

A FRANK LOOK AT APPELLATE WAIVER IN THE SEVENTH CIRCUIT

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In several important respects, the Seventh Circuit writes inconsistently on appellate waivers. Although the problem is not confined to the opinions of any particular judge,¹ it is notable that the hard-lined language employed by Chief Judge Easterbrook butts against other panels' published opinions with some regularity.² This article highlights several areas of inconsistency in the appellate waiver jurisprudence of the Seventh Circuit and advances recommended resolutions.

I. AN INTRODUCTION TO APPELLATE WAIVER IN THE SEVENTH CIRCUIT

As one condition to a plea agreement, many defendants agree to waive their statutory right to appeal the conviction, the yet-to-be-imposed sentence, or both.³ The phrasing of appellate waiver clauses varies and specific terms may be negotiated between the prosecutor and the

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1. In some senses it is unfair to single out any appellate judge for authoring opinions that take an extreme or inconsistent approach within a circuit, because an appellate judge must always be joined by at least one other appellate judge to create a majority. And, because Seventh Circuit law is not an objective fact, but instead is whatever the majority of the court (or a particular panel) says it to be, no panel's (or panel member's) views can truly be more "extreme" than another's views because extremity cannot be measured without an objective baseline.
2. This article does not analyze the outside writings of Chief Judge Easterbrook (or other Seventh Circuit judges for that matter). It is not meant to be a tutorial on what any judge personally thinks of appellate waivers—rather, it is meant to focus attention on inconsistencies in the case law of the Seventh Circuit. For the sake of simplicity, the remainder of this article refers to Chief Judge Easterbrook as Judge Easterbrook irrespective of whether the reference pre-dates or post-dates Judge Easterbrook's elevation to Chief Judge in 2006.
3. A fairly standard waiver of appellate rights reads:
Defendant understands that he has a statutory right to appeal the conviction and sentence imposed and the manner in which the sentence was determined. Acknowledging this right and in exchange for the concessions made by the Government in this Plea Agreement, Defendant expressly waives his right to appeal the conviction and any sentence imposed on any ground, including the right to appeal conferred by 18 U.S.C. § 3742. Additionally, he also expressly agrees not to contest his conviction or sentence or seek to modify his sentence or the manner in which it was determined in any type of proceeding, including, but not limited to, an action brought under 28 U.S.C. § 2255.

United States v. Chapa, 602 F.3d 865, 867 (7th Cir. 2010).

defendant.⁴ In tandem with a waiver of appellate rights, a plea agreement may also contain a waiver of the defendant's right to challenge her conviction through collateral attack, such as a habeas proceeding.⁵

Appeal waivers are "generally enforceable" in the Seventh Circuit.⁶ Enforceability turns on whether (1) the terms of the appellate waiver are express and unambiguous, and (2) the record demonstrates that the defendant knowingly and voluntarily entered into the agreement.⁷ To be precluded by an appellate waiver, the appealed issue must fall within the scope of the waiver.⁸

At least two exceptions to appellate waivers are generally accepted: "despite a valid waiver of the right to appeal, a defendant could appeal his

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4. See, e.g., *United States v. Sines*, 303 F.3d 793, 797 (7th Cir. 2002) (defendant only waived right to appeal if sentence was within a Guidelines range using offense level thirteen or below); *United States v. Joiner*, 183 F.3d 635, 644 (7th Cir. 1999) (defendant specifically excepted his right to appeal the amount and quantity of drugs attributable to him). But "[r]eserving the right to appeal some issues does not entitle a defendant to appeal others." *United States v. Roche*, 415 F.3d 614, 617 (7th Cir. 2005). Depending on the language used in the waiver, an appellate waiver provision may bar a defendant from appealing a restitution order imposed as part of her sentence. See *United States v. Shah*, 665 F.3d 827, 838-39 (7th Cir. 2011) (finding that one defendant's appeal waiver encompassed the restitution order and a second defendant's appeal waiver did not); *United States v. Worden*, 646 F.3d 499, 502 (7th Cir. 2011) ("Because restitution is part of a criminal sentence, and [the defendant] agreed not to challenge his sentence, he may not appeal the restitution order."); *United States v. Behrman*, 235 F.3d 1049, 1052 (7th Cir. 2000) (appeal waiver did not bar appeal of restitution judgment because defendant waived appeal of "sentence within the maximum provided in the statute(s) of conviction" and restitution was imposed pursuant to a different statutory provision than the statute of conviction).
 5. See, e.g., *Bridgeman v. United States*, 229 F.3d 589, 591 (7th Cir. 2000) ("A plea agreement that also waives the right to file a § 2255 motion is generally enforceable unless the waiver was involuntary or counsel was ineffective in negotiating the agreement."); *Keller v. United States*, 657 F.3d 675, 681 (7th Cir. 2011) ("To bar collateral review, the plea agreement must clearly state that the defendant waives his right to collaterally attack his conviction or sentence *in addition to* waiving his right to a direct appeal."). The preferred procedure to enforce a waiver of the right to bring a § 2255 motion is for the government "to file a separate motion to dismiss the § 2255 proceeding on this ground, in which it specifically calls the court's attention to the waiver." *Roberts v. United States*, 429 F.3d 723, 724 (7th Cir. 2005).
 6. See, e.g., *United States v. Woods*, 581 F.3d 531, 534 (7th Cir. 2009).
 7. *Id.*; *United States v. Aslan*, 644 F.3d 526, 534 (7th Cir. 2011).
 8. *Id.* Some inconsistency exists regarding the strictness of the "scope" of an appellate waiver. Compare *United States v. Quintero*, 618 F.3d 746, 750 (7th Cir. 2010) ("[W]e will enforce a waiver only if the disputed appeal falls within the *general ambit* of the waiver." (emphasis added)), with *United States v. Monroe*, 580 F.3d 552, 556 (7th Cir. 2009) (a court should "review the language of the plea agreement objectively and hold the government to the literal terms of the plea agreement."). Because ambiguities in plea agreements should be construed against the government, the fairer result would be to likewise strictly construe the scope of appellate waivers and resolve ambiguities in favor of the defendant. See *Shah*, 665 F.3d at 837 ("We interpret terms of the plea agreement according to the parties' reasonable expectations and construe any ambiguities in the light most favorable to the defendant."). In *Shah*, the court paraphrased the word "general" out of *Quintero*'s "general ambit" language: "we enforce a waiver only if the disputed appeal comes within the ambit of the waiver." *Id.* (citing *Quintero*, 618 F.3d at 750). Hopefully this revision signals a narrowing of appeal waiver construction.

