

A BIRD IN THE HAND OR TWO IN THE BUSH: ENFORCING APPEAL WAIVERS AFTER THE PASSAGE OF THE FIRST STEP ACT

ABSTRACT

Congress passed the First Step Act in 2018 to implement meaningful sentencing reforms and to help reduce the overall number of individuals in federal prisons. The Act provides new avenues for defendants to seek adjustments to their sentences, none more important than making the Fair Sentencing Act retroactive. But because of these new avenues, questions abound about the Act's application. What should federal courts do with defendants who have already signed a plea agreement waiving their right to appeal? Should federal courts disregard the appeal waivers and allow defendants to appeal under the First Step Act? Or should courts interpret these appeal waivers in such a way that bars defendants from appealing under the First Step Act?

A handful of courts have addressed these questions but are split on how to answer them. Two circuit courts have barred defendants from appealing under the First Step Act after they had signed an appeal waiver. But many district courts have allowed defendants to appeal under the First Step Act, even after the defendants had signed appeal waivers. Within the Eighth Circuit, two district court judges have disagreed on whether to allow a defendant to appeal under the First Step Act.

This Note seeks to answer the questions that have split the various federal courts. It first outlines the background of the First Step Act and the standards that courts use when interpreting appeal waivers. Then, this Note will survey the various federal courts that have addressed these questions, looking to analogous cases that have dealt with similar issues of appeal waivers and newly changed laws. Finally, the Note will conclude with a recommendation for federal courts to bar defendants, who have signed an appeal waiver, from appealing under the First Step Act.

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I. INTRODUCTION

As the famous saying goes, a bird in the hand is worth two in the bush. For almost 30 years, federal courts have adhered to this saying by allowing defendants to opt for the bird in the hand by signing a plea agreement, while forfeiting their right to the two birds in the bush by agreeing to waive their right to appeal.¹ Recently, the First Step Act was passed and made the Fair Sentencing Act retroactive.² Federal courts are split on whether to allow a defendant—who signed a plea agreement containing an appeal waiver before 2018—to appeal their sentence under the First Step Act.³ The Sixth and Eleventh Circuits have addressed this issue, ruling that a defendant is barred from bringing their appeal.⁴ But most district courts have ruled in favor of the defendant’s right to appeal.⁵ Within the Eighth Circuit, two district court judges have disagreed on whether a defendant’s appeal waiver prohibits their ability to appeal their sentence.⁶

1. *See* *United States v. Evenson*, 864 F.3d 981, 984 (8th Cir. 2017) (“[Defendant], as the saying goes, opted for the bird in hand at the time of sentencing. On appeal, he asks this court to give him the two birds from the bush as well, after someone else caught them. We simply hold him to his choice.”).

2. First Step Act, Pub. L. No. 115–391, § 404, 132 Stat. 5194, 5222 (2018) (“A court that imposed a sentence for a covered offense may . . . impose a reduced sentence as if sections 2 and 3 of the Fair Sentencing Act of 2010 were in effect at the time the covered offense was committed.”).

3. *See infra* Parts III.A–B.

4. *See* *United States v. Smith*, 960 F.3d 883, 886 (6th Cir. 2020); *United States v. Hamilton*, 770 F. App’x 1003, 1005 (11th Cir. 2019) (per curiam).

5. *See infra* Parts III.C 1–3.

6. *See* *United States v. Johnson*, No. CR06-4031-LTS, 2020 WL 5949220, at *10 (N.D. Iowa Oct. 7, 2020) (holding that the defendant’s appeal waiver did not preclude his motion for a reduction in sentence); Order at 5, *United States v. Cribbs*, No. 2:08-cr-01320-CJW-MAR, 2020 WL 6470181 (N.D. Iowa June 5, 2020), ECF No. 92, *aff’d*, No. 20-2224, 2021 WL 3440761 (8th Cir. Aug. 6, 2021) (enforcing the defendant’s appeal waiver).

This Note delves into the concerns raised by the federal courts and seeks to answer whether a plea agreement including an appeal waiver precludes a defendant from seeking relief under the First Step Act. This Note first provides some brief background on the First Step Act and appeal waivers, using two recent Eighth Circuit opinions as examples of how courts address the enforceability of appeal waivers.⁷ The Note will then discuss how the various federal courts have analyzed the issue of whether an appeal-waiving defendant can appeal under the First Step Act.⁸ Finally, it recommends that federal courts should enforce an appeal waiver against a defendant who attempts to appeal under the First Step Act.⁹

II. BACKGROUND

A. First Step Act

The First Step Act of 2018 was implemented “to improve criminal justice outcomes, as well as to reduce the size of the federal prison population while also creating mechanisms to maintain public safety.”¹⁰ The Act gives prisoners the ability to reduce their sentences for various reasons—arguably the most important is making the Fair Sentencing Act of 2010 apply retroactively.¹¹ This change permits defendants who were sentenced before 2010 the ability to seek a sentence reduction.¹² The First Step Act also provides prisoners “a clearer avenue to petition courts” directly to get their sentences reduced for “extraordinary and compelling reasons.”¹³ It also expands “compassionate release” for terminally ill prisoners to be released early and allows district courts to reduce prisoners’ sentences based on decreased mandatory minimums.¹⁴ The First Step Act also changes certain “mandatory minimum sentences” for various drug traffickers with prior drug

7. *See infra* Part II.

8. *See infra* Part III.

9. *See infra* Part IV.

10. *An Overview of the First Step Act*, FED. BUREAU OF PRISONS [hereinafter FED. BUREAU OF PRISONS], <https://www.bop.gov/inmates/fsa/overview.jsp> [<https://perma.cc/J33J-MF4J>].

11. Julie Zibulsky & Christine Kitchens, *The First Step Act of 2018: One Year of Implementation*, U.S. SENT’G COMM’N 41 (Aug. 2020) [hereinafter U.S. SENT’G COMM’N], https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2020/20200831_First-Step-Report.pdf [<https://perma.cc/QK22-554D>].

12. *Id.*

13. Todd Bussert, *What the First Step Act Means for Federal Prisoners*, THE CHAMPION, May 2019, at 28 (explaining the direct impacts the Act will have on prisoners, including earned time credit, compassionate release, home confinement, opioid addiction treatment, and no restraints on pregnant prisoners).

14. *Id.* at 32.

convictions “by increasing the threshold for prior convictions that count toward triggering higher mandatory minimums for repeat offenders.”¹⁵

Since its beginning, the First Step Act has seen over 4,000 orders to reduce sentences granted under the Fair Sentencing Act.¹⁶ Over 4,500 petitions for compassionate release have been approved—notwithstanding more than 1,200 elderly offender home confinement petitions granted.¹⁷ The greatest rise in compassionate release approvals occurred during the COVID-19 pandemic.¹⁸ Based on complications created by the virus, over 3,000 inmates were granted compassionate release.¹⁹

B. Plea Agreements

Plea agreements have been utilized by prosecutors for decades.²⁰ Prosecutors offer these agreements, containing some bargain or inducement, to defendants in exchange for a guilty plea.²¹ Around 85 percent of federal criminal cases end with the defendant signing a plea agreement.²² In 1975, Federal Rule of Criminal Procedure 11 was amended to “regularize[] plea bargaining in the federal system.”²³ Rule 11(c) governs plea agreements, it reads:

[T]he plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

15. Fed. Bureau of Prisons, *supra* note 10.

16. *First Step Act*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmates/fsa/> [<https://perma.cc/RV8Y-NWP3>] (displaying statistics as of Dec. 21, 2024). To see historical data on the First Step Act’s impact, see Ellen A. Wiencek, Post, *Waivers of Compassionate Release in Plea Bargains: The Need for Administrative Action to Prevent Unfair Sentencing*, U. CHIC. L. REV. ONLINE, Aug. 2021, at 1, 2, <https://lawreviewblog.uchicago.edu/2021/08/05/wiencek-compassionate-release/> [<https://perma.cc/FQ43-89JE>].

