"UNWAIVERING" JUSTICE: HOW INDIANA SHOULD BALANCE FAIRNESS AND FINALITY BY LIMITING WAIVERS OF SENTENCE APPEALS

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INTRODUCTION

In 2022, the Indiana criminal justice system disposed of cases through guilty plea or admission in more than 110,000 cases—twenty-eight times for every one jury or bench trial.[1] Or, as Justice Anthony Kennedy said, "[C]riminal justice today is for the most part a system of pleas, not a system of trials."[2]

This system of pleas applied to the case of Joseph Hook.[3] Hook took a plea agreement in 2022, pleading guilty to two Level 4 felonies.[4] The plea agreement did not contain a sentencing recommendation, but it did state that Hook would serve his individual sentences concurrently.[5] At Hook's guilty plea hearing—but prior to acceptance of Hook's guilty plea—the trial court addressed Hook.[6] The judge informed Hook of the rights he waived by pleading guilty and stated, "[Y]ou give up your right to appeal the convictions. *You are not agreeing to your sentences, so you don't give up your right to appeal your sentences*, but you are pleading guilty to two charges, and you give up your right to appeal those convictions . . . ."[7]

The trial court's admonishment contradicted a term in Hook's written plea agreement, which stated:

> By entering into this agreement, you are expressly waiving your right to such appeal under Appellate Rule 7, and are expressly waiving your right to appeal your sentence on the basis that it is erroneous or otherwise challenge the appropriateness of your sentence, or on the basis that the court abused its discretion so long as the Judge sentences you within the terms of this plea agreement.[8]

Despite the trial judge's statement to Hook contradicting Hook's written plea agreement with the State, the Indiana Court of Appeals decision made no

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1. *Indiana Trial Court Statistics by County*, IND. JUD. BRANCH, https://publicaccess.courts.in.gov/ICOR [https://perma.cc/8JPJ-K3V6] (last visited Oct. 21, 2023) (showing 110,805 cases in 2022 disposed of via guilty plea/admission compared to 911 cases disposed of via jury trial and 2,973 disposed of via bench trial, not including juvenile delinquency cases).

2. Lafler v. Cooper, 566 U.S. 156, 168 (2012).

3. *See generally* Hook v. State, No. 23A-CR-820, 2023 WL 8946141 (Ind. Ct. App. Dec. 28, 2023).

4. *Id.* at *2.

5. *Id.*

6. *Id.* at *1.

7. *Id.*

8. *Id.*

mention of any objection by the State to this erroneous admonishment at the guilty plea hearing.[9] State objection to this judicial admonishment was not noted until six months later, when the trial court made a similar statement that Hook had a right to appeal his sentence at Hook's sentencing hearing.[10] After the State's objection, the trial court for the third time advised Hook that he had a right to appeal his sentence and, three days later, appointed Hook appellate counsel at Hook's request.[11]

Hook argued on appeal that his guilty plea was not entered into knowingly and voluntarily when the trial court specifically misadvised him.[12] The State first filed a motion to dismiss the appeal.[13] The Indiana Court of Appeals motions panel denied that motion.[14] The State then cross-appealed, arguing that Hook waived his right to directly appeal his sentence.[15] In December of 2023, more than five years after the State initially charged Hook and fifteen months after the trial court accepted his plea agreement, the Indiana Court of Appeals dismissed Hook's appeal.[16] The court held that Hook's only remedy for challenging the sentence—a sentence which the trial court explicitly told him three times he could appeal—was for Hook to seek post-conviction relief.[17] Such relief, if granted, would set aside Hook's plea agreement entirely and allow the State to go to trial on the two Level 1 felonies, Class A felony, and Level 4 felony, on which they originally charged him.[18]

This Note highlights the serious inefficiencies in cases such as Hook's, where appellate counsel for the defendant, the Indiana Attorney General's office, and two different panels from the Indiana Court of Appeals spent nearly six months litigating an appeal that could only go nowhere under current Indiana law.[19] This process did not just waste resources. It delayed the finality of Hook's case and left Hook with no way to remedy an improper admonishment on his sentencing other than setting aside his entire conviction.

This Note examines these issues and recommends changes to Indiana's criminal rules to better protect every defendant's right under the Indiana Constitution to "in all cases an absolute right to one appeal" and to promote fairness within the justice system.[20]

This Note argues that because of serious public policy concerns with the current enforcement of waivers of the right to appeal a sentence in Indiana, the

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9. *See generally id.*
10. *Id.* at *1.
11. *Id.*
12. *Id.* at *2.
13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.* at *3.
17. *Id.* at *3.
18. *See* IND. POST-CONVICTION RULE 1(10); *see also* Hook v. State, No. 23A-CR-820, 2023 WL 8946141, at *1 (Ind. Ct. App. Dec. 28, 2023).
19. *See generally Hook*, 2023 WL 8946141.
20. IND. CONST. art. VII, § 6.

Indiana Supreme Court should adopt a criminal rule that prohibits trial courts from accepting plea agreements that include a waiver of the right to appeal sentencing in some circumstances. Specifically, the proposed rule would bar acceptance of plea agreements that both (1) preserve some judicial discretion in sentencing, and (2) include waivers of the right to appeal sentencing that has not yet occurred. Part I of this Note defines key terms and provides an overview of the waivers of sentence appeals in Indiana. Part II provides an overview of sentence appeals in other United States jurisdictions, including the federal system and Indiana's neighboring states. Part III then discusses the serious public policy concerns with Indiana's current practice and the available remedies. Part IV argues for possible reform, including narrowing the application of certain case law going forward, creating a new criminal rule, and applying contract law to find improper waivers unenforceable.

I. OVERVIEW OF WAIVERS OF SENTENCE APPEAL IN INDIANA

A. Defining "Partially Negotiated Pleas"

The term "partially negotiated plea" is a key phrase in this Note. In the landmark Indiana case *Collins v. State*, the Court stated that "[a] plea agreement where the issue of sentencing is left to the trial court's discretion is often referred to as an 'open plea.'"[21] However, there are narrower definitions. In a 2016 case, the plea agreement defined an open plea as one that "leaves the sentence entirely to the Judge's discretion, without any limitations or the dismissal of any charges."[22] Even more specifically, an open plea can refer to a plea where the defendant pleads guilty without coming to any agreement with the prosecution.[23] This Note differentiates between (1) such as a fully-open guilty plea with no State-defendant agreement and (2) pleas that are "partially negotiated." The term "partially negotiated plea"—like the "open plea" in *Collins v. State*—refers to plea agreements that set some parameters on convictions or sentencing but preserve some level of discretion for the judge.[24] For example, in Indiana, the sentence for a Level 6 Felony is between six months and two and one-half years.[25] If a defendant pleading guilty to a Level 6 felony

21. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004).

