

**SENTENCE APPEAL WAIVERS SHOULD NOT BE ENFORCED IN THE  
EVENT OF SUPERSEDING SUPREME COURT LAW: THE *DURHAM* RULE  
AS APPLIED TO APPEAL WAIVERS**

*Aliza Hochman Bloom\**

**ABSTRACT**

*Sentence appeal waivers contained in plea agreements are generally enforced when entered into knowingly and voluntarily.<sup>1</sup> In the absence of Supreme Court precedent guiding the enforcement of appeal waivers, however, various courts of appeal have created their own limits and exceptions to their enforcement.<sup>2</sup> Given the concerns with enforcing appeal waivers in the case of intervening changes in applicable law, the Eleventh Circuit should adopt an exception that bars enforcement of appellate waivers where intervening Supreme Court law changes the outcome of a criminal sentence. This suggested exception is narrower than the “miscarriage of justice” exception and would parallel the court’s recent decision in *United States v. Durham*, which held that when there is an intervening decision of the Supreme Court on an issue that overrules either a decision of that Court or a published Eleventh Circuit decision, an appellant may raise a new claim or theory in a timely supplemental brief on appeal.<sup>3</sup> Similarly,*

---

\* Aliza Hochman Bloom is an appellate attorney at the Office of the Federal Defender for the Middle District of Florida. In her current role, she represents indigent criminal defendants before the Eleventh Circuit Court of Appeals. Prior to beginning her current position, Ms. Bloom clerked for the Honorable Charles Wilson of the Eleventh Circuit Court of Appeals and the Honorable Charlene Honeywell of the Middle District of Florida. She has also worked as a litigation associate at Cleary Gottlieb Steen & Hamilton LLP in New York. Ms. Bloom is very grateful to attorneys Kara Maguire and George Couture for their thoughtful reviews of earlier drafts of this Article.

<sup>1</sup> See *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993) (holding that appeal waivers must be enforced but made knowingly and voluntarily).

<sup>2</sup> See cases cited *infra* note 6.

<sup>3</sup> See *United States v. Durham*, 795 F.3d 1329, 1329 (11th Cir. 2015); see generally *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1931-33 (2013) (explaining how the Supreme Court has applied the “miscarriage of justice” exception for procedural defaults).

*the proposed exception for appellate waivers would prevent the unjust scenario where an appellant is barred from appealing his conviction or sentence based upon changes in substantive law prior to the sentence becoming final.*

### I. KNOWING AND VOLUNTARY SENTENCE APPEAL WAIVERS ARE STRICTLY ENFORCED

The Supreme Court has repeatedly held that a criminal defendant can waive various statutory and constitutional rights as part of the plea bargain process.<sup>4</sup> For example, a defendant can waive the right to a double jeopardy defense, the right to confront his accusers, and the right against mandatory self-incrimination.<sup>5</sup> Every court of appeal that has opined on this issue has found that waiving the right to appeal is permissible, as long as such waivers are entered into knowingly and voluntarily.<sup>6</sup> In the Eleventh Circuit, an appeal waiver “is valid if the government shows either that: (1) the district court specifically questioned the defendant about the waiver; or (2) the record makes clear that the defendant otherwise understood the full

---

<sup>4</sup> See *Peretz v. United States*, 501 U.S. 923, 936 (1991) (“The most basic rights of criminal defendants are . . . subject to waiver.”).

<sup>5</sup> See *Ricketts v. Adamson*, 483 U.S. 1, 8-10 (1987) (showing that a double jeopardy defense is waivable by pretrial agreement); *Boykin v. Alabama*, 395 U.S. 238, 242-43 (1969) (explaining that a knowing and voluntary guilty plea waives the privilege against compulsory self-incrimination, the right to a jury trial, and the right to confront one’s accusers).