17. *First Step Act*, *supra* note 16.

18. See Wiencek, *supra* note 16.

19. *Id.* (“Since the BOP reported 145 inmates were granted release in 2019, an estimated 3,149 inmates have been granted release in 2020 and so far in 2021.”).

20. 1A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 181 (5th ed. 2021).

21. *Plea Bargain*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“A negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty or no contest to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [e.g.,] a more lenient sentence or a dismissal of the other charges.”).

22. Wright & Miller, *supra* note 20.

23. *Id.*

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply . . . ; or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply.²⁴

Many plea agreements include appeal waivers.²⁵ These waivers are the “intentional relinquishment or abandonment of a known right.”²⁶ Appeal waivers essentially eliminate the defendant's right to appeal their conviction, sentence, or both—bringing finality to the case and the sentence.²⁷ Some appeal waivers read that the defendant waives their right to appeal their sentence on any ground.²⁸ Others describe that the defendant waives their right to seek a sentence reduction “under any provision of law whatsoever.”²⁹ Others explain that a defendant waives all grounds for appeal but saves a specific number of instances in which they can appeal.³⁰

24. Fed. R. Crim. P. 11(c).

25. Wright & Miller, *supra* note 20.

26. United States v. Olano, 507 U.S. 725, 733 (1993) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). This case differentiated between the forfeiture of a right and the waiver of a right. “[F]orfeiture is the failure to make the timely assertion of a right, waiver is the ‘intentional relinquishment or abandonment of a known right.’” *Id.*

27. See Kevin Bennardo, *Post-Sentencing Appellate Waivers*, 48 U. MICH J. L. REFORM 347, 348 (2015) (describing the “garden-variety appellate waiver”).

28. Appellant's Reply Brief at 9, United States v. Johnson, No. CR06-4031-LTS (N.D. Iowa Oct. 7, 2020). The plea agreement reads:

After conferring with his attorney and after being advised of his appeal rights, the defendant knowingly and voluntarily waives his right to appeal his conviction and the sentence imposed. The defendant also waives his right to file post-conviction relief actions . . . and motions to reconsider or reduce his sentence.

Id.

29. United States v. Saulsbury, 479 F. Supp. 3d 225, 228 (D. Md. 2020); *see also* United States v. Ellerby, No. CCB-07-064, 2020 WL 2395619, at *2 (D. Md. May 12, 2020) (waiving the right to file future post-conviction motions).

30. *See, e.g.*, United States v. Smith, 960 F.3d 883, 886 (6th Cir. 2020) (waiving all grounds for appeal except five specific instances: if he was sentenced above the agreed-upon statutory maximum; if he was sentenced above the agreed-upon guideline range; his career-offender status; ineffective counsel; and prosecutorial abuse).

Appellate courts review de novo whether the appeal falls within the scope of the waiver.³¹ When enforcing an appeal waiver, courts look to whether the waiver was entered into knowingly and voluntarily, unless enforcement would result in a miscarriage of justice.³² The Eighth Circuit, for example, provides circumstances when enforcing an appeal waiver constitutes a miscarriage of justice: an illegal sentence, a sentence violating the terms of an agreement, or ineffective assistance of counsel.³³ The court has not provided every circumstance in which a miscarriage of justice would result, yet the court recognizes “that these waivers are contractual agreements between a defendant and the Government and should not be easily voided by the courts.”³⁴ Other circuits have allowed defendants to appeal sentences based on constitutionally impermissible factors such as race.³⁵ But the general rule is that appeal waivers are considered valid.³⁶ And when interpreting plea agreements, federal courts interpret them strictly; if there are any ambiguities, they “will be read against the Government and in favor of a defendant’s appellate rights.”³⁷

C. Recent Eighth Circuit Opinions on Appeal Waivers

Two recent cases were presented to the Eighth Circuit dealing with questions of enforcement of appeal waivers.³⁸ While neither case is precisely on point with

31. *United States v. Scott*, 627 F.3d 702, 704 (8th Cir. 2010) (citing *United States v. Sisco*, 576 F.3d 791, 795 (8th Cir. 2009)). This defendant’s plea agreement contained an appeal waiver that stated, “The defendant expressly waives his right to appeal his sentence, directly or collaterally, on any ground except a sentence imposed in excess of the statutory maximum or an illegal sentence.” *Id.*

32. *United States v. Andis*, 333 F.3d 886, 889–90 (8th Cir. 2003) (en banc); *see also* *Parke v. Raley*, 506 U.S. 20, 28 (1992) (holding that the Supreme Court also applies the knowing and voluntary standard); *accord Scott*, 627 F.3d at 704.

33. *DeRoo v. United States*, 223 F.3d 919, 923–24 (8th Cir. 2000) (holding that the defendant should not be barred from bringing an appeal for ineffective assistance of counsel).

34. *Andis*, 333 F.3d at 891. In the next sentence, the court urged that these “narrow” exceptions should “not be allowed to swallow the general rule that waivers of appellate rights are valid.” *Id.*

35. *United States v. Brown*, 232 F.3d 399, 403 (4th Cir. 2000) (citing *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992)) (holding that a “defendant could not be said to have waived his right to appellate review of a sentence imposed . . . based on a constitutionally impermissible factor such as race”).

36. *Andis*, 333 F.3d at 891.

37. *Id.* at 890.

38. *See United States v. Collins-Abbott*, 812 F. App’x 398, 398 (8th Cir. 2020) (per curiam); *United States v. Howard*, 27 F.4th 1367, 1367 (8th Cir. 2022) (per curiam).

the ability to appeal under the First Step Act,³⁹ they help illustrate how the Eighth Circuit treats and enforces appeal waivers.⁴⁰ The first case, *United States v. Collins-Abbott*, dealt with a defendant challenging the validity of his appeal waiver because the First Step Act was enacted three days after his sentencing.⁴¹ In this short per curiam opinion, the court set out the appeal-waiver standard—the defendant must knowingly and voluntarily enter into the agreement, and enforcing the waiver would not result in a miscarriage of justice.⁴² The court determined that “the record establishes [the defendant] made a knowing and voluntary choice to enter into the plea agreement and appeal waiver; and that his choice was not affected by the First Step Act, which was enacted six months after he entered his guilty plea.”⁴³ But the court did not elaborate on the reason for holding that the appeal waiver was made knowingly and voluntarily.⁴⁴ And the court did not discuss whether the enactment of the First Step Act three days after his sentencing altered his plea agreement.⁴⁵

The second case, *United States v. Howard*, addressed the validity of a defendant’s appeal waiver.⁴⁶ The defendant’s plea agreement waived “all defenses and his right to appeal any non-jurisdictional issues.”⁴⁷ The defendant asserted that the district court erred in classifying him as a career offender, and therefore, he received an illegal sentence.⁴⁸ He also argued alternatively that imposing the sentence “will result in a miscarriage of justice because it [was] substantively unreasonable, as the district court failed to appropriately weigh various factors.”⁴⁹ The government conceded that the career-offender classification was plain error, but it argued that the defendant’s appeal waiver barred the court from reviewing his sentence and that enforcing the appeal waiver would not result in a miscarriage of justice.⁵⁰ The court agreed with the government, holding that the defendant’s

39. See *Collins-Abbott*, 812 F. App’x at 399 (explaining how the First Step Act was inapplicable to the present case, thereby avoiding the need to discuss the ability to appeal under the First Step Act); *Howard*, 27 F.4th at 1367 (providing no mention of the First Step Act).