22. T.A.D.W. v. State, 51 N.E.3d 1205, 1209 (Ind. Ct. App. 2016).

23. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 233 (2005) ("One defender's explanation was typical of many of those interviewed: 'Our position is we're only going to sign [a plea agreement containing an appeal waiver] if we get a significant concession. . . . If not, we plead open, [because there's] not much advantage to entering into an agreement.'"); *see also* Tracey B. Carter, *Drunk Drivers Are A Moving Time Bomb: Should States Impose Liability on Both Social Hosts and Commercial Establishments Whose Intoxicated Guests and Patrons Subsequently Cause Injuries or Death to Innocent Third Parties?*, 49 CAP. U. L. REV. 385, 404 (2021) ("It was an open plea, meaning he hadn't negotiated a deal with prosecutors.")

24. *See Collins*, 817 N.E.2d at 231.

25. *See* IND. CODE § 35-50-2-7(b) (2019).

signed a plea agreement to a sentence of up to one year, this Note would categorize that plea as partially negotiated. This is because a judge could sentence the defendant anywhere between six and twelve months. However, if the plea set the maximum sentence at six months, the plea would be fully negotiated. If the judge accepted the plea agreement, she would retain no discretion since the statutory minimum of the offense and the plea-agreement maximum sentence are both six months.

B. Waiver of the Right to Appeal Sentence

A plea agreement is essentially a contract between a criminal defendant and the State.[26] Via the agreement, a defendant receives certain benefits in exchange for pleading guilty to some offense and waiving certain rights, such as the right to a trial or—at issue in this Note—the right to appeal one's case.[27] As one scholar noted, "[T]hough its victory merits no fanfare, plea bargaining has triumphed."[28] Parties and non-parties alike benefit from a plea agreement; by avoiding the time and resources of going to trial, prosecutors and law enforcement officers have more energy to solve, prevent, and prosecute other crimes.[29] Victims get immediate closure when a plea is accepted and the defendant admits guilt, as opposed to being subjected to a trial where the defendant maintains her innocence while the victim grapples with the uncertainty of a possible acquittal.[30] Defendants also have a clear incentive to plea bargain. "Their incentive lay in the difference between the severe sentence that loomed should the jury convict at trial and the more lenient sentence promised by the prosecutor or judge in exchange for a plea."[31] And as far back as 1971, the highest Court of the land stated that the country would need many more courtrooms and judges if the United States stopped using plea agreements.[32] As Justice Burger wrote, "If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."[33]

As recognized in the Indiana Criminal Rules adopted January 1, 2024, a defendant who pleads guilty waives many rights.[34] These include "the rights to

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26. U.S. DEP'T OF JUST., CRIM. RESOURCE MANUAL § 626 https://www.justice.gov/archives/jm/criminal-resource-manual-626-plea-agreements-and-sentencing-appeal-waivers-discussion-law.

27. *Id.*

28. George Fisher, *Plea Bargaining's Triumph*, 109 YALE L.J. 857, 859 (2000).

29. Michael Conklin, *In Defense of Plea Bargaining: Answering Critics' Objections*, 47 W. ST. L. REV. 1, 3 (2020).

30. *Id.* at 4.

31. Fisher, *supra* note 28, at 965.

32. *See* Santobello v. New York, 404 U.S. 257, 260 (1971).

33. *Id.*

34. Order Amending the Rules of Criminal Procedure, No. 23S-MS-10, 11 (Ind. June 23, 2023) https://www.in.gov/courts/files/order-rules-2023-0623-crim-proc.pdf [https://perma.cc/FCQ7-XV3F].

public and speedy trial by jury, to confront and cross-examine witnesses, to have compulsory process, to have proof by the state of guilt beyond a reasonable doubt, not to be compelled to testify against himself/herself, and to appeal the conviction . . . ."[35]

However, Indiana's appellate courts have recognized a distinction between defendants with plea agreements appealing their conviction versus appealing the sentence of a court that has exercised a degree of sentencing discretion.[36] In *Collins v. State*, Indiana's Supreme Court stated that "[a] person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal."[37] But, the defendant may appeal "a trial court's sentencing decision where the trial court has exercised sentencing discretion."[38]

In 2008, the Indiana Supreme Court held for the first time that a defendant can—as part of her plea agreement—waive her right to appeal a discretionary sentencing decision when that waiver is knowing and voluntary.[39]

C. Appeal of One's Sentence Despite Waiver

Despite Indiana's 2008 allowance of defendants waiving their right to appeal a discretionary sentencing decision, many appellate waivers regarding sentencing have historically gone unenforced in Indiana.[40] This section of this Note details a number of instances where Indiana appellate courts allowed an appeal despite a plea agreement's waiver of the right to appeal.

First, the Indiana Supreme Court has held that when the trial court sentences a defendant to the specifics of a plea agreement containing an illegal sentence, the sentence is not in error.[41] In *Collins v. State*, the defendant's plea agreement gave him credit for time served and suspended his remaining time.[42] Despite the fact that this suspension of time was illegal, the trial court sentenced the defendant in accordance with his plea.[43] This benefited the defendant, as he served less time than he ought to.[44] Because the defendant benefited from the illegal sentence, the court held that the sentence could not be challenged.[45]

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35. *Id.*

36. Collins v. State, 817 N.E.2d 230, 231 (Ind. 2004).

37. *Id.*

38. *Id.*

39. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008).

40. *See generally* Brief for Indiana Public Defender Council as Amicus Curiae in Support of Rehearing at 15, Davis v. State, 217 N.E.3d 1229 (Ind. 2023) (No. 22S-CR-253) [hereinafter Indiana Public Defender Council Amicus Curiae Brief].

41. Collins v. State, 509 N.E.2d 827, 833 (Ind. 1987).

42. *Id.*

43. *Id.*

44. The defendant later challenged the underlying conviction and asked for his plea to be set aside. The court stated that "a defendant may not enter a plea agreement calling for an illegal sentence, benefit from that sentence, and then later complain that it was an illegal sentence." *Id.*

45. *Id.*

However, when the plea agreement did not explicitly allow for the illegal sentence, the defendant was "entitled to presume that the trial court would sentence him in accordance with the law."[46] In *Crider v. State*, a trial court ordered that a defendant's habitual offender enhancement would run consecutive to a habitual offender enhancement imposed by another county.[47] This was contrary to Indiana law and not explicitly agreed to in the plea agreement.[48] The Court of Appeals held the remedy was to allow an appeal of the illegal sentence, thus invalidating the waiver of appeal.[49] Similarly, in *Lacey v. State*, the Indiana Court of Appeals upheld a defendant's right to appeal his sentence despite a waiver of that right when the defendant argued that the trial court erred in adding a thirteen-year habitual offender enhancement to his sentence.[50]

Likewise, in *Ricci v. State*, where the trial court clearly stated at the plea hearing that the defendant retained the right to appeal his sentence and the State did not object to that advisement, the Indiana Court of Appeals nullified the waiver of appeal, and the defendant retained the right to appeal his sentence.[51] And, when the trial court in *Bonilla v. State* told a defendant who was not a native English speaker at the plea hearing that he "may" have waived his right to appeal, it created enough contradictory and confusing information that the Court of Appeals held that the right to appeal the sentence was not waived.[52]