sentence [1] if the trial court relied on a constitutionally impermissible factor such as race or [2] if the court sentenced the defendant above the statutory maximum.”⁹ The right to appeal also survives an appellate waiver “where the agreement to waive is involuntary.”¹⁰ The involuntariness of the appellate waiver (or of the greater plea agreement) should not, however, be viewed as an “exception” to enforcement of a valid waiver. Because voluntariness is a requirement of a valid appellate waiver, a showing of involuntariness does not only permit an appeal, it invalidates the waiver itself.¹¹ Similarly, issues outside of an appellate waiver’s scope should not be categorized as exceptions to the enforceability of the waiver.¹² Note that

9. United States v. Williams, 184 F.3d 666, 668 n.2 (7th Cir. 1999) (quoting United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995)); see also United States v. Kratz, 179 F.3d 1039, 1041 (7th Cir. 1999); United States v. Hicks, 129 F.3d 376, 377 (7th Cir. 1997); United States v. Feichtinger, 105 F.3d 1188, 1190 (7th Cir. 1997). For a rare quasi-application of one of these exceptions, see United States v. Gibson, 356 F.3d 761, 765 (7th Cir. 2004) (addressing merits of appeal despite appellate waiver where defendant’s sentence exceeded the maximum sentence provided for by the statute of conviction). In actuality, the avoidance of the appellate waiver in *Gibson* was analyzed as a matter of scope because the defendant’s appellate waiver explicitly excluded a sentence above the statutory maximum.

These exceptions have been misstated on occasion to an unfortunate effect by refocusing on the waiver rather than on the sentence: “A defendant does not lose the right to pursue a claim that the *waiver* was involuntarily made, was based on a constitutionally impermissible factor (such as race), or was made without the effective assistance of counsel.” United States v. Rhodes, 330 F.3d 949, 952 (7th Cir. 2003) (emphasis added); *Sines*, 303 F.3d at 798 (“A defendant does not lose the right to pursue a claim that relates directly to the negotiation of the waiver, such as a claim that the *waiver* . . . was based on an impermissible factor such as race, [or] exceeds the statutory maximum.” (emphasis added)). This refocusing completely changes the applicability of the exceptions—and does so with incoherent results. It is difficult to imagine how an *appellate waiver* could be based on race or could exceed the statutory maximum. The proper inquiry is whether the *sentence* was based on race (or another impermissible factor) or exceeds the statutory maximum.

It seems only sensible—although it is generally unstated—that the right to appeal a sentence that is below the statutory minimum also survives a valid waiver of appeal. See United States v. Cieslowski, 410 F.3d 353, 363 (7th Cir. 2005) (“This is not to say that all sentences under a plea agreement can be accepted by the court. The sentence must comply with the maximum (and minimum, if there is one) provided by the statute of conviction.”). Of course, in practice it is unlikely that a defendant would challenge an impermissibly short sentence.

10. United States v. Joiner, 183 F.3d 635, 644 (7th Cir. 1999); see also Jones v. United States, 167 F.3d 1142, 1144 (7th Cir. 1999).

11. A defendant’s claim that her guilty plea was involuntary, “if successful, would undercut the guilty plea itself, and would allow an appeal since a plea waiver stands or falls with the plea agreement.” United States v. Wilson, 481 F.3d 475, 483 (7th Cir. 2007).

12. A unique issue straddling the fence between scope and exception arose in United States v. Vega, 241 F.3d 910 (7th Cir. 2001) (per curiam). The district court in *Vega* amended the defendant’s judgment to increase her sentence after it had lost jurisdiction to do so. *Id.* at 911-12. The Seventh Circuit held that the defendant’s appellate waiver—although broadly worded to encompass “the right to appeal any sentence within the maximum provided in the statute(s) of conviction . . . on any ground whatsoever”—did not bar her appeal because the term “sentence” as used in the waiver only included a sentence made within the district court’s jurisdiction. *Id.* Although the definition of the word “sentence” was technically a matter of the scope of the appellate waiver, the circumvention of the waiver in *Vega* can also be regarded as an exception to

not even a claim of deprivation of a constitutional right, without more, permits a defendant to disregard an appeal waiver.¹³

Seventh Circuit precedent dictates that, despite the presence of an appellate waiver, the appellate court will consider the merits of an allegation of ineffective assistance of counsel in the negotiation of the appellate waiver or the plea agreement at large:

Justice dictates that a claim of ineffective assistance of counsel in connection with the negotiation of a cooperation agreement cannot be barred by the agreement itself—the very product of the alleged ineffectiveness. To hold otherwise would deprive a defendant of an opportunity to assert his Sixth Amendment right to counsel where he had accepted the waiver in reliance on delinquent representation.¹⁴

the enforcement of a valid appellate waiver—a sentence imposed outside of the district court’s jurisdiction may be appealed regardless of waiver. Because of its exceptional circumstances, *Vega* lays outside of the mine run of appellate waiver cases.