<sup>6</sup> See *United States v. Guillen*, 561 F.3d 527, 529 (D.C. Cir. 2009); *United States v. Chen*, 127 F.3d 286, 289-90 (2d Cir. 1997) (explaining that a knowing and voluntary waiver of the right to appeal a sentence imposed within a range specified in the plea agreement is generally enforceable); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995) (holding that an appeal waiver is enforceable unless it was not made knowingly, intelligently, or voluntarily); *United States v. Bushert*, 997 F.2d 1343, 1351 (11th Cir. 1993) (holding that appeal waivers must be enforced, but, like guilty pleas, they must be made knowingly and voluntarily); *United States v. DeSantiago-Martinez*, 38 F.3d 394, 395 (9th Cir. 1992) (“[A]n express waiver of the right to appeal in a negotiated plea of guilty is valid if knowingly and voluntarily made.”); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) (showing that defendants may waive the statutory right to appeal if such waiver is informed and voluntary); *United States v. Wessells*, 936 F.2d 165, 167 (4th Cir. 1991) (waiving appellate rights in a valid plea agreement is enforceable as long as it is “the result of a knowing and intelligent decision to forgo the right to appeal”).

significance of the waiver.”<sup>7</sup>

Although the language of appeal waivers contained in plea agreements varies, it typically waives the right to appeal any sentence within the sentencing guideline range as calculated by the district court.<sup>8</sup> Accordingly, defendants bound by an appellate waiver are precluded from arguing that a sentencing court erred in calculating the applicable guidelines range or that certain enhancements have been improperly applied.<sup>9</sup> For example, if the U.S. Probation Office identified a defendant’s prior conviction as meriting a certain number of criminal history points, but that conduct was actually too old to be scored with criminal history points, and the district court applied the erroneous criminal history calculation, the defendant could not appeal the error even if the error was obvious and resulted in a longer prison sentence.<sup>10</sup>

---

<sup>7</sup> United States v. Johnson, 541 F.3d 1064, 1066 (11th Cir. 2008) (citing *Bushert*, 997 F.2d at 1351).

<sup>8</sup> See generally United States v. Cancel-Velez, 614 F. App’x 994 (11th Cir. 2015) (showing the typical language used in Eleventh Circuit appeal waivers). The standard plea agreement in the Middle District of Florida contains the following paragraph under the section entitled “Defendant’s Waiver of Right to Appeal the Sentence”:

The defendant agrees that this Court has jurisdiction and authority to impose any sentence up to the statutory maximum and expressly waives the right to appeal defendant’s sentence on any ground, including the ground that the Court erred in determining the applicable guidelines range pursuant to the United States Sentencing Guidelines, except (a) the ground that the sentence exceeds the defendant’s applicable guidelines range *as determined by the Court* pursuant to the United States Sentencing Guidelines; (b) the ground that the sentence exceeds the statutory maximum penalty; or (c) the ground that the sentence violates the Eighth Amendment to the Constitution; provided, however, that if the government exercises its right to appeal the sentence imposed, as authorized by 18 U.S.C. § 3742(b), then the defendant is released from his waiver and may appeal the sentence as authorized by 18 U.S.C. § 3742(a).

*Id.* (emphasis added).

<sup>9</sup> United States v. Howle, 166 F.3d 1166, 1169 (11th Cir. 1999).

<sup>10</sup> See generally Gainer v. State, 590 So. 2d 1001, 1002 (Fla. Dist. Ct. App. 1991) (showing an example of how a scoresheet created for sentencing was improperly calculated but the sentencing error imposed was agreed to by the defendant as part of a plea agreement and therefore was harmless).

To be sure, appeal waivers contained in plea agreements are strictly enforced. For example, the Eleventh Circuit concluded that an appeal waiver “includes more than just difficult or debatable legal issues; it includes ‘waiver of the right to appeal blatant error.’”<sup>11</sup> Indeed, appellate waivers are enforced even when a district court judge suggests at sentencing that a defendant may appeal a particular issue.<sup>12</sup>

## II. IN THE ABSENCE OF SUPREME COURT LAW, MOST CIRCUITS HAVE DEFINED EXCEPTIONS TO THE ENFORCEMENT OF APPELLATE WAIVERS

The Supreme Court has not ruled on the validity or scope of appeal waivers. However, in *United States v. Mezzanatto*, the Court stated that absent indication of congressional intent to preclude waiver, it presumes that “statutory provisions are subject to waiver by voluntary agreement of the parties.”<sup>13</sup> *Mezzanatto* supports the proposition that defendants can waive their statutory right to appeal as part of a plea agreement.<sup>14</sup>

Although knowing and voluntary appeal waivers are generally enforced, there is substantial controversy about their effect on the criminal process, particularly when defendants waive their right to appeal without achieving meaningful bargaining gains from the government, such as dismissing a count from the indictment or promising to argue for a U.S. Sentencing Guidelines Manual section 5K1.1 motion.<sup>15</sup> Courts of appeal have noted that appellate waivers

---

<sup>11</sup> *Johnson*, 541 F.3d at 1068 (quoting *Howle*, 166 F.3d at 1169).