40. See *Collins-Abbott*, 812 F. App’x at 399; *Howard*, 27 F.4th at 1368.

41. *Collins-Abbott*, 812 F. App’x at 398–99.

42. *Id.* at 399.

43. *Id.*

44. See *id.*

45. See *id.*

46. 27 F.4th 1367, 1368 (8th Cir. 2022) (per curiam).

47. *Id.*

48. *Id.* at 1369.

49. *Id.*

50. *Id.* at 1369–70.

appeal waiver was valid, enforceable, and fell within the scope of the waiver.⁵¹ It also held there was no miscarriage of justice because the sentence imposed was still within the statutory range.⁵²

Following the per curiam opinion, each of the three judges authored their own individual concurring opinion.⁵³ Judge Raymond Gruender wrote a concurring opinion to defend the court's holding "against the criticism" that enforcing an appeal waiver even when the district court erred "is unfair to criminal defendants."⁵⁴ He described that if courts disregard appeal waivers, it "would reduce the value of appeal waivers to the government and thus reduce criminal defendants' bargaining power in plea negotiations."⁵⁵ Citing an Eleventh Circuit opinion, Judge Gruender reasoned that prosecutors would be less willing to bargain, and this would hinder a defendant's ability to plea bargain.⁵⁶ He concluded, "Waiving the right to appeal . . . is risky. But for a criminal defendant who values what the government has to offer in exchange, the risk may be worth it."⁵⁷

Judge Michael Melloy wrote a short concurring opinion expressing his "disappointment" in the U.S. Attorney's Office for not "join[ing] with the defense in requesting a remand to correct an obvious error."⁵⁸ Even though the defendant is an "unsympathetic individual" and he "may very well deserve the sentence that was ultimately imposed[.]" Judge Melloy concluded that he "believe[d] that decision should have been made after a proper computation of the appropriate sentencing guideline."⁵⁹

51. *Id.* at 1369.

52. *Id.* at 1370; *see also* *DeRoo v. United States*, 223 F.3d 919, 923–24 (8th Cir. 2000). The *Howard* decision was in line with prior precedent from *DeRoo v. United States* where the court discussed that a defendant could not waive their right to appeal an illegal sentence. *DeRoo*, 223 F.3d at 923. Here, because the sentence was within the statutory range, it was not an illegal sentence. *Howard*, 27 F.4th at 1368.

53. *Howard*, 27 F.4th at 1370–72.

54. *Id.* at 1371 (Gruender, J., concurring).

55. *Id.*

56. *Id.* (alterations in original) (citing *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999)) ("[P]rosecutors would no longer be willing to give very much in exchange for [an appeal] waiver, and the ability of defendants to plea bargain would be hampered.").

57. *Id.*

58. *Id.* (Melloy, J., concurring).

59. *Id.*

Judge Jane Kelly wrote the final concurrence.⁶⁰ She wrote to convey her frustration with the court's prior precedent.⁶¹ She noted that the court's precedent recognizes a miscarriage of justice exception when there is an illegal sentence "greater than the maximum statutory penalty," but not for a misapplication of the guidelines.⁶² And the defendant's statutory range, in this case, was 10 years to life imprisonment; therefore, no sentencing error would fall under a miscarriage of justice, "so long as the sentence imposed was no longer than a sentence of life imprisonment."⁶³ "It can't be that simple. . . . [W]hat we are left with now is a significant error at [the defendant's] sentencing hearing that everyone acknowledges and everyone concedes but no one is willing or able to correct."⁶⁴ She, too, was disappointed in this outcome, concluding that she "concur[s] only because our case law demands it."⁶⁵

III. LEGAL LANDSCAPE

With this background in mind, this Note surveys the various federal court decisions analyzing whether courts enforce pre-2018 plea agreements against defendants when they seek to appeal under the First Step Act.⁶⁶ It discusses the apparent split between the federal district courts and the circuit courts, while also analyzing the reasons given by these courts for their holdings.⁶⁷

A. Iowa District Court Split

Two district judges in the Eighth Circuit—both from the Northern District of Iowa—have addressed this issue but disagree on whether the defendant is precluded from appealing their sentence under the First Step Act.⁶⁸ The first case

60. *Id.* (Kelly, J., concurring).

61. *Id.* at 1371–72.

62. *Id.* at 1372 (citing *United States v. Pierre*, 912 F.3d 1137, 1143–44 (8th Cir. 2019)).

63. *Id.*

64. *Id.*

65. *Id.*

66. *See infra* Parts III.A–B; *see also* First Step Act, Pub. L. No. 115–391, 132 Stat. 5194 (2018).

67. *See infra* Part III.B.

68. *See United States v. Johnson*, No. CR06-4031-LTS, 2020 WL 5949220, at *10 (N.D. Iowa Oct. 7, 2020) (holding that the defendant's appeal waiver did not preclude his motion for a reduction in sentence); Order at 5, *United States v. Cribbs*, No. 2:08-cr-01320-CJW-MAR, 2020 WL 6470181 (N.D. Iowa June 5, 2020), ECF No. 92, *aff'd*, No. 20-2224, 2021 WL 3440761 (8th Cir. Aug. 6, 2021) (enforcing the defendant's appeal waiver).

involved a defendant's motion to reduce their sentence under the First Step Act.⁶⁹ The defendant was charged with three counts related to crack cocaine distribution.⁷⁰ The defendant signed a plea agreement that imposed a 200-month sentence followed by a five-year term of supervised release.⁷¹ The court held that "if the Fair Sentence Act of 2010 had been in effect when defendant was sentenced, defendant's guideline range would have been reduced"; therefore, making the defendant eligible for a sentence reduction under the First Step Act.⁷² The court disagreed with the government that the plea agreement disqualified the defendant from relief under the statute.⁷³ The court discussed that the general rule is to enforce plea waivers against a defendant seeking relief if the waiver *explicitly* required the defendant to think about a guidelines reduction.⁷⁴ But, in this case, the "defendant's appeal waiver d[id] not explicitly contemplate a sentence reduction pursuant to a statutory change in the sentencing range."⁷⁵ The defendant had to know that a particular statutory avenue was available and knowingly waive their right found in that statute.⁷⁶ And because the defendant could not have known about the change in the law, the court held that they did not waive their right to apply for a sentence reduction under the First Step Act.⁷⁷

The second case involved a defendant charged with two counts related to the distribution of cocaine.⁷⁸ The defendant pleaded guilty to the second count via a

69. *Johnson*, 2020 WL 5949220, at *1. Chief Judge Leonard T. Strand delivered the opinion of the court. He found that the defendant was potentially eligible for relief under the First Step Act because it made the Fair Sentencing Act retroactive, and the defendant's convictions fell under "covered offenses" by the Fair Sentencing Act. *Id.* at *8. The defendant would have been eligible for a guidelines range of 78 to 97 months of imprisonment, but despite this finding, Judge Strand denied the defendant's motion. *Id.* at *3, *11. "Because [the defendant's] sentence was not based on the guideline range, any effort to recalculate that sentence based on a retroactive application of the Fair Sentencing Act would require pure conjecture on my part." *Id.* at *11.

