INTERPRETATION OF PROBLEMATIC FEDERAL CRIMINAL APPEAL WAIVERS

Michael Zachary*

A common scenario: In a signed plea agreement, a federal criminal defendant agrees, inter alia, to waive any appeal of her sentence if the sentence imposed is "within or below" a stipulated range of twenty-four to forty months imprisonment. However, the sentence imposed is twenty-four months imprisonment, twelve months supervised release, and a $100 mandatory assessment.

Issue: Is the appeal waiver effective?

When facing the above scenario, an appellate court generally has two choices: (1) find the waiver provision entirely ineffective pursuant to the rule that courts should construe plea agreements strictly against the government; or (2) find the waiver provision effective, at least in part, pursuant to the contract principle requiring courts to construe contracts so as to give meaning to as much of the parties' agreement as possible. The first choice protects the defendant by avoiding any adverse constitutional or equitable implications and reflects the government's usual superior bargaining position. The second choice focuses on the fact that the parties reached a bargain concerning the waiver provision, based on their mutual interest in streamlining the proceedings and clarifying expectations, and on the likelihood that failure to enforce the provision would give the defendant an unbargained-for windfall. The importance of these competing interests suggests that appellate courts should strive to reconcile them when practicable. But is this possible?

The principles governing the interpretation of criminal appeal waivers—and all other provisions in plea agreements—have wide-ranging implications. Nearly 90% of federal criminal case dispositions are convictions.[1] Currently, more than 95% of federal criminal convictions are ob-

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* Supervisory staff attorney, United States Court of Appeals for the Second Circuit. The views expressed are those of the author and not necessarily those of the Second Circuit.

1. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL CRIMINAL CASE PROCESSING 2001, at 11 tbl.5 (2003) [hereinafter CRIMINAL CASE PROCESSING 2001] (indicating that 88.8% of all federal criminal cases, and 91.5% of federal felony cases, that terminated in the year ending Sept. 30, 2001, resulted in conviction); *id.* at 31 tbl.A.9 (showing similar statistics for years 1994 through 2001); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 2001, at 423 tbl.5.24 (Ann L. Pastore & Kathleen Maguire eds., 2001) [hereinafter CRIMINAL JUSTICE STATISTICS 2001] (indicating that 89.5% of federal criminal cases disposed of in fiscal year 2001 resulted in conviction) (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE U.S. COURTS: 2001 ANNUAL REPORT OF THE DIRECTOR 211–13 tbl.D-4 (2002) [hereinafter JUDICIAL

tained through the entry of a guilty plea.[2] Many—if not most—of those guilty pleas are the result of plea agreements,[3] and many—if not most—of

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BUSINESS 2001]); *id.* at 419 tbl.5.22 (showing the total annual tally of federal convictions and guilty pleas for each year from 1945 to 2001 and also showing that, from 1996 to 2001, the percentage of criminal cases resulting in conviction rose annually as follows: 86.7%, 88.1%, 88.2%, 88.2%, 89.3%, 89.5%); OFFICE OF HUMAN RES. AND STATISTICS, ADMIN. OFFICE OF THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS 95 tbl.D-4 (2002) [hereinafter JUDICIAL CASELOAD STATISTICS] (indicating that 89.8% of federal criminal cases disposed of in the year ending March 31, 2002, resulted in conviction).

2. U.S. SENTENCING COMM'N, 2001 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 20 fig.C, 24 tbl.11 (2001) [hereinafter 2001 SOURCEBOOK OF SENTENCING STATISTICS] (indicating percentage of convictions through guilty pleas as: 96.6% for fiscal year 2001; 95.5% for 2000; 94.6% for 1999; 93.6% for 1998; and 93.2% for 1997); JUDICIAL CASELOAD STATISTICS, *supra* note 1, at 95 tbl.D-4 (indicating that 95.2% of convictions for the year ending Mar. 31, 2002, were through guilty pleas); CRIMINAL CASE PROCESSING 2001, *supra* note 1, at 11 tbl.5 (indicating that 95.1% of all federal convictions, and 96% of federal felony convictions, entered between Oct. 1, 2000, and Sept. 30, 2001, resulted from guilty pleas or pleas of nolo contendere); CRIMINAL JUSTICE STATISTICS 2001, *supra* note 1, at 423 tbl.5.24 (indicating that 94.7% of convictions in fiscal year 2001 were the result of guilty pleas) (citing JUDICIAL BUSINESS 2001, *supra* note 1, at 211–13 tbl.D-4 (2002)); *id.* at 419 tbl.5.22 (showing numbers of federal convictions and guilty pleas for years 1945 through 2001); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS 2000, at 56 tbl.4.2 (2002) (indicating that 94.7% of all federal convictions, and 95.5% of federal felony convictions, entered between Oct. 1, 1999, and Sept. 30, 2000, resulted from guilty pleas). In the Second Circuit, 97.1% of federal criminal convictions in fiscal year 2001 were obtained through the entry of a guilty plea. 2001 SOURCEBOOK OF SENTENCING STATISTICS, *supra*, at 21 tbl.10. In the state systems, 94% of felony convictions in 1998 resulted from guilty pleas. CRIMINAL JUSTICE STATISTICS 2001, *supra* note 1, at 445 tbl.5.44.

3. *See* FED. R. CRIM. P. 11 advisory committee's note to 1974 amendment ("A substantial number of [guilty pleas] are the result of plea discussions."); U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A(4)(c) (2002) ("Nearly ninety percent of all federal criminal cases involve guilty pleas and many of these cases involve some form of plea agreement."); DONALD J. NEWMAN, CONVICTION: THE DETERMINATION OF GUILT OR INNOCENCE WITHOUT TRIAL 236 (1966) ("[D]owngrading charges and promising lenient sentences in exchange for guilty pleas are common . . . ."); *id.* at 237 ("[A]t present[,] [plea bargaining] is clearly a major characteristic of nontrial adjudication."); Ronald Wright & Marc Miller, *The Screening/Bargaining Tradeoff*, 55 STAN. L. REV. 29, 30 (2002) ("Most of those guilty pleas result from negotiations between prosecution and defense.") (citing HERBERT S. MILLER ET AL., U.S. DEP'T OF JUSTICE, PLEA BARGAINING IN THE UNITED STATES 17 (1978)).
Some recent articles state that 80% to 90% of criminal cases are disposed of by a plea agreement. Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 128 n.3 (1995) ("[M]ost sources estimate that 85% to 90% of criminal cases are disposed of by some form of plea bargain." (citation omitted)); David E. Carney, Note, *Waiver of the Right to Appeal Sentencing in Plea Agreements with the Federal Government*, 40 WM. & MARY L. REV. 1019, 1037 (1999) ("Plea agreements resolve more than eighty percent of federal criminal cases." (citation omitted)); Jack W. Campbell, IV & Gregory A. Castanias, *Sentencing-Appeal Waivers: Recent Decisions Open the Door to Reinvigorated Challenges*, CHAMPION, May 24, 2000, at 34 ("Plea agreements resolve more than 90 percent of federal criminal prosecutions . . . ."). However, the authorities and statistics in the above-noted articles actually concern the percentage of convictions obtained through a guilty plea, not the percentage obtained through a plea agreement. *See* Calhoun, *supra*, at 128 n.3 (citing NEWMAN, *supra*, at 3 n.1 (discussing guilty pleas without mention of the percentage of pleas entered in the absence of a plea agreement); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1909 n.1 (1992) (stating "[m]ost criminal prosecutions are settled without a trial," and supporting this assertion with a citation to documents that indicate the percentage of federal cases resolved without a

those plea agreements contain waivers of the defendant's right to appeal.[4] In the Second Circuit, the plea agreement forms used by the U.S. Attorneys' Offices for the District of Connecticut and the Eastern, Northern, Southern, and Western Districts of New York all contain appeal waiver provisions of one kind or another.[5] However, the appeal waivers used in Second Circuit federal prosecutions are frequently ambiguous and possibly ineffective. As a result, the parties' shared interest in clarifying their rights and streamlining the proceedings is undermined in a great many cases.

