Plea agreements are an integral and necessary component of the federal criminal justice system, enabling prosecutors to guarantee convictions and maximize the efficiency of the courts, while defendants aim to reduce their sentences. Often, plea agreements contain waivers of a defendant’s right to appeal his conviction or sentence. A defendant must have knowingly and voluntarily entered into this agreement for it to be considered valid. To determine if the agreement was entered into knowingly and voluntarily, the Third Circuit uses a “miscarriage of justice” test, which is ill-defined and very rarely applied.

This Comment will first discuss plea agreements generally (e.g., why they are made and who is involved in the process). In addition, this Comment will focus on the waivers of appellate rights that are often contained in plea agreements; specifically, it will study the right to appeal and how defendants can use that right in the bargaining process. Third, and most importantly, this Comment will examine the validity of plea agreements and enforcement of appellate waivers in the Third Circuit. It will begin with a review of Rule 11 of the Federal Rules of Criminal Procedure and a discussion of knowing and voluntary guilty pleas. Furthermore, this Comment will focus on how a “miscarriage of justice” is indeed difficult to attain. The Third Circuit’s “miscarriage of justice” concept is very broad, yet the theory is actually very rarely applied. The Third Circuit seldom finds that a defendant would suffer a miscarriage of justice by enforcement of his plea agreement’s appellate waiver.

II. WHY PLEA AGREEMENTS ARE MADE AND WHO IS INVOLVED

In the federal criminal justice system, plea agreements are a key part of the system. In fact, in the federal system, most criminal cases are settled with a plea agreement. Plea agreements have been defined as “rational agreements between a prosecutor and a defendant where each attempts to maximize his respective benefit through the bargaining process.” More and more plea agreements throughout the federal criminal justice system, including plea

agreements entered into in the Third Circuit, contain waivers of the defendant’s appellate rights. Appellate waivers are generally enforced in the Third Circuit as long as the defendant entered into the agreement knowingly and voluntarily and absent a miscarriage of justice.

In a plea agreement, both the prosecutor and the defendant are trying to maximize their own benefit through their agreement. The prosecutor is also trying to increase the efficiency of the criminal justice system by maximizing convictions of the guilty and dismissing charges against the innocent. Sometimes offering a plea agreement to one defendant means that the prosecutor might find out information regarding a more serious crime, or it might simply mean more time that the prosecutor can spend on other cases. In addition, in a plea agreement, a conviction of the defendant is guaranteed, while in a trial, the outcome is unpredictable. Prosecutors want to maximize criminal convictions and the lengths of sentences. Plea agreements are a sound way to achieve this goal.

The defendant’s goal in the plea agreement process is to obtain a lenient sentence while balancing the costs to his reputation and future opportunities. To obtain his goals, the defendant must place a lot of faith in his attorney. Defense counsel must effectively assist his client in achieving his goals. And defense counsel must adequately inform his client about his options and the consequences of his decisions. As with the prosecutor, the unknown of a trial’s outcome is burdensome to defense counsel and is also an incentive for defense counsel to advise his client to plead guilty and receive a more predictable sentence.

The judge presiding over the defendant’s case must remain an independent party during the plea agreement process. A judge is also interested in cases being resolved through plea agreements, because he is less likely to commit reversible error than he would during a trial. He is required to examine whether the defendant’s guilty plea is voluntary, knowing, and uncoerced. The federal judge is also responsible for ensuring that the defendant understands all of the rights he will give up by pleading guilty. The federal judge’s duties to examine a defendant’s guilty plea are outlined in Rule 11 of the Federal Rules of Criminal Procedure.

4. Id. at 727-28.
5. Knowing is defined as “[h]aving or showing awareness or understanding; well-informed.” BLACK’S LAW DICTIONARY 888 (8th ed. 2004).
6. Voluntarily is defined as “[i]ntentionally; without coercion.” BLACK’S LAW DICTIONARY 1605 (8th ed. 2004).
11. Id. at 193.
15. Hessick & Saujani, 16 BYU J. PUB. L. at 207.
16. Id. at 206.
17. Id.
18. Id. at 211.
19. Id. at 222; FED. R. CRIM. P. 11(e).
21. Id. at 222. Coerce is defined as “[t]o compel by force or threat.” BLACK’S LAW DICTIONARY 275 (8th ed. 2004). Clearly, an “uncoerced” guilty plea would be one that was not compelled by force or threat.
Each participant in the plea agreement process, whether the prosecutor, defendant, defense counsel, or judge, has an important role to play in the administration of justice. Additionally, as set forth above, each participant has an incentive to enter into a plea agreement, which is likely why most criminal cases are settled with plea agreements in the federal system.24

III. THE HISTORY OF RULE 11: ENSURING THAT A GUILTY PLEA IS ENTERED INTO KNOWINGLY, VOLUNTARILY, AND WITHOUT COERCION

Rule 11 of the Federal Rules of Criminal Procedure governs the guilty plea.26 It is a procedural safeguard used to protect the parties and to ensure an orderly result.27 Rule 11 was first enacted in 1944.28 In 1966, a few amendments were made to Rule 11 where a court was

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24. In 2000, about 84 percent of federal criminal cases were settled with plea agreements. Teeter, 53 U. KAN. L. REV. at 727 n.12.


