver of the unimpaired assistance of counsel.”²⁰⁴

2. A Theoretical Conflict of Interest Such as This One May Be Consented To and Should Not Preclude All Prospective Waivers of Postconviction Collateral Relief

In cases of waivers of postconviction collateral relief, a theoretical conflict between an attorney's personal interests and those of his client will not preclude a defendant from consenting to the continued representation.²⁰⁵ It is well established that criminal defendants must retain control over the course of their defense,²⁰⁶ and even representation that is dangerously conflicted may still benefit the defendant in a way that is otherwise unavailable.²⁰⁷

As such, a *per se* rule preventing the client's consent would be wholly inappropriate, as courts will generally not presume harm unless the conflict arises from particularly egregious circumstances—such as the co-representation of multiple defendants.²⁰⁸ Rather than assume that *all* defense attorneys are incapable of acting

201. See *supra* note 154 for authorities that support the proposition that a waiver does not preclude a criminal defendant's malpractice case against the defendant's attorney.

202. See *supra* notes 175–76 and accompanying text for a description of when the breach of an ethical standard would equate to a Sixth Amendment right to counsel violation.

203. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

204. *Campbell v. United States*, 352 F.2d 359, 361 (D.C. Cir. 1965) (citing *Glasser v. United States*, 315 U.S. 60, 70 (1942)); see also *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) (stating that “‘courts [must] indulge every reasonable presumption against [the] waiver’ of fundamental constitutional rights” (quoting *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393 (1937))).

205. See *supra* Part IV.B for a discussion of personal conflicts of interest in the context of criminal representation.

206. See *supra* note 90 and accompanying text for a discussion of defendants' right to choose whether to exercise a right granted for their benefit.

207. See *supra* note 170 and accompanying text for an explanation of the Supreme Court's conclusion that even the most potentially severe conflicts of interest may present the potential for a unique benefit to defendants who grant their knowing consent to such conflicts.

208. See *supra* Part IV.A for a discussion of conflicts of interest that arise from concurrent

ethically, courts should take the necessary steps to ensure that a criminal defendant receives proper representation when he chooses to execute a prospective waiver of postconviction relief. The Supreme Court of Texas Professional Ethics Committee came to this reasonable conclusion in reasoning that each conflict of interest will present a different set of factual circumstances and will therefore require a unique set of precautions.²⁰⁹ Presumably for this reason, the Model Rules specifically state that attorneys may represent a client notwithstanding a conflict of interest if they believe that it will not materially limit their conduct, and if they attain the client's informed consent.²¹⁰ Each criminal defense attorney should therefore be trusted to make an informed judgment after considering the client's needs.

However, the presumption that a defendant may consent to representation that is nonetheless conflicted relies on the assumption that the potential benefit from the representation is worth the risk to his Sixth Amendment rights.²¹¹ As such, courts have found that the right to conflict-free counsel can be waived if "(1) the waiver is made voluntarily, knowingly, and intelligently, and (2) the conflict is not so severe as to undermine the integrity of the judicial system."²¹² Therefore, courts must take affirmative steps to ensure that defendants who choose to execute these prospective waivers do so in a manner that does not undermine courts' integrity.

B. Courts Should Adopt the Duty Articulated by the Eighth Circuit in United States v. Andis To Ensure that Defendants Receive Equitable Agreements

To effectively mitigate the harms presented by prospective waivers of collateral relief, courts should interpret Rule 11 in a novel but not unsubstantiated way that encourages defendants to enter fair agreements. Courts should adopt the principle articulated by the Eighth Circuit in *United States v. Andis*:²¹³ that Rule 11 grants a district court the power to ensure that a defendant has received an equitable agreement.²¹⁴ Although it has been explicitly adopted in only the Eighth Circuit, this duty has its foundation in the intentions of Rule 11 itself, as the advisory committee notes make repeated reference to a court's ability to reject a plea agreement at its own discretion.²¹⁵

To ensure that these waivers are executed in an equitable and voluntary manner, a court considering a defendant's plea should require two additional affirmations before accepting the agreement. First, the defendant must be aware of and affirm his consent

representation.

209. See *supra* notes 150–54 and accompanying text for a discussion of the Texas board opinion and other state authorities that have found that these waivers can be ethically executed.

210. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2012).

211. See *supra* Part IV.A for a discussion of when a defendant's choice of attorney may conflict with the court's duty to ensure a fair process.