<sup>12</sup> *United States v. Bascomb*, 451 F.3d 1292, 1295 (11th Cir. 2006) (explaining that even “if a district court encourages a defendant to appeal a [legal] issue,” the government need not assert, at that time, that an appeal is barred by an appeal waiver); see *Howle*, 166 F.3d at 1168.

<sup>13</sup> See *United States v. Mezzanatto*, 513 U.S. 196, 201, 210 (1995). “[A]bsent some affirmative indication that the agreement was entered into unknowingly or involuntarily, an agreement to waive the exclusionary provisions of the plea-statement Rules is valid and enforceable.” *Id.* at 201.

<sup>14</sup> See *id.* at 210.

<sup>15</sup> See, e.g., Steven L. Chanenson, *Guidance from Above and Beyond*, 58 STAN. L. REV. 175, 182-83 (2005);

Nancy J. King & Michael E. O’Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 218, 252-53 (2005) (noting that some of the risks of appeal

present “grave dangers” and implicate “both constitutional questions and ordinary principles of fairness and justice.”<sup>16</sup> One appellate judge commented that a defendant cannot “ever knowingly and intelligently waive, as part of a plea agreement, the right to appeal a sentence that has yet to be imposed . . . ; such a ‘waiver’ is inherently uninformed and unintelligent.”<sup>17</sup> The Second Circuit warned that appeal waivers threaten basic principles of justice, and as such, they should not be “enforceable on a basis that is unlimited and unexamined.”<sup>18</sup> Accordingly, the Second Circuit urged sentencing judges to construe plea agreements strictly against the government, given the principles at stake and the government’s “awesome advantages in bargaining power.”<sup>19</sup> In an Eleventh Circuit decision enforcing an appeal waiver, one concurring judge noted that broad appeal waivers are necessarily not knowing and voluntary.<sup>20</sup> Indeed, the notion of waiving the right to appeal any district court error that occurs after a defendant pleads guilty is problematic.<sup>21</sup>

Given the concerns with appellate waivers in plea agreements, many circuits have established a few exceptions or limits to their enforcement.<sup>22</sup> For example, most courts recognize the inability of a waiver to preclude appeal of any punishment above the statutory maximum.<sup>23</sup> Also, some circuits preclude the waiver of an appeal

---

waivers, including the increased risk of sentences, are not compliant with the law).

<sup>16</sup> *United States v. Rosa*, 123 F.3d 94, 99 (2d Cir. 1997).

<sup>17</sup> *See United States v. Melancon*, 972 F.2d 566, 571 (5th Cir. 1992) (Parker, J., concurring).

<sup>18</sup> *United States v. Ready*, 82 F.3d 551, 555 (2d Cir. 1996), *superseded by rule as stated in United States v. Mergen*, 764 F.3d 199 (2d Cir. 2014).

<sup>19</sup> *Id.* at 559.

<sup>20</sup> *See United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (Propst, J., concurring). “As a trial judge, I have a problem with obtaining a knowing and understanding waiver of appeal with respect to any potential error I might make at sentencing.” *Id.*

<sup>21</sup> *See, e.g., R.I. DIST. R. CRIM. P. 35.* In contrast to the federal system, where motions for a district court’s reconsideration are typically reserved for evidentiary or trial rulings, some state systems provide the opportunity to challenge a mistaken sentence, despite a guilty plea. *See id.*

<sup>22</sup> *See United States v. Holton*, 571 F. App’x 794, 796-97 (11th Cir. 2014).

<sup>23</sup> *See, e.g., id.* at 797 (holding that the defendant’s appeal was not barred by his appeal waiver because his challenge to the Armed Career Criminal Act enhancement

based upon the ineffective assistance of counsel.<sup>24</sup> By contrast, the Eleventh Circuit held that a valid sentence appeal waiver, when entered into knowingly and voluntarily, precludes an appellant from raising a claim of ineffective assistance of counsel in a collateral proceeding.<sup>25</sup> The court does, however, recognize that the plea agreement and appellate waiver must be knowing and voluntary for the bar on collateral attacks to apply and has disregarded waivers when it determined that they were involuntary.<sup>26</sup>

The Supreme Court, recognizing the omnipresence of plea-bargaining in the federal criminal system, extended the right to effective assistance of counsel to the plea agreement stage.<sup>27</sup> Recently, the Department of Justice opined that, while a defendant is legally permitted to waive the claim of ineffective assistance of counsel, federal prosecutors should not seek such waivers in their standard plea agreements.<sup>28</sup> Nevertheless, there continues to be active debate

---

fell within the exception providing that he could appeal if his sentence “exceeds the maximum permitted by statute”); *see also* *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992) (holding that a defendant cannot waive the right to appellate review of his sentence if it is “imposed in excess of the maximum penalty provided by statute or based on a constitutionally impermissible factor such as race”).