This article analyzes several frequently used waivers, suggests how those waivers should be interpreted under the applicable case law and contract interpretation principles, and recommends how attorneys should draft

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trial in 1989 and the percentage of state convictions obtained through guilty pleas); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1990, at 502 tbl.5.25 (Kathleen Maguire & Timothy J. Flanagan eds., 1990) [hereinafter CRIMINAL JUSTICE STATISTICS 1990] (detailing, inter alia, the number of defendants who, in the year ending June 30, 1989, were convicted through a guilty plea, nolo contendere plea, or verdict of a judge or jury; no mention made of plea agreements)); Carney, *supra*, at 1037 n.97 (citing CRIMINAL JUSTICE STATISTICS 1990, *supra*, at 502 tbl.5.25); Campbell & Castanias, *supra*, 34 n.1 (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 1997 ANNUAL REPORT OF THE DIRECTOR 224 tbl.D-7 (1997) (presenting, inter alia, the numbers of defendants who, in the year ending Sept. 30, 1997, were convicted through a guilty plea, nolo contendere plea, or verdict of a judge or jury; no mention made of plea agreements). Guilty pleas may be, and have been, entered without the defendant also entering into a plea agreement. *E.g.*, United States v. Simpson, 319 F.3d 81, 84 (2d Cir. 2003); United States v. Bello, 310 F.3d 56, 57 (2d Cir. 2002); United States v. Acevedo, 229 F.3d 350, 354 (2d Cir. 2000). Although the author was unable to locate definitive statistics, review of the literature cited in this article supports the conclusion that plea agreements resolve a significant number, and perhaps a majority or more, of federal criminal prosecutions.

4. *See* Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 FORDHAM L. REV. 2011, 2029 (2000) (describing appeal waivers as "particularly widespread"); Calhoun, *supra* note 3, at 211–12 ("Appeal waivers are now a dominant feature of the plea bargaining landscape . . . . In many jurisdictions, such waivers are a virtual precondition to engaging in plea bargaining."); Thomas W. Hillier, II, *Commentary by Federal Defenders on the August 1997 Proposed Amendment to Fed. R. Crim. P. 11(c)*, 11 FED. SENTENCING REP. 48 (July/Aug. 1998) (noting the "proliferation of appeal waivers in plea agreements"), *available at* 1998 WL 911928, at *1; *see also* Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 147 n.109 (1999) (noting that "[t]he ABA Criminal Justice Section has become . . . apprehensive about the routine practice of including in every federal plea agreement an 'unconditional waiver of appellate and habeas rights'"). Although no statistics could be found concerning the number of plea agreements containing appeal waivers, the literature referred to in this article suggests, at the very least, that such waivers are frequently included in plea agreements. This conclusion is also supported by the inclusion of appeal waivers in the form plea agreements used by the U. S. Attorneys' Offices in the District of Connecticut and the Eastern, Northern, Southern, and Western Districts of New York. *See infra* text accompanying notes 5, 24–30 (discussing plea agreements from those districts).

5. Comm. on Second Circuit Courts, Fed. Bar Council, Proffer, Plea and Cooperation Agreements in the Second Circuit 1, app. C (2003) [hereinafter Proffer, Plea and Cooperation Agreements]. The plea agreement form currently used by the U.S. Attorney's Office for the District of Vermont does not contain an appeal waiver. *Id.* at 18, app. C at 80–86.

future waivers. Although the discussion focuses on criminal appeal waivers in the Second Circuit, and on a particular type of ambiguity, the issues and legal principles discussed in this article are relevant to most other jurisdictions and are relevant to many other instances of ambiguous language in plea agreements.

I. STRICT CONSTRUCTION AGAINST THE GOVERNMENT

The Second Circuit has stated that plea agreement provisions waiving a criminal defendant's right to appeal a conviction and/or sentence are enforceable, with certain exceptions.[6] Such exceptions include cases where the defendant's waiver was not made knowingly and voluntarily; the sentence was tainted by ethnic bias or some other constitutionally impermissible factor; or the government breached the terms of the plea agreement.[7] However, the cases in which the exceptions to enforceability arise are infre-

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6. *See* United States v. Gomez-Perez, 215 F.3d 315, 318–19 (2d Cir. 2000) (noting the enforceability of appeal waivers and discussing various reasons the Second Circuit has invalidated waivers). Although none of the cases cited in *Gomez-Perez* in support of the proposition that appeal waivers are enforceable concerned plea agreement provisions waiving an appeal of the conviction, the plea agreement in *Gomez-Perez* did provide for waiver of any appeal of the conviction. *Id.* at 317–18. There is no indication in the *Gomez-Perez* opinion that the appellant wished to appeal the conviction; however, in conjunction with the court's finding under *Anders v. California*, 386 U.S. 738, 744 (1967), that there were no nonfrivolous issues for appeal, the court found that the appellant "knowingly, voluntarily, and competently waived his right to appeal." *Gomez-Perez*, 215 F.3d at 321.
Federal Rule of Criminal Procedure 11(b)(1)(N), formerly Rule 11(c)(6), is also relevant to the validity of appeal waivers because this rule requires the judge taking a guilty plea to determine that the defendant understands "the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence." FED. R. CRIM. P. 11(b)(1)(N). Oddly, the rule does not mention the possibility of a plea agreement provision waiving the right to appeal the conviction. Moreover, the Advisory Committee's note for the 1999 Amendments to Rule 11 states that the Committee took "no position on the underlying validity of such waivers." FED. R. CRIM. P. 11 advisory committee's note for the 1999 amendment. The Committee also added language to the note "which reflects the view that the amendment is not intended to signal [the Committee's] approval of the underlying practice of including waiver provisions in pretrial agreements." *Id.* The *United States Attorneys' Manual* also discusses the use of "waivers of sentencing appeal rights" without noting the use of waivers of conviction appeal rights. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL 9-16.330 (2002); *see also* U.S. DEP'T OF JUSTICE, CRIMINAL RESOURCE MANUAL 626 (1997) [hereinafter CRIMINAL RESOURCE MANUAL] (discussing the material covered in the *United States Attorneys' Manual* at 9-16.330 in greater detail but still omitting discussion of conviction appeal rights).

7. *See Gomez-Perez*, 215 F.3d at 319 (knowingly-made waiver held valid); United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997) (finding that the waiver does not bar appeal if the Government breaches the agreement) (citing United States v. Gonzalez, 16 F.3d 985, 990 (9th Cir. 1993)); United States v. Jacobson 15 F.3d 19, 22–23 (2d Cir. 1994) (noting that the waiver will not bind defendant if a sentence is imposed with ethnic bias); *see also* United States v. Goodman, 165 F.3d 169, 174–75 (2d Cir. 1999) (finding an appeal waiver invalid and noting that the defendant did not receive a reduction in sentencing, that her understanding of the waiver provision was doubtful, and that the sentence imposed was outside of the predicted sentencing range).

quent. A more prevalent problem is ambiguous drafting, which, in a large number of criminal appeals, significantly impacts the scope of the appeal waiver. In fact, in many federal criminal appeals, the language used in the appeal waiver reasonably can be construed as rendering the waiver virtually meaningless, and, thus, it may fail to serve its intended purpose. In those cases, a party to a criminal action who believed that an appeal from the judgment was either foreclosed entirely or limited in some respect might be in for an unpleasant surprise.

"Plea agreements are construed according to contract law principles."[8] However, as noted by the Second Circuit, they are "unique contracts 'in which special due process concerns for fairness and the adequacy of procedural safeguards obtain.'"[9] Thus, when interpreting a plea agreement, the courts must construe its provisions strictly against the Government, since, among other things, the Government is usually the party that drafted the agreement and it "ordinarily has certain awesome advantages in bargaining power."[10] Furthermore, the plea agreement must be interpreted based on the premise that the parties intended all of its provisions to be legal and in compliance with general public policy and fairness principles.[11]

The special rules of interpretation for plea agreements reflect the fact that because the defendant's "contract" rights and obligations are constitutionally based, the agreement "reflects concerns that differ fundamentally from and run wider than those of commercial contract law[,]" and the court must, in addition to protecting the defendant's constitutional rights, take into consideration "the honor of the government, public confidence in the

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8. United States v. Yemitan, 70 F.3d 746, 747 (2d Cir. 1995); *see also* United States v. Ready, 82 F.3d 551 (2d Cir. 1996); Carnine v. United States, 974 F.2d 924, 928 (7th Cir. 1992).

9. *Ready*, 82 F.3d at 558 (quoting *Carnine*, 974 F.2d at 928 (quoting United States v. Ataya, 864 F.2d 1324, 1329 (7th Cir. 1988))); *accord* United States v. Herrera, 928 F.2d 769, 773 (6th Cir. 1991) ("Although the plea agreement is contractual in nature, it is by no means an ordinary contract."); United States v. Giorgi, 840 F.2d 1022, 1026 (1st Cir. 1988) (discussing the "unique nature of a plea agreement"); *see also* Frank H. Easterbrook & Stephen J. Schulhofer, *Plea Bargaining as Compromise*, 101 YALE L.J. 1969, 1974–75 (1992) (discussing the differences between plea bargains and other types of contracts); Scott & Stuntz, *supra* note 3, at 1930 (arguing that the nature of the interest being negotiated in a plea bargain ought to dictate greater regulation of the contract).