Similarly, although more squarely an issue of scope, an appellate waiver does not bar an appeal from a district court’s denial of a defendant’s 18 U.S.C. § 3582(c) motion unless it is specifically precluded in the waiver. *See* *United States v. Monroe*, 580 F.3d 552 (7th Cir. 2009); *United States v. Woods*, 581 F.3d 531 (7th Cir. 2009). Such a motion requests that the district court reduce a defendant’s sentence when the defendant had been “sentenced to a term of imprisonment based on a sentencing range that has subsequently been lowered by the Sentencing Commission.” 18 U.S.C. § 3582(c) (2006). A Section 3582(c) motion “is fundamentally different from the legal challenges and assertions of error typically at issue in appeals and collateral attacks” (*Monroe*, 580 F.3d at 557) in that it “‘does not so much challenge the original sentence as it seeks a modification of that sentence based upon an amendment to the Guidelines.’” *Woods*, 581 F.3d at 536 (quoting *United States v. Chavez-Salais*, 337 F.3d 1170, 1173 (10th Cir. 2003)). The same goes for a district court’s order commanding a defendant to reimburse the government for the amount of funds disbursed to court-appointed counsel pursuant to 18 U.S.C. § 3006A(f). *See* *United States v. Standiford*, 148 F.3d 864, 870 (7th Cir. 1998) (“Because the reimbursement order is not part of the sentence [despite its imposition during the course of the sentencing process], [the defendant] has not waived his right to appeal this point.”).

13. *See, e.g.*, *United States v. Nave*, 302 F.3d 719, 720 (7th Cir. 2002) (Fifth Amendment double jeopardy claim precluded by appellate waiver); *Cieslowski*, 410 F.3d at 364 (Sixth Amendment claim precluded by appellate waiver); *United States v. Davey*, 550 F.3d 653, 658 (7th Cir. 2008) (Eighth Amendment claim of cruel and unusual punishment precluded by appellate waiver: “We see no reservation in that waiver for constitutional arguments.”); *United States v. Lockwood*, 416 F.3d 604, 606-08 (7th Cir. 2005) (claim that sentence was based on judge-found facts in violation of Sixth Amendment precluded by appellate waiver). *Cf. Kratz*, 179 F.3d at 1043 (“Nor do we express a view about whether a due process violation at sentencing might be sufficient to invalidate a knowing and voluntary waiver of appeal rights.”). An opinion authored by Judge Easterbrook explained that an exception for constitutional claims (or any exception at all) would only disserve defendants because, in a world with no exceptions, a defendant would receive the greatest benefit for bargaining away her appellate rights (and would be free to choose to bargain for the exceptions that she desires most highly). *United States v. Behrman*, 235 F.3d 1049, 1051 (7th Cir. 2000) (“To create a general ‘constitutional-argument exception’ to waivers in plea agreements would be to reduce the concessions defendants could obtain for their promises, because it would reduce the number of (enforceable) promises defendants could make.”).
14. *Jones*, 167 F.3d at 1145; *see also* *United States v. Woolley*, 123 F.3d 627, 634-35 (7th Cir. 1997) (analyzing defendant’s argument that counsel was ineffective in advising her to accept the

This method of avoiding an appellate waiver is a “narrow confines.”¹⁵ It arises because an agreement resulting from ineffective assistance of counsel is involuntary and thus invalid.¹⁶ Thus, only a claim of ineffective assistance of counsel before the acceptance of a plea of guilty withstands an appellate waiver.¹⁷ When counsel is sufficiently ineffective so as to invalidate the plea agreement, the matter should be remanded to the district court for the parties to start anew.¹⁸

II. THE JURISDICTIONAL QUESTION

The limit of a court’s jurisdiction may sometimes be murky, but it should at least be consistent. The Seventh Circuit, however, has yet to decisively resolve the impact of a valid appellate waiver on its jurisdiction.

In an early appellate waiver decision authored by Judge Easterbrook, the court clearly placed appellate waiver in a jurisdictional posture: “[The

appellate waiver as part of the plea agreement); *Blacharski v. United States*, 215 F.3d 792, 793-94 (7th Cir. 2000) (government conceded that appellate waiver did not bar appeal of ineffective assistance of counsel that went to the validity of the plea agreement itself); *Bridgeman v. United States*, 229 F.3d 589, 593 (7th Cir. 2000) (“[E]ven an ineffective assistance claim cannot survive a waiver unless the claim relates specifically to the voluntariness of the waiver itself.”); *United States v. Jemison*, 237 F.3d 911, 916 n.8 (7th Cir. 2001) (merits of ineffective assistance claim not reached because defendant “neither argued that her appellate waiver was the product of ineffective assistance of counsel nor set forth facts illustrating that her attorney was deficient in negotiating her plea agreement.”); *United States v. Hodges*, 259 F.3d 655, 659 n.3 (7th Cir. 2001) (“[A] valid appellate waiver contained in a plea agreement does not preclude a defendant’s claim that the plea agreement itself was the product of ineffective assistance of counsel.”).

15. *Joiner*, 183 F.3d at 645.

16. *Jones*, 167 F.3d at 1145 (“It is intuitive that in these circumstances the waiver is ineffective against a challenge based on involuntariness.”).

17. *Nunez v. United States*, 495 F.3d 544, 548 (7th Cir. 2007), *vacated* 554 U.S. 911 (2008) (“Ineffective assistance before the plea’s acceptance might spoil the plea’s validity and thus undermine the waiver. But ineffective assistance *after* the plea . . . cannot retroactively make the plea invalid.”); *see also* *Mason v. United States*, 211 F.3d 1065, 1069 (7th Cir. 2000) (“[The defendant’s] ineffective assistance of counsel claim relates only to his attorney’s performance with respect to sentencing. Because the challenge has nothing to do with the issue of a deficient negotiation of the waiver, [the defendant] has waived his right to seek post-conviction relief.”). The court has recently mis-paraphrased itself in dicta by stating that an appellate waiver is unenforceable where “the defendant received ineffective assistance of counsel during plea negotiations and *sentencing proceedings*.” *United States v. Cole*, 569 F.3d 774, 776 (7th Cir. 2009) (citing *United States v. Lockwood*, 416 F.3d 604, 608 (7th Cir. 2005)) (emphasis added). Such language should not be perpetuated because it is not accurate—ineffective assistance of counsel at sentencing could not invalidate a plea of guilty and thus would be deemed waived as within the scope of an appellate waiver.