<sup>24</sup> *See, e.g., Hurlow v. United States*, 726 F.3d 958, 964, 966 (7th Cir. 2013). (“[A] direct or collateral review waiver does not bar a challenge regarding the validity of a plea agreement (and necessarily the waiver it contains) on grounds of ineffective assistance of counsel.”); *United States v. Attar*, 38 F.3d 727, 729 (4th Cir. 1994) (holding that a general waiver of appellate rights in a plea agreement cannot be fairly construed as waiving claims of ineffective assistance of counsel).

<sup>25</sup> *Williams v. United States*, 396 F.3d 1340, 1342 (11th Cir. 2005) (holding that appellant’s appeal waiver precluded a collateral claim of ineffective assistance of counsel. “[A] contrary result would permit a defendant to circumvent the terms of the sentence-appeal waiver simply by recasting a challenge to his sentence as a claim of ineffective assistance, thus rendering the waiver meaningless.”).

<sup>26</sup> *See, e.g., Lattimore v. United States*, 185 F. App’x 808, 809 n.1 (11th Cir. 2006).

<sup>27</sup> *See Missouri v. Frye*, 132 S. Ct. 1399, 1412 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 359-60 (2010).

<sup>28</sup> Memorandum from James M. Cole, Deputy Attorney Gen., U.S. Dep’t of Justice on Dep’t Policy on Waivers of Claims of Ineffective Assistance of Counsel to All Federal Prosecutors (Oct. 14, 2013), [https://www.fd.org/docs/select-topics/pleas/memorandum-to-all-federal-prosecutors-from-james-m-cole-deputy-attorney-general-on-waivers-of-ineffective-assistance-of-counsel-in-plea-agreements-\(10-14-14\).pdf?sfvrsn=6](https://www.fd.org/docs/select-topics/pleas/memorandum-to-all-federal-prosecutors-from-james-m-cole-deputy-attorney-general-on-waivers-of-ineffective-assistance-of-counsel-in-plea-agreements-(10-14-14).pdf?sfvrsn=6). In 2013, the deputy attorney general announced that while assuring

regarding whether a standard appeal waiver can prohibit all collateral claims brought pursuant to 28 U.S.C. § 2255, including ineffective assistance of counsel claims.<sup>29</sup>

In addition to these prevalent exceptions, several circuits will not enforce an otherwise valid appeal waiver where doing so would result in a miscarriage of justice.<sup>30</sup> The definition of “miscarriage of justice,” however, varies considerably and often includes the recognized exceptions to the enforcement of appellate waivers mentioned above.<sup>31</sup> For example, the Fourth Circuit held that it will not enforce an appellate waiver where the sentence imposed exceeds the statutory maximum or is “based on a constitutionally impermissible factor such as race.”<sup>32</sup> While a sentence above the statutory maximum is considered a “miscarriage of justice,” a sentence that erroneously increases a defendant’s term of imprisonment based upon a miscalculation of the applicable guidelines is not, despite the requirement in 18 U.S.C. § 3553(a)(4) that a sentencing judge consider the applicable sentencing guidelines range.<sup>33</sup>

---

prosecutors that “a waiver of the claim of ineffective assistance of counsel is both legal and ethical,” he stated that federal prosecutors should no longer seek such waivers. *Id.*

<sup>29</sup> See generally Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73 (2015) (examining applications and effects of waivers in the criminal justice system).

<sup>30</sup> See, e.g., *United States v. Andis*, 333 F.3d 886, 889-90 (8th Cir. 2003) (finding that the term “miscarriage of justice” as applied to avoiding an appeal waiver differs from its use in the habeas corpus context, where it refers to actual innocence); see *McQuiggen v. Perkins*, 133 S. Ct. 1924, 1931 (2013) (holding that a miscarriage of justice in the habeas context may excuse procedural default, abuse of the writ, and even statute of limitations, explaining that the fundamental “miscarriage of justice” exception “is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons”).