(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;
(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;
(C) the right to a jury trial;
(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;
(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;
(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;
(G) the nature of each charge to which the defendant is pleading;
(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;
(I) any mandatory minimum penalty;
(J) any applicable forfeiture;
(K) the court's authority to order restitution;
(L) the court's obligation to impose a special assessment;
(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and
(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

FED. R. CRIM. P. 11.


28. Cook, 77 NOTRE DAME L. REV. at 606. The text of Rule 11 in 1944 read:
now required to find a factual basis for the plea.\textsuperscript{29} With the 1966 amendments, the court was also required to address the defendant personally.\textsuperscript{30} A 1969 Supreme Court decision\textsuperscript{31} led to the drastic 1975 alterations of Rule 11.\textsuperscript{32} The amendments can be described as drastic, because, beginning with the 1975 amendments, they set forth procedural requirements for the judges to follow to better ensure that defendants entered a knowing and voluntary guilty plea.\textsuperscript{33} Even with all of the new specific requirements, courts still have discretion over how to implement the procedure.\textsuperscript{34}

Under the 1975 amendments, the plea agreement must be disclosed in court on the record, and the judge is permitted to accept or reject the plea agreement.\textsuperscript{35} A judge must also advise the defendant that if the court rejects the plea agreement, the defendant may withdraw his plea and the court must tell the defendant that if he continues to plead guilty, the outcome may be less favorable than it was with the terms of the plea agreement.\textsuperscript{36} In the 1975 amendments, subsection (c) is probably the most notable change of the amendments.\textsuperscript{37} Subsection (e) was also added and included pre-plea conduct of the prosecutor and judiciary, rather than just plea hearing procedure like in subsection (c).\textsuperscript{38}

In the 1980s, Rule 11 was further amended a few times, though more modestly than the 1975 changes.\textsuperscript{39} In 1982, a phrase was added to subsection (c)(1), "the effect of any special pattern."\textsuperscript{40} In 1983, a new subsection, (h), was added for instances when courts inadvertently

\begin{quote}
A defendant may plead not guilty, guilty or, with consent of the court, nolo contendere. The court may refuse to accept a plea of guilty, and shall not accept the plea without first determining that the plea is made voluntarily with understand of the nature of the charge. If a defendant refuses to plea or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty.

\textit{Id.}; \textit{FED. R. CRIM. P. 11} (1944).
\end{quote}

\textsuperscript{29} \textit{Cook}, \textit{77 NOTRE DAME L. REV.} at 606.
\textsuperscript{30} \textit{Id}. at 607.
\textsuperscript{32} \textit{Cook}, \textit{77 NOTRE DAME L. REV.} at 607.
\textsuperscript{33} \textit{Id.}
\textsuperscript{34} \textit{Id}. at 608.
\textsuperscript{35} \textit{Id}. at 609.
\textsuperscript{36} \textit{Id}. at 610.
\textsuperscript{37} \textit{Cook}, \textit{77 NOTRE DAME L. REV.} at 607. Subsection (c) reads:

Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following: the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and that if he pleads guilty or nolo contendere, there court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

\textit{FED. R. CRIM. P. 11} (c) (1975). The change is notable because now Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or nolo contendere." \textit{FED. R. CRIM. P. 11} advisory committee's note (Note to subdivision (c) under 1975 Enactment).

\textsuperscript{38} \textit{Cook}, \textit{77 NOTRE DAME L. REV.} at 609.
\textsuperscript{39} \textit{Id}. at 610.
\textsuperscript{40} \textit{Id.}; \textit{FED. R. CRIM. P. 11} (c)(1) (1982).
missed a part of the Rule 11 procedure, providing that it would be harmless error.\textsuperscript{41} Another phrase was added in 1989, “or supervised release,” in response to the 1987 United States Sentencing Guidelines.\textsuperscript{42} Conditional pleas\textsuperscript{43} were added to the list of plea alternatives so that defendants could plead guilty but preserve items of concern for appellate review.\textsuperscript{44} And in 1999, subsection (c)(6) was added to ensure that courts went over the appellate waiver provision in a plea agreement.\textsuperscript{45} In 2002, Rule 11 was reorganized so that they could be better understood and so the terminology was consistent with the rest of the rules.\textsuperscript{46} After United States v. Booker\textsuperscript{47}, the United States Sentencing Guidelines are now advisory, and the 2007 Amendments of Rule 11 reflected that change.\textsuperscript{48}