10. *Ready*, 82 F.3d at 559; *see also* United States v. Gottesman, 122 F.3d 150, 152 (2d Cir. 1997) ("As with any contract in which the drafting party has an overwhelmingly superior bargaining position, plea agreements are construed strictly against the government." (citation omitted)); United States v. De la Fuente, 8 F.3d 1333, 1338 (9th Cir. 1993) ("Construing ambiguities in favor of the defendant makes sense in light of the parties' respective bargaining power and expertise."); *Carnine*, 974 F.2d at 928 (describing an expectation that the government draft plea agreements carefully and precisely); *Giorgi*, 840 F.2d at 1026 (holding that "the government must shoulder a greater degree of responsibility for lack of clarity in a plea agreement"); E. ALLAN FARNSWORTH, CONTRACTS § 7.11, at 518 (2d ed. 1990) (The *contra preferentem* rule "often operates against a party that is at a distinct advantage in bargaining . . . . [but] may be invoked even if the parties bargained as equals.").

11. *Ready*, 82 F.3d at 559 (citation omitted).

fair administration of justice, and the effective administration of justice in a federal scheme of government."[12] For these reasons, the courts "must scrutinize [appeal] waivers closely and apply them narrowly."[13]

A fairly simple example of how the above-noted principles are applied is provided in *United States v. Hernandez*, where the Second Circuit held that an appeal waiver, on its face, applied "only to an appeal or motion to vacate regarding the defendant's 'sentence,'" and, therefore, did not bar the defendant from "appealing the denial of his motion to withdraw his guilty plea, an issue related to the merits of the underlying conviction."[14] Thus, when you waive an appeal of the sentence, you may still appeal the conviction—and vice versa.

Other Second Circuit holdings in this area are more useful in illustrating the importance of careful drafting. In *United States v. Cunningham*, Cunningham agreed not to appeal his sentence if he were sentenced to a term of imprisonment of "time served." However, Cunningham was not sentenced solely to that sentence, "he was sentenced to time served *and* two

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12. *Id.* at 558 (quoting United States v. Harvey, 791 F.2d 294, 300 (4th Cir. 1986)) (citation and internal quotation marks omitted). While Second Circuit case law makes clear the relevance of the Constitution and other special considerations beyond ordinary contract law, there is no Second Circuit decision identifying the source of the applicable non-constitutional contract law—the law of the state where the agreement was executed or performed or federal common law. Two other circuits, however, have held that district courts must interpret federal plea agreements in accordance with federal law, including the Constitution, and not state or local contract law. United States v. Herrera, 928 F.2d 769, 773 (6th Cir. 1991) ("Federal plea agreements must be governed by the Constitution and federal law, otherwise identical agreements would be subject to different interpretations depending upon which state rule was being applied."); United States v. Alegria, 192 F.3d 179, 183 n.2 (1st Cir. 1999) (quoting *Herrera* with approval). This choice of law conclusion appears to be correct. The interpretation of federal plea agreements directly affects unique interests of the United States—how federal prosecutions are terminated and how federal criminal statutes and rules are enforced. Allowing the district courts to interpret identical plea agreements differently depending on the state of execution or performance would both create a significant conflict between federal interests and the operation of state law and frustrate the federal interest in uniformity of: (1) interpretation of the agreements; (2) application of those portions of Rule 11 governing plea agreements; and (3) how federal prosecutions proceed and terminate. *See* Boyle v. United Techs. Corp., 487 U.S. 500, 504, 507–08 (1988) (discussing requirements for application of federal law and stating that "[i]n some cases, for example where the federal interest requires a uniform rule, the entire body of state law applicable to the area conflicts and is replaced by federal rules"); *see also* Taylor v. United States, 495 U.S. 575, 602 (1990) (holding that state law definitions of burglary should not control whether a federal sentencing enhancement provision should apply); *Boyle*, 487 U.S. at 504 ("We have held that obligations to and rights of the United States under its contracts are governed exclusively by federal law."); United States v. Turley, 352 U.S. 407, 411 (1957) ("[I]n the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law."). However, finding that courts must apply federal common law clarifies what body of law is *not* binding more than it identifies an extant body of applicable law. Federal common law governing plea agreements and appeal waivers exists in an accessible form only to the extent federal courts have identified it in specific situations.

13. *Ready*, 82 F.3d at 556; *accord* United States v. Rosa, 123 F.3d 94, 98 (2d Cir. 1997).

14. United States v. Hernandez, 242 F.3d 110, 113 (2d Cir. 2001) (per curiam).

years' supervised release."[15] Based on a plain reading of the plea agreement, the court found that Cunningham did not waive his right to appeal the length of his term of supervised release, which was the only issue presented in the appeal.[16]

The Second Circuit rejected the Government's argument that because Cunningham could not appeal the imprisonment portion of his sentence—since, by the time the appeal was filed, his "time served" sentence had already been completed—the waiver provision must be read more expansively as a blanket agreement by Cunningham not to contest any part of his sentence.[17] This request that the court look to the "actual" intent of the parties rather than the plain language of the plea agreement was summarily rejected: "'[i]f the Government wished to negotiate for a broader waiver, it was certainly entitled to do so.' However, the Government did not draft a broader waiver and it is therefore bound by the language contained in the agreement it drafted."[18]

Other Second Circuit cases further illustrate the principle of strict construction of plea agreements against the government. In *United States v. Brown*, the Second Circuit found that a plea agreement provision that waived the right to appeal "any sentence within or below the stipulated [Sentencing] Guidelines range,"[19] did not bar an appeal of the district court's determination to make the sentence concurrent to a state sentence without giving credit for time served.[20] In *United States v. Ready*, the court found that, because an appeal waiver's use of the word "sentence" was ambiguous with regard to whether it encompassed the imposed restitution penalty, the provision, construed narrowly against the government, did not bar an appeal of restitution issues.[21] Similarly, in *United States v. Lebow*, the appeal of a restitution penalty was found not barred where the plea agreement waiver discussed only the sentencing range and did not address restitution.[22]

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15. United States v. Cunningham, 292 F.3d 115, 117 (2d Cir. 2002).

16. *Id.*

17. *Id.*

18. *Id.* (quoting *Hernandez*, 242 F.3d at 113) (citation omitted).

19. United States v. Brown 232 F.3d 44, 46 (2d Cir. 2000) (quoting the plea agreement).

20. *Id.* at 48 (citing United States v. Velasquez, 136 F.3d 921, 923 n.1 (2d Cir. 1998) (per curiam)).

21. *Ready*, 82 F.3d at 559–60.

22. United States v. Lebow, 162 F.3d 1149 (2d Cir. 1998) (unpublished table decision), *available at* 1998 WL 639260, at *1; *accord* Giraldi v. United States, Nos. 01 Civ. 2049, 99 CR 1228, 2001 WL 409529, at *3 (S.D.N.Y. Apr. 3, 2001) (Mag. J. report) (stating that the waiver which barred appeal of a sentence within a stipulated sentencing range, and which only referred to the period of imprisonment, did not encompass the appeal of a supervised release term or restitution).

II. FAILURE TO COMPORT WITH THE REALITIES OF SENTENCING

In *Hernandez*, *Cunningham*, *Ready*, and *Lebow*, the defendants appealed only matters not within the express language of the appeal waivers in their plea agreements.[23] However, as discussed below, many appeal waivers may be ineffective even as to matters explicitly encompassed by the waivers due to the failure of the waivers to comport with the realities of sentencing.

Many plea agreement appeal waivers in federal cases prosecuted within the Second Circuit use language similar to one of the following:

Waiver A: The defendant will neither appeal, nor litigate under 28 U.S.C. § 2255, any sentence within or below the stipulated Sentencing Guidelines range set forth [in a preceding plea agreement provision which states, as a range, the number of months imprisonment required by the Guidelines calculation].

Waiver B: The defendant will neither appeal, nor litigate under 28 U.S.C. § 2255, the conviction or sentence in the event that the court imposes a sentence within or below the stipulated Sentencing Guidelines range set forth [in a preceding plea agreement provision which states, as a range, the number of months imprisonment required by the Guidelines calculation].

Waiver C: The defendant will neither appeal, nor litigate under 28 U.S.C. § 2255, the conviction or sentence if the sentence does not exceed [insert number] months imprisonment, a [insert number] year term of supervised release, and [insert fine and restitution].