Additionally, where the waiver of the right to appeal appeared alongside a waiver of post-conviction relief, the Indiana Supreme Court held the plea agreement insufficient to establish the defendant's knowing and voluntary waiver of the right to appeal the sentence.[53] In *Johnson v. State*, a plea agreement stated, "DEFENDANT WAIVES RIGHT TO APPEAL AND POST CONVICTION RELIEF"—despite the fact that waivers of post-conviction relief have been held "patently void and unenforceable . . . for almost thirty years."[54] The Court held the waiver was not sufficiently explicit so as to establish an enforceable waiver of the right to appeal the sentence.[55] Because of the appeal waiver's location in the same sentence as the unenforceable post-conviction waiver provision, the Indiana Supreme Court held that the waiver did not establish that the defendant knowingly and voluntarily waived the right to appeal his sentence.[56]

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46. Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013).
47. *Id.* at 621.
48. *Id.* at 621–22.
49. *Id.* at 625.
50. Lacey v. State, 124 N.E.3d 1253, 1255–56 (Ind. Ct. App. 2019).
51. Ricci v. State, 894 N.E.2d 1089, 1093–94 (Ind. Ct. App. 2008).
52. Bonilla v. State, 907 N.E.2d 586, 589–90 (Ind. Ct. App. 2009).
53. *See generally* Johnson v. State, 145 N.E.3d 785 (Ind. 2020).
54. *Id.* at 786–87.
55. *Id.*
56. *Id.*

The examples of appeals allowed despite a waiver of the right to appeal the sentences continue. In one case, the court allowed the defendant to appeal the amount of restitution ordered because the plea agreement left the restitution amount blank and did not specify how restitution would be determined.[57] Finally, in at least one modern case, the Indiana Court of Appeals held that a defendant retained the right to appeal a sentence as illegal, despite a waiver of the right to appeal the sentence, because the defendant alleged the trial court improperly applied an aggravator that was also an element of the offense.[58] However, the Indiana Supreme Court's recent decision in *Davis v. State* distinguishes the above case law and calls into question when—if ever—a defendant can successfully seek direct appeal of a sentence once they have signed a waiver of the right to appeal the sentence.[59]

D. Post-conviction Relief as the Remedy

In 2023, the Indiana Supreme Court held that a defendant who signed an appeal waiver based on a misunderstanding of the rights being waived could only seek redress via post-conviction relief.[60] If a defendant is successful on post-conviction relief, their entire plea agreement is invalidated, and all parties are returned to the state they were in before the agreement.[61] In its recent decision in *Davis v. State*, the Indiana Supreme Court held in a 3-2 decision that when the trial court's misstatement misleads a defendant about his ability to appeal his sentence, Indiana's courthouse doors are closed to a direct appeal.[62] The Court focused on the written instrument of the plea agreement, which stated:

> The Defendant hereby waives the right to appeal any sentence imposed by the Court, including the right to seek appellate review of the sentence pursuant to Indiana Appellate Rule 7(B), so long as the Court sentences the defendant within the terms of this plea agreement.[63]

In exchange for Davis's agreement to plead guilty and waive his rights, the State agreed that Davis's executed sentence would be no greater than four years, with a maximum of two served in the Department of Correction.[64] After Davis signed this agreement but before the trial court accepted it, the trial judge made

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57. Archer v. State, 81 N.E.3d 212, 215 (Ind. 2017).

58. Haddock v. State, 112 N.E.3d 763, 766 (Ind. Ct. App. 2018).

59. *See generally* Davis v. State, 207 N.E.3d 1183 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023).

60. *Id.* at 1234–35.

61. *Id.*

62. *Id.* at 1233.

63. *Id.* at 1231.

64. *Id.*

two statements to Davis regarding his right to appeal his sentence.[65] The court said that while Davis was waiving his "right to appeal any decision made by the court," there was an exception.[66] "The one exception is because you have a plea agreement that provides the court some discretion about where your sentence is, in a certain range, you would have the ability to appeal my use of discretion in that sentencing."[67] A month later, after formally accepting Davis's plea and sentencing him, the judge again told Davis he could appeal. "[Y]ou're a person who's been sentenced after [a] contested sentencing hearing where there was some discretion that was left to the court under the plea agreement. Because of that you do have the ability to appeal the sentence that was imposed today."[68] Neither Davis's defense counsel nor the State objected to either of these mis-advisements by the trial court.[69]

When Davis appealed his sentence, the Indiana Supreme Court enforced the appellate waiver of the plea deal.[70] The Court reasoned that Davis did not argue the written instrument of the plea deal was ambiguous, only that the trial court gave Davis contrary advisements.[71] As such, the Court held that Davis's only means of remedy was via post-conviction relief.[72] If successful, post-conviction relief would vacate the defendant's conviction and render the plea agreement unenforceable.[73] The Court added, "[T]he defendant cannot retain the benefits of the bargain (a more lenient sentence) while escaping its burdens (the promise not to appeal for an even more lenient sentence)."[74] This Note argues that the post-conviction remedy is insufficient for several reasons discussed in Part III.

II. OVERVIEW OF WAIVERS OF SENTENCE APPEAL IN UNITED STATES JURISDICTIONS

A. Federal System

Nationally, waivers of the right to appeal sentences emerged in federal courts as early as 1989.[75] "In 1999, amendments to the Federal Rules of Criminal Procedure took effect which formally legitimized appeal waivers by requiring judges to discuss them with defendants prior to accepting the plea agreement."[76]

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65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 1231–32.
69. *Id.* at 1232.
70. *Id.* at 1236.
71. *Id.* at 1233.
72. *Id.* at 1234.
73. *Id.*
74. *Id.*
75. United States v. Wiggins, 905 F.2d 51, 52 (4th Cir. 1990).
76. Andrew Dean, *Challenging Appeal Waivers*, 61 BUFF. L. REV. 1191, 1196–97 (2013).

The D.C. Circuit was a holdout on affirming the use of sentencing appeal waivers in plea agreements, but did so in 2009.[77]

However, waivers of the right to appeal one's sentence are not always enforced at the federal level.[78] In 2001, the First Circuit announced that "if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver."[79] Subsequently, the Third, Eighth, and Tenth Circuits adopted this approach.[80] Additionally, at the federal level, appeals of ineffective assistance of counsel may result in the voiding of a waiver.[81]

B. Processes in Neighboring States

Illinois has explicit rules governing when a defendant who signed a plea agreement can appeal their sentence. Specifically, an Illinois Supreme Court Rule limits a defendant's ability to appeal the sentence in a "negotiated plea" of guilty, where "the prosecution has bound itself to recommend a specific sentence, or a specific range of sentence, or where the prosecution has made concessions relating to the sentence to be imposed and not merely to the charge or charges then pending."[82] In cases involving a negotiated plea, a defendant seeking to challenge a sentence as excessive must first file a motion with the trial court to "withdraw the plea of guilty and vacate the judgment."[83] The trial court can grant the motion and "modify the sentence or vacate the judgment and permit the defendant to withdraw the plea of guilty and plead anew."[84] If the trial court denies the motion, the defendant can appeal the judgment and the sentence, arguing that the trial court errored in denying his motion to withdraw the plea.[85] The Illinois system allows a defendant to seek remedy for perceived injustice by keeping the courthouse doors open to him, but it simultaneously incentivizes a defendant to abide by the terms he negotiated, since his challenge to a "negotiated plea" could result in his entire judgment being set aside.