In the Third Circuit, the Court of Appeals reviews the district court’s Rule 11 plea colloquy\textsuperscript{49} with the defendant not only to see if the guilty plea was entered knowingly, voluntarily, and uncoerced, but also to examine whether plea agreements were validly entered.\textsuperscript{50} The Third Circuit maintains that a plea agreement is valid if it is entered into knowingly and voluntarily.\textsuperscript{51}

\section*{IV. Appellate Waivers in Plea Agreements}

The right to appeal is neither constitutional nor ancient.\textsuperscript{52} The number of appeals grew exponentially after the United States Sentencing Guidelines took effect, because a defendant could raise hundreds of sentencing issues under the guidelines on appeal.\textsuperscript{53} Prosecutors hoped to

\begin{itemize}
\item \textsuperscript{41} Cook, 77 \textit{NOTRE DAME L. REV.} at 610; \textit{FED. R. CRIM. P.} 11 (h) (1983).
\item \textsuperscript{42} Cook, 77 \textit{NOTRE DAME L. REV.} at 610; \textit{FED. R. CRIM. P.} 11 (c)(1) (1989).
\item \textsuperscript{43} A conditional plea is defined as “a plea of guilty or nolo contendere entered with the court’s approval and the government’s consent, the defendant reserving the right to appeal any adverse determinations on one or more pretrial motions.” BLACK’S LAW DICTIONARY 1189 (8th ed. 2004).
\item \textsuperscript{44} Cook, 77 \textit{NOTRE DAME L. REV.} at 610.
\item \textsuperscript{45} Id.
\item \textsuperscript{46} \textit{FED. R. CRIM. P.} 11 advisory committee’s note (under 2002 Amendments).
\item \textsuperscript{47} United States v. Booker, 543 U.S. 220 (2005). The advisory committee explains:

Booker held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act “makes the Guidelines effectively advisory,” and “requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp. 2004).” \textit{FED. R. CRIM. P.} 11 advisory committee’s note (under 2007 Amendments) (quoting \textit{Booker} 543 at 245-46).

“Rule 11(b)(M) incorporates the \textit{Booker} analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.” \textit{FED. R. CRIM. P.} 11 advisory committee’s note (under 2007 Amendments).

\item \textsuperscript{49} A colloquy is “[a]ny formal discussion, such as an oral exchange between a judge, the prosecutor, the defense counsel, and a criminal defendant in which the judge ascertains the defendant’s understanding of the proceedings and of the defendant’s rights.” BLACK’S LAW DICTIONARY 281 (8th ed. 2004).

\item \textsuperscript{50} \textit{Khatak}, 273 F.3d at 558; Brady v. United States, 397 U.S. 742, 748 (1970) (plea agreement must be knowing and voluntary).

\item \textsuperscript{51} United States v. Gwinnett, 483 F.3d 200, 203 (3d Cir. 2007).
\item \textsuperscript{52} Ginger K. Gooch, 64 MO. L. REV. at 459.
avoid challenges when defendants pled guilty by adding appellate waivers to plea agreements.\textsuperscript{54} Appellate waivers became widespread in the early 1990s and slowly were upheld in the federal circuits across the country.\textsuperscript{55} It is widely accepted for criminal defendants to bargain with their right to appeal their conviction and sentence.\textsuperscript{56} The Supreme Court has not addressed the issue of whether a criminal defendant can bargain with his appellate rights.\textsuperscript{57} Each federal circuit that allows a criminal defendant to bargain with his appellate rights, however, requires that the defendant must have “knowingly” and “voluntarily” entered into the agreement for it to be valid.\textsuperscript{58} The judge’s duty in the federal criminal justice system is to examine whether the defendant’s guilty plea, and plea agreement, are entered into voluntarily, knowingly, and uncoerced.\textsuperscript{59} The judge accomplishes this task by following Rule 11 of the Federal Rules of Criminal Procedure.\textsuperscript{60}

\begin{center}
\begin{tabular}{|l|l|}
\hline
Degree of Bodily Injury & Increase in Level \\
\hline
(A) Bodily Injury & add 3 \\
(B) Serious Bodily Injury & add 5 \\
(C) Permanent or Life-Threatening Bodily Injury & add 7 \\
(D) If the degree of injury is between that specified in subdivisions (A) and (B), add 4 levels; or \\
(E) If the degree of injury is between that specified in subdivisions (B) and (C), add 6 levels. \\
\hline
\end{tabular}
\end{center}

However, the cumulative adjustments from application of subdivisions (2) and (3) shall not exceed 10 levels.

(4) If the offense was motivated by a payment or offer of money or other thing of value, increase by 2 levels.

(5) If the offense involved the violation of a court protection order, increase by 2 levels.

(6) If the defendant was convicted under 18 U.S.C. § 111(b) or § 115, increase by 2 levels.

\textit{Id.} On appeal, the defendant could raise every special offense characteristic that the district court found applicable.