18. *Behrman*, 235 F.3d at 1051 (“Some constitutional theories—particularly claims that the plea agreement was involuntary or the result of ineffective assistance of counsel—concern the validity of the plea agreement and thus would knock out the waiver of appeal along with the rest of the promises; all terms stand or fall together.”).

defendant's] waiver of appeal is valid and deprives us of jurisdiction."¹⁹ Later cases—including another authored by Judge Easterbrook—cast appellate waivers in a jurisdictional light by reference to the court's ability to hear an appeal after finding a valid waiver.²⁰ This line of analysis was further confirmed in *United States v. Nave*: "We find that we do not have jurisdiction to address these claims, since [the defendant] waived his right to appeal in his plea agreement."²¹

The next year, however, a later panel went out of its way in *United States v. Mason* to include dicta clarifying that appellate waivers are not jurisdictional: "In fact a waiver of appeal rights does not deprive us of our appellate jurisdiction, although it is a ground for dismissing the appeal."²² Although he authored neither, Judge Easterbrook joined in the majority of both *Nave* and *Mason*. The overt clarification of *Mason* should have ended the question, but a later opinion authored by Judge Easterbrook again injected appellate waivers with jurisdictional significance by stating that the court's ability to determine whether an appellate waiver barred review was "an application of the principle that every court has jurisdiction to determine its own jurisdiction."²³ Since then, the court recently again went out of its way—in dicta in a non-appeal waiver case—to state that the "answer is no" to the question of "whether an explicit waiver of appellate rights in a plea agreement affects the court's jurisdiction."²⁴

Whether appellate waiver is jurisdictional is linked to whether a court of appeals must raise it sua sponte. If a waiver works a deprivation of jurisdiction, an appellate court must raise a valid waiver sua sponte and dismiss on that ground because a court must always hound over its jurisdiction. Seventh Circuit precedent reveals that the court need not raise preclusion by an appellate waiver sua sponte, but may do so when the court is so inclined.²⁵ This approach is consistent with a non-jurisdictional approach to appellate waiver.

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19. *United States v. Barnes*, 83 F.3d 934, 941 (7th Cir. 1996). The *Barnes* court did not merely employ loose language in referring to jurisdiction; rather, it spoke on its "jurisdiction" to hear the appeal at some length.
 20. See *United States v. Hicks*, 129 F.3d 376, 377 (7th Cir. 1997) ("As a threshold matter, we must decide whether we *can* hear [the defendant's] appeal at all." (emphasis added)); *United States v. Hare*, 269 F.3d 859, 860 (7th Cir. 2001) ("A waiver of appeal is valid, and *must* be enforced, unless the agreement in which it is contained is annulled (for example, because involuntary)." (emphasis added)).
 21. *United States v. Nave*, 302 F.3d 719, 720 (7th Cir. 2002).
 22. *United States v. Mason*, 343 F.3d 893, 893 (7th Cir. 2003).
 23. *Latham v. United States*, 527 F.3d 651, 653 (7th Cir. 2008).
 24. *United States v. Combs*, 657 F.3d 565, 570 (7th Cir. 2011) (per curiam) (citing *Latham*, 527 F.3d at 653; *Mason*, 343 F.3d at 893). The court's citation to *Latham* is curious because *Latham* cast appellate waivers in a jurisdictional light.
 25. See *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995) (upon government's failure to raise appellate waiver, the court of appeals weighed "whether to determine the merits of the

The better course, however, would be to approach appellate waivers from a contractual perspective rather than a jurisdictional one.²⁶ As creatures of contract, appellate waivers work no divestment of jurisdiction. Moreover, the government, as the beneficiary of the waiver, should bear the onus to elect to enforce the waiver or waive its enforcement.²⁷ Because the waiver inures to the benefit of the government alone and has no impact on the jurisdiction of the appellate court, the court should not enforce appellate waivers *sua sponte*. Hopefully the court will adhere to its most recent dicta and treat the jurisdictional question as closed.

III. DISTRICT COURTS' DUTY TO INFORM AND QUESTION REGARDING THE WAIVER

Before a 1999 amendment, the Federal Rules of Criminal Procedure did not mandate a district court to advise and question a defendant on the existence of an appellate waiver in her plea agreement when accepting her plea of guilty. In *United States v. Wenger*, Judge Easterbrook first set out the Seventh Circuit's approach during that pre-amendment phase: the "legal system makes no appeal the default position," and thus no "procedural citadel" of "elaborate warnings" must be established around the right to appeal.²⁸ In short, the district court did not have to mention the appellate waiver in its plea colloquy with the defendant in order for a guilty plea to be knowing and voluntary. Although it broke with earlier views in

[defendants'] arguments or overlook the government's failure to argue waiver" and stated that it was "not precluded" from affirming on the basis of waiver despite the government's non-reliance on that issue); *United States v. Sines*, 303 F.3d 793, 800 (7th Cir. 2002) (analyzing merits of one ground for appeal because "[t]he government... ma[de] no claim of waiver on this ground"). The clearest statements came in a Judge Easterbrook-authored opinion that issued less than six months after *Latham*: "[T]he United States, as the waiver's beneficiary, may freely give up its protection" and "[a]ny litigant is entitled to give up a contractual benefit." *Nunez v. United States*, 546 F.3d 450, 452 (7th Cir. 2008).