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77. *See id.* at 1197 (stating that appeal waivers were not used in the D.C. Circuit); *see also* United States v. Guillen, 561 F.3d 527, 529 (D.C. Cir. 2009) ("We now agree with our sister circuits that such waivers generally may be enforced.").

78. *See* Dean, *supra* note 76, at 1123–24.

79. United States v. Teeter, 257 F.3d 14, 25 (1st Cir. 2001).

80. Dean, *supra* note 76, at 1123–24 ("The First, Third, Eighth, and Tenth Circuits refuse to enforce an appeal waiver if doing so would result in a miscarriage of justice.").

81. If a defendant makes a colorable claim of ineffective assistance of counsel in signing the plea's waiver, the waiver may be voided. *See* United States v. Elliott, 264 F.3d 1171, 1173 (10th Cir. 2001). Additionally, the Department of Justice updated its Justice Manual to state, "When negotiating a plea agreement, the attorney for the government should also not seek to have a defendant waive claims of ineffective assistance of counsel whether those claims are made on collateral attack or, when permitted by circuit law, made on direct appeal." U.S. DEP'T OF JUST., JUSTICE MANUAL § 9-27.420 (2023).

82. ILL. SUP. CT. R. 604(d).

83. *Id.*

84. *Id.*

85. *Id.*; *see* People v. Robinson, 197 N.E.3d 683, 691 (Ill. App. Ct. 2021).

The Commonwealth of Kentucky has recognized that one's right to appeal sentencing issues can remain even when a defendant pleads guilty and waives the right to appeal the finding of guilt.[86] In Kentucky, a defendant may appeal a sentencing issue when he has "a claim that a sentencing decision is contrary to statute, such as when an imposed sentence is longer than allowed by statute for the crime, or a claim that the decision was made without fully considering the statutorily-allowed sentencing options."[87] This has similarities to Indiana—Indiana likewise allows a defendant to directly appeal an illegal sentence.[88] But it is distinct in that the Kentucky rule allows challenges to sentences that are lawful but where the sentence "was made without fully considering what sentencing options were allowed by statute."[89]

Plea agreements in Michigan take the names of keystone cases that set their precedent. A defendant in Michigan might take a *Cobbs* agreement. A *Cobbs* agreement "involves the trial court participating in sentencing discussions at the request of a party, by stating 'on the record the length of sentence that, on the basis of the information then available to the judge, appears to be appropriate for the charged offense.'"[90] A defendant who pleads guilty with a *Cobbs* agreement "must be expected to be denied appellate relief on the ground that the plea demonstrates the defendant's agreement that the sentence is proportionate."[91] On the other hand, a Michigan defendant may enter into a *Killebrew* agreement, where the defendant and the prosecution agree to a sentence within a specified range.[92] Under Michigan law, entering a *Killebrew* agreement means a defendant waives "challenges to the proportionality and reasonableness of sentences within that range."[93]

Finally, Ohio also has explicit rules about when a sentence after a guilty plea can be challenged on appeal. Per Ohio state statute, "A sentence imposed upon a defendant is not subject to review under [the appeals as a matter of right section] if the sentence is authorized by law, has been recommended jointly by the defendant and the prosecution in the case, and is imposed by a sentencing judge."[94] Thus, the Ohio Supreme Court did not allow an appeal of three eight-year consecutive sentences jointly agreed upon by the defendant and the State, even when the trial court failed to make the findings required by state law before imposing consecutive sentences.[95] More recently, Ohio has held that a defendant

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86. The Kentucky Supreme Court allowed appeal despite the defendant's plea agreement form containing an express waiver of the right to direct appeal. Windsor v. Com., 250 S.W.3d 306, 307 (Ky. 2008)

87. Hayes v. Commonwealth, 627 S.W.3d 857, 862 (Ky. 2021).

88. *See generally* Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013).

89. Grigsby v. Com., 302 S.W.3d 52, 54 (Ky. 2010).

90. People v. Guichelaar, No. 363588, 2023 WL 8852963, at *3 (Mich. Ct. App. Dec. 21, 2023) (quoting People v. Cobbs, 505 N.W.2d 208, 283 (1993)).

91. *Id.* at *4.

92. *Id.* at *3.

93. *Id.* at *7.

94. OHIO REV. CODE § 2953.08(D)(1).

95. State v. Sergent, 148 Ohio St. 3d 94, 2016-Ohio-2696, 69 N.E.3d 627, at ¶ 43.

may not have a right to appeal a sentence within an agreed-upon range, which has broader applicability than a waiver of the right to appeal a specific sentence fixed by the plea agreement.[96]

In the surrounding states, defendants have more clarity regarding their appellate rights after when they have taken a plea agreement. Case law such as Michigan's and court rules such as those in Illinois provide information to judges, defendants, and defendants' counsel about when a sentence can be appealed.[97] This is preferable to Indiana's current situation, where great uncertainty and public policy concerns exist regarding when a defendant who waived her right to appeal may appeal her sentence. These concerns are discussed in Part III of this Note.

III. PUBLIC POLICY CONCERNS WITH INDIANA'S CURRENT PRACTICE

A. Efficiency

One major reason individuals support plea agreements overall is under the rationale that they are an efficient use of justice-system resources.[98] The United States Supreme Court has pointed out that plea agreements can benefit all involved.[99] "The defendant avoids extended pretrial incarceration and the anxieties and uncertainties of a trial . . . . Judges and prosecutors conserve vital and scarce resources."[100] The Seventh Circuit likewise stated specific to waivers of the right to appeal; "An appeal requires the prosecutor's office to spend time researching the record, writing a brief, and attending oral argument. All of this time could be devoted to other prosecutions; and a promise that frees up time may induce a prosecutor to offer concessions."[101] The Indiana Supreme Court repeated this quotation in *Creech v. State* regarding the benefits of appeal waivers.[102]

However, in Indiana, appeals are not prosecuted by the local prosecutor who tried the case originally, but by the Attorney General.[103] In Indiana, resources for the Attorney General's office are appropriated directly out of the State General Fund, not from the limited county funding that supports county

96. State v. Brown, 129 N.E.3d 524, at ¶ 18 (Ohio Ct. App. 2019).

97. *See supra* text accompanying notes 82–85, 90–93.

98. Jeffrey Bellin, et al., *Plea Bargains: Efficient or Unjust?*, 107 JUDICATURE 50 (2023) (Jeffrey Bellin said, "The truth is that judges like plea bargains, just like everybody else in the system, because plea deals are efficient, and judges care about efficiency.").

99. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

100. *Id.*

101. United States v. Hare, 269 F.3d 859, 861 (7th Cir. 2001).

102. Creech v. State, 887 N.E.2d 73, 75 (Ind. 2008).

103. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 15.

prosecutors.[104] There is an argument to be made that allowing for direct appeals of sentencing issues is more efficient. If a defendant with a partially negotiated plea can directly appeal concerns with their sentence but leave their conviction and guilty plea intact, the possible impact on judicial resources is lower. The sentence could be litigated on appeal and reversed or affirmed without implicating the underlying conviction. However, under the post-*Davis* scheme, a defendant must challenge their plea as a whole. While this post-conviction relief is handled by the State Public Defender,[105] if the action is successful and the plea is vacated, the whole matter is turned back to the local prosecutor, county public defender, and trial court to take another crack at both the conviction and the sentencing.

Additionally, as the Indiana Public Defender Council argued in their amicus brief for *Davis*, "[s]ince *Creech* was decided, more than one hundred appeals involving an appeal waiver were decided on the merits of issues raised."[106] This indicates that many appeals are still being brought, despite plea agreements specifically waiving the rights to those appeals. While *Davis* stated that the appropriate remedy for many is post-conviction relief and not direct appeal, that has not stemmed the tide, as clearly seen in *Hook*, which survived the state's initial motion to dismiss the appeal.[107]

Finally, any resources conserved through the reduced administrative costs since appeal waivers gained use in Indiana could possibly be offset by the expenses of incarcerating defendants improperly.[108] Andrew Chongseh Kim examined Utah's criminal justice system and found that the state experienced net savings on direct sentencing appeals.[109] In 2013, the law review note estimated that, on average, a direct appeal saved the state "around $14,700 in reduced incarceration and costs around $7,900 in total administrative costs."[110] Lesser incarceration costs when sentences are shortened as a result of an appeal produce these savings.[111] Applying Kim's methods to Indiana is beyond the scope of this Note. However, the Utah research suggests that enforcing waivers

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104. *See* IND. P.L.201-2023 § 1 ("FOR THE ATTORNEY GENERAL Total Operating Expense 29,344,488"); Violet Comber-Wilen, *Indiana has 91 elected prosecutors. Experts say the state needs more deputy prosecutors*, WFYI (June 5, 2023), https://www.wfyi.org/news/articles/indiana-has-91-elected-prosecutors-experts-say-the-state-needs-more [https://perma.cc/4J24-AU56] (quoting Indiana Prosecuting Attorneys Council's assistant executive director Courtney Curtis, "county prosecutor's offices are funded by local counties. So when the state creates a new courtroom and staffs that courtroom and pays for that, they don't pay anything to have the prosecutor staff.").

105. *Frequently Asked Questions*, IND. JUD. BRANCH, https://www.in.gov/courts/defender/faq/ [https://perma.cc/B7J3-26EH] (last visited Mar. 10, 2024).

106. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 16.

107. Hook v. State, No. 23A-CR-820, 2023 WL 8946141, at *4 (Ind. Ct. App. Dec. 28, 2023).

108. Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality"*, 2013 UTAH L. REV. 561, 599 (2013).

109. *Id.*

110. *Id.*

111. *Id.*

of sentencing appeals actually results in inefficiency of overall system resources, with the state spending more on incarceration costs than what is saved by not litigating the appeal.[112]

B. Ethics & Professional Responsibility

Waivers of the right to appeal one's sentence raise important ethical and professional responsibility questions. As noted by Justice David, "Sentencing waivers are, by their nature, prospective: a defendant waives the right to appeal her sentence before the trial court accepts her guilty plea."[113] The trial court has to accept the plea and the waivers it contains prior to issuing the sentence.[114] Because of this, a defendant with a partially negotiated plea has to waive the right to appeal their sentence prior to learning what their sentence will be. As Justice David went on to say,

> [w]hile this Court has previously found a defendant's assent to the express waiver language in a written plea agreement indicates she knowingly and voluntarily waives her right to appeal the sentence, the prospective nature of the waiver calls into question the propriety of this conclusion.[115]

Further, waivers of sentence appeals serve to insulate trial court judges from appellate review of any number of errors.[116] One Colorado District Court judge raised this issue.[117] The judge refused to accept a plea containing a waiver of the right to appeal sentencing, stating, "[i]ndiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decisions."[118]

Beyond judicial concern for validity and reasonableness, Indiana's current process does not promote public confidence in the judiciary. Consider the 2023 case of *Hook v. State*, where the trial judge—three times and over the State's objection—told a defendant he would have the right to appeal his sentence, only

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112. *Id.*

113. Wihebrink v. State, 192 N.E.3d 167, 168 (Ind. 2022) (David, J., dissenting from denial of transfer).

114. Order Amending the Rules of Criminal Procedure, No. 23S-MS-10, 14 (Ind. June 23, 2023), https://www.in.gov/courts/files/order-rules-2023-0623-crim-proc.pdf [https://perma.cc/FCQ7-XV3F] ("Upon entering a conviction, the court must sentence a defendant within thirty days of the plea or the finding or verdict of guilty, unless extended for good cause.").

115. *Wihebrink*, 192 N.E.3d at 168 (David, J., dissenting from denial of transfer).

116. *See id.* (David, J., dissenting from denial of transfer) ("These waiver provisions are worthy of criticism because they seemingly sanction any misstatement or abuse by the trial court and allow trial courts to deviate from the defendant's reasonable expectations.").

117. United States v. Vanderwerff, No. 12-CR-00069, 2012 WL 2514933, at *5 (D. Colo. June 28, 2012), *rev'd and remanded*, 788 F.3d 1266 (10th Cir. 2015).

118. *Id.*

for the defendant to have his appeal dismissed because of the waiver provision of his partially-negotiated plea.[119] Rule 1.2 of the Indiana Code of Judicial Conduct states that "[a] judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and shall avoid impropriety and the appearance of impropriety."[120] Integrity is specifically defined as, "probity, fairness, honesty, uprightness, and soundness of character."[121] When a judge errors and mis-admonishes a defendant about that defendant's rights at a key junction of that defendant's case, there are ethical concerns that the judge, however unknowingly, undermines public confidence in the judiciary.[122] When a defendant, relying on the admonishment they received from a judicial officer, files an appeal to their sentence, it undermines public confidence in the judiciary to penalize the defendant for their actions by threatening to nullify the defendant's plea agreement.[123] Defendants ought to be able to rely on the statements judicial officers make to them in the course of criminal proceedings.