\textsuperscript{54} King and O’Neill, 55 Duke L.J. at 220. With a waiver of appellate rights, “criminal defendants may, in several ways, lose or waive whatever rights to appeal are granted to them.” Kristine Cordier Karnezis, 89 A.L.R. 3d 864 §2[a]. Additionally, “in a negotiated plea agreement, a defendant expressly waives the right to appeal in order to obtain certain concessions from the state.” \textit{Id.}

\textsuperscript{55} King and O’Neill, 55 Duke L.J. at 220-21. In the early 1990s, the Fourth Circuit saw a significant increase in the amount of illegal reentry of aliens cases. \textit{Id.} at 220. In response, prosecutors began a “fast-track program,” where defendants who pled guilty early would receive a significantly lower sentence if he agreed to waive all of his rights—including the right to appeal. \textit{Id.} The Fifth and Ninth Circuits also began to follow the Fourth Circuit’s fast-track program. \textit{Id.} at 221. Six additional courts of appeals upheld the validity of appellate waivers by the end of 1995. \textit{Id.} The wide success of appellate waivers led to a memo to the United States Attorneys from the Washington which encouraged them to make use of appellate waivers. King and O’Neill, 55 Duke L.J. at 221.

\textsuperscript{56} Ginger K. Gooch, 64 MO. L. REV. at 459.

\textsuperscript{57} \textit{Id.} at 463.

\textsuperscript{58} \textit{Id.} at 464.

\textsuperscript{59} Hessick & Sajani, 16 BYU J. PUB. L. at 222; 37 GEO. L.J. ANN. REV. CRIM. PROC. 392; FED. R. CRIM. P. 11.

\textsuperscript{60} FED. R. CRIM. P. 11 (2008).
V. VALIDITY AND ENFORCEMENT OF APPELLATE WAIVERS

As part of his plea agreement, a defendant can waive most of his constitutional rights. The Supreme Court has yet to specifically address appellate waivers, but seems to lean towards approval of appellate waivers. Meanwhile, every federal circuit court of appeals has held that the theory of appellate waivers is valid.

The federal circuit courts of appeals approve of appellate waivers because defendants are permitted to waive constitutional rights. The right to appeal is a statutory right—it is not even a constitutional right. The Supreme Court has held that the Constitution does not include a right to appeal in criminal cases. But if a defendant has the right to freely trade constitutional rights, he surely can bargain away his statutory rights as well—such as his right to appeal.

Tests for the validity of waivers of the right to appeal vary between districts. Some tests are quite vague but others are rather strict. The vague tests usually give a broad exception to the validity of the appellate waiver where a “miscarriage of justice” has occurred. The courts using a vague test—such as the First, Third, and Eighth Circuits—do not fully define the “miscarriage of justice” concept. This fact makes it difficult for the parties involved to know whether the court will enforce their appellate waiver. The strict tests allow no exceptions if the waiver was made knowingly and voluntarily.

64. Teeter, 53 U. KAN. L. REV. at 738; Mezzanatto, 513 U.S. at 201 (“A criminal defendant may knowingly and voluntarily waive many of the most fundamental protections afforded by the Constitution.”).
65. Teeter, 53 U. KAN. L. REV. at 738; see 18 U.S.C. § 3742 (appeal from an illegal sentence); see 28 U.S.C. § 1291 (a general appeal from a final order).
66. Teeter, 53 U. KAN. L. REV. at 739; Jones v. Barnes, 463 U.S. 745, 751 (1983); Abney v. United States, 431 U.S. 651, 656 (1977). In 1889, Congress enacted a statute first allowing appeals as of right in criminal cases where the crime was punishable by death. Abney, 431 U.S. at 656 n.3. Not until 1911 was a general right of appeal created for criminal cases. Id.
67. Teeter, 53 U. KAN. L. REV. at 738; Khattak, 273 F.3d at 561.
68. Teeter, 53 U. KAN. L. REV. at 728. For example, the First, Third, Eighth, and Tenth Circuits use a broad approach that a waiver of a right to appeal is valid if it is knowing, voluntary, and enforcement would work a miscarriage of justice—yet miscarriage of justice goes undefined. Id. at 746 n.130, 133, 137, & 139; United States v. Teeter, 257 F.3d 14, 26 (1st Cir. 2001); Khattak, 273 F.3d at 563; United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003); United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004). The Fourth Circuit’s approach is that the waiver is valid if entered into knowingly and voluntarily unless a sentence was imposed “in excess of the statutory maximum or if the court relied on an impermissible factor, such as race.” Teeter, 53 U. KAN. L. REV. at 748; United States v. Brown, 232 F.3d 399, 403 (4th Cir. 2000). Additionally, the Fifth Circuit only requires that the waiver be made knowingly and voluntarily. Teeter, 53 U. KAN. L. REV. at 747; United States v. Melancon, 972 F.2d 566, 567 (5th Cir. 1992).
70. Teeter, 257 F.3d at 26; Khattak, 273 F.3d at 563; Andis, 333 F.3d at 891; Hahn, 359 F.3d at 1327.
72. Id. The Tenth Circuit attempts to limit its miscarriage of justice exception “where the alleged error ‘seriously affect[s] the fairness, integrity or public reputation of judicial proceedings...’” Id. at 747.
73. Id. at 746.
74. See Brown, 232 F.3d 403; see also Melancon, 972 F.2d at 567.
75. Teeter, 53 U. KAN. L. REV. at 728.
The Third Circuit follows a First Circuit decision, United States v. Teeter, 76 which uses the broad miscarriage of justice exception. 77 Miscarriage of justice is not defined in Teeter. 78 This broad conception of miscarriage of justice makes the plea bargaining system uncertain. 79 What is problematic is that the two sides cannot weigh the benefits of the plea agreement if they are uncertain as to whether the plea agreement will be enforced. 80