212. *United States v. Rico*, 51 F.3d 495, 508 (5th Cir. 1995) (footnote omitted).

213. 333 F.3d 886 (8th Cir. 2003).

214. See *Andis*, 333 F.3d at 891 (finding that the court's authority to reject an inequitable or otherwise objectionable agreement operates as a check on prosecutorial over-reaching).

215. See FED. R. CRIM P. 11 advisory committee's note ("[P]lea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.").

to the potential conflict of interest that inheres in each of these prospective waivers. Second, the defendant should be able to affirm what distinct concession the government has provided in return for his waiver of postconviction relief. With the inclusion of these additional plea colloquy affirmations, courts may effectively prevent most of the potential harms that can result from the waiver of postconviction relief, and defendants will receive more equitable bargains.

1. Where a Defendant Chooses To Prospectively Waive Collateral Relief, He Should Also Grant Consent to the Potential Conflict of Interest

Because the range of factual circumstances in which this particular conflict may arise is vast, it would be inappropriate for a court to presume that a defendant's right to effective assistance has been harmed by the conflict in all cases. Courts should also not assume that there is no potential for harm where a conflict remains a possibility, and an individual inquiry into each potential conflict is therefore necessary in each case.²¹⁶ Therefore, the court must affirm that the defendant has knowingly consented to the advice of *theoretically* conflicted counsel, so that his subsequent waiver of these rights is truly knowing and voluntary.

Foremost, the court should ensure that the defendant is aware of the potential for conflicted counsel where this waiver is proposed as part of a plea bargain.²¹⁷ This responsibility to investigate known conflicts of interest is firmly grounded in Federal Rule of Criminal Procedure 44. Although the Rule applies explicitly to concurrent multiple representation, this type of inquiry is necessary in cases where the presence of a conflict is highly likely, and its inherent risks may be known to all but those who it would affect the most—the defendants.²¹⁸ Accordingly, the Supreme Court has agreed that a trial court possesses an affirmative duty to investigate a particular conflict of which it knows or reasonably should know.²¹⁹ Likewise, the conflict at issue is widely known to practitioners, but defendants may not immediately comprehend its potential risks. Therefore, a court that ignores such a conflict may fundamentally undermine the integrity of the judicial system and unconsciously expose a defendant to deficient representation.

Furthermore, it is likely that no additional action will be needed beyond a simple verbal inquiry in the majority of circumstances. It is not unreasonable to assume that the vast majority of defense attorneys discharge their duties professionally and ethically, and there is no reason to presume that defense attorneys as a whole will counsel their clients to sign waivers for the express purpose of shielding themselves

216. See *supra* notes 166–67 and accompanying text for a description of the courts' duty to enquire into the nature of a conflict of which it may be aware.

217. This Comment proposes that this should be done by the court at the start of the plea colloquy—not during actual plea bargaining.

218. See FED. R. CRIM. P. 44 advisory committee's note (stating that "Rule 44(c) establishes a procedure for avoiding the occurrence of events which might otherwise give rise to a plausible post-conviction claim that because of joint representation the defendants in a criminal case were deprived of their Sixth Amendment right to the effective assistance of counsel").

219. See *supra* notes 167–67 and accompanying text for a description of the courts' duty to enquire into the nature of a conflict of which it may be aware.

from subsequent claims of ineffective assistance.²²⁰

There may be some cases, however, where a waiver is insufficient to cure the potential conflict of interest. In these cases, a defense attorney may feel compelled to seek outside counsel to provide his client with a second informed opinion as contemplated by Model Rule 1.8(h)(1).²²¹ Alternatively, the client may forgo the waiver of collateral relief or seek a new attorney. Even the delay and complications brought on by this outcome are preferable to the alternative—a defendant who executes an unknowing waiver and litigates an appeal, asserting that a conflict of interest renders the waiver unenforceable. As such, the imposition of a duty to inquire into the potential conflict of interest at issue will prevent baseless appeals and ensure that defendants who choose to waive these rights do so in a completely knowing and voluntary manner.

2. The Government Should Be Required To Present a Defendant with a Second Plea Agreement That Does Not Include a Waiver of Appellate Rights

The second way to ensure that each defendant receives a knowing and equitable waiver of postconviction relief is for the court to affirm that a defendant knows exactly what he stands to gain in return for relinquishing those rights. Although federal courts are expressly prohibited from entering plea agreement negotiations, Rule 11 mandates impartial judicial review of all plea bargains.²²² Therefore, the defendant should have the option to consider a second plea agreement that does not contain an appellate waiver, and this second agreement should be presented to the court for public review.