In addition to the judicial concerns, there are professional responsibility issues for both prosecutors and defense counsel. Regarding prosecutors, under Indiana's Rules of Professional Conduct, "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate."[124] Appellate waivers encourage prosecutors to, as one writer for the Georgetown Journal of Legal Ethics described, "insulate review of their own past and future misconduct through waiver of direct and collateral review."[125] This Note argues that as ministers of justice, prosecutors should welcome opportunities to correct any errors in sentencing that occur and thus only argue for enforcing waivers of sentencing appeal when absolutely appropriate. After all, "the State can have no true interest in the imposition of an excessive or inappropriate sentence."[126]

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119. Hook v. State, No. 23A-CR-820, 2023 WL 8946141, at *2 (Ind. Ct. App. Dec. 28, 2023).

120. IND. CODE OF JUD. CONDUCT RULE 1.2.

121. IND. CODE OF JUD. CONDUCT, TERMINOLOGY.

122. Krstafer Pinkerton, *Investigative Analysis: The Silent Threat of Judicial Incompetence and Corruption—Exposing the Failures that Erode Justice*, MEDIUM (Nov. 18, 2024) https://medium.com/@pinkerton_69080/justice-unbalanced-the-silent-threat-of-judicial-incompetence-33f2dfede58e [https://perma.cc/H3W9-WXKC] ("Every judicial error sends ripples through the justice system, eroding public trust.").

123. *See id.*

124. IND. PRO. CONDUCT RULE 3.8, cmt. 1.

125. Jackelyn Klatte, *Guilty As Pleaded: How Appellate Waivers in Plea Bargaining Implicate Prosecutorial Ethic Concerns*, 28 GEO. J. LEGAL ETHICS 643, 658 (2015).

126. Davis v. State, 207 N.E.3d 1183, 1191 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023) (Goff, J., dissenting). For example, a prosecutor read to the jury a United States Supreme Court concurrence that stated, "[if defense counsel] can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course" and contrasted that with the role of the prosecutor. "But while [the prosecutor] may strike hard blows he's not a [sic] liberty to strike foul ones. It is as much his duty

Further ethical concerns exist for the defendant's counsel, especially one court-appointed. In Indiana (unlike at the federal level), appellate defense counsel may not use *Anders* briefs to withdraw from direct appeals where the attorney sees no non-frivolous claims.[127] At the federal level, if "defendant-appellant's counsel determines that no non-frivolous issues exist on appeal after thorough review of the district court record," counsel may file a so-called "*Ander*'s brief."[128] If the court agrees after examination that the appeal is wholly frivolous, it may grant defense counsel's request to withdraw.[129] However, "*Ander*'s briefs" are disfavored in Indiana.[130] Instead, under the Indiana Supreme Court's opinion in *Mosley v. State*, counsel may be forced to "locate meritorious issues in a seemingly empty record."[131]

This framework paints defense counsel into a corner, as an appellate defense counsel jeopardizes their client's entire plea agreement if the only issues that could be raised on appeal are within the scope of the appeal waiver.[132] *Mosely* prohibits appellate defense counsel from withdrawing from cases even when she sees no meritorious issue on which to base an appeal.[133] The court in *Mosley* also states that, in line with Indiana's Rules of Professional Conduct, an attorney in a seemingly non-meritorious appeal may make a good faith argument to solicit a change in the law.[134] However, if appellate defense counsel files an appeal of her client's sentence that is subject to a waiver, she runs the risk of her client being found in breach of the terms of the plea agreement.[135] This could result in the setting aside of the defendant's entire plea agreement.[136]

However, to further complicate the situation, the United States Supreme Court held in *Garza v. Idaho* that, even in the face of a waiver of appeal, defense counsel violated a defendant's Sixth Amendment rights when counsel failed to file a notice of appeal.[137] Despite the defendant's plea agreement containing a waiver of appeal, the defendant was denied effective assistance of counsel when their attorney failed to file a notice of appeal "despite the defendant's express

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to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." The Indiana Court of Appeals held the prosecutor's comments were clearly improper and granted a new trial. Bardonner v. State, 587 N.E.2d 1353, 1355–62 (Ind. Ct. App. 1992) (quoting United States v. Wade, 388, 257 U.S. 218 (1967), J. White, concurring in part)).

127. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 7.

128. 2D CIR. CT. OF APP., HOW TO FILE AN ANDERS BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT 1 (Aug. 8, 2022), https://ww3.ca2.uscourts.gov/clerk/case_filing/appealing_a_case/pdf/Anders%20brief%20instructions%20and%20checklist%20combined%2010-11.pdf.

129. Anders v. California, 386 U.S. 738, 744 (1967).

130. Mosley v. State, 908 N.E.2d 599, 607 (Ind. 2009).

131. *Id.* at 608.

132. *See* Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 11–12.

133. *Mosley*, 908 N.E.2d at 608.

134. *Id.*; *see also* IND. PRO. CONDUCT RULE 3.1.

135. Indiana Public Defender Council Amicus Curiae Brief, *supra* note 40, at 11–12.

136. *Id.*

137. Garza v. Idaho, 586 U.S. 232, 246–47 (2019).

instructions."[138] Between the federal and state case law, appellant defense counsel must choose to either endanger all the benefits of their client's plea agreement or provide ineffective assistance of counsel.[139] This Note argues each of the above ethical and professional concerns with the current practice in waivers of appeals is worthy of consideration. The ethical and professional quandaries necessitates change to Indiana's current treatment of waivers of sentencing appeals.

C. Post-Conviction Relief Insufficient to Safeguard Rights

In *Davis*, the court held that a defendant seeking to dispute his sentence set by a trial court after a plea agreement must seek remedy under post-conviction relief, even when the defendant alleged that his agreement to the waiver of the right to appeal was not knowing and voluntary.[140] Justice Goff critiqued this approach, saying, "Under the majority's approach, Davis must invalidate his entire plea bargain, exposing himself to the risk of additional or more serious charges, in order to assert his right to appeal. Mandating this procedure severely burdens his exercise of a right which he never properly waived."[141] This Note agrees with Justice Goff that requiring a defendant to abandon her entire plea agreement to vindicate her right to a just sentence burdens the defendant unnecessarily.

To provide a background, circumstances eligible for post-conviction relief are set by the Indiana Rules of Court Rules of Post-Conviction Remedies:[142]

> (a) Any person who has been convicted of, or sentenced for, a crime by a court of this state, and who claims:
> (1) that the conviction or the sentence was in violation of the Constitution of the United States or the constitution or laws of this state;
> (2) that the court was without jurisdiction to impose sentence;
> (3) that the sentence exceeds the maximum authorized by law, or is otherwise erroneous;
> (4) that there exists evidence of material facts, not previously presented and heard, that requires vacation of the conviction or sentence in the interest of justice;

138. *Id.*

139. *Supra* text accompanying notes 127–38.

140. Davis v. State, 207 N.E.3d 1183 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229, 1231 (Ind. 2023).

141. *Id.* at 1239 (Goff, J., dissenting).