VI. THIRD CIRCUIT PLEA AGREEMENTS CONTAINING APPELLATE WAIVERS: THREE OPTIONS FOR APPEAL

When a criminal defendant in the Third Circuit who has entered into a plea agreement that contains an appellate waiver wants to appeal his conviction or sentence, he has three arguments that he can make so the Third Circuit will exercise jurisdiction over the merits of his appeal. 81 First, he could argue that his appellate issues do not “fall within the scope of his appellate waiver.” 82 Second the defendant could argue that he did not knowingly and voluntarily enter into the plea agreement. 83 Third, the defendant could argue that “enforcing the waiver would work a miscarriage of justice.” 84

When the Third Circuit looks to the scope of the appellate waiver, it must heed the language of the waiver—for plea agreements are “analyzed under contract law standards.” 85 Thus, the appellate waiver’s language is of grave importance, as is the language in a contract. 86 In addition, appellate waivers are necessarily “strictly construed.” 87 The language of appellate waivers often includes limited exceptions that allow the defendant to appeal. 88 Oftentimes, for example, the defendant may appeal if the government took an appeal, if the sentence exceeded the statutory limit, or if the sentence unreasonably exceeded the sentencing court’s guideline

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76. Teeter, 257 F.3d 14; Khattak, 273 F.3d at 563.
77. Teeter, 53 U. KAN. L. REV. at 746.
78. Id.
79. Id.
80. Id. A defendant is unable to predict whether or not his waiver of appellate rights will be enforced if the test is vague. Id. at 749. With a vague test:
Two results are likely: either defendants who might not otherwise waive their right to appeal will, because they think the miscarriage of justice exception is broader than it actually is, or defendants who otherwise would plead guilty will not, because they are frightened by dicta indicating that the miscarriage of justice exception is narrower than it actually is.
81. United States v. Corso, 549 F.3d 921, 927 (3d Cir. 2008); United States v. Goodson, 544 F.3d 529, 536 (3d Cir. 2008); United States v. Jackson, 523 F.3d 234, 243-44 (3d Cir. 2008); Gwinnett, 483 F.3d at 203.
82. Corso, 549 F.3d at 927; Jackson, 523 F.3d at 244.
83. Corso, 549 F.3d at 927; Jackson, 523 F.3d at 243.
84. Corso, 549 F.3d at 927; Jackson, 523 F.3d at 244.
85. Corso, 549 F.3d at 927 (citing Goodson, 544 F.3d at 535 n. 3); see also United States v. Williams, 510 F.3d 416, 422 (3d Cir. 2007).
86. Corso, 549 F.3d at 927 (citing Goodson, 544 F.3d at 535).
87. Corso, 549 F.3d at 927 (citing Khattak, 273 F.3d at 562); see also Williams, 510 F.3d at 422.
If none of the exceptions apply, then the defendant must advance another argument as to why his plea agreement should not be enforced. If none of the exceptions apply, then the defendant must advance another argument as to why his plea agreement should not be enforced.  

A defendant’s second argument for the Third Circuit to disregard his appellate waiver and to address the merits of his appeal is that he unknowingly and involuntarily entered his plea agreement. In Brady v. United States, the Supreme Court held that plea agreements must be made knowingly and voluntarily. The sentencing judge’s role is “critical” in determining whether the defendant’s guilty plea and plea agreement are made knowingly and voluntarily. The Third Circuit reviews a district court’s Rule 11 plea colloquy during the defendant’s change of plea hearing to assess whether the sentencing judge complied with Rule 11 and to determine that the defendant entered his plea agreement knowingly and voluntarily. If the sentencing judge complied with Rule 11, the Third Circuit deems the defendant’s plea agreement knowingly and voluntarily entered into, making his waiver of appeal valid.

Finally, a defendant’s third argument so that the Third Circuit will not enforce his appellate waiver when he appeals is that “enforcing the waiver would work a miscarriage of justice.” The Third Circuit has been careful not to specifically define when enforcement of an appellate waiver would work a miscarriage of justice. Rather, the Third Circuit seems to take more of an “I know it when I see it” approach.