Waiver D: The defendant will neither appeal, nor litigate under 28 U.S.C. § 2255, the conviction or sentence if the court imposes a term of imprisonment of [number] months or less.

Waiver E: The defendant will neither appeal, nor litigate under 28 U.S.C. § 2255, the conviction or any sentence of imprisonment of [number] months or less.

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23. *Cunningham*, 292 F.3d at 117 (concluding that Cunningham "did not waive his right to appeal the length of the supervised release term"); *Hernandez*, 242 F.3d at 113 ("appealing the denial of his motion to withdraw his guilty plea"); *Lebow*, 1998 WL 639260, at *1 (holding that appellant did not waive the right to appeal restitution); *Ready*, 82 F.3d at 560 (concluding that "the waiver of Ready's right to appeal his 'sentence' did not include a waiver of his right to appeal his restitution penalty").

Waiver A is based on the appeal waiver provision in the plea agreement form, dated September 2002, used by the U.S. Attorney's Office for the Southern District of New York and the appeal waivers in plea agreements, dated various dates from April 1999 through January 2002, actually used in a number of cases prosecuted by that Office.[24] Waiver B is based on the appeal waivers in plea agreements, dated various dates in 1999 and 2000, used in several cases prosecuted by the U.S. Attorney's Office for the Eastern District of New York; several of those plea agreements contain notations suggesting that they were based on forms dated 1996 and 1999.[25] Waiver D is based on the appeal waiver provision contained in the plea agreement form, dated January 2001, used by the U.S. Attorney's Office for the Eastern District of New York, and the appeal waivers in plea agreements, dated various dates in 2001 and 2002, used in a number of cases prosecuted by that Office.[26] Waiver C is based on the appeal waiver provision in a plea agreement form provided to the author, in February 2003, by the U.S. Attorney's Office for the District of Connecticut,[27] and on the appeal waiver provision in the plea agreement form, undated, used by the U.S. Attorney's Office for the Western District of New York.[28] Waiver E is

24. PROFFER, PLEA AND COOPERATION AGREEMENTS, *supra* note 5, app. C at 36. *See, e.g.*, Plea Agreement at 5, United States v. Batista, No. S1-00-Cr-1265 (S.D.N.Y. Jan. 22, 2002) (on file with *Vermont Law Review*); Plea Agreement at 4, United States v. Abdelrahman, No. S1-00-CR-1238 (S.D.N.Y. May 7, 2001) (on file with *Vermont Law Review*); Plea Agreement at 4, United States v. Acosta, No. 99-CR-1221 (S.D.N.Y. Nov. 14, 2000) (on file with *Vermont Law Review*); Plea Agreement at 4, United States v. Bailey, No. S1-99-CR-42 (S.D.N.Y. Apr. 19, 1999) (on file with *Vermont Law Review*). The plea agreements noted in the text as having been used in Southern District of New York prosecutions contain notations that suggest that they are based on forms dated September 29, 1997 or August 9, 1999.

25. *See, e.g.*, Plea Agreement at 4, United States v. Reese, No. 96-CR-373 (E.D.N.Y. Oct. 4, 1999) (on file with *Vermont Law Review*); Plea Agreement at 3, United States v. Gonzalez, No. 00-CR-515 (E.D.N.Y. date unavailable) (on file with *Vermont Law Review*).

26. PROFFER, PLEA AND COOPERATION AGREEMENTS, *supra* note 5, app. C at 14–15. The plea agreements noted in the text as having been used in Eastern District of New York prosecutions contain notations which suggest that they are based on forms dated 1999, 2000, 2001, or 2002. *See, e.g.*, Plea Agreement at 3, United States v. Gonzalez, No. 02-CR-513 (E.D.N.Y. June 4, 2002) (on file with *Vermont Law Review*); Plea Agreement at 3, United States v. Grant, No. 02 CR 284 (E.D.N.Y. June 18, 2002) (on file with *Vermont Law Review*); Plea Agreement at 3, United States v. Nastasi, No. 00-CR-809 (S-1) (E.D.N.Y. Feb. 22, 2001) (on file with *Vermont Law Review*); Plea Agreement at 3, United States v. Carlini, No. 01-CR-327 (E.D.N.Y. 2000) (on file with *Vermont Law Review*); Plea Agreement at 3, United States v. Moreira, No. 01-CR-329 (E.D.N.Y. 2000) (on file with *Vermont Law Review*).

27. Standard Form Plea Agreement (D. Conn. 2003) (on file with *Vermont Law Review*).

28. PROFFER, PLEA AND COOPERATION AGREEMENTS, *supra* note 5, app. C at 62–63. The author has also reviewed, for purposes of this article, appeal waivers from plea agreements used in Western District of New York prosecutions, several of which differ significantly from those discussed in this text. In a plea agreement signed in September 2002, the defendant waived the right to appeal, request modification under 18 U.S.C. § 3582(c), or collaterally attack "any sentence imposed by the Court which falls within or is less than the sentencing range for imprisonment, a fine and supervised release set forth in [a prior section of the plea agreement]." Plea Agreement at 9, United States v. Goss, No. 02-

based on the appeal waiver provision in the plea agreement form, dated 2000, used by the U.S. Attorney's Office for the Northern District of New York.[29] The U.S. Attorney's Office for the District of Connecticut, however, also has, or had, a plea agreement form, dating from December 2000, which contained an appeal waiver somewhat similar to Waiver E.[30]

Waivers A and B are problematic because, in most cases, the defendant is sentenced to a specific term of imprisonment *plus* other sentence components such as supervised release, parole or probation, a fine, restitution, and the mandatory special assessment. In such cases, waivers similar to A or B reasonably can be interpreted as not barring any appeal of any aspect of the conviction or sentence since the sentence components that do not concern imprisonment cause the sentence not to be "within or below" the Guidelines range of imprisonment stipulated in the plea agreement.[31]

For example, a sentence of sixty months imprisonment *plus* some combination of supervised release, probation or parole, fine, restitution, and mandatory special assessment is not a sentence "*within or below* a stipulated Sentencing Guidelines range" of sixty months imprisonment. Likewise, a sentence of sixty months imprisonment plus one month of supervised release is not a sentence "*within or below* a stipulated Sentencing Guidelines range" of sixty to seventy months imprisonment. The addition of a sentence component that is qualitatively different than imprisonment causes the total sentence not to be *within or below* a sentence of any number of months imprisonment. A fruit analogy might be helpful: if a waiver bars an appeal if the sentence is *within or below* three to five apples, the

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CR-169 (W.D.N.Y. Sept. 6, 2002) (on file with *Vermont Law Review*). Under this waiver, the defendant may appeal the conviction; in all other respects, the waiver is similar to Waiver C. While the waiver does not take into account the likelihood that a mandatory special assessment would be part of the sentence, that omission should be deemed de minimis and not fatal to the effectiveness of the waiver as to the specified sentence components. *See infra* note 64.

Another Western District of New York plea agreement, signed in late 2000 or early 2001, is substantially similar to Waiver C in the text. Decision and Order denying 28 U.S.C. § 2255 motion at 2, Tondreau v. United States, 02-CV-362A (W.D.N.Y. Oct. 11, 2002) (quoting Plea Agreement at ¶ 19, United States v. Tondreau, No. 00-CR-186A (W.D.N.Y. n.d.)) (on file with *Vermont Law Review*).

29. Proffer, Plea and Cooperation Agreements, *supra* note 5, app. C at 31–32.

30. *See id.* at app. C at 4 ("[T]he defendant will not appeal or collaterally attack . . . the conviction or sentence of imprisonment imposed by the Court if that sentence does not exceed [insert number] months . . . ."). Also on file with *Vermont Law Review* is a plea agreement, dated October 21, 1998, used in a District of Connecticut prosecution, which contains an appeal waiver somewhat similar to Waiver E. That waiver states that "neither the Government nor the defendant will appeal a sentence of imprisonment imposed by the Court if that sentence is within the Guideline range of 151 to 188 months . . . ." Plea Agreement at 4, United States v. Richardson, No. 3:97-CR-00137 (D. Conn. Oct. 21, 1998).

31. Waiver C is likewise problematic, but only to the extent that most sentences will include a mandatory special assessment, which Waiver C does not mention. The effect of de minimis errors is discussed *infra*, at note 64.

waiver is arguably ineffective where the sentence actually imposed is three apples and one orange since that sentence is not *within or below* three to five apples.