By comparing the two agreements, criminal defendants and their attorneys can truly weigh the costs and benefits of the provision and enter into its terms in the most knowing and voluntary manner if they so choose. This change will also benefit the substantive rights of defendants in several significant ways. By visibly extracting the “price” of an appellate waiver from a plea agreement, defendants with less experienced counsel will stand on a more level plea bargaining field as compared to the government’s prosecutors. As defendants will be able to plainly see if they are receiving a benefit in exchange for their appellate waiver, it will ensure that waivers of appellate rights are never contracts of adhesion. Additionally, presenting the specific concession that the government is willing to “pay” for an appellate waiver will allow subsequent defendants to gain the knowledge that was previously only available to plea bargaining’s most experienced repeat players. And finally, this change could help to promote sentencing consistency by discouraging the use of appellate waivers in cases

220. See *supra* note 171 and accompanying text for the proposition that an attorney presumably places his professional responsibility above his own pecuniary interests. Ineffectiveness may even be a legitimate dilatory strategy rather than an outcome to be avoided. See Jonathan H. Adler, *When Ineffective Assistance Becomes Malpractice*, VOLOKH CONSPIRACY (Nov. 5, 2009, 9:47 AM), <http://www.volokh.com/2009/11/05/when-ineffective-assistance-becomes-malpractice/> (describing a situation in which ineffectiveness may be by “design” where an attorney who secured a finding of ineffective counsel on collateral review as well as a new capital trial for his client proceeded to commit precisely the same error during the second trial).

221. MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (2012)..

222. See *supra* notes 69–76 and accompanying text for a description of plea-colloquy procedure, including the prohibition on court participation in negotiations.

where a sentencing appeal appears more likely to occur.²²³

a. This Interpretation Is Consistent with Plea-Colloquy Procedural Doctrine

The interpretation of the Federal Rules underlying this Comment's proposed change is supported by current plea-colloquy procedure.²²⁴ A court that accepts a plea bargain has a duty to ensure that the defendant understands "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence."²²⁵ These foundational rules have generally been interpreted to require that defendants affirm their awareness of any waiver provisions included in a plea bargain and show a basic understanding of what these provisions may mean for their rights.²²⁶ Similarly, the Supreme Court has stated that, where a plea bargain is contingent on a promise or promises, "the essence of those promises must in some way be made known."²²⁷ The change in procedure proposed by this Comment merely asserts that these principles should be extended, so that where a court finds that the defendant has not been adequately counseled as to the value of his promise to waive his right to appeal, it should not accept the defendant's plea as a knowing and informed agreement.

Under *Andis*, the court would have the duty under Rule 11 to reject an inequitable plea agreement where it finds that the government has not provided sufficient consideration in return for the defendant's waiver of postconviction relief.²²⁸ However, the court would not necessarily need to use this power for it to be effective. Practical considerations dictate that this power should only be used—and would only *need* to be used—in the most extreme circumstances akin to a miscarriage of justice.²²⁹ The primary benefits of having courts adopt this theoretical duty would come from a more informed marketplace under which the practice of plea bargaining would be conducted. Defendants who know the value of what they are relinquishing will be in a better position to achieve a bargain that secures that value.

223. Gazal-Ayal, *supra* note 19, at 2313–15. The heart of this argument was borrowed from this very intriguing article and applied to the present appellate waiver debate. The author suggests that forbidding the government from offering overly generous plea-bargain concessions will take away the incentive for defendants with a higher likelihood of acquittal to plead guilty. *Id.* As the government is then forced to try its weakest cases to juries, constraints on resources would force prosecutors to forgo charges on those defendants who are most likely to be innocent. *Id.*

224. See *supra* Part II.A.3 for a description of federal plea-colloquy procedure and policy goals.

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

226. See *supra* notes 69–76 and accompanying text for a discussion of the inquiry that courts make to ensure defendants who have waived their rights in a plea agreement did so in an informed manner.

227. *Santobello v. New York*, 404 U.S. 257, 261–62 (1971).

228. See *United States v. Andis*, 333 F.3d 886, 891 (8th Cir. 2003) (stating that the court's ability to reject an agreement at its discretion during the plea colloquy is crucial to preventing overreaching in the bargaining process).