VII. THE THIRD CIRCUIT MISCARRIAGE OF JUSTICE STANDARD

Instead of defining “miscarriage of justice,” the Third Circuit follows the First Circuit’s approach in setting forth factors to consider. These factors include:

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

These factors are supposed to provide guidelines for the court to determine when enforcement of an appellate waiver would work a miscarriage of justice. The Third Circuit has also provided a couple of examples of a miscarriage of justice, such as “a sentence based on constitutionally impermissible criteria, such as race, or a sentence in excess of the statutory maximum sentence for the defendant’s crime.”

90. Id.
91. Corso, 549 F.3d at 927; Jackson, 523 F.3d at 243.
92. Brady, 397 U.S. at 748.
93. Corso, 549 F.3d at 931 (citing Khattak, 273 F.3d at 563); see also United States v. Schweitzer, 454 F.3d 197, 205 (3d Cir. 2006).
94. Id.; see Teeter, 257 F.3d at 25-26.
95. Id. (alteration in original) (quoting Teeter, 257 F.3d at 25-26).
96. Id.
98. Id.; see Teeter, 257 F.3d at 25-26.
99. Id. (citing United States v. Bownes, 405 F.3d 634, 637 (7th Cir. 2005)).
Indeed, the Third Circuit has found a few instances where a defendant would suffer a miscarriage of justice. First, if a defendant should have been permitted by the district court to withdraw his guilty plea and was not permitted to do so, the defendant’s appellate waiver may not be enforced. Second, the defendant’s appellate waiver may not be enforced if the defendant did not understand his guilty plea due to “constitutionally deficient lawyering” or if the deficient attorney failed to file a direct appeal for an issue included in the plea agreement that was an exception to the appellate waiver.

In analyzing whether enforcement of an appellate waiver would work a miscarriage of justice, at times, the Third Circuit does not go into much analysis beyond simply listing the First Circuit’s factors. Rather, the Third Circuit sometimes stops the analysis after determining that the defendant’s Rule 11 plea colloquy was valid and that the defendant’s guilty plea and plea agreement were entered into knowingly and voluntarily. In some cases, the Third Circuit simply affirms the decision below without reaching the merits, because the defendant did not argue miscarriage of justice. Conversely, in other cases, the court reaches the merits in order to determine whether enforcing the appellate waiver would work a miscarriage of justice—when sometimes the defendant argues a miscarriage of justice and other times the defendant does not even mention his appellate waiver. The Third Circuit must create a procedure that it follows each time it reviews appeals of criminal defendants who have entered into plea agreements with appellate waivers so that the federal criminal justice system can be effective and similarly applied for all defendants. While the Third Circuit’s “miscarriage of justice” concept is very broad, the theory is actually very rarely applied—and seldom is the procedure consistent.

Although the Third Circuit admittedly categorizes the miscarriage of justice as “quite narrow” and that it should be applied sparingly, the court should advance a set procedure for analyzing whether enforcement of an appellate waiver would work a miscarriage of justice. The Third Circuit chose not to define miscarriage of justice so that the concept could be analyzed on case by case basis, but a specific procedure would still allow for a case by case analysis. Additionally, a specific procedure would also allow each case to be uniformly analyzed so both the government and the defendant knows what to expect from the court.

Oftentimes in practice, defendants are unhappy with the length of their sentences, and on appeal they are not trying to invalidate their guilty plea but are trying to obtain a shorter sentence. It is more difficult for a defendant to try to argue that enforcement of his plea

104. Appellate waivers also often include a collateral attack waiver. United States v. Shedrick, 493 F.3d 292, 297 (3d Cir. 2007). In the case of an ineffective assistance of counsel claim, the collateral attack waiver would be in question.
105. Shedrick, 493 F.3d at 298. In addition, the Third Circuit has held that it may not enforce a defendant’s appellate waiver where the government breached its plea agreement obligations. United States v. Schwartz, 511 F.3d 403, 405 (3d Cir. 2008). This argument, however, is based on contract principles & not the miscarriage of justice exception.
110. Wilson, 429 F.3d at 458-60 & n.6.
111. Khattak, 273 F.3d at 563.
agreement, which contains an appellate waiver, would work a miscarriage of justice for a sentencing issue than to try to completely invalidate his guilty plea. If a defendant does not want to invalidate his guilty plea but simply wants to challenge his sentence, and if the sentence is not within the scope of the exceptions to his appellate waiver, a defendant must try to argue that enforcement of his plea agreement appellate waiver would work a miscarriage of justice. The problem in the Third Circuit is that the defendant is unsure of how to appropriately argue to the circuit that he would suffer a miscarriage of justice.

If a defendant wishes to invalidate his guilty plea, however, one way he can do so is with an ineffective assistance of counsel claim. In United States v. Shedrick, the Third Circuit heard the merits of the appeal because they proclaimed that the defendant had suffered a "miscarriage of justice." The miscarriage of justice standard was not actually defined by Shedrick — the court did not further explain the concept.