Waiver D avoids this problem by conditioning the appeal waiver on the imposition of a particular term of imprisonment, instead of a particular, although contextually ambiguous, sentence. Waiver E avoids the problem by making the waiver unconditional with respect to the conviction (insofar as the waiver of any appeal of the conviction is not conditioned on the defendant receiving a particular sentence), limiting the waiver of a sentencing appeal so that only a challenge to the term of imprisonment is barred, and further limiting the sentencing appeal waiver by making it applicable only when the defendant receives a term of imprisonment of a specified number of months or less. Although the government attorneys who drafted Waivers A and B may have thought that those waivers were contingent solely on the term of imprisonment, those waivers do not clearly state that contingency. Waivers D and E illustrate the ease with which such a condition can be unambiguously drafted.[32]

A. The Meaning of "Sentence"

The above analysis is based on the assumption that the word "sentence" in Waivers A and B encompasses all of the non-imprisonment sentence components noted above and is not limited to the term of imprisonment. However, contract interpretation principles would require a different conclusion if one could demonstrate, through application of those principles, that the word "sentence" in Waivers A and B refers specifically to the term of imprisonment and does not encompass the other penalties noted

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32. *Compare* Waiver A, *supra* p. XX (waiver of appeal of a sentence within or below a specific guidelines range) and Waiver B, *supra* p. XX (waiver of appeal of conviction or sentence where sentence is within a specific guidelines range) *with* Waiver D, *supra* p. XX (waiver of appeal of conviction or sentence if term of imprisonment is within a specific guidelines range). Waivers D and E, *supra* p. XX are only two of innumerable formulations that avoid the ambiguity of Waivers A and B. The *U.S. Department of Justice Criminal Resource Manual* provides the following sample language, which is quite different than the waiver language discussed in the text:

> The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

Criminal Resource Manual, *supra* note 6, at 626.

above.[33] Relevant to the interpretation of the word "sentence," aside from the rule requiring strict construction against the government are, inter alia: (1) the generally prevailing or ordinary meaning of the word;[34] (2) any technical meaning it has within the relevant field—or "trade usage";[35] (3) any special meaning given to the word in the plea agreement itself, in the parties' prior course of dealing, or in their performance of the agreement;[36] and (4) any meaning that would make effective as much of the waiver provision as possible.[37]

B. "Generally Prevailing" and "Technical" Meaning of "Sentence"

Both the "generally prevailing" meaning and the "technical" criminal law meaning of the word "sentence" clearly indicate that the word encompasses all of the sentence components identified above, and not just the term of imprisonment. First, both standard and legal dictionaries define "sentence" as the judgment imposing the punishment in a criminal proceeding or the punishment itself.[38] Clearly, all of the above-noted sentence components are punishment.

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33. *See, e.g.*, United States v. Ready, 82 F.3d 551, 559–60 (2d Cir. 1996) (interpreting a waiver of the right to appeal a "sentence" so as not to include a waiver of the right to appeal a restitution penalty).

34. Restatement (Second) of Contracts § 202(3)(a) (1981); John D. Calamari & Joseph M. Perillo, The Law of Contracts § 3–13 n.53(a) (3d ed. 1987).

35. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(b) (1981); CALAMARI & PERILLO, *supra* note 34, § 3–13 n.53(b). *But see* RESTATEMENT (SECOND) OF CONTRACTS § 220(1) (1981) (explaining that trade usage does not apply where one party knows the other does not intend it to apply).

36. RESTATEMENT (SECOND) OF CONTRACTS § 202(4) (1981) (course of performance); *id.* § 202(5) (course of dealing); *id.* § 203(d) (terms negotiated in agreement); CALAMARI & PERILLO, *supra* note 34, §3–13 n.53(e).

37. RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981); CALAMARI & PERILLO, *supra* note 34, § 3–13 n.55.

38. *Black's Law Dictionary* (*Black's*) defines "sentence" as "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer." BLACK'S LAW DICTIONARY 1367 (7th ed. 1999). *Black's* also defines "noncustodial sentence" as "[a] criminal sentence (such as probation) not requiring prison time," and "conditional sentence," "deferred sentence," and "suspended sentence" as all sentences under which confinement is required only if the defendant fails to comply with specified conditions, such as probation conditions. *Id.* at 1367–68. *Webster's Ninth New Collegiate Dictionary* (*Webster's*) defines the noun "sentence" as, in relevant part, "JUDGMENT . . . *specif[ically]*: one formally pronounced by a court or judge in a criminal proceeding and specifying the punishment to be inflicted upon the convict [or] the punishment so imposed." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1072 (1990) [hereinafter WEBSTER'S]. The *Oxford English Dictionary* (*OED*) provides, in relevant part, the following definitions of the noun form of the word "sentence": "An authoritative decision; a judgment pronounced by a tribunal. . . . The judgment or decision of a court in any civil or criminal cause. . . . The judicial determination of the punishment to be inflicted on a convicted criminal. Hence, the punishment to which a criminal is sentenced." OXFORD ENGLISH DICTIONARY 990–91 (2d ed. 1989). In both *Webster's* and the *OED*, the

Second, the relevant federal statutes, the Sentencing Guidelines, and other federal sentencing materials indicate that the word "sentence" encompasses all of the other sentence components noted above in addition to the term of imprisonment. Chapter 227 of Title 18 of the United States Code, entitled "Sentences," covers probation and fines,[39] in addition to imprisonment.[40] Various individual provisions in Chapter 227 and elsewhere specifically state, or otherwise indicate, that defendants may be sentenced to probation and/or a fine.[41] Regarding supervised release, 18 U.S.C. § 3583 states, and other provisions indicate, that a court imposing a term of imprisonment "may [and, in some instances, shall] include as a part of the sentence a requirement that the defendant be placed on a term of supervised release after imprisonment."[42] Likewise, a variety of provisions indicate that defendants also may, or must, be "sentenced" to pay restitution and/or a special assessment.[43]

The statute defining the duties of the Sentencing Commission states, inter alia, that the Guidelines are to be used by sentencing courts in determining "whether to impose a sentence to probation, a fine, or a term of imprisonment,"[44] and "whether a sentence to a term of imprisonment should include a requirement that the defendant be placed on a term of supervised

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definition of the verb "sentence" is consistent with the preceding noun definitions. *Id.* at 992; WEBSTER'S, *supra*, at 1072.

39. 18 U.S.C. §§ 3561–3566, 3571–3574 (2000).

40. *Id.* §§ 3581–3586.

41. *See, e.g., id.* §§ 3551(b)–(c), 3561(a)–(b), 3562(a)–(b), 3563(a)–(c), 3564(a), (e), 3565(a)–(c), 3566, 3571(a), 3572(c)–(g), 3574, 3601, 3604, 3611, 3742(a)(3), (b)(3) (permitting the court to impose, or otherwise discussing, a sentence consisting of, or including, a fine, or probation, or both); 21 U.S.C. §§ 841(b)(1)–(3), 842(c)(2)(A)–(B), 843(d) (2000) (permitting the court to impose a sentence consisting of a fine, or probation, or both); FED. R. CRIM. P. 38(c)–(d) (2002) (permitting a court to stay a sentence of probation or fine on terms the court deems appropriate while the appeal is pending); FED. R. CRIM. P. 38(c)–(d) (2000) (renumbered and superceded 2002) (granting a reviewing court broad power to stay fine and probation sentences, on a conditional basis, pending appeal). Although there is some ambiguity in a few statutes, most references clearly indicate that fines are part of the sentence. *Compare* 21 U.S.C. § 844 (stating that the defendant "shall be sentenced to a term of imprisonment . . . and shall be fined"), *with* 18 U.S.C. § 3551 ("A sentence to pay a fine may be imposed in addition to any other sentence.").

42. 18 U.S.C. § 3583(a); *see also id.* § 3586 (directing the sentencing court to the appropriate statutory provision when "the sentence includes a term of supervised release"); § 3624(e) (discussing terms and conditions of supervised release when prisoner's "sentence includes a term of supervised release after imprisonment"); § 3742(a)–(b) (permitting either party to, under appropriate circumstances, appeal a sentence that includes a term of supervised release); 21 U.S.C. § 841(b)(1)–(2) (requiring sentences to include a term of supervised release); United States v. Cunningham, 292 F.3d 115, 117 (2d Cir. 2002) (stating that Cunningham "was sentenced to time served *and* two years' supervised release").

43. 18 U.S.C. §§ 3572(d), (f), 3611, 3664(o); FED. R. CRIM. P. 38(e) (2002); FED. R. CRIM. P. 38(e) (2000) (superceded 2002).