26. The Seventh Circuit otherwise professes to "apply principles of contract law in analyzing the terms of [an appellate] waiver, 'tempered by recognition of limits that the Constitution places on the criminal process.'" *United States v. Worden*, 646 F.3d 499, 502 (7th Cir. 2011) (quoting *United States v. Bownes*, 405 F.3d 634, 636 (7th Cir. 2005)); *see also* *United States v. Quintero*, 618 F.3d 746, 751 (7th Cir. 2010) ("A plea agreement is a contract and is therefore governed by ordinary contract law principles.").
27. *See Schmidt*, 47 F.3d at 193 (Ripple, J., dissenting) ("[I]t is not our usual practice to ignore the government's waiver of an appellant's waiver."); *id.* at 194 ("It is not our task to insist on a bargain that the government, the only party which might benefit from it, does not want to enforce."); *see also* *United States v. Westbrook*, 125 F.3d 996, 1005 (7th Cir. 1997) (defendant allowed to raise issue on appeal that was not raised to the district court: "[B]ecause the government did not raise the defense of waiver, it has waived the waiver and we shall address the issue."); *United States v. Archambault*, 62 F.3d 995, 999 (7th Cir. 1995) (defendant allowed to raise challenge to sufficiency of the evidence on appeal despite not moving pursuant to Fed. R. Crim. P. 29 in the district court: "[B]ecause the government does not argue that [the defendant] waived this challenge, it has waived [the defendant's] waiver.>").
28. *United States v. Wenger*, 58 F.3d 280, 281-82 (7th Cir. 1995).

other circuits,²⁹ this approach was consistently applied within the Seventh Circuit.³⁰

Originally added in late 1999 as a subsection to Federal Rule of Criminal Procedure 11(c) before migrating to its current home in Federal Rule of Criminal Procedure 11(b)(1)(N) in 2002, the amendment states that a district court “must inform the defendant of, and determine that the defendant understands . . . the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.” The Seventh Circuit did not apply this subsection in a published opinion until *United States v. Loutos* in 2004.³¹ The court found that, under the totality of the circumstances, the *Loutos* defendant’s guilty plea was knowing and voluntary despite the district court’s total failure to engage in a discussion of the appellate waiver with the defendant at the plea hearing in violation of Federal Rule of Criminal Procedure 11(b)(1)(N).³² Part of the court’s basis for finding the district court’s omission to be harmless error³³ was that the *Loutos* defendant was himself a practicing attorney possessing “a substantial level of sophistication” as well as “familiar[ity] with contracts and the need to carefully read documents that are contractual in nature and signed by the party.”³⁴

The issue came back to the court again three years later before a panel of Judges Easterbrook, Posner, and Diane P. Wood in *United States v. Sura*.³⁵ Unlike the *Loutos* defendant, the *Sura* defendant never raised the district court’s lack of an appellate waiver warning before the district court.

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29. *United States v. Bushert*, 997 F.2d 1343, 1352 (11th Cir. 1993) (“Without a manifestly clear indication in the record that the defendant otherwise understood the full significance of the sentence appeal waiver, a lack of sufficient inquiry by the district court during the Rule 11 hearing will be error.”); *United State v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (“We have also held that a waiver is not knowingly or voluntarily made if the district court fails to specifically question the defendant concerning the waiver provision of the plea agreement during the Rule 11 colloquy and the record indicates that the defendant did not otherwise understand the full significance of the waiver.” (citing *United States v. Wessells*, 936 F.2d 165, 168 (4th Cir. 1991)).
30. *United States v. Williams*, 184 F.3d 666, 669 (7th Cir. 1999) (“Our law is settled that no specific instruction need be given.”); *United States v. Woolley*, 123 F.3d 627, 632 (7th Cir. 1997) (“[T]he law of this Circuit is clear that the court is not required to conduct a specific dialogue with the defendant concerning the waiver, so long as the record contains sufficient evidence for the court to determine if the defendant has knowingly and voluntarily waived his or her right to appeal.”); *United States v. Agee*, 83 F.3d 882, 886 (7th Cir. 1996) (“[W]e have held that a specific dialogue with the judge is not a necessary prerequisite to a valid waiver of appeal, if there is other evidence in the record demonstrating a knowing and voluntary waiver.”).
31. *United States v. Loutos*, 383 F.3d 615 (7th Cir. 2004).
32. *Id.* at 619. The *Loutos* defendant sought to use the lack of an appellate waiver warning to set aside his guilty plea.
33. Harmless error analysis was applied because the defendant had moved unsuccessfully in the district court to vacate his guilty plea. *Id.* at 618.
34. *Id.* at 619.
35. *United States v. Sura*, 511 F.3d 654 (7th Cir. 2007).

Rather, the *Sura* defendant was in front of the Seventh Circuit seeking to appeal the district court's Guidelines calculation in imposing his sentence. Thus, the *Sura* court engaged in plain error review of the district court's omission (rather than harmless error, as the *Loutos* court had done).³⁶ Upon considering the totality of the circumstances, the *Sura* majority found that the district court's failure to mention the appellate waiver during the plea colloquy constituted plain error and mandated reversal of the defendant's conviction.³⁷ The majority found no "substitute for the safeguards of Rule 11" in the record and therefore was unable to find the defendant's appellate waiver to be knowing and voluntary.³⁸ Because an appellate waiver stands or falls with the larger plea agreement, the result was invalidation of the entire plea agreement and the conviction; the defendant was free to re-plea or to go to trial.³⁹

Judge Easterbrook dissented sharply from the majority, stating that the defendant had failed to demonstrate plain error because nothing in the record showed a reasonable probability that, but for the district court's failure to warn him of the appellate waiver, the defendant would not have pleaded guilty.⁴⁰ Ultimately, Judge Easterbrook found that "[w]hat the defendant would have done," if properly warned, was a question of fact and thus it was "unsupportable" for the majority to reverse "on an empty record, bypassing the district court's role as trier of fact."⁴¹ This approach makes little sense, however, because an appellate court must always determine "what the defendant would have done" in its plain error analysis of any Federal Rule of Criminal Procedure 11 omission by the district court—indeed, the plain error standard is specifically reserved for cases in which a defendant failed to move to vacate her guilty plea before the district court.⁴² Had the district court made the factual determination of "what the defendant would have done" in the first instance, the plain error standard would not apply on appeal, just as had been the case in *Loutos*. Judge Easterbrook's dissent therefore raises an unsatisfying objection.⁴³

36. *Id.* at 658.

37. *Id.* at 659-63.