<sup>31</sup> *Andis*, 333 F.3d at 889-90.

<sup>32</sup> *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (finding that the waiver at issue precluded defendant’s claim that his sentence resulted from a misapplication of the sentencing guidelines).

<sup>33</sup> Compare *id.*, and 18 U.S.C. § 3553(a)(4) (2010) (discussing that a defendant did not waive his right to appeal if his sentence is in excess of the maximum penalty allowed by statute), with *United States v. DeRoo*, 304 F.3d 824, 826-29 (8th Cir. 2002) (finding that even though the court did not give DeRoo an opportunity to supplement the record, the court did not abuse its discretion).

The First Circuit has concluded that, although knowing and voluntary appeal waivers are presumptively valid, they “are subject to a general exception under which the court of appeals retains inherent power to relieve the defendant of the waiver, albeit on terms that are just to the government, where a miscarriage of justice occurs.”<sup>34</sup> However, a miscarriage of justice permits courts to grant relief from waivers only “in egregious cases.”<sup>35</sup> For example, in *United States v. Rodríguez-Morales*, the appellant argued that the prosecutor drastically overstated his sentencing exposure if he were to proceed to trial and that he would not have pled guilty but for the prosecutor’s inaccurate information.<sup>36</sup> With respect to the appellate waiver, the First Circuit determined that “[i]t is clear that there has been no miscarriage of justice within the meaning of our case law governing waivers of appeal under *Teeter* . . . .”<sup>37</sup> The Tenth Circuit held:

To prove that enforcement of an appellate waiver would result in a miscarriage of justice, a defendant must establish at least one of four circumstances: (1) reliance by the court upon an impermissible factor such as race in imposition of the sentence; (2) ineffective assistance of counsel in connection with the negotiation of the waiver; (3) the sentence exceeds the statutory maximum; or (4) the waiver is otherwise unlawful and seriously affects the fairness, integrity, or public reputation of judicial proceedings.<sup>38</sup>

The Third Circuit explained that although appeal waivers are generally permissible, “[t]here may be an unusual circumstance where an error amounting to a miscarriage of justice may invalidate the waiver.”<sup>39</sup> Although the Third Circuit declined to “delineate[] specific instances in which waiver-of-appeals provisions may be found invalid,”<sup>40</sup> it endorsed the First Circuit’s approach in *Teeter*, setting

---

<sup>34</sup> *United States v. Teeter*, 257 F.3d 14, 25-26 (1st Cir. 2001).

<sup>35</sup> *Id.* at 25.

<sup>36</sup> *United States v. Rodríguez-Morales*, 647 F.3d 395, 398 (1st Cir. 2011).

<sup>37</sup> *Id.* at 399 (citing *Teeter*, 257 F.3d at 14).

<sup>38</sup> *United States v. Porter*, 405 F.3d 1136, 1143 (10th Cir. 2005).

<sup>39</sup> *United States v. Khattak*, 273 F.3d 557, 562 (3d Cir. 2001).

<sup>40</sup> *Id.*

forth the following factors before disregarding an appellate waiver:

[T]he clarity of the error, its gravity, its character (e.g., whether it concerns a fact issue, a sentencing guideline, or a statutory maximum), the impact of the error on the defendant, the impact of correcting the error on the government, and the extent to which the defendant acquiesced in the result.<sup>41</sup>

Although the “miscarriage of justice” exception is an effort to mitigate some problematic consequences of appellate waivers, it is amorphous and completely defined by judicial discretion.<sup>42</sup> Further, courts have declined to find common errors—such as a miscalculation of the guidelines’ range—to be miscarriages of justice, leaving most errors unreviewable.<sup>43</sup>

### III. THE ELEVENTH CIRCUIT SHOULD NOT ENFORCE APPEAL WAIVERS WHERE AN INTERVENING SUPREME COURT DECISION DIRECTLY AFFECTS A DEFENDANT’S CONVICTION OR SENTENCE

The Eleventh Circuit has no published decision creating an exception to the enforcement of appeal waivers akin to the “miscarriage of justice” exception. To the contrary, the Eleventh Circuit strictly enforces appeal waivers.<sup>44</sup> The Eleventh Circuit, like other appellate courts, justifies the strict enforcement of appeal waivers by explaining that, were the court free “to strike a defendant’s waiver of his right to

---

<sup>41</sup> *Id.* at 562-63; *see Teeter*, 257 F.3d at 25-26.