Furthermore, one can invalidate a guilty plea by arguing that the plea was made unknowingly and involuntarily. If a defendant wants to invalidate his guilty plea, he could argue that his guilty plea was not knowing and voluntary, rather than arguing that he would suffer a miscarriage of justice if his appellate waiver was enforced. It is easier to challenge a conviction by arguing under the knowing and voluntary standard, because Rule 11 guides this standard. Defense counsel knows what to argue while the prosecutor can anticipate defense counsel’s arguments.

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112. For example, the Third Circuit Court of Appeals states that “if the district court's sentence is procedurally sound, we will affirm it unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.” United States v. Tomko, 562 F.3d 558, 568 (3d Cir. 2009). Therefore, the district court is given wide deference in sentencing defendants. This deference makes it difficult for the court of appeals to disagree with the district court, to find that the district court has erred, and to find that the defendant must be re-sentenced.

113. Ineffective assistance of counsel is defined as:
A representation in which the defendant is deprived of a fair trial because the lawyer handles the case unreasonably, usually either by performing incompetently or by not devoting full effort to the defendant, especially because of a conflict of interest. • In determining whether a criminal defendant received ineffective assistance of counsel, courts generally consider several factors: (1) whether the lawyer had previously handled criminal cases; (2) whether strategic trial tactics were involved in the allegedly incompetent action; (3) whether, and to what extent, the defendant was prejudiced as a result of the lawyer's alleged ineffectiveness; and (4) whether the ineffectiveness was due to matters beyond the lawyer's control.

BLACK’S LAW DICTIONARY 130 (8th ed. 2004).

The Sixth Amendment right to assistance of counsel has been held to imply the “right to the effective assistance of counsel.” The Court has often said that the converse — ineffective assistance of counsel — is a constitutional denial of the Sixth Amendment right, even if the lawyer has been retained by rather than appointed for the defendant. “Ineffective” does not necessarily mean incompetent or unprepared; it means an inability to perform as an independent lawyer devoted to the defendant.... However, counsel’s assistance is not necessarily ineffective because the lawyer made mistakes. Only very serious errors, such as would likely have produced an entirely different outcome at trial, will suffice to require a new trial.

*Id. (quoting Jethro K. Lieberman, The Evolving Constitution 263–64 (1992)).

114. See Shedrick, 493 F.3d 292.
115. See FED. R. CRIM. P. 11.
VIII. A SUGGESTION FOR ADOPTION OF A NEW STANDARD: PLAIN ERROR

The Third Circuit needs a defined standard for the miscarriage of justice exception — for instance, defense counsel can follow Rule 11 when arguing that a plea was unknowingly and involuntarily made. The Court should create a standard for the miscarriage of justice procedurally akin to the plain error standard.\[117\]

The Tenth Circuit in United States v. Hahn found that they had “not previously defined [the miscarriage of justice] exception, but [they had] described many of its components.\[118\] One of these components, which the Third Circuit does not follow, was “where the waiver is otherwise unlawful.”\[119\] The Tenth Circuit held that to satisfy this factor, “the error [must] seriously affect[] the fairness, integrity or public reputation of judicial proceedings[,] as that test was employed in United States v. Olano, 507 U.S. 725, 732, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993).”\[120\]

The plain error standard comes from “Federal Rule of Criminal Procedure 52(b), which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited because not timely raised in district court.”\[121\] Obviously the miscarriage of justice procedure would differ because the subject of the appeal could have been preserved below, but the plain error standard would apply because of the appellate waiver provision. Rule 52(b)’s language provides: “Plain errors or defects affecting the substantial rights may be noticed although they were not brought to the attention of the court.”\[122\] The Supreme Court held that for plain error 1) there must be an error; 2) the error must be plain; 3) and the error must affect substantial rights.\[123\] The court of appeals has the discretion to correct the error, but it must “seriously affect[] the fairness, integrity or public reputation of judicial proceedings.”\[124\]

For the court to find a miscarriage of justice, first the defendant would have to argue that there indeed was error. The Supreme Court explained, however, that if a defendant waives his right he cannot later argue that he should have been entitled to whatever it is that he waived.\[125\] For a miscarriage of justice standard, the basis of a defendant’s argument could not simply be that he should have had the opportunity to appeal. There must be some error present not regarding the appellate waiver itself. The Supreme Court explains that a waiver differs from forfeiture—the former is the “intentional relinquishment or abandonment of a known right”\[126\] and the latter is the “failure to make a timely assertion of a right.”\[127\] Therefore, the error must be a violation of a legal rule that was not waived by the defendant.