38. *Id.* at 662.

39. *Id.* at 663.

40. *Id.* at 665 (Easterbrook, C.J., dissenting).

41. *Id.* at 665-66.

42. *See* *United States v. Vonn*, 535 U.S. 55, 59 (2002) ("We hold that a silent defendant has the burden to satisfy the plain-error rule and that a reviewing court may consult the whole record when considering the effect of any error on substantial rights."); *United States v. Dominguez Benitez*, 542 U.S. 74, 83 (2004) ("[A] defendant who seeks reversal of his conviction after a guilty plea, on the ground that the district court committed plain error under Rule 11, must show a reasonable probability that, but for the error, he would not have entered the plea.")

43. The remainder of the dissenting opinion differs with the majority's conclusion that no plain error existed, finding that the defendant's execution of the plea agreement (without any contrary

The Seventh Circuit has failed to consistently apply the plain error and harmless error standards in reviewing a district court's omission of a discussion of an appeal waiver during the plea colloquy. In *United States v. Polak*, the court, per Judge Williams, applied the plain error standard to a district court's failure to abide by Federal Rule of Criminal Procedure 11(b)(1)(N) "[b]ecause [the defendant] failed to object before the end of the [plea] colloquy."⁴⁴ The onus placed on defendants by this standard is incredible, as it would require a defendant (or defense counsel) to stop the district court mid-colloquy and remind the court to question the defendant on whether she understood the significance of her appellate waiver. The purpose of Rule 11(b)(1), however, is to safeguard a defendant from her own ignorance or misconceptions by requiring the district court to review certain items in the plea colloquy, not burden her with the responsibility to remind the judge what was left out of the colloquy. The *Polak* timeline for imposition of plain error is also inconsistent with *Loutos*, where harmless error analysis was applied because the defendant moved to vacate his guilty plea *after* his plea had been accepted.⁴⁵ Because of its harsh effect and inconsistency with *Loutos*, the *Polak* timeline for imposition of the plain error standard should not be perpetuated further.

The application of the plain error standard arose again in *United States v. Smith*, a seemingly results-driven (and thus questionably-reasoned) opinion.⁴⁶ In its review, the *Smith* panel erroneously analyzed whether the error alleged in the grounds for appeal—that the district court violated the defendant's Sixth Amendment right to substitute counsel⁴⁷—rose to the plain error standard, rather than inspecting whether the district court's failure to discuss the appellate waiver during the plea colloquy in violation of Federal Rule of Criminal Procedure 11(b)(1)(N) constituted plain error⁴⁸ (as the court had done in *Sura* and *Polak*⁴⁹). Finding that the district court's abridgement of the defendant's Sixth Amendment rights was plain error,

showing that the defendant was illiterate) demonstrated that the defendant was sufficiently informed of the appellate waiver. *Sura*, 511 F.3d at 666 (Easterbrook, C.J., dissenting) ("But whether or not we accept the representations to which [the defendant] and his lawyer affixed their signature, we surely cannot act as if the *opposite* of those assurances were the truth!").

44. *United States v. Polak*, 573 F.3d 428, 431 (7th Cir. 2009). The court ultimately found that no plain error was present because the defendant affirmed that he had gone over the plea agreement with his attorney, the defendant signed the plea agreement, the court inquired into the defendant's knowledge of the appellate waiver after the plea was taken, the defendant was "more educated," and the government had overwhelming evidence against the defendant, thus making the defendant's acceptance of the appellate waiver "highly reasonable." *Id.* at 432.

45. *United States v. Loutos*, 383 F.3d 615, 618 (7th Cir. 2004).

46. *United States v. Smith*, 618 F.3d 657 (7th Cir. 2010). *Smith* was authored by Judge Kennelly of the United States District Court for the Northern District of Illinois, sitting by designation.

47. *Id.* at 663.

48. *Id.* at 664.

49. *United States v. Sura*, 511 F.3d 654, 658 (7th Cir. 2007); *Polak*, 573 F.3d at 431-32.

the panel only analyzed whether the district court's warning complied with Federal Rule of Criminal Procedure 11, not whether its failure to comply with that rule in itself constituted plain error.⁵⁰ Most out of step with precedent, though, is that the panel found that the plain error only vitiated the appellate waiver and therefore moved on to deciding the appeal on the merits.⁵¹ This approach runs directly counter to the majority's ruling in *Sura* that a failure to warn that rises to the level of plain error results in an invalid plea of guilty and thus demands reversal of the conviction.⁵² The court did not indicate that it wished to part ways with the overwhelming line of past Seventh Circuit precedent stating that an appellate waiver stands or falls with the entire plea agreement and may not be severed on appellate review.⁵³ Indeed, only six days later a different panel would reconfirm that "a waiver stands or falls with the plea bargain of which it is a part."⁵⁴ *Smith* should be confined to its facts given its unorthodox approach to plain error analysis and the panel's willingness to detach the invalid appellate waiver from the greater plea agreement rather than finding the greater guilty plea invalid as well.

IV. ALLEGED BREACH OF THE PLEA AGREEMENT BY THE GOVERNMENT

By invalidating the larger plea agreement, the government's breach of a plea agreement may affect a defendant's responsibility to abide by an appellate waiver. Here again, Judge Easterbrook takes a position that is extreme relative to most of the circuit in his published opinions. When faced with an allegation of breach of a plea agreement by the government, Seventh Circuit panels have generally analyzed the merit of the allegation.⁵⁵

50. *Smith*, 618 F.3d at 664-65.

51. *Id.* at 665.

52. *Sura*, 511 F.3d at 663.