70. *Id.* at *2.

71. *Id.*

72. *Id.* at *3.

73. *Id.* at *10.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at *11.

78. Order at 5, *United States v. Cribbs*, No. 2:08-cr-01320-CJW-MAR, 2020 WL 6470181 (N.D. Iowa June 5, 2020), ECF No. 92, *aff'd*, No. 20-2224, 2021 WL 3440761 (8th Cir. Aug. 6, 2021). This case was decided by Judge Linda R. Reade. The defendant filed a motion for reduced sentence based on the First Step Act. The court denied the motion based on his appeal waiver and, in the alternative, based on a careful analysis of the 18 U.S.C. § 3553(a) factors.

plea agreement, “which each party gave up specified rights in order to ‘avoid trial and have defendant’s case finally concluded.’”⁷⁹ The defendant specifically waived his right to appeal his conviction and sentence, his right to appeal any issues that may arise in the future, and his right to file post-conviction relief actions, including motions to reduce his sentence.⁸⁰ In the opinion, the court held that the language used in the appeal waiver was plain with no limitations, even though the defendant did not know Congress would pass a bill that would provide him a new avenue to reduce his sentence almost 11 years later.⁸¹ The defendant knew the consequences when accepting the appeal waiver and thus satisfied the knowing-and-voluntary requirement.⁸² The court held that enforcing the waiver would not result in a miscarriage of justice.⁸³

B. Unanimity Among Two Circuit Courts

Other federal courts have addressed the issue, including two circuit courts. The Sixth Circuit held that the defendant waived his right to appeal under the First Step Act.⁸⁴ The defendant was charged with distributing a controlled substance.⁸⁵ The defendant signed a plea agreement waiving his right to appeal his conviction and sentence but for a few enumerated circumstances.⁸⁶ The defendant timely appealed under the First Step Act, claiming that the Act rendered his statutory enhancement invalid, thereby reducing his sentence.⁸⁷ Judge Chad A. Readler, writing for the court, determined that the defendant knowingly and voluntarily entered into the agreement after the district court “carefully explained to him the ramifications of his waiver of his appeal rights.”⁸⁸ The court held, “In these careful circumstances, we cannot say that Smith[’s] actions were not knowing and

79. *Id.* at 4.

80. *Id.* at 4–5.

81. *Id.* at 5 (“Of course, defendant and the Government did not know during plea negotiations that, eleven years later, Congress would pass a bill with retroactive application to some sentenced defendants; but the fact remains that the language of the plea agreement waiver is plain . . .”).

82. *Id.*

83. *Id.*

84. *United States v. Smith*, 960 F.3d 883, 886 (6th Cir. 2020). The court declared, “To the extent this result strikes one as inequitable, it is perhaps a slight comfort to know that, even had [the defendant] not waived his First Step Act challenge to § 841(b)(1)(C), his argument would fail.” *Id.*

85. *Id.* at 885.

86. *Id.*

87. *Id.*

88. *Id.* at 886.

voluntary.”⁸⁹ In other words, “We . . . see no basis to conclude that Smith’s tailored plea agreement preserved for appeal his arguments regarding the First Step Act.”⁹⁰

The Eleventh Circuit concluded similarly.⁹¹ A defendant charged with conspiracy to distribute and intent to distribute marijuana signed a plea agreement which waived his right to appeal his sentence on any ground with three exceptions, one allowing an appeal if the sentence “exceed[ed] the . . . applicable guidelines range.”⁹² The magistrate judge who presided over the sentencing explained to the defendant the rights he was giving up and asked him if he understood his waiver; the defendant answered that he did.⁹³ On appeal, the defendant sought to appeal his sentence after the First Step Act amended 18 U.S.C. § 3553(f), arguing that the amendment qualified him for “the safety valve exception” and required the court to vacate his sentence.⁹⁴ The Eleventh Circuit, in a brief paragraph, ruled that the defendant was barred from appealing because he “made a knowing and voluntary waiver of his right to appeal his sentence.”⁹⁵ Yet the court did not give any specific details as to why.⁹⁶

C. Near Consensus in District Courts

Most federal district courts have held the opposite of the circuit courts.⁹⁷ These district courts span the country, ranging from Maryland to California.⁹⁸ The most notable federal district cases are from the District of Maryland, the Southern District of Illinois, and the Northern District of California.

89. *Id.*

90. *Id.*

91. *See* United States v. Hamilton, 770 F. App’x 1003, 1005 (11th Cir. 2019) (per curiam). The defendant specifically waived his right to “appeal [his] sentence on any ground, including the ground that the [district] [c]ourt erred in determining the applicable guidelines range pursuant to the . . . Guidelines.” *Id.* at 1004. The waiver provided for three exceptions, none applying to this appeal. *Id.*

92. *Id.* (alteration in original).

93. *Id.*

94. *Id.* at 1004–05.

95. *Id.* at 1005.

96. *See id.*

97. *See infra* Parts III.C.1–III.C.3.

98. *See, e.g.,* United States v. Saulsbury, 479 F. Supp. 3d 225 (D. Md. 2020); United States v. Sembrano, No. 19-cr-00651-CRB-1, 2020 WL 3161003 (N.D. Cal. May 28, 2020).

1. *District of Maryland*

The first notable district court case to address this issue was *United States v. Ellerby*.⁹⁹ The defendant was found guilty of multiple drug trafficking convictions.¹⁰⁰ The defendant filed several post-conviction motions challenging his conviction and sentence, and the district court ordered an evidentiary hearing to take place on two of the claims raised in the post-conviction motion.¹⁰¹ Based on a joint motion for resentencing, the parties negotiated an agreement “by which the government agreed to withdraw both § 851 motions in exchange for [the defendant’s] withdrawal of all pending post-conviction motions and waiver of his right to file any future post-conviction motions.”¹⁰² The defendant appealed under the First Step Act to receive a sentence reduction, and the government opposed.¹⁰³ The court determined that “[a] defendant . . . can waive only ‘known right[s].’”¹⁰⁴ Indeed, a defendant “could not have known that future legislation would enable him to seek further reduction of his sentence based on statutory changes to the sentencing range.”¹⁰⁵ As a result, “[a] waiver of [the defendant’s] right to file ‘any future post-conviction motions,’ then, could not have been ‘knowing’ with respect to his rights under the First Step Act.”¹⁰⁶

Nearly two months later, the government filed motions for reconsideration and resentencing.¹⁰⁷ The court doubled down on its prior ruling.¹⁰⁸ This time the court briefly addressed *United States v. Smith*, *United States v. Collins-Abbott*, and *United States v. Hamilton* in a footnote, but dismissed them as inapplicable.¹⁰⁹

99. No. CCB-07-064, 2020 WL 2395619, at *1 (D. Md. May 12, 2020).

100. *Id.*

101. *Id.*

102. *Id.* at *2.

103. *Id.*

104. *Id.* (second alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

105. *Id.*

106. *Id.*

107. *United States v. Ellerby*, 471 F. Supp. 3d 683, 684 (D. Md. 2020).

108. *Id.* at 686 (“The government claims that the court’s conclusion conflicts with . . . Fourth Circuit cases The court disagrees.”).

109. *Id.* at 687 n.5 (“None of those cases, however involve subsequent Section 404 First Step Act motions, and are thus inapplicable.”); see *United States v. Smith*, 960 F.3d 883, 886 (6th Cir. 2020); *United States v. Hamilton*, 770 F. App’x 1003, 1005 (11th Cir. 2019) (per curiam); *United States v. Collins-Abbott*, 812 F. App’x 398, 398 (8th Cir. 2020) (per curiam).