44. 28 U.S.C. § 994(a)(1)(A) (2000).

release after imprisonment,"[45] and should "reflect the . . . appropriateness of imposing a sentence other than imprisonment" in certain cases.[46] The Guidelines themselves reflect the understanding that probation, supervised release, restitution, fines, assessments, and forfeitures are all sentence components.[47] Federal Rule of Criminal Procedure 11(c)(1), which governs plea agreement procedures, also seems to reflect the distinction between "sentence" and "term of imprisonment" when it uses the phrase "sentence or sentencing range."[48] Finally, federal criminal judgments, which are rendered on a standard form entitled "Judgment in a Criminal Case," generally include the terms of imprisonment and supervised release, any fines or restitution, and the special assessments on the pages where the form states the sentence is found.[49]

C. Agreeing on a Non-Standard Definition of "Sentence"

Regardless of the "generally prevailing" or "technical" meanings of the word "sentence," the parties can be bound to a different meaning if a definition is agreed upon in the plea agreement.[50] In other words, if the plea agreement defines, or clearly uses, the word "sentence" as encompassing only the term of imprisonment, then the non-imprisonment penalties are irrelevant to a waiver conditioned solely on the sentence being within a particular term of imprisonment. Although I have yet to see a plea agreement that specifically defines the word "sentence", some plea agreements contain language suggesting that the parties may have had an understanding of the word that differed from its generally prevailing or technical meaning.

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45. *Id.* at § 994(a)(1)(C).

46. *Id.* at § 994(j); *see also id.* § 994(c)–(d) (discussing parameters that the Sentencing Commission should use to establish offense categories and defendant categories).

47. *See* U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A introductory cmt. (2002) ("A sentence is within the guidelines if it complies with each applicable section of this chapter," which includes all of the sentencing components.).

48. FED. R. CRIM. P. 11(c)(1) (designated as FED. R. CRIM. P. 11(e)(1) prior to December 1, 2002).

49. *See* United States District Court Form AO 245B, at 1 (stating that "[t]he defendant is sentenced as provided in pages ___ through ___ of this judgment"). The indicated pages nearly always contain all of the sentence components noted in the text. Federal Rule of Criminal Procedure 32(d)(1) requires a judgment of conviction to "set forth the plea, the verdict or findings, the adjudication, and the sentence." FED. R. CRIM. P. 32(d)(1). The word "sentence" in that rule apparently encompasses all of the sentence components discussed in the text. Additionally, the appeal waiver in the standard-form plea agreement used by the U.S. Attorney's Office for the District of Connecticut, upon which Waiver C is based, includes all of the various sentence components, except the mandatory special assessment, within the meaning of "sentence."

50. RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) cmt. (b) (1981); *see also* CALAMARI & PERILLO, *supra* note 34, §§ 3–10 (Four Corners Rule), 3–11 (Williston's Rule), 3–12 (Corbin's Rule), 3–13 to 3–15 (parol evidence).

A number of plea agreements drafted by the U.S. Attorney's Office for the Southern District of New York include a penalty provision which states that the charged offense "carries a maximum sentence of ___ years imprisonment, a maximum fine . . . of the greatest of $___ [or two other amounts based either on gain to the defendant or loss to the victims], a maximum term of supervised release of ___ years, and a mandatory special assessment of $100."[51] A grammatical analysis of this penalty provision yields the nonfrivolous argument that the parties understood "sentence" to refer only to the term of imprisonment, "sentence" being the first in a list of independent penalties—i.e., sentence, fine, special assessment, and supervised release. An alternative, but weaker, argument could be made that all of the penalties that follow "a maximum sentence of" are components of the "maximum sentence." The alternative argument would make the provision grammatically incorrect and use of the word "maximum" before both "fine" and "term of supervised release" mere surplusage.[52]

However, the above-quoted penalty provision language is still too ambiguous, by itself, to require "sentence" in Waivers A and B to be equated with "term of imprisonment" in light of: (1) the rule requiring plea agreements to be strictly construed against the government and applied narrowly; and (2) reflecting that rule, the Second Circuit's decision in *Cunningham* holding the Government responsible for not drafting "a broader waiver" specifically reflecting its interpretation of the waiver in that case and "therefore bound by the language contained in the agreement it drafted."[53]

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51. *E.g.*, Plea Agreement at 1, United States v. Abdelrahman, No. S1-00-CR-1238 (S.D.N.Y. May 7, 2001) (on file with *Vermont Law Review*).

52. Many plea agreements from prosecutions in the Eastern District of New York refer to all of the sentence components, including the term of imprisonment, as "statutory penalties," and then state that the "sentence is governed by the United States Sentencing Guidelines." *E.g.*, Plea Agreement at 2, United States v. Nucci, No. 00-CR-588 (E.D.N.Y. Oct. 19, 1999) (on file with *Vermont Law Review*). As noted earlier, according to the U.S. SENTENCING GUIDELINES MANUAL, ch. 5, pt. A introductory cmt. (2002), "[a] sentence is within the guidelines if it complies with each applicable section of [chapter five of the Guidelines]," which includes all of the sentencing components. Thus, those Eastern District waivers appear to use the generally prevailing meaning of the word "sentence." However, if a plea agreement provision that states that the sentence is governed by the Sentencing Guidelines is accompanied by a Guidelines determination of only the term of imprisonment, a reasonable argument can be made that the parties intended the word "sentence" to be limited in meaning to the imprisonment component. Such an argument is even stronger in cases where the agreement states that the sentence is expected to be a particular term of imprisonment.

53. United States v. Cunningham, 292 F.3d 115, 117 (2d Cir. 2002). The conclusion in the text that the quoted plea agreement language is too ambiguous to allow "sentence" to be equated with "term of imprisonment" is particularly strong in those cases where other language in the plea agreement appears to use the generally prevailing, or some other, meaning of "sentence" (e.g., the cases where a range of fines is included in the "sentencing range" provision of the plea agreement).

D. Course of Dealing or Performance and Other Parol Evidence

Even if the plea agreement does not clearly set forth or use a special definition of sentence, a party still might argue that the word "sentence" in an appeal waiver should be understood as being limited to the term of imprisonment in light of the parties' prior course of dealing, their performance of the agreement itself, or some understanding they shared as to a nonstandard definition of the word in that particular agreement. However, while the applicable parol evidence and contract interpretation rules might permit inquiry into the parties' actual intent or course of conduct in order to determine the meaning of the appeal waiver provision, such an inquiry is unlikely to be fruitful in many cases for the reasons that follow.[54]

First, many—if not most—plea agreements contain a merger clause stating that the agreement "supersedes any prior understandings, promises, or conditions between [the U.S. Attorney's Office] and the defendant. . . . No additional understandings, promises, or conditions have been entered into . . . and none will be entered into unless in writing and signed by all parties."[55] Second, as suggested in *Cunningham*, the government's failure to draft the plea agreement to account for the alleged nonstandard meaning of "sentence" may bar the government from presenting parol evidence of any such meaning in light of the strict construction against the government.[56] Third, examining parol evidence to interpret, on a case-by-case basis, the meaning of one of the most basic words in a plea agreement would

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54. *See* RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981) (great weight given to parties' principal purpose); *id.* § 202(4) (course of conduct); *id.* § 202(5) (manifestations of intent); *id.* § 203(d) (negotiated terms); *id.* § 220 (relevant usage); CALAMARI & PERILLO, *supra* note 34, § 3–12 ("Under Corbin's rules all relevant extrinsic evidence is admissible on the issue of meaning including evidence of subjective intention and what the parties said to each other with respect to meaning."); *id.* § 3–15 (parol evidence). The requirement in Rule 11(b)(1)(N) that the district court, before accepting a guilty plea, determine that the defendant understands the terms of any appeal waiver in a plea agreement may present the best opportunity for the parties to clarify the meaning of the waiver. FED. R. CRIM. P. 11(b)(1)(N). Thus, the discussion concerning the waiver at that juncture could represent the most credible parol evidence of the waiver's meaning. The plea colloquy is often close in time to the execution of the plea agreement; the defendant is usually under oath; the parties are on notice that the subject is to be addressed and have the opportunity to respond to each other's contentions; and the proceeding is for the very purpose of ensuring that the plea is knowingly and voluntarily entered. Unfortunately, many plea colloquy discussions regarding the appeal waiver are somewhat conclusory or vague about the breadth of the waiver, or conflict with the waiver language, without any explanation offered for the contradiction.

55. Plea Agreement at 4–5, United States v. Bailey, No. S1-99-CR-42 (S.D.N.Y. Apr. 21, 1999) (on file with *Vermont Law Review*).