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118. Hahn, 359 F.3d at 1327.
119. Id. The other three components that the Tenth Circuit listed were “[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [3] where the sentence exceeds the statutory maximum...” Id. (alterations in original) (quoting United States v. Elliot, 264 F.3d 1171, 1173 (10th Cir. 2001).
120. Id.
121. Olano, 507 U.S. at 731; see also FED. R. CRIM. P. 52(b).
122. FED. R. CRIM. P. 52(b).
124. Id. (quoting United States v. Young, 470 U.S. 1, 15 (1985)).
125. Id. at 733.
127. Id.
Second, the defendant must show that the error was plain, which the Supreme Court explained “is synonymous with ‘clear’ or, equivalently, ‘obvious.’” And third, the error must affect the defendant’s substantial rights. The Supreme Court explains that this means that the error needs to be prejudicial—“[i]t must have affected the outcome of the district court proceedings.”

The Tenth Circuit standards for miscarriage of justice would aid those who are faltering (whether the defense, prosecution, or the judge) in the Third Circuit. The way that the Third Circuit proceeds now—without defining “miscarriage of justice” or offering any procedure—is not providing equal treatment in each defendant’s case. As stated above, the Third Circuit handles the cases differently and defendants are unsure as to what needs to be present for a miscarriage of justice to exist in his case. Furthermore, enforcing a plea agreement regardless of any unusual circumstances as long as the plea agreement was made knowingly and voluntarily is too strict of an approach. Some grave mistake might have been made in a defendant’s case, and with this approach, there is no way for a defendant to have his case reviewed. This system could lead to harsh, draconian results.

Additionally, the miscarriage of justice in the Third Circuit is even less likely to come to a resolution because of the court’s influential suggestion in United States v. Goodson. In a footnote, the court “emphasized that the government may file a motion for summary action under Third Circuit L.A.R. 27.4 to enforce the waiver and to dismiss the appeal” so that the government may “obtain the full benefit of its bargain.” In response, the defendant can submit an argument in opposition of the government’s motion, and a motion’s panel then would rule on the “enforceability of the waiver.” The court finds this process beneficial to the government stating that “briefing at this stage is limited to the validity and scope of the waiver.” This process to enforce the defendant’s plea agreement, however, provides no insight as to how a defendant can argue that enforcement of his waiver would work a miscarriage of justice. This process also, if utilized and if successful for the government, drastically reduces the number of Third Circuit opinions dealing with appellate waivers. Therefore, those involved in the plea agreement process have less of a chance that further instructions on a Third Circuit miscarriage of justice will be provided.

128. Olano, 507 U.S. at 734 (quoting Young, 470 U.S. at 17).
129. Id.
130. Id.
131. Goodson, 544 F.3d at 535 n.2.
132. Id.
133. Id.
134. Id.
135. The Chief of the Appellate Division for the Office of the United States Attorney in the Western District of Pennsylvania (“WDPA”) reported that since the Third Circuit’s emphasis on this process in Goodson, his office indeed heeds this suggestion of the court. Interview with Robert L. Eberhardt, Chief of Appeals, Office of the United States Attorney, Western District of Pennsylvania (“WDPA”), in Pittsburgh, Pa. (Oct. 28, 2009). The WDPA makes a motion to the Third Circuit to dismiss an appellant’s case when a defendant has entered into a plea agreement with an appellate waiver. Id. The WDPA has been successful and has had many of its motions for dismissal granted. Id. Other districts within the Third Circuit follow a similar procedure. Id. Therefore, this process is utilized and is successful for the government.
136. The only way that the court can reach the miscarriage of justice exception and be able to give a complete analysis in an opinion is where the government makes a motion to dismiss the appeal and where the court denies the government’s motion. Then the case would proceed to briefing on the merits. Even then, the defendant would need to make a compelling miscarriage of justice argument in his response to the government’s motion. Having no instructions on how to do so beforehand, a defendant is not likely to be successful in the court denying the government’s motion.
Providing some sort of approach for the defendant and his counsel—particularly, one akin to plain error procedure—would help all parties involved in the process. With a procedure to follow regarding a miscarriage of justice argument, all those who are involved with the plea agreement process would benefit. First, defense counsel would have an outline to follow and would be aware of what arguments he needs to make to satisfy the miscarriage of justice standard for the Third Circuit to reach the merits of the defendant’s case. Second, the defendant would know what kind of barrier he would have to overcome to show that enforcing his plea agreement containing an appellate waiver would work a miscarriage of justice. Third, the defendant would also know whether his defense counsel was advocating his position properly. Fourth, the prosecutor could better prepare, because he would have a better understanding of what kind of an argument to expect from defense counsel. Fifth, the prosecutor could also analyze the case with the plain error standard to ensure that justice was properly administered. And sixth, the judge would understand what standard the Third Circuit would use to review the defendant’s case on appeal.

IX. CONCLUSION

With the frequent use of plea agreements in the federal criminal justice system, and the widespread popularity of appellate waivers, all parties involved need to understand the meaning of “miscarriage of justice.” With some type of procedure in place to aid a defendant in arguing that enforcement of his appellate waiver would work a miscarriage of justice, all parties would benefit. Use of the plain error standard to guide arguments for miscarriage of justice may be one suggestion among others, but clearly the Third Circuit must eventually attain a permanent solution to the confusion.

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