Only a month later, in *United States v. Saulsbury*, another judge from the District of Maryland agreed with the conclusion in *Ellerby*.¹¹⁰ The waiver at issue in *Saulsbury* said that the defendant “agrees to waive, and not to file, any additional challenges, collateral attacks, motions to modify his sentence, motions to vacate his sentence, or any other motion, petition or pleading under any provision of law whatsoever to vacate, adjust, modify or reduce the sentence being imposed in this case.”¹¹¹ The court reasoned that the plea agreement could have included a waiver of a right to pursue a sentence reduction according to newly passed legislation but did not.¹¹² The court next distinguished this case from a line of Fourth Circuit cases that dealt with a waiver and a subsequent change in law:

In the *Blick* line of cases, the Fourth Circuit emphasized that a defendant can, in some circumstances, knowingly waive his right to appeal or attack his sentence even if there is a relevant subsequent change in sentencing law. But a motion for a sentence reduction under the First Step Act is not an appeal or an attack on a sentence; it is a request that a court, in its newly afforded discretion, reduce a sentence that is otherwise valid and lawful.¹¹³

The district court further addressed that the *Blick* case “involved the waiver of a right to appeal a ‘non-retroactive’ change in sentencing law derived from a Supreme Court decision,” and “not a right to seek relief under a newly enacted statute that expressly makes certain statutory changes retroactive.”¹¹⁴ The court determined that a waiver is valid only “if it is the ‘intentional relinquishment . . . of a known right.’”¹¹⁵ Here, the defendant “did not waive his right to seek a sentence reduction under a unique statute that did not exist at the time he entered into the 2016 agreement.”¹¹⁶

2. Northern District of California

In *United States v. Burrill*, the court held similarly that the defendant’s appeal waiver did not encompass the right to appeal under the First Step Act.¹¹⁷ The defendant pled guilty to investment advisor fraud and filing a false tax

110. *Saulsbury*, 479 F. Supp. 3d at 228–29 (first citing *Ellerby*, 471 F. Supp. 3d at 684; and then citing *United States v. Johnson*, No. CR06-4031-LTS, 2019 WL 3938472, at *10 (N.D. Iowa Aug. 20, 2019)).

111. *Id.* at 227.

112. *Id.* at 229.

113. *Id.* (citations omitted).

114. *Id.* (citations omitted).

115. *Id.* (alteration in original) (quoting *United States v. Olano*, 507 U.S. 725, 733 (1993)).

116. *Id.*

117. 445 F. Supp. 3d 22, 25 (N.D. Cal. 2020).

return.¹¹⁸ In the plea agreement, the defendant “waived his right to seek relief under section 3582.”¹¹⁹ The defendant’s appeal sought a sentence reduction under that exact provision—which the First Step Act amended to allow for sentence reductions upon a defendant’s motion, not upon a motion by the Bureau of Prisons.¹²⁰ The court held that the waiver did not bar the defendant from bringing the action because the defendant “could not have ‘knowingly waived rights that were not in existence, or even contemplated, at the time of his plea.’”¹²¹

Additionally, in *United States v. Sembrano* (only a month after *Burrill*), the court held similarly, but it gave policy reasons as to why the court declined to enforce the defendant’s appeal waiver.¹²² The court discussed the intent behind the passage of the First Step Act: “Congress did not intend for federal prosecutors to have the final say on a defendant’s request for compassionate release. . . . Congress made courts rather than executive agencies the final arbiters of compassionate release motions.”¹²³ Further, the court held “It is unacceptable for the United States Attorneys’ Office to use its favorable position at the plea bargaining table to abrogate a role Congress designated for the courts.”¹²⁴ The court did not mince words when describing their frustration with the “disproportionate power” the government wields over defendants and believed it inappropriate to enforce a plea agreement against a defendant when it would violate the essence of what the law was intended to do.¹²⁵

Judge Charles Breyer, the same judge to decide *Sembrano*, rendered a similar ruling in *United States v. Osorto* two weeks before.¹²⁶ The court decided that a plea

118. *Id.* at 24.

119. *Id.* at 25.

120. *Id.*

121. *Id.* The same court, months earlier, was faced with the similar question about appeal waivers under 18 U.S.C. § 3582 in *United States v. Rodriguez*. 424 F. Supp. 3d 674, 680–81 (N.D. Cal. 2019). The court provided an analysis of whether the defendant was barred from appealing under the First Step Act in a footnote. *Id.* at 681 n.4. The court determined that the First Step Act “was passed after his sentence, so [the defendant] could not have waived the rights it contains.” *Id.* They further held that the defendant’s waiver “could not have encompassed the relief sought under the newly amended Section 3582, nor could he have knowingly waived rights that were not in existence, or even contemplated, at the time of his plea.” *Id.*

122. No. 19-cr-00651-CRB-1, 2020 WL 3161003, at *2–3 (N.D. Cal. May 28, 2020).

123. *Id.* at *3. The opinion, written by Judge Charles Breyer, discusses why Congress now allows for defendants to file compassionate release motions to the court. *Id.*

124. *Id.*

125. *Id.* at *2.

126. *See* 445 F. Supp. 3d 103 (N.D. Cal. 2020).

agreement explicitly waiving the defendant's right to file for compassionate release was invalid and enforcing this appeal waiver was unacceptable for two reasons: (1) it undermines the very reason Congress passed the First Step Act, and (2) it was "inhumane."¹²⁷ The court also discussed the unfair reality of plea bargaining for defendants:

[P]lea agreements are contracts of adhesion. The Government offers the defendant a deal, and the defendant can take it or leave it. If he leaves it, he does so at his peril. And the peril is real, because on the other side of the offer is the enormous power of the United States Attorney to investigate, to order arrests, to bring a case or to dismiss it, to recommend a sentence or the conditions of supervised release, and on and on. . . . That Faustian choice is not really a choice at all for a man in the defendant's shoes. But the Court has a choice, and it will not approve the bargain.¹²⁸

Judge Breyer, one of the first judges to state his clear disagreement with appeal waivers in an opinion,¹²⁹ concluded by declaring, "The waiver of compassionate release is senseless."¹³⁰

3. *Southern District of Illinois*

The next notable holding came from the Southern District of Illinois in *United States v. Glasper*.¹³¹ The defendant filed a motion for compassionate release after signing a plea agreement with an appeal waiver in 2012—before the passage of the First Step Act.¹³² The court did not enforce the appeal waiver against the defendant, finding that the defendant did not waive a known right.¹³³ "The

127. *Id.* at 107. Judge Breyer stated, "Congress's intent in amending the statute is clear[:] . . . to increase the number of defendants who received compassionate release." *Id.* at 108. Because of this, he held that the defendant's plea agreement "neatly undoes Congress's work. It closes the escape hatch and replaces it with an alternative likely to be just as if not more time consuming than exhaustion. It restores the very obstacles the First Step Act removed and undermines the purpose of that law's amendments." *Id.* Judge Breyer further discusses the unacceptability of the "appallingly cruel" effects this waiver has on the defendant. *Id.* at 109.

128. *Id.* at 109–10.

129. Wiencek, *supra* note 16, at 2.

130. *Osorto*, 445 F. Supp. 3d at 110.

131. *See* No. 3:11-CR-30053-NJR, 2020 WL 6363703, at *1 (S.D. Ill. Oct. 29, 2020), *aff'd*, 854 F. App'x 748 (7th Cir. 2021).