<sup>42</sup> *Teeter*, 257 F.3d at 25.

<sup>43</sup> *See, e.g., DeRoo v. United States*, 223 F.3d 919, 926 (8th Cir. 2000) (finding that the defendant’s appeal based on ineffective counsel was sufficient to permit meaningful review on appeal; however, the defendant suffered no prejudice because there was no probability that the motion would have been successful); Amy Adelson, *Appellate Advocacy*, CHAMPION, Nov. 2015, at 52.

<sup>44</sup> *See, e.g., United States v. Johnson*, 541 F.3d 1064, 1069 (11th Cir. 2008) (finding that an appeal waiver will be enforced to bar the appeal of a restitution order); *United States v. Grinard-Henry*, 399 F.3d 1294, 1296 (11th Cir. 2005) (finding that the “[b]road waiver language covers those grounds of appeal” where the appellant challenged the sentence on grounds of *Booker/Apprendi* error); *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999) (finding that a knowing and voluntary appeal waiver is enforceable even where the sentencing judge strongly encouraged the defendant to appeal the sentence).

appeal every time a case presents a legal sentencing issue, ‘prosecutors would no longer be willing to give very much in exchange for such a waiver, and the ability of defendants to plea bargain would be hampered.’”<sup>45</sup> Given the omnipresence of appellate waivers in plea agreements, it seems unlikely that defendants are gaining more in the bargaining process by waiving their right to appeal. Further studies must be done to see if this justification for the strict enforcement of appeal waivers—to help defendants have more bargaining power—is grounded in practical realities, where appellate waivers are part of the boilerplate plea agreements provided to criminal defendants.

While the “miscarriage of justice” exception is fairly amorphous, the adoption of a narrower exception could reduce actual injustice resulting from appellate waivers. The proposed exception would bar application of an appellate waiver *where a Supreme Court decision overrules its own prior precedent or Eleventh Circuit precedent on an issue affecting a defendant’s guilty plea or sentence*.<sup>46</sup> A recent Eleventh Circuit decision logically supports this exception and has several legal and practical advantages.<sup>47</sup>

First, the proposed exception closely parallels the reasoning in the Eleventh Circuit’s recent decision in *United States v. Durham*.<sup>48</sup> Sitting en banc, the court reversed its prior precedent stating that an appellant who did not raise an issue in his opening brief could not do so in a reply brief, supplemental brief, rehearing petition, or on remand from the Supreme Court, even when the new issue was based upon an intervening decision of the Supreme Court.<sup>49</sup> The Eleventh Circuit joined the rest of its sister circuits in holding that:

[W]here there is an intervening decision of the Supreme Court on an issue that overrules either a decision of that

---

<sup>45</sup> *United States v. Porter*, 591 F. App’x 724, 726 (11th Cir. 2014) (citing *Howle*, 166 F.3d at 1169); *see also DeRoo*, 223 F.3d at 923 (“Waivers preserve the finality of judgments and sentences, and are of value to the accused to gain concessions from the government.”).

<sup>46</sup> *See United States v. Durham*, 795 F.3d 1329, 1331 (11th Cir. 2015).

<sup>47</sup> *Id.* at 1331.

<sup>48</sup> *Id.*

<sup>49</sup> *Hamilton v. Southland Christian Sch., Inc.*, 680 F.3d 1316, 1319 (11th Cir. 2012), *abrogated by Durham*, 795 F.3d at 1330.

Court or a published decision of this Court that was on the books when the appellant's opening brief was filed, and that provides the appellant with a new claim or theory, the appellant will be allowed to raise that new claim or theory in a supplemental or substitute brief provided that he files a motion to do so in a timely fashion after (or, as in this case, before) the new decision is issued.<sup>50</sup>

The logic behind *Durham* is applicable to the proposed exception. In criticizing the Eleventh Circuit's procedural rule in effect prior to *Durham*, Justice Kagan explained that "[w]hen a new claim is based on an intervening Supreme Court decision—as [the Defendant's] is on *Descamps*—the failure to raise the claim in an opening brief reflects not a lack of diligence, but merely a want of clairvoyance."<sup>51</sup> Moreover, relying on that defendant's inability to predict the Supreme Court's law in denying release violates the principle underlying the concept of criminal retroactivity, wherein the Supreme Court endeavors to "treat[] similarly situated defendants the same" on direct appeal.<sup>52</sup> Indeed, the Supreme Court explained that "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication."<sup>53</sup>

Judge Tjoflat provided similar reasoning in a different case, explaining that depriving defendants of the benefit of a changed law does not "comport[] with the ideal of evenhanded justice" because doing so creates sentencing disparities between evenly situated defendants.<sup>54</sup> Further, without permitting defendants to bring claims

---

<sup>50</sup> *Durham*, 795 F.3d at 1331.