56. *Cunningham*, 292 F.3d at 118.

introduce an uncalled-for level of complexity into the appellate process, possibly requiring evidentiary hearings and/or remands to the district courts. Such a prospect is antithetical to at least two of the central purposes of a plea agreement and an appeal waiver—streamlining criminal proceedings and clarifying the parties' expectations—and implicates the special constitutional and other considerations that distinguish plea agreements from ordinary contracts.[57] And finally, in many cases, there will be no need, or less need, to resolve the issue of whether, and to what degree, courts should allow parties to introduce parol evidence to contradict or clarify the meaning of the word "sentence" in a plea agreement since the rule of interpretation discussed below will render the issue moot.[58]

III. GIVING EFFECTIVE MEANING TO ALL TERMS WHEN POSSIBLE

While much of the preceding discussion weighs heavily toward construing the word "sentence" as bearing its generally prevailing meaning, it does not account for the contract interpretation principle that states that an interpretation that gives an effective meaning to all terms is preferred to an interpretation that leaves a part ineffective.[59] Defining the word "sentence" so that it renders the appeal waiver ineffective *ab initio*, although consistent with the requirement that the agreement be strictly construed against the

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57. *See supra* notes 9–13 and accompanying text.

58. Although parol evidence of the parties' prior course of dealing, performance under a particular plea agreement, or understanding as to a nonstandard definition of "sentence" may be relevant in particular cases, the subject is not discussed further as each nonstandard definition established through such evidence is likely to be either case-specific or otherwise of limited applicability.

59. RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981); *see* Int'l Multifoods Corp. v. Commercial Union Ins. Co., 309 F.3d 76, 86 (2d Cir. 2002) ("We disfavor contract interpretations that render provisions of a contract superfluous."); Interstate Brands Corp. v. Bakery Drivers & Bakery Goods Vending Mach. Local 550, 167 F.3d 764, 768 (2d Cir. 1999) (stating that the court prefers giving "reasonable and effective meaning" to all contractual terms) (quoting Rothenberg v. Lincoln Farm Camp, Inc., 755 F.2d 1017, 1019 (2d Cir. 1985)); Galli v. Metz, 973 F.2d 145, 149 (2d Cir. 1992) ("Under New York law an interpretation of a contract that has 'the effect of rendering at least one clause superfluous or meaningless . . . is not preferred and will be avoided if possible.'") (alteration in original) (quoting Garza v. Marine Transp. Lines, 861 F.2d 23, 27 (2d Cir. 1988)); Am. Home Assurance Co. v. Baltimore Gas & Elec. Co., 845 F.2d 48, 52 (2d Cir. 1988) (stating that a contract interpretation that provides effective meaning to all terms is preferred over one that does not); *Rothenberg*, 755 F.2d at 1019 (referring to numerous state cases in New York and approvingly referring to *Restatement (Second) of Contracts* § 203(a)); *see also* United States v. Yemitan, 70 F.3d 746, 748 (2d Cir. 1995) ("If this waiver does not preclude a challenge to the sentence as unlawful, then the covenant not to appeal becomes meaningless and would cease to have value as a bargaining chip in the hands of defendants."); United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1993) (stating that a defendant who benefits from a plea agreement may not appeal a sentence that complies with the terms of the agreement because allowing the appeal "would render the plea bargaining process and the resulting agreement meaningless"); RESTATEMENT (SECOND) OF CONTRACTS § 202(1) (1981) ("[I]f the principal purpose of the parties is ascertainable it is given great weight.").

government, would be clearly contrary to the parties' intention—that the waiver be effective in some fashion—and would grant the defendant an unbargained-for windfall. The problem that remains, however, is how to determine the parties' intentions and how to avoid a windfall to the defendant without imposing an unbargained-for obligation.

A. Waiver of Appeal of the Sentence

With regard to Waivers A and B, the tension between the strict construction rule and the rule against ineffective surplusage can be resolved as follows. When a waiver of an appeal of a sentence is conditioned on the sentence being within or below a particular term of imprisonment, the strict construction rule, by itself, would justify finding the waiver entirely ineffective in cases where non-imprisonment sentence components are imposed, i.e., in most prosecutions. While a finding that the waiver is ineffective would be appropriate with respect to appellate issues concerning the non-imprisonment components—since it usually will be unclear what the parties intended with respect to those components—it is not appropriate with respect to an appellate issue concerning the term of imprisonment, since the parties obviously intended the waiver to apply to at least that portion of the sentence. The argument that a party intended the waiver to be entirely meaningless should be summarily rejected as contrary to the rules of construction.[60]

Thus, in the absence of parol evidence requiring a different result, Waivers A and B should be found effective to bar an appeal of the term of imprisonment when that term is within the specified range, but not effective to bar an appeal of any other aspect of the sentence. When the waiver is construed in this fashion, strict construction against the government is tempered by the rule against ineffective surplusage, binding the parties to what the waiver's contextual logic tells us the parties, at a minimum, agreed to. While this balance does not eliminate all ambiguity—chargeable to the government—it minimizes it to a level that assures the integrity of the

60. I have yet to see a case where a defendant argued that he or she intended an appeal waiver to be meaningless. Such an argument would conflict with the contract interpretation rules, which give preference to a contract interpretation that provides a "reasonable and effective" meaning to all terms, and which bind the parties to a "relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage." RESTATEMENT (SECOND) OF CONTRACTS §§ 203(a), 220(1) (1981).

waiver; while it does not make the entire waiver effective—since the word "sentence" is restricted in meaning—it minimizes the surplusage.[61]

B. Waiver of Appeal of the Conviction

Although it is tempting to assume that the above sentence-appeal waiver result also applies to the portion of Waiver B that bars an appeal of the conviction when the sentence is within or below the specified term of imprisonment, it does not. When determining the scope of the sentence-appeal waiver, the word "sentence" must be interpreted in terms of both what is being waived and what condition must be met. When determining the scope of the conviction-appeal waiver, "sentence" is only being interpreted in terms of what condition must be met. This distinction leads to a different result, even though the analysis employs the same logic as the sentence-appeal waiver analysis. In this context, the interplay between the strict construction rule and the rule against ineffective surplusage is demonstrated by the following three possible outcomes.

1. Appeal of the Conviction is Waived When the Term of Imprisonment is Within or Below the Range Specified in the Waiver

Interpreting the word "sentence" as not incorporating non-imprisonment sentence components results in the broadest possible waiver, rather than a narrower waiver to which the parties, at the very least, clearly agreed. This broad interpretation requires use of a nonstandard definition of sentence, with little or no evidence, beyond the ambiguous waiver itself, that the parties agreed on such a definition. Thus, this interpretation resolves the ambiguity of the waiver entirely in favor of the government, contrary to the rules and case law discussed above, and places the entire risk of an unbargained-for obligation on the defendant. Although this interpretation "gives effect" to the waiver, it does so at too high a price.

61. However, an interpretation that allows an appeal of one or more components of the sentence, but not others, may lead to incongruities or anomalies in the sentence if the appeal succeeds. *See infra* Part IV.

2. The Waiver of Any Appeal of the Conviction is Entirely Ineffective When the Sentence Imposed by the Court Contains Any Non-imprisonment Components

As discussed above, the plain language of the waiver, and the rule requiring strict construction against the government, would support this conclusion. However, rendering the entire waiver as ineffective surplusage clearly awards the defendant an unbargained-for windfall.

If the choice were only between finding the waiver totally ineffective—alternate two—and finding it effective with its broadest possible meaning—alternate one—the rule requiring strict construction against the government and the various constitutional and equitable considerations noted earlier should result in a finding that the waiver is ineffective. However, in many cases, there is a third possibility, by which the language of the waiver, and the parties' intent, can be given at least partial effect.