132. *Id.*

133. *Id.* at *3.

Court finds that [the defendant] could not have knowingly waived his ability to bring a claim under the First Step Act, as that avenue to relief did not yet exist.”¹³⁴

The second notable case from this court is *United States v. Wilson*.¹³⁵ The court denied the government’s argument that the defendant’s appeal waiver barred the defendant from appealing for a sentence reduction.¹³⁶ The court distinguished this case from other recent cases in the Southern District of Indiana, as those cases barred the defendant from appealing because the “defendants signed their plea waivers *after* the enactment of the First Step Act.”¹³⁷ But in this case, the defendant’s plea agreement “was made *before* the enactment of the First Step Act.”¹³⁸ And because of this, the court held the defendant “could not have knowingly waived his ability to bring a claim under the First Step Act, as that avenue to relief did not yet exist.”¹³⁹

D. Analogous Cases

Before the First Step Act, federal courts faced similar questions about enforcing appeal waivers when there were subsequent changes in the law. These analogous cases bring insight into answering the question of enforcing appeal waivers after the First Step Act. One major change in the law occurred when the Sentencing Commission lowered the base offense levels for drug offenses in 2008 and 2014.¹⁴⁰ Two circuits held that appeal-waiving defendants would be barred

134. *Id.* (citing *Burrill, Rodriguez, and Ellerby* for support in finding that the defendant could not have knowingly waived his ability to appeal under the First Step Act). Just over a month later, the same judge—Chief Judge Nancy J. Rosenstengel—reaffirmed that the defendant could not have waived their ability to appeal under the First Step Act “as that avenue to relief did not yet exist.” *United States v. Milligan*, No. 3:08-CR-30234-NJR-3, 2020 WL 7446546, at *3 (S.D. Ill. Dec. 18, 2020).

135. *See* No. 3:13-CR-30036-NJR, 2021 WL 2207452 (S.D. Ill. June 1, 2021).

136. *Id.* at *2.

137. *Id.*

138. *Id.*

139. *Id.* at *3 (citing, again, to *Burrill, Rodriguez, and Ellerby* to support its holding).

140. *United States v. Morrison*, 852 F.3d 488, 491 (6th Cir. 2017) (“[C]ourts will enforce appeal waivers even when a legal development makes it likely that the defendant would receive a lower sentence were the defendant resentenced under the new law, and even when the legal change affects constitutional rights.”).

from challenging their sentence.¹⁴¹ They held that these defendants waived their rights to appeal, even though they would benefit from the change in law.¹⁴²

Another similar issue arose in *Johnson v. United States*, in which the Supreme Court voided a clause in the Armed Career Criminal Act's definition of "violent felony" as unconstitutional.¹⁴³ Several circuits held that when a defendant signs an appeal waiver, they are barred from appealing their sentence under *Johnson*, despite the defendant possibly benefiting from the case and receiving a lesser sentence.¹⁴⁴ These defendants assumed the risk of a future legal development, and a "lack of clairvoyance cannot undo [their] decision."¹⁴⁵ On the other hand, in *United States v. McBride*, the Sixth Circuit ruled that a defendant did not knowingly and voluntarily waive his right to appeal under *Johnson*.¹⁴⁶ The defendant in *McBride* argued that *Johnson* enabled him to appeal his conviction even though he signed a plea agreement that waived his specific right to appeal his career-offender status.¹⁴⁷ Based on the *Olano* ruling that a defendant can only abandon a "known right," the court in *McBride* ruled that the defendant "could not have intentionally relinquished a claim based on *Johnson*, which was decided after his sentencing."¹⁴⁸

In a different context, multiple circuits determined that a defendant could not appeal under the favorable legal change in *United States v. Booker*, holding that the defendant assumed the risk of exchanging the dismissal of a charge for the right

141. *United States v. Ellison*, 664 F. App'x 507, 510 (6th Cir. 2016) (per curiam); *United States v. Marquez*, 570 F. App'x 816, 818–19 (10th Cir. 2014) (per curiam); *United States v. Polly*, 630 F.3d 991, 1002 (10th Cir. 2011).

142. *See Ellison*, 664 F. App'x at 509–10; *Marquez*, 570 F. App'x at 818–19; *Polly*, 630 F.3d at 1002.

143. 576 U.S. 591, 597, 601–02 (2015). The Armed Career Criminal Act imposed an increase in a defendant's sentence who had three prior convictions for a "violent felony." *Id.* at 593.

144. *See Sanford v. United States*, 841 F.3d 578, 580 (2d Cir. 2016) (per curiam); *In re Garner*, 664 F. App'x 441, 443 (6th Cir. 2016); *United States v. Hurtado*, 667 F. App'x 291, 292–93 (10th Cir. 2016) (per curiam); *United States v. Bey*, 825 F.3d 75, 83 (1st Cir. 2016); *United States v. Blackwell*, 651 F. App'x 8, 10 (2d Cir. 2016) (per curiam); *United States v. Ford*, 641 F. App'x 650, 651 (8th Cir. 2016) (per curiam).

145. *In re Garner*, 664 F. App'x at 443.

146. *United States v. McBride*, 826 F.3d 293, 295 (6th Cir. 2016).

147. *Id.* at 295–96.

148. *Id.* at 295 (citations omitted); *see also United States v. Olano*, 507 U.S. 725, 733 (1993) (defining waiver as the "intentional relinquishment or abandonment of a known right").

to appeal.¹⁴⁹ The Fourth Circuit ruled, “Declining to enforce [the] appeal waiver because of a subsequent change in the law would deprive the Government of some of the benefits of its bargain, which might ultimately work to the detriment of defendants who may find the Government less willing to offer a plea agreement.”¹⁵⁰ Another Fourth Circuit opinion stated, “‘A plea agreement, like any contract, allocates risk.’ ‘And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompan[ies] a guilty plea.’”¹⁵¹ The Fourth Circuit further explained, “If [courts] declined to enforce [a defendant’s] appeal waiver because of a subsequent change in the law, [courts] would deprive the Government of the benefit of its bargain and frustrate the purpose underlying such contracts.”¹⁵²

IV. ANALYSIS

After discussing the various cases and their holdings, this Note argues that federal courts should bar defendants from appealing under the First Step Act after signing an appeal waiver. This Note presents four main reasons for why a defendant should not be allowed to appeal, while also responding to the various arguments against this recommendation.

A. The Plain Language

The first reason for barring defendants from appealing is found in the ordinary language of the appeal waiver. Most appeal waivers read like the one found in *Cribbs*:

[D]efendant knowingly and voluntarily waives defendant’s right to appeal the conviction and the sentence imposed. Defendant also waives the right to file post-conviction relief actions . . . and motions to reconsider or reduce defendant’s sentence. . . . The waivers set out above relate to any issues which now exist or which may arise in the future.¹⁵³

149. See *United States v. Booker*, 543 U.S. 220, 245 (2005) (ruling that the mandatory Federal Sentencing Guidelines violated the Sixth Amendment right to a jury trial, making the guidelines advisory); *United States v. Johnson*, 410 F.3d 137, 153 (4th Cir. 2005); *United States v. Cardenas*, 405 F.3d 1046, 1048 (9th Cir. 2005); *United States v. Morgan*, 406 F.3d 135, 137 (2d Cir. 2005).

150. *Johnson*, 410 F.3d at 153.

151. *United States v. Archie*, 771 F.3d 217, 222 (4th Cir. 2014) (second alteration in original) (first quoting *Johnson*, 410 F.3d 137, 153 (4th Cir. 2005); and then quoting *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005)).