<sup>51</sup> *Joseph v. United States*, 135 S. Ct. 705, 706 (2014) (Kagan, J., concurring) (respecting the denial of certiorari).

<sup>52</sup> *Griffith v. Kentucky*, 479 U.S. 314, 323, 328 (1987) (holding that new rules "appl[y] retroactively to all cases . . . pending on direct review").

<sup>53</sup> *Id.* at 322 (describing that when substantive changes to the law occur, petitioners are entitled to have those changes apply on collateral rule); see also *Montgomery v. Louisiana*, 136 S. Ct. 718, 729-30 (2016) (explaining that when a substantive rule has eliminated a state's power to proscribe the defendant's conduct or sentence, "the resulting conviction or sentence is, by definition, unlawful").

<sup>54</sup> *United States v. Higdon*, 418 F.3d 1136, 1149 (11th Cir. 2005) (Tjoflat, J., dissenting).

resulting from an intervening change in Supreme Court law, litigants would be forced to raise and preserve “claims that are squarely foreclosed by circuit and [even] Supreme Court precedent on the off chance that [a new] decision will make them suddenly viable.”<sup>55</sup> Such an onerous requirement certainly does not promote judicial economy.

These justifications, which supported reversing the Eleventh Circuit’s procedural rule in *Durham*, resonate strongly with the proposed exception to the enforcement of appellate waivers.<sup>56</sup> The exception would permit appeals, despite an appellate waiver, on the ground that the conviction or sentence would be different in light of intervening Supreme Court precedent between the signing of the plea agreement and the pronouncement of a defendant’s final sentence. For example, imagine a defendant pleads guilty to a crime pursuant to a written agreement with a standard waiver. At the time of the defendant’s sentencing, he is categorized as a career offender pursuant to U.S. Sentencing Guidelines section 4B1.1, but he has objected to one of his qualifying predicate convictions as not constituting a crime of violence. The sentencing court then sentences the defendant as a career offender in light of authoritative Eleventh Circuit precedent finding that a particular prior offense is a crime of violence, but shortly after sentencing, the Supreme Court issues a decision abrogating the Eleventh Circuit case used to justify the defendant’s career offender enhancement. Accordingly, were the defendant sentenced without the appeal waiver, he would not be classified as a career offender and would therefore be facing significantly less imprisonment for the same crime. Similarly, should the Supreme Court redefine a particular crime as requiring proof of four, instead of three elements, a defendant would be barred from relief by an appellate waiver.<sup>57</sup>

---

<sup>55</sup> *United States v. Vanorden*, 414 F.3d 1321, 1324 (11th Cir. 2005) (Tjoflat, J., dissenting).

<sup>56</sup> *See United States v. Durham*, 795 F.3d 1329, 1330 (11th Cir. 2015).

<sup>57</sup> *United States v. Chandler*, 388 F.3d 796, 805 (11th Cir. 2004). The Eleventh Circuit held that “[i]f there is doubt whether the defendants’ conduct is criminal, the rule of lenity requires that the doubt be resolved in favor of the accused.” *Id.* Without the proposed exception to appellate waivers, a defendant who pleads guilty with a standard plea agreement would be barred from appealing in the event that the Supreme Court strikes the definition for a particular crime. *See id.*

This exception to the enforcement of appeal waivers, where there is intervening Supreme Court law that affects a defendant's conviction or sentence, can be interpreted as falling within the requirement that a valid appeal waiver must be knowing and voluntary.<sup>58</sup> Indeed, entering a guilty plea, which waives the right to appeal, when an intervening Supreme Court decision then changes the nature of a defendant's conviction or sentence, cannot be described as "knowing" or "voluntary."<sup>59</sup> This exception is markedly different from the scenario where a defendant enters a plea agreement but is sentenced to a much higher sentence than what he originally expected. If the district court miscalculates a defendant's applicable guidelines, he has notice and opportunity to argue error at least before the district court.<sup>60</sup> In contrast, when a defendant's claim relies upon a post-sentencing intervening change in law, and there is an appeal waiver, a defendant has neither notice nor an opportunity to argue for the correct application of the law to the facts of the case.<sup>61</sup>