142. IND. POST-CONVICTION RULE 1(a).

> (5) that his sentence has expired, his probation, parole or conditional release unlawfully revoked, or he is otherwise unlawfully held in custody or other restraint;
> (6) that the conviction or sentence is otherwise subject to collateral attack upon any ground of alleged error heretofore available under any common law, statutory or other writ, motion, petition, proceeding, or remedy;
> may institute at any time a proceeding under this Rule to secure relief.[143]

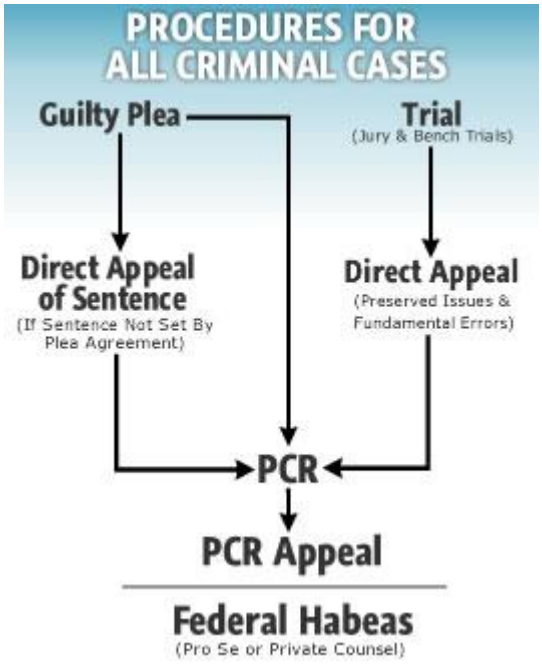

Figure 1. Public Defender of Indiana Post-Conviction Relief Process Map. IND. JUD. BRANCH, *Frequently Asked Questions*, *supra* note 105.

The Public Defender of Indiana represents indigent adults and juveniles in their post-conviction relief actions.[144] From July 1, 2020, to June 30, 2022, the Public Defender of Indiana reviewed 595 post-conviction trials and guilty pleas other than capital cases.[145] The Public Defender states that 99 of those cases received some form of relief.[146] However, the office defined that relief as "a change in sentence, a vacation of conviction or sentence, an appeal, a new sentencing hearing, or a new [post-conviction relief] hearing."[147] Compare that to the 25,385 adult offenders in the Indiana Department of Correction in July 2020, and one can see that only a very small percentage of criminal defendants are granted post-conviction relief.[148] In addition to the fact that only very few petitioners actually receive post-conviction, the process to seek post-conviction relief is lengthy for an indigent defendant. Per the Office of the Public Defender of Indiana,

143. *Id.*

144. IND. JUD. BRANCH, *Frequently Asked Questions*, *supra* note 105.

145. *About*, PUB. DEF. OF IND., https://www.in.gov/courts/defender/about/ [https://perma.cc/6BSY-BWCR] (last visited Mar. 10, 2024).

146. *Id.*

147. *Id.*

148. Robert Carter, *Offender Population Report*, IND. DEP'T OF CORR. at 6 (July 2020), https://www.in.gov/idoc/files/Indiana-Department-of-Correction-July-2020-Total-Population-Summary.pdf [https://perma.cc/NP5Y-UT2L].

"Demand for services is high and there is a significant backlog of cases awaiting review."[149] So there will be challenges for a defendant trying to collaterally attack their sentence via post-conviction relief.

Then, in the unlikely event that the defendant succeeds in showing their waiver of the right to appeal was not knowing and voluntary, *Davis* now requires the entire plea agreement, conviction and all, to be set aside.[150] This is not without issue. If a defendant secures post-conviction relief after some time, the State will have to decide whether to continue with the prosecution.[151] The case will likely face issues like those that led to the policy behind statutes of limitation: witness memories may fade, and key evidence may be lost.[152] Additionally, a delay in prosecution may implicate due process when a defendant is prejudiced in their ability to defend themself due to delay.[153] Finally, under the *Davis* rule, the State must do more than defend at the appellate court the reasonableness of the conviction (as previously required when the court held a waiver was invalid).[154] Instead, the state loses not just the sentence but the conviction, too.[155] Part IV of this Note argues that for public policy reasons, Indiana should adopt a remedy other than post-conviction relief for cases where a plea agreement provides the judge with some discretion in sentencing.

IV. ARGUING FOR REFORM

A. Apply Current Case Law Only When a Plea Explicitly Provides for a Sentence

To promote fairness while preserving finality, Indiana should only enforce blanket waivers of appeal to sentences that are explicitly provided for in the plea agreement. Although this would narrow the scope of *Creech*, it actually preserves its spirit that waivers of the right to appeal a sentence be "knowing and voluntary."[156] Only when a defendant knows the exact sentence that will be applied to her case can the waiver of her right to appeal that sentence be truly knowing and voluntary.[157]

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149. IND. JUD. BRANCH, *Frequently Asked Questions*, *supra* note 105.

150. Davis v. State, 207 N.E.3d 1183, 1187 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023) ("It is all or nothing.").

151. *See id.*

152. *See generally* CONG. RSCH. SERV., RL31253, STATUTE OF LIMITATION IN FEDERAL CRIMINAL CASES: AN OVERVIEW (Nov. 14, 2017).

153. *Id.* at 16–17.

154. *Davis*, 217 N.E.3d at 1233–34; *see* Ricci v. State, 894 N.E.2d 1089, 1093–94 (Ind. Ct. App. 2008) (reviewing a sentence for inappropriateness after holding the waiver of appeal null because the defendant's waiver was not knowing, voluntary, and intelligent).

155. *Davis*, 217 N.E.3d at 1233.

156. Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008).

157. *See* Wihebrink v. State, 192 N.E.3d 167, 168 (Ind. 2022) (David, J., dissenting from denial of transfer).

Allowing waivers for fully negotiated pleas will allow certain illegal sentences. However, this is in line with Indiana precedent established in 1987 and upheld in 2004 and 2013.[158] "[W]hen a defendant explicitly agrees to a particular sentence . . . whether or not the sentence or method is authorized by the law, he cannot later appeal such sentence on the ground that it is illegal."[159] Thus, under the example provided at the outset of this Note, a defendant's plea agreement for a Level 6 Felony could set the sentence at five months or thirty-five months, clearly in violation of Indiana Sentencing Statute.[160] If that illegal time period is explicitly bargained for in the plea agreement and accepted by the trial court, it would be unappealable. As the Court held in *Davis*, a defendant's only remedy for a term explicitly captured in her plea agreement is through post-conviction relief and the setting aside of the entire plea agreement, including both its benefits and burdens.[161]

B. Prohibit Waivers of Appeal for Partially Negotiated Pleas

Indiana should limit *Creech* and *Davis* when it comes to sentencing appeal waivers where the judge maintains some discretion.[162] If the plea agreement places no constraints upon the judge's discretion in sentencing, the defendant's right to appeal the sentence should remain intact, because the defendant cannot *knowingly* waive the right to appeal a sentence when certain terms of the sentence are unknown to her.[163]

When a plea agreement leaves any room for judicial discretion, Indiana should adopt the rule articulated by the trial court in *Davis*.[164] Namely, in a plea agreement that provides the court some discretion in sentencing, the defendant should be able to appeal the sentence regardless of any waiver contained in the plea agreement. For example, if the plea agreement presents a sentencing range or simply states the defendant agrees to be sentenced subject to Indiana law and waives the right to appeal the sentence, Indiana should allow that defendant to appeal any sentence that the defendant can non-frivolously argue is contrary to Indiana law. This would include claims for abuse of discretion or sentences that are not appropriate pursuant to Rule 7 of the Indiana Rules of Appellant Procedure.[165] A defendant who accepts a plea agreement that preserves judicial discretion in sentencing relies on the belief that a judge will sentence her in

158. Collins v. State, 509 N.E.2d 827, 833 (Ind. 1987).; Lee v. State, 816 N.E.2d 35, 40 (Ind. 2004); Crider v. State, 984 N.E.2d 618, 625 (Ind. 2013).