53. *See, e.g.*, *United States v. Wenger*, 58 F.3d 280, 282 (7th Cir. 1995) ("Waivers of appeal must stand or fall with the agreements of which they are a part."); *United States v. Ogden*, 102 F.3d 887, 888 (7th Cir. 1996) ("If the district court had intended to revisit the issue of [the defendant's] appeal waiver, nothing short of setting aside the plea agreement would have sufficed."); *United States v. Williams*, 184 F.3d 666, 668 (7th Cir. 1999); *United States v. Behrman*, 235 F.3d 1049, 1051 (7th Cir. 2000) ("[A]ll terms stand or fall together."); *United States v. Wilson*, 481 F.3d 475, 483 (7th Cir. 2007) ("[A] plea waiver stands or falls with the plea agreement.")

54. *United States v. Quintero*, 618 F.3d 746, 752 (7th Cir. 2010) (internal quotation marks and citation omitted); *see also* *United States v. Sakellarion*, 649 F.3d 634, 639 (7th Cir. 2011).

55. *See, e.g.*, *United States v. Matchopatow*, 259 F.3d 847, 850 (7th Cir. 2001) (allegation that government breached its agreement to recommend only a five-level upward departure based on the brutality of the crime); *United States v. Feichtinger*, 105 F.3d 1188, 1190 (7th Cir. 1997) (allegation that government breached its agreement to recommend a three-level reduction for acceptance of responsibility); *see also* *Sakellarion*, 649 F.3d at 639 ("A defendant may void a plea agreement in certain circumstances, such as a material breach by the government . . .").

If the court finds no breach of the plea agreement by the government, it upholds the validity of the plea agreement and enforces the appellate waiver.⁵⁶ Failure to raise the issue before the district court does not work to preclude appellate review of this issue, but only affects the standard of review on appeal.⁵⁷

Opinions authored by Judge Easterbrook take a different approach and state that an appellate waiver precludes a court of appeals from even considering whether the government breached its obligations under a plea agreement: “[w]aiver of appeal, rather, means that the final decision will be made by one Article III judge rather than three Article III judges.”⁵⁸ Judge Easterbrook applies this approach regardless of whether the defendant raised the government’s breach before the district court:

[The defendant] presented to the district judge his contention that the prosecutor broke his promise by failing to recommend a three-level reduction for acceptance of responsibility. The judge found [the defendant’s] argument to be insubstantial. So it has been authoritatively determined that the government has kept its part of the bargain. What [the defendant] must be arguing, then, is not that a breach allows appeal, but that a *claim* of breach allows appeal. That would make all waivers unenforceable as a practical matter, for talk is cheap A waiver of appeal does not authorize a prosecutor to dishonor his promises; instead it determines *who* will be the judge of a claim that breach has occurred.⁵⁹

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56. *Matchopatow*, 259 F.3d at 851 (“[W]e cannot fathom even a scintilla of support for [the defendant’s] argument that the government broke its promise to him.”); *Feichtinger*, 105 F.3d at 1191 (despite apparent recognition that the government technically breached the plea agreement, the court found that a plea agreement should not be treated as breached where the government “in effect, does a little less than it promised, but actually does something which may be more likely to yield good results for a defendant”); *Quintero*, 618 F.3d at 751-52 (finding that the government did not breach plea agreement by failing to recommend an acceptance of responsibility reduction because the defendant breached first by committing perjury and obstruction of justice); *United States v. Linder*, 530 F.3d 556 (7th Cir. 2008) (finding that government did not breach plea agreement by arguing for a six-offense level enhancement).
57. *Matchopatow*, 259 F.3d at 851 (“[The defendant’s] failure to raise the issue of the government’s alleged breach during sentencing limits our review to one for plain error.”).
58. *United States v. Hare*, 269 F.3d 859, 861 (7th Cir. 2001); *see also id.* at 862 (“Although [the defendant] contends that the prosecutor broke his promise to recommend a lower sentence, the waiver prevents us from considering that contention; [the defendant] agreed that arguments of this sort would be conclusively resolved by the district judge.”); *United States v. Whitlow*, 287 F.3d 638, 640 (7th Cir. 2002).
59. *Whitlow*, 287 F.3d at 640. The *Whitlow* language has recently been cited with approval, but in a decision that reviewed whether a defendant could appeal an alleged breach of a supplemental agreement with the government, not an alleged breach of the plea agreement that contained the appeal waiver provision. *Sakellarion*, 649 F.3d at 639. Because that defendant did not allege breach of the plea agreement itself and a resulting invalidation of the appellate waiver provision, the court’s analysis is distinguishable. *See id.* at 640 (“But [the defendant] did not seek to

Not only does this approach break with the precedent establishing that a claim of breach by the government calls for plain error review where the defendant failed to raise the claim in the district court, it also creates tension with opinions holding that an appellate waiver does not bar an appeal of a district court's denial of a defendant's motion to vacate her guilty plea⁶⁰ or an appeal alleging that the plea agreement is void for lack of consideration.⁶¹

This intra-circuit split creates non-conformity within the circuit and unbalanced treatment of appellants. Moreover, Judge Easterbrook's approach ignores the fact that a breach of the plea agreement by the government may, in some instances, lead to a total invalidation of the plea agreement and conviction:

To the extent that these arguments [*inter alia*, breach of the plea agreement by the Government, mutual mistake], if successful, would result in setting aside the plea agreement as a whole, we entertain them despite the fact that the agreement itself contains a waiver of appeal rights.⁶²

Thus, Judge Easterbrook's steel curtain invocation of appellate waivers against allegations of plea agreement breaches by the government is impossible to square with other opinions of the Seventh Circuit that engage in a merits analysis of the allegation of breach by the government.⁶³ Because these opinions recognize that a breach of the plea agreement by the

withdraw from her plea or from the original plea agreement and the waiver of her right to appeal still stands.”)

60. See *United States v. Hodges*, 259 F.3d 655, 661 (7th Cir. 2001); *United States v. Cavender*, 228 F.3d 792, 802-03 (7th Cir. 2000) (Judge Easterbrook joined the majority opinion of Judge Diane P. Wood).