152. *Id.*

153. Appellant’s Brief at 9, *United States v. Cribbs*, No. 20-2224 (8th Cir. Aug. 6, 2021).

This appeal waiver states that the defendant knowingly and voluntarily waives their right to appeal their sentence or any motion to reconsider or reduce their sentence.¹⁵⁴ Then, the catch-all statement declaring that the waivers (e.g., the right to appeal the conviction/sentence and the right to file post-conviction relief actions) “relate to any issues which now exist or which may arise in the future” appears to encompass whether a defendant is eligible for relief under the First Step Act.¹⁵⁵

Further, the word “issue” is defined as “a point in dispute between two or more parties.”¹⁵⁶ The question of a defendant’s ability to appeal their sentence under the First Step Act would fall squarely within the ordinary meaning of “any issues which now exist or which may arise in the future.”¹⁵⁷ It would encompass the passing of a new statute that allows defendants to appeal their sentence or ask to reduce their sentence.¹⁵⁸ Thus, the ordinary language found in these plea agreements describe the right to appeal under the First Step Act.¹⁵⁹

The opposition argues that these appeal waivers use broad and overinclusive language, failing to specify the right the defendant is waiving.¹⁶⁰ In *United States v. Saulsbury*, the court expressed this concern directly, stating that the waivers could expressly say the defendant relinquishes their right to pursue a sentence reduction according to newly passed legislation, but most do not.¹⁶¹ So if judges decide to stop enforcing these waivers, it will force prosecutors to be specific in the language they use in plea waivers.¹⁶²

But these arguments do not dispel the point that the appeal waiver’s plain language encompasses the right to appeal under the First Step Act.¹⁶³ While it is true that appeal waivers do not always describe, in specific detail, every right that

154. *Id.*

155. *Id.*

156. *Issue*, BLACK’S LAW DICTIONARY (11th ed. 2019).

157. Appellant’s Brief at 9, *United States v. Cribbs*, No. 20-2224 (8th Cir. Aug. 6, 2021) (emphasis added).

158. *See, e.g.*, Order at 5, *United States v. Cribbs*, No. 2:08-cr-01320-CJW-MAR, 2020 WL 6470181 (N.D. Iowa June 5, 2020), ECF No. 92, *aff’d*, No. 20-2224, 2021 WL 3440761 (8th Cir. Aug. 6, 2021).

159. *Id.*

160. *See United States v. Saulsbury*, 479 F. Supp. 3d 225, 229 (D. Md. 2020).

161. *Id.*

162. *United States v. Andis*, 333 F.3d 886, 890 (8th Cir. 2003) (en banc).

163. *See First Step Act of 2018*, Pub. L. No. 115-39, 132 Stat. 5194; *Saulsbury*, 479 F. Supp. 3d at 229 (citing *United States v. Johnson*, No. CR06-4031-LTS, 2019 WL 3938472, at *10 (N.D. Iowa Aug. 20, 2019)).

the defendant waives, describing each right would be cumbersome and tedious.¹⁶⁴ Further, it would be impossible for an appeal waiver to correctly predict future legislation that could affect the defendant.¹⁶⁵ Prosecutors instead should be able to write a provision that encompasses rights that currently exist or may arise in the future.¹⁶⁶ Such an appeal waiver would not be ambiguous, and would properly include the right to appeal under the First Step Act.¹⁶⁷

B. Knowing and Voluntary Requirement

The second reason is that the defendants knowingly and voluntarily waived their rights to appeal. This was iterated by the Sixth Circuit in *Smith*: “[T]he district court carefully explained . . . the ramifications of [the] waiver[,] . . . even pausing at one point to re-phrase the exceptions to [the] waiver so that [the defendant] could better understand them.”¹⁶⁸ The court also explained that the defendant “indicated during the hearing that [they] understood and agreed to the waiver.”¹⁶⁹ In these plea agreements, the judge must make certain that the defendant is fully aware of the rights they are relinquishing.¹⁷⁰ While a defendant—who waived their right to appeal before the First Step Act was passed—did not specifically know that Congress would pass a law allowing for them to appeal their sentence, the defendant *did* know that they would be unable to appeal their sentence or conviction on any grounds that may come up in the future.¹⁷¹ If the judge read the defendant their rights and explained to them what they were forfeiting, then the defendant “knowingly and voluntarily” gave up their right to appeal.¹⁷²

164. See *Saulsbury*, 479 F. Supp. 3d at 229.

165. See, e.g., Johnson, 2019 WL 3938472, at *10 (finding that the defendant did not knowingly waive his right to sentence reduction where the waiver does not explicitly contemplate a sentence reduction under a changed statute).

166. See, e.g., Appellant’s Brief at 9, *United States v. Cribbs*, No. 20-2224, (8th Cir. Aug. 6, 2021).

167. See, e.g., Order at 5, *United States v. Cribbs*, No. 2:08-cr-01320-CJW-MAR, 2020 WL 6470181 (N.D. Iowa June 5, 2020), ECF No. 92, *aff’d*, No. 20-2224, 2021 WL 3440761 (8th Cir. Aug. 6, 2021) (“[T]he fact remains that the language of the plea agreement waiver is plain with no limitations on the basis for a motion to reduce sentence that would trigger the waiver.”).

168. *United States v. Smith*, 960 F.3d 883, 886 (6th Cir. 2020).

169. *Id.*

170. See FED. R. CRIM. P. 11(c).

171. See, e.g., Order at 5, *United States v. Cribbs*, No. 2:08-cr-01320-CJW-MAR, 2020 WL 6470181 (N.D. Iowa June 5, 2020), ECF No. 92, *aff’d*, No. 20-2224, 2021 WL 3440761 (8th Cir. Aug. 6, 2021).

172. See, e.g., *Smith*, 960 F.3d at 886.

Conversely, the opposition argues that a defendant could not “knowingly” waive something that they had no idea would arise later.¹⁷³ As the Supreme Court held in *Olano*, a defendant can only waive a known right.¹⁷⁴ The First Step Act is a revolutionary statute making an earlier law apply retroactively.¹⁷⁵ As many district courts have held, a defendant would have never imagined this unique statute providing them with the particular avenue to challenge their sentence.¹⁷⁶ Thus, a defendant could not have *knowingly* waived their right to appeal under the First Step Act.¹⁷⁷ As the court in *Ellerby* expressed:

[The defendant] could not have known that future legislation would enable him to seek further reduction of his sentence based on statutory changes to the sentencing range. A waiver of his right to file “any future post-conviction motions,” then, could not have been “knowing” with respect to his rights under the First Step Act.¹⁷⁸

But again, this argument asks for the impossible. If courts apply this uniformly to any change in the law, few appeal waivers would have any practical impact. There is no conceivable way for the prosecution to know of or anticipate every possible change in the law. Therefore, the knowing requirement should be construed to require only that the defendant, when signing the plea agreement, knows that they are giving up their right to appeal in the future, even when there may be favorable changes to the law. As the Fourth Circuit concluded, “‘A plea agreement, like any contract, allocates risk.’ ‘And the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompan[ies] a guilty plea.’”¹⁷⁹

C. Analogous Cases

The third reason is that the analogous cases discussed earlier point to denying a defendant’s ability to appeal.¹⁸⁰ Similar principles can be applied from those

173. See e.g., *United States v. Ellerby*, No. CCB-07-064, 2020 WL 2395619, at *2 (D. Md. May 12, 2020); *United States v. Glasper*, No. 3:11-CR-30053-NJR, 2020 WL 6363703, at *3 (S.D. Ill. Oct. 29, 2020).