229. *Id.* The court recognized that the power to invalidate a plea agreement should not be overused: [W]e recognize that these waivers are contractual agreements between a defendant and the Government and should not be easily voided by the courts. As such, we caution that this exception is a narrow one and will not be allowed to swallow the general rule that waivers of appellate rights are valid.

Id.

Furthermore, a court that exercises its *Andis* duty would not be in violation of the rule prohibiting court participation in plea bargain negotiations, as courts are currently under no obligation to accept a plea bargain.²³⁰ A court only violates the prohibition on entering negotiations when it acts as an advocate for the agreement rather than as an independent arbiter.²³¹ To the contrary, the duty articulated by *Andis* is consistent with the fundamental notions of plea agreement procedure, to “bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.”²³² Under *Andis*, a court should not advocate for a particular agreement but should act in order to ensure that an equitable deal is struck in the interests of justice and fairness in the federal court system—an affirmative duty that is well established.²³³ Accordingly, the most efficient way to demonstrate that a defendant has received a fair deal and knows the value of his promise not to appeal is to show him what it would “cost” by requiring the government to present a second plea bargain under which he retains that right.

b. This Interpretation Will Bolster the Knowing and Voluntary Nature of the Agreement

Where a defendant can see exactly what he is giving up in return for his rights, the bargain that he strikes is sure to be more equitable because this will serve to transfer knowledge of plea bargaining practice from the prosecution to defendants.²³⁴ As the most experienced player in the plea bargaining system, the government is likely to possess the most informed opinion about potential outcomes that could arise from a given set of factual circumstances concerning the charges filed, the facts of the defendant’s case, the sentencing judge, and other variable factors affecting the sentence.²³⁵ This collective knowledge that comes from executing plea bargains on a daily basis necessarily places the prosecution at an advantage when determining the value of a particular waiver of postconviction relief. Prosecutors may know the sentencing preferences of a particular judge, the court’s treatment of certain sentencing factors, and may have deeper knowledge of other variables specific to the unique outcome of each case.²³⁶

230. See *supra* note 74 for the proposition that the court has discretion as to whether it accepts a plea bargain.

231. See *supra* note 70 for a list of cases in which the court found it could act as an independent arbiter but not as an advocate during plea discussions.

232. FED. R. CRIM. PRO. 11 advisory committee’s note (“[T]he basis of the bargain should be disclosed to the court and incorporated in the record.” (alteration in original) (quoting *People v. West*, 477 P.2d 409, 417 (Cal. 1970))).

233. See *Wheat v. United States*, 486 U.S. 153, 160 (1988) (stating that “[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them”).

234. See *Gazal-Ayal*, *supra* note 19, at 2313–15 (finding that enacting rules that act to transfer clues about the strength of a case from the prosecution to the defense will help to encourage proper disposition of criminal charges).

235. See Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining As Negotiation*, 2 HARV. NEGOT. L. REV. 115, 124 (1997) (listing factors prosecutors use to determine if a plea bargain is warranted in a given case).

236. *Id.*

Particularly if the charges involve especially complex sentencing factors or disputed factual elements, the government may more accurately predict the merit of a potential appeal than even the most experienced defense counsel.²³⁷ Where the defendant is presented with two agreements, the difference in concessions offered will allow a defendant to see the specific enticement that the government is offering for him to relinquish his appellate rights. Accordingly, a waiver of collateral relief would be most valuable to a prosecutor who wishes to avoid complex, drawn-out appeals, and the government may be willing to relinquish a fairly generous concession in return for the defendant's waiver. Absent a duty to present the waiver in a separate agreement, a prosecuting attorney could easily disguise the true value of the appellate waiver by presenting the entire agreement as a whole.

Where there is little to no difference between the concessions offered in the agreements, the defendant will be able to see that the possibility of a sentencing appeal does not present much risk to the government.²³⁸ However, where the government offers a large concession in return for the plea agreement containing the appellate waiver, the defendant may infer that the government believes that there is a particularly high chance of a meritorious appeal.²³⁹ The appeal's relatively strong merit would make the appeal costly and time consuming for the government to respond to, hence the large concession granted in return for the plea agreement containing the appellate waiver.