61. See *United States v. Kilcrease*, 665 F.3d 924, 927-28 (7th Cir. 2012) (analyzing merits of claim that plea agreement was not supported by adequate consideration in the face of an otherwise valid appeal waiver because “a waiver of appeal is not valid if the underlying plea agreement is unenforceable”); see also *United States v. Thomas*, 639 F.3d 786, 788 (7th Cir. 2011) (finding that the government gave adequate consideration for plea agreement without deciding whether lack of consideration would render appellate waiver unenforceable).

Judge Easterbrook's approach—at least with respect to defendants who did not raise the issue of breach before the district court—is consistent with one previous Seventh Circuit opinion, authored by Judge Bauer, in which the court stated that “[a] defendant's failure to allege the breach of a plea agreement at sentencing waives the matter for appeal.” *United States v. Hicks*, 129 F.3d 376, 378 (7th Cir. 1997) (all judges voted to deny rehearing en banc except Judges Ripple, Rovner, and Diane P. Wood).

62. *United States v. Cieslowski*, 410 F.3d 353, 361-62 (7th Cir. 2005). Authored by Judge Diane P. Wood and joined by Judge Ripple (two of the judges who wished to re-hear *Hicks* en banc), the *Cieslowski* opinion ultimately found that the government did not breach the plea agreement, and thus enforced the appellate waiver. *Id.* at 362-63.

63. See, e.g., *Cieslowski*, 410 F.3d at 361-63; *United States v. Feichtinger*, 105 F.3d 1188, 1190-91 (7th Cir. 1997).

government may invalidate the entire plea agreement, including the appellate waiver, Judge Easterbrook's hard line approach should not be extended.

V. REINSTATING DISMISSED CHARGES AFTER A DEFENDANT'S BREACH BY APPEAL

Perhaps most unique are Judge Easterbrook's opinions stating that a defendant's breach of an appeal waiver (by the act of filing an appeal) constitutes a breach of the plea agreement that permits the government to reinstate charges dismissed pursuant to the plea agreement. This approach, first set forth in *United States v. Hare*, appears motivated by a desire to deter other defendants from similar breaches in order to make the outcome of future appellate waivers more certain and the bargaining process more informed:

Dismissing the appeal is an essential but incomplete response [to a defendant's appeal despite the existence of an appellate waiver], because the prosecutorial resources are down the drain, and dismissal does nothing to make defendants' promises credible in future cases. But there is another remedy: If the defendant does not keep his promises, the prosecutor is not bound either. This is established for broken agreements to cooperate. A defendant who promises as part of his plea agreement to provide truthful information or testify in some other case, and who does not carry through, forfeits the benefits of the agreement, and the United States is free to reinstate dismissed charges and continue the prosecution. So, too, with a defendant who promises not to appeal and then puts the prosecutor through the appellate process anyway. This remedy assists other defendants by enabling them to make *believable* promises not to appeal.⁶⁴

Similarly:

Specific performance is a poor remedy for this kind of breach by the defendant; once an appeal is taken and a brief filed, the prosecutor must respond, and the resources sought to be conserved by the waiver have

64. *United States v. Hare*, 269 F.3d 859, 862-63 (7th Cir. 2001) (internal citations omitted). Judge Easterbrook has employed similar logic in other aspects of plea agreements. See *United States v. Fariduddin*, 469 F.3d 1111, 1112 (7th Cir. 2006) (when defendant's plea agreement called for payment of restitution at the time of entry of judgment, but defendant later requested a schedule of payments, the court, in a Judge Easterbrook-authored opinion, stated that "[b]y making a request that he agreed not to make, [the defendant] has broken his promise and should count himself lucky that the United States has not proposed to take back its own concessions and ask the judge to increase his sentence.").

been squandered. Money damages are unavailable. The only potentially effective remedy when a defendant breaks a promise not to appeal is to allow the prosecutor to withdraw some concessions. That is why we concluded in *Hare* that the defendant's appeal, in disregard of a promise not to do so, exposes him to steps that can increase the sentence.⁶⁵

No published Seventh Circuit opinion authored by a panel member other than Judge Easterbrook makes mention of the prosecution's ability to reinstate charges after a defendant's breach of her waiver of appeal. Judge Diane P. Wood has voiced disagreement with Judge Easterbrook's invitations to the government to remove concessions from defendants who breach their appellate waiver agreements.⁶⁶ Furthermore, Judge Easterbrook's reinstatement-of-charges approach is seemingly inconsistent with his own statement that "[a] defendant who forswears appellate review as part of a plea bargain remains entitled to file a notice of appeal."⁶⁷ Especially in an area so fraught with unpredictability and contradictions, it is harshly punitive to wave the specter of reinstated charges over the head of a defendant seeking to enforce whatever appellate rights she may retain. This unique-within-the-circuit approach should be abandoned, lest the identity of the author of the opinion rise to paramount importance to appealing defendants.

VI. CONCLUSION

Quite simply, the Seventh Circuit's appellate waiver case law lacks consistency. This uncertainty impedes efficiency in plea bargaining because it interferes with a defendant's ability to properly set a value on her appellate waiver. Greater predictability would place both defendants and the government in a more informed position and lead to better bargains for both sides. And, once these intra-circuit inconsistencies are resolved, future opinions should abide by circuit precedent or signal a purposeful deviation from it.

65. *United States v. Whitlow*, 287 F.3d 638, 640-41 (7th Cir. 2002). *See also* *Nunez v. United States*, 546 F.3d 450, 455 (7th Cir. 2008) (citing *Hare* and *Whitlow* for the proposition that "when a defendant appeals despite agreeing not to do so, the prosecutor may withdraw concessions made as part of the bargain.").

66. *Whitlow*, 287 F.3d at 642 (Diane P. Wood, J., dissenting) ("I would therefore not invite the government to re-open every other part of the plea agreement just because Whitlow structured his appeal as he did."). *See id.* at 643 (stating that the defendant's "expansion of his otherwise legitimate appeal ought not to constitute a basis for the government to recant on the entirety of the agreement from which it too benefitted.").

67. *Latham v. United States*, 527 F.3d 651, 653 (7th Cir. 2008).