174. *United States v. Olano*, 507 U.S. 725, 733 (1993).

175. See U.S. SENT’G COMM’N, *supra* note 11.

176. See *Ellerby*, 2020 WL 2395619, at *2; see also *Glasper*, 2020 WL 6363703, at *3.

177. See *Ellerby*, 2020 WL 2395619, at *2.

178. *Id.*

179. *United States v. Archie*, 771 F.3d 217, 222 (4th Cir. 2014) (second alteration in original) (first quoting *United States v. Johnson*, 410 F.3d 137, 153 (4th Cir. 2005); and then quoting *United States v. Sahlin*, 399 F.3d 27, 31 (1st Cir. 2005)).

180. See *supra* Part III.E.

cases, such as the allocation of risk.¹⁸¹ A defendant accepts the risk of signing the plea agreement rendering them unable later to appeal their sentence or conviction, while also accepting the risk of pleading guilty rather than going to trial.¹⁸² On the other hand, the government accepts similar risks in not going to trial. Both parties give up something in exchange for something favorable. As the court in *Archie* declared, “If we declined to enforce Archie’s appeal waiver because of a subsequent change in the law, we would deprive the Government of the benefit of its bargain and frustrate the purpose underlying such contracts.”¹⁸³

Opponents attempt to distinguish the First Step Act from the analogous cases.¹⁸⁴ Not one analogous case dealt with a statute that applied retroactively, they say.¹⁸⁵ As Judge Strand conveyed in *Johnson*, “because the [First Step Act] is a novel piece of legislation, none of the analogies to other sentencing issues . . . are perfectly on point.”¹⁸⁶ Thus, applying appeal waivers to the First Step Act is unfamiliar territory for courts, and so courts should allow defendants to appeal under the First Step Act due to its revolutionary nature.

But again, this seems to run counter to the purpose of these agreements. These agreements allocate risk to each party.¹⁸⁷ Just because a novel law is passed does not mean it should become an exception to enforcing appeal waivers. The appeal waivers will lose their effectiveness if defendants can challenge their sentence every time there is a new change in the law that is beneficial to them.¹⁸⁸

181. *Johnson*, 410 F.3d at 153 (“A plea agreement, like any contract, allocates risk.”).

182. *See* *United States v. Andis*, 333 F.3d 886, 896 (8th Cir. 2003) (en banc) (Arnold, J., concurring).

183. *Archie*, 771 F.3d at 222.

184. *See* *United States v. Johnson*, No. CR06-4031-LTS, 2020 WL 5949220, at *10 (N.D. Iowa Oct. 7, 2020).

185. *See id.*

186. *Id.* at *8.

187. *See Andis*, 333 F.3d at 896 (Arnold, J., concurring); *United States v. Johnson*, 410 F.3d 137, 153 (4th Cir. 2005) (“A plea agreement, like any contract, allocates risk.”); *United States v. Cook*, 722 F.3d 477, 481 (2d Cir. 2013); *see also* *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992) (“We also note that plea agreements are of value to the accused in order to gain concessions from the government.”), *overruled on other grounds by, Andis*, 333 F.3d at 892 n.6.

188. *See Archie*, 771 F.3d at 222 (“If we declined to enforce Archie’s appeal waiver because of a subsequent change in the law, we would deprive the Government of the benefit of its bargain and frustrate the purpose underlying such contracts.”).

D. Policy

The final reason is an important policy argument. The general purpose for having and enforcing plea agreements is finality, speed, and efficiency.¹⁸⁹ “Appellate waivers advance powerful considerations of efficiency and finality; prosecutors make various accommodations in plea deals in exchange for the certainty that they will not have to spend resources litigating appeals down the line.”¹⁹⁰ If courts allow defendants to sidestep their plea agreements because of a new law, it will conflict with the purpose of plea agreements.¹⁹¹ As many courts have recognized, the exceptions to not enforcing plea agreements are narrow and the exceptions “will not be allowed to swallow the general rule that waivers of appellate rights are valid.”¹⁹²

Opponents point to the unfair advantage prosecutors have over defendants at the bargaining table.¹⁹³ This was discussed by various judges, but none more passionately than Judge Breyer.¹⁹⁴ Judge Breyer contends that enforcing these appeal waivers frustrates the congressional intent of the First Step Act while also being, in his words, “appallingly cruel.”¹⁹⁵ When defendants are forced to either sign a plea agreement or face expensive litigation against the federal government, defendants feel they must take the plea agreement when the scales are weighed so heavily against them.¹⁹⁶ As Judge Breyer stated, “[T]he Court has a choice, and it will not approve the bargain.”¹⁹⁷

But, despite these concerns, if courts stop enforcing appeal waivers, it will negatively affect defendants. The government will be less willing to offer plea agreements to defendants out of the risk that changes in the law would deprive the government of the benefit of the bargain they receive from plea agreements. The Fourth Circuit made this argument in *Johnson* holding that declining to enforce the appeal waiver might “ultimately work to the detriment of defendants who may find the Government less willing to offer a plea agreement.”¹⁹⁸ If plea agreements are

189. *Cook*, 722 F.3d at 481; *see also Rutan*, 956 F.2d at 829.

190. *Cook*, 722 F.3d at 481; *accord Rutan*, 956 F.2d at 829 (“We also note that plea agreements are of value to the accused in order to gain concessions from the government.”).

191. *Archie*, 771 F.3d at 222.

192. *Andis*, 333 F.3d at 891.

193. *See* Wiencek, *supra* note 16, at 4.

194. *United States v. Osorto*, 445 F. Supp. 3d 103, 109 (N.D. Cal. 2020).

195. *Id.*

196. *See id.*

197. *Id.* at 110.

198. *United States v. Johnson*, 410 F.3d 137, 153 (4th Cir. 2005).

not enforced, future defendants might be unable to benefit from plea agreements due to the government's unwillingness to offer them as options.¹⁹⁹

Judge Gruender, in *United States v. Howard*, also described this relationship when bargaining in plea agreements.²⁰⁰ “Disregarding appeal waivers . . . would reduce the value of appeal waivers to the government and thus reduce criminal defendants’ bargaining power in plea negotiations.”²⁰¹ The defendant values the offer that the government is giving, usually dropping a charge or offering a lesser sentence, and “the risk may be worth it.”²⁰² As Judge Gruender held, “I would leave each criminal defendant free to decide that question for himself.”²⁰³

V. CONCLUSION

In sum, this Note explained the background of the First Step Act and how courts generally enforce appeal waivers. It also explained the various arguments and disagreements between the federal courts. Then, it summarized the many arguments in favor and against enforcing appeal waivers when defendants seek to appeal under the First Step Act. Finally, this Note argued that the First Step Act should not provide a work-around to the general rule that appeal waivers are to be validly enforced. Even though there are persuasive arguments on both sides of the issue, defendants receive their bargain of a dropped charge or lesser sentence in the plea agreement, and the government—as influential and powerful as it may be—receives its bargain of efficiency and finality. In the end, these defendants decided to take the bird in the hand rather than wait to see if they could get the birds in the bush. Unfortunately, they must reap the consequences of taking the bird in the hand.

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199. *See id.*

200. *See* 27 F.4th 1367, 1371 (8th Cir. 2022) (Gruender, J., concurring) (per curiam).

201. *Id.*

202. *Id.*

203. *Id.*

* B.S., University of Northwestern–St. Paul, 2020; J.D., Drake University Law School, 2023.