This proposed exception to the enforcement of appellate waivers also aligns with the body of law recognizing plea bargains as contracts between the government and defendants.<sup>62</sup> Several circuits, including the Eleventh, recognize that plea agreements are contracts, which should be interpreted in accord with what the parties intended.<sup>63</sup> For example, the Eleventh Circuit held that an ambiguity in a plea agreement must be read against the government.<sup>64</sup> Further, in uniformly holding that an appellate waiver may not bar an appeal asserting that a sentence exceeds the statutory maximum, some circuits

---

<sup>58</sup> See *United States v. Bushert*, 997 F.2d 1343, 1345 (11th Cir. 1993) (holding that an appeal waiver was not valid where the defendant did not understand its full significance).

<sup>59</sup> See *id.*

<sup>60</sup> See *id.* at 1352.

<sup>61</sup> *Id.* at 1351.

<sup>62</sup> *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999).

<sup>63</sup> See, e.g., *United States v. Rubbo*, 396 F.3d 1330, 1334 (11th Cir. 2005); *Howle*, 166 F.3d at 1168 (reasoning that plea agreements are essentially contracts between the government and criminal defendants); *Allen v. Thomas*, 161 F.3d 667, 671 (11th Cir. 1998) (explaining that, in general, the principles of contract law govern the creation of plea agreements).

<sup>64</sup> *United States v. Jeffries*, 908 F.2d 1520, 1523 (11th Cir. 1990).

rely upon “the unconscionability doctrine of contract law (since plea agreements are contracts) . . . .”<sup>65</sup> To the extent that intervening changes in the applicable law upend the settled and negotiated expectations of the parties, principles of equity counsel against the enforcement of a contract that would cause severe hardship to one party.<sup>66</sup>

Finally, as a matter of policy, a reviewing court should not enforce an appeal waiver when there is an intervening change of law of the Supreme Court. The Supreme Court has explained that, whether a legal question was settled or unsettled at the time of a defendant’s trial, “it is enough that the error be ‘plain’ at the time of appellate consideration” for it to be considered plain error within the meaning of Rule 52(b).<sup>67</sup> The logic of *Henderson*’s definition of when plain error can occur is echoed in *Durham*, whereby the Eleventh Circuit permits appellants to be entitled to beneficial changes of applicable law up until the moment that their appeal is decided.<sup>68</sup> Further, the inclusion of the proposed exception in plea agreements would avoid injustice and unwarranted sentencing disparities that result due to the Eleventh Circuit’s limitation on collateral attacks to a sentence.<sup>69</sup> The Eleventh Circuit has recently held that defendants cannot collaterally attack their sentences pursuant to 28 U.S.C § 2255 based on a misapplication of the sentencing guidelines when their sentence falls below the statutory maximum.<sup>70</sup> Accordingly, without an exception to the enforcement of appellate waivers where intervening Supreme Court law changes the substantive conviction or sentence of the defendant, defendants

---

<sup>65</sup> *United States v. Caruthers*, 458 F.3d 459, 472 (6th Cir. 2006); *United States v. Hahn*, 359 F.3d 1315, 1327 (10th Cir. 2004); *see United States v. Khattak*, 273 F.3d 557, 563 (3d Cir. 2001).

<sup>66</sup> *See Hahn*, 359 F.3d at 1324-25.

<sup>67</sup> *See* FED. R. CRIM. P. 52(b); *Henderson v. United States*, 133 S. Ct. 1121, 1127 (2013).

<sup>68</sup> *Henderson*, 133 S. Ct. at 1126.

<sup>69</sup> *See id.* at 1127.

<sup>70</sup> *See Spencer v. United States*, 773 F.3d 1132, 1335 (11th Cir. 2014) (en banc). Notably, however, the four dissenting Eleventh Circuit judges in *Spencer* believed that “an erroneous guideline determination that is likely to result in a person spending such a considerable amount of additional time in prison—here, six years—constitutes a fundamental error resulting in a complete miscarriage of justice.” *Id.* at 1145 (Wilson, J., dissenting).

sentenced erroneously pursuant to the sentencing guidelines will lack both the ability to file a direct appeal and to collaterally attack their sentence.