3. Appeal of the Conviction Waived When All Sentence Components Are Within or Below the Ranges or Amounts Specified in the Plea Agreement

Since the parties clearly agreed that the appeal waiver would be conditioned on a sentencing contingency, it is safe to assume that, at the very least, they agreed on the narrowest contingency: that all sentence components would be (1) within or below the ranges or amounts specified in the plea agreement—even if not in the waiver provision itself; and (2) within or below the penalties specified in the statutes and Guidelines referred to in the portions of the agreement where the possible ranges or amounts are noted—assuming, of course, that the agreement cites the correct statutes and Guidelines.[62]

Plea agreements prepared by prosecutors in the Second Circuit typically outline all of the maximum imprisonment and non-imprisonment penalties to which the defendant may be subject. Some of these plea agreements also specify numerical ranges for one or more non-imprisonment penalties, below the maximum specified by statute or Guideline, that the parties believe will apply to the defendant. By conditioning the waiver on both the term of imprisonment and the non-imprisonment sentence compo-

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62. *See* United States v. Ready, 82 F.3d 551, 559 (2d Cir. 1996) ("[W]e presume that both parties to the plea agreements contemplated that all promises made were legal, and that the non-contracting 'party' who implements the agreement (the district judge) will act legally in executing the agreement."). After finding "ambiguity (at the least) as to the parties' intent with regard to restitution penalties imposed illegally . . . [the court] presume[d] that on the issue of restitution, the parties intended the phrase, 'whatever sentence is imposed,' to mean 'whatever sentence is imposed by law.'" *Id.*

nents being as specified in the agreement, and the agreement accurately reflecting the appropriate penalty provisions, the waiver is given effect while still being construed against the government.[63]

However, a reasonable argument can be made that interpreting the waiver in this fashion is not, in many cases, truly a strict construction against the government. In cases where the agreement simply outlines the maximum possible non-imprisonment penalties, this interpretation will rarely have any practical negative effect on the government since the district courts will usually impose penalties that are below the maximum limits provided by law. Moreover, there is much room for argument concerning the degree of ambiguity that should be tolerated. Thus, an appellate court could reasonably find that, contrary to the preceding analysis, stretching the waiver condition to include all sentence components is either not a fair reflection of the parties' intent or not a strict enough construction against the government. Based upon such findings, a court could find the waiver ineffective as to an appeal of the conviction.

Finally, in situations where the agreement does not specify the penalties for the non-imprisonment components, the waiver should be found ineffective as to the conviction. In that event, the rule requiring strict construction against the government takes precedence over the rule against ineffective surplusage since there is no unambiguous evidence of the parties' shared understanding of the meaning of the waiver—i.e., what conditions control—and no "narrowest" interpretation supported by the agreement itself.[64]

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63. Plea agreements that are specific as to the likely range of imprisonment, and contain an appeal waiver conditioned on the "sentence" being within that range of imprisonment, but which only state the maximum non-imprisonment penalties, reflect the central importance of imprisonment in the eyes of the parties to the agreement. The lesser importance of the non-imprisonment penalties may explain the parties' failure to clarify how those penalties affect the appeal waiver provision. Under these circumstances, it is a fair assumption that the defendant was in agreement that the non-imprisonment penalties imposed at sentencing, as long as they were within the terms or amounts specified in the plea agreement, would not justify a challenge to the conviction.

64. However, with respect to de minimis omissions, such as where the agreement lists all maximum penalties except the mandatory special assessment, the appellate court could still find the waiver effective. Since a mandatory special assessment applies to nearly all federal convictions, under 18 U.S.C. § 3013 (2000), and is therefore not subject to the parties' negotiations, the appellate court could find the waiver satisfied if the mandatory assessment is within statutory limits and the remaining sentence components are within the ranges or amounts provided in both the pertinent statutes and the agreement.

A somewhat different de minimis error is presented by a number of the Western District appeal waivers, some of which are discussed above. *See supra* note 28. In those waivers, the defendant waived the right to appeal, to modify pursuant to 18 U.S.C. § 3582(c) (2000), *and* to collaterally attack the sentence. Obviously, the word "and" in that portion of those waivers should be "or." Therefore, a defendant who signed such a waiver cannot legitimately argue that an appeal is not waived on the grounds that the defendant is only bringing an appeal and not the entire combination of an appeal *and* a

IV. INCONGRUITIES AND ANOMALIES

A finding that an appeal waiver is effective only as to some, but not all, issues may, in some appeals, result in an incongruity or anomaly of some sort. For example, an appellate issue that is not barred by a waiver may require, as a condition precedent, a determination on an issue barred by the waiver. A second, perhaps more common, scenario is where an appellate issue that is not barred by a waiver has the potential to result in an appellate decision that conflicts with the district court's decision on an issue barred from appeal.

The latter category would include instances where an appeal waiver bars any issue concerning the term of imprisonment, but not any issue concerning the supervised release term, and the court of appeals concludes that a district court determination which underlies both of those sentence components is incorrect. Thus, in cases where the court of appeals finds that the defendant was sentenced for the wrong offense, but that only the supervised release term may be challenged on appeal, the result could be a defendant serving a term of imprisonment for one offense, but a supervised release term for another. A somewhat lesser conflict would occur in a case where the court of appeals concluded that the district court erred in deciding the defendant's entitlement to a safety valve reduction in the defendant's term of imprisonment and supervised release term, but that only the supervised release was subject to challenge due to a partial waiver. In that case, the result might be a term of imprisonment without the safety valve reduction but a supervised release term with the reduction.

In such situations, the court of appeals would need to decide: (1) how the linkage between the two issues bears on the parties' intentions when executing the waiver (i.e., whether, under the particular circumstances, the linkage between the two issues suggests that the parties intended the waiver to apply to both issues, neither, or only one); (2) even if the parties intended the waiver to apply in such a way that incongruous or anomalous results might occur, whether the special due process and other concerns that attach

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§ 3582(c)(2) motion *and* a collateral attack, which is prohibited under a literal reading of the waiver. *See* Nat'l Am. Corp. v. Federal Republic of Nigeria, 597 F.2d 314, 320–22 (2d Cir. 1979) (omission of "key phrase" from contract was "obviously a typographical error" and parties had full notice of the contents of the phrase from other, similar contracts between the parties); United States v. Olushina, 63 Fed. Appx. 553, 556, 2003 WL 1973531, at *3 (2nd Cir. Apr. 24, 2003) (unpub. op.) (rejecting argument based on plea agreement language that was found to be "a typographical error on a matter as to which there is no legitimate dispute"); RESTATEMENT (SECOND) OF CONTRACTS § 203(a) (1981) (preferring interpretation which gives "reasonable, lawful, and effective" meaning to all terms over interpretation which "leaves a part unreasonable, unlawful, or of no effect"); *id.* § 220(1)–(2) (requiring interpretation of all terms in accordance with a relevant usage known by one or both parties).

to the interpretation of a plea agreement affect the scope of the waiver in such cases;[65] and (3) if the waiver is still deemed effective as to one, but not both, issues, how the merits of the non-barred issue should be resolved in light of the linkage. However, step (3) need not wait until steps (1) and (2) are completed. In many cases, a finding that the non-barred issue lacks merit may either eliminate the need to perform steps (1) and (2) or significantly affect the determination of what issues are encompassed by the waiver.[66]

CONCLUSION

Although it is clear that Waivers A and B do not have the same legal meaning as Waivers D and E, it is not entirely clear what meaning should attach to Waivers A and B. The possible interpretations discussed in the preceding analysis are just that—*possible* interpretations. While certain interpretations seem more appropriate under the applicable rules of interpretation, reasonable persons could reach very different results. The one firm conclusion that can be made regarding Waivers A through E is that greater care is needed in the drafting of even "simple" plea agreement appeal waivers.

Looking beyond the specific waiver language discussed in this article, the parties to criminal proceedings need to carefully consider—with regard to every provision in a plea agreement—the interaction between the standard rules of contract interpretation and the special rules that apply to plea agreements. Since a plea agreement is considered a unique form of contract, the parties' expectations may be upset if those expectations are based solely on the standard rules of contract interpretation. Moreover, the reverse is also true—parties relying solely on the special rules that apply to plea agreements may find, to their surprise, that the standard rules of contract interpretation occasionally trump, or significantly alter the result that might be expected under the special rules.

Finally, the fact that slight differences in even a simple appeal waiver can lead to widely different and unexpected results also will bear on the

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65. *See supra* Part I.

66. When construing an appeal waiver that has the potential for resulting in such an incongruity or anomaly, the court should consider, in addition to the factors noted in the text, the possibility that the defendant could raise, on appeal or in a collateral proceeding, a claim that counsel rendered ineffective assistance by permitting the defendant to agree to such a waiver. If the waiver would simply delay a decision on an issue rather than totally bar contemplation of the issue, or would generate more litigation than a decision on the merits of the issue, the waiver may not have served its purpose—in whole or part—and that fact may weigh in favor of finding the waiver ineffective.

question of whether the defendant entered into the plea agreement and appeal waiver knowingly and voluntarily.[67]

67. *See* Kristine Cordier Karnezis, Annotation, *Validity and Effect of Criminal Defendant's Express Waiver of Right to Appeal as Part of Negotiated Plea Agreement*, 89 A.L.R.3d 864 (1979 and supp. 2003) (describing, inter alia, a large number of cases in which particular appeal waivers were held to be either effective or ineffective as to particular appellate issues).