Accordingly, the change in procedure proposed by this Comment could therefore help to create a more informed defendant who can gain some bargaining power by taking advantage of this knowledge that is already possessed by the government, and to foster an open and informed marketplace of plea bargaining that may allow parties to execute the most beneficial agreements.

c. This Interpretation Will Mitigate Harmful Effects of Disparities in Experience of Defense Counsel

Additionally, the requirement that both plea agreements be presented in open court will preserve the terms of the agreement for future defendants. This will help to alleviate knowledge disparities not only between the government and defendants as a whole—but also between defense attorneys of varying experience. As plea bargaining relies on a less formalized process than a full-scale trial, it presents different challenges to defense attorneys.²⁴⁰ By preserving details of the government's past concessions, and the price that the government is willing to pay for a particular waiver of postconviction relief in past cases, the record may also help to mitigate the disparities in the quality of

237. See Gazal-Ayal, *supra* note 19, at 2313–15 (finding that the weakest cases in plea bargaining are offered the largest concessions and that forbidding large concessions would take away the incentive for defendants with a higher likelihood of acquittal to plead guilty).

238. This may occur in situations where the sentencing calculations in consideration are commonplace or straightforward, and there is therefore little chance of a potentially time-consuming appeal.

239. This may indicate to otherwise inexperienced counsel that consideration of the particular sentencing factors may be in a state of flux or that the government's evidence regarding the factual circumstances of the crime (e.g., amounts of money or drugs) may be weak.

240. See *supra* note 239 and accompanying text for a description of the kinds of beneficial information available to prosecutors and other attorneys who engage in repeated plea bargaining.

legal counsel retained to aid defendants. In particular, defense counsel may compare their clients' circumstances to past plea bargains, and even an inexperienced defense attorney will enter plea negotiations with an informed idea of what concessions the attorney should be prepared to expect from the government in return for the client's waiver of postconviction relief.

d. This Interpretation Encourages Sentencing Consistency

In embracing a rule requiring the government to present waivers of postconviction relief in a second agreement, courts may also encourage greater sentencing consistency. As described earlier, a generous concession by the government may signal the presence of a meritorious sentencing issue, and a defendant may not be fully aware of these circumstances until the sentencing hearing occurs. In this case, a defendant who is offered a concession in return for his appellate waiver that appears overly generous in light of past agreements may instead decide to preserve his right to appeal considering the ambiguity that the waiver suggests. While this cannot necessarily remove any and all sentencing issues deserving appellate consideration from the bounds of a defendant's waiver, it may at least prevent the most outwardly complex issues from being resolved in finality at the district court level. Similarly, a court considering a defendant's plea and waiver may decide to exercise its *Andis* duty when presented with an agreement containing such an overly generous concession. Like the defendant, the court may wish to preserve the right to an appeal in the interest of furthering appellate consideration of a particularly complex or pressing sentencing issue.

Accordingly, broad recognition of the duty articulated in *Andis* will ensure that waivers of postconviction relief are executed in a way that preserve their benefits and ensure that the profession's foundational ethics and professional responsibility are not compromised. With the adoption of two additional plea-colloquy disclosures, courts can ensure that these agreements are executed by defendants who are truly aware of the agreements' provisions and consequences.

VI. CONCLUSION

The right to effective and unconflicted counsel is essential to ensuring a fair criminal process, as this right provides each defendant the opportunity to knowledgeably and effectively assert his best defense. As such, Justice Thurgood Marshall has noted that "every defendant has a constitutional right to the assistance of an attorney unhindered by a conflict of interests."²⁴¹ However, courts have also reiterated the notion that a criminal defendant must have the freedom to conduct his defense in the way that he chooses—which may include relying on the advice of trusted counsel who may nonetheless be *theoretically* conflicted. For this reason, a per se rule that bars the use of prospective waivers of postconviction collateral relief altogether would be inappropriate. As these waivers pose great harm to unwitting defendants, yet are simultaneously clearly capable of providing concrete benefits to others, courts must take care to stringently evaluate each occurrence on an individual basis. Therefore,

241. *Cuyler v. Sullivan*, 446 U.S. 335, 355 (1980) (Marshall, J., concurring in part and dissenting in part) (quoting *Holloway v. Arkansas*, 435 U.S. 475, 483, n.5 (1978)) (internal quotation mark omitted).

courts should adopt the duty articulated in *Andis* to ensure that these waivers are executed in a fair, knowledgeable, and ethical manner in every instance.