159. *Crider*, 984 N.E.2d at 625.

160. *See* IND. CODE § 35-50-2-7(b) (2024); *supra* Part I, sect. A.

161. Davis v. State, 207 N.E.3d 1183 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229, 1234 (Ind. 2023).

162. *See generally* Creech v. State, 887 N.E.2d 73, 74 (Ind. 2008); *Davis*, 217 N.E.3d 1229.

163. *See* Wihebrink v. State, 192 N.E.3d 167, 168 (Ind. 2022) (David, J., dissenting from denial of transfer).

164. *Davis*, 217 N.E.3d at 1231.

165. IND. R. APP. P. 7.

accordance with the law. That defendant ought not to be penalized for her trust in Indiana's justice system by insulating her sentence from appellate review.

In addition to protecting a defendant's right to a just sentence, allowing an appeal of sentencing terms for defendants who have signed a plea agreement would address many of the concerns raised in Part III of this Note. First, it would bolster public confidence in the criminal justice system. Indiana, in its most foundational legal document, the Constitution, sets out a policy that criminal defendants have a right to appeal their sentence.[166] The Constitution explicitly says the Indiana Court of Appeals shall "provide in all cases an absolute right to one appeal and to the extent provided by rule, review and revision of sentences for defendants in all criminal cases."[167] This shows just how important third-party review of sentencing is.

Public faith in the judicial branch can be bolstered by allowing an appeal for all sentences where the judge exercised a degree of discretion. Appellate courts can review trial courts' use of discretion in sentencing and affirm (or, if the occasion warrants, reverse) a sentence. This creates opportunities for errors to be remedied, resulting in an overall fairer criminal law system. Even when no errors exist, appellate review of the trial court's actions strengthens the public's confidence in judges. The current Indiana caselaw does not accomplish this goal. Instead, it tells defendants that even when a judicial officer (1) misstates their legal rights and (2), by the defendant's argument, abuses their discretion in sentencing, the defendant cannot directly appeal the sentence. The proposal of this Note would avoid this outcome.

Likewise, when negotiating a plea, prosecutors could choose to either (1) offer a specific sentence in the agreement, which can be subject to a waiver of the right to an appeal, or (2) leave some discretion for the judge, knowing that means the State may expend additional resources defending the sentence on appeal in the case of an abuse of discretion. Under this rule, the prosecutor who chooses option one benefits from knowing exactly what sentence a defendant will receive and weighing as a minister of justice whether that is fair. And under option two, the prosecutor is safeguarded, too, because a sentence the defendant views as unjust would be subject to appellate review. As Justice Goff wrote in his dissent in *Davis*, "[T]he State can have no true interest in the imposition of an excessive or inappropriate sentence."[168] The proposal in this Note helps ensure that a defendant is sentenced either to a term mutually set by the defendant and prosecutor or to one that can be reviewed for its fairness.

Additionally, under the proposal of this Note, a judge will have more clarity on when to grant or deny a defendant's request for the appointment of appellate counsel. As seen in *Hook v. State*, judicial officers appoint appellate counsel for

166. IND. CONST. art. VII, § 6.

167. *Id.*

168. Davis v. State, 207 N.E.3d 1183, 1191 (Ind. 2023), *opinion modified and superseded on reh'g*, 217 N.E.3d 1229 (Ind. 2023); *see also* Bardonner v. State, 587 N.E.2d 1353, 1355–62 (Ind. Ct. App. 1992).

a defendant, even in circumstances where a defendant seeking to appeal his sentence cannot do so via direct appeal.[169] But the proposed rule below would provide clarity. The trial court could appoint counsel if the court exercised a degree of discretion in sentencing, but if the terms of the plea agreement were fully negotiated and the right to appeal the sentence was waived, no attorney would be appointed for the defendant to directly appeal the sentence. Finally, with courts receiving more clarity on when to appoint or deny appellate counsel, appellate defense attorneys would not face the same dilemmas they do today, as described in Part III of this note.[170]

C. Accomplish via New Criminal Rule

Indiana should adopt a new criminal rule prohibiting trial courts from accepting plea agreements that include sweeping waivers on the defendant's rights to appeal. Instead, appellate waivers of sentencing issues should be narrowly tailored. The rules of Ohio and Illinois discussed in Part II of this note set when sentences in plea agreements may be appealed. Likewise, this rule would set clear expectations of what a defendant could and could not appeal when she enters into a partially negotiated plea agreement. This addition to the Indiana Rules of Criminal Procedure would dovetail with the expansion of the rules that went into effect in 2024.

The proposed rule would add a new rule, Rule 3.4, represented by **bold text**, to the existing rules (existing Rule 3.4 would be renumbered as 3.5). The proposed rule could read as follows:

Rule 3.4. Accepting a Waiver of the Right to Appeal the Sentence

(A) When Waiver is Permitted.

The court may accept a plea agreement containing a waiver of the defendant's right to appeal the sentence when the plea agreement sets the exact terms of the defendant's sentence.

(B) When Waiver is Prohibited.

Where the court retains any judicial discretion in sentencing, the court shall not accept a plea agreement containing any waiver of the defendant's right to appeal the sentence.

(C) Advising the Defendant.

(1) Advising of Waiver

Before accepting a plea agreement that sets exact terms of the defendant's sentence and contains a waiver of the defendant's right to appeal the sentence, the court must advise the defendant that by pleading guilty the defendant waives the right to appeal the sentence.

(2) Advising of Right to Appeal

169. Hook v. State, No. 23A-CR-820, 2023 WL 8946141 at *2 (Ind. Ct. App. Dec. 28, 2023).

170. *Supra* text accompanying notes 127–38.

Before accepting a plea agreement where the court retains any judicial discretion in sentencing or where the defendant did not waive the right to appeal the sentence, the court must advise the defendant that the defendant retains the right to appeal the sentence.

D. Find Improper Waivers Unenforceable

Indiana should not adopt the reasoning of the Seventh Circuit requiring that "[w]aivers of appeal . . . stand or fall with the agreements of which they are a part."[171] This reasoning ignores a key provision of the Indiana Constitution that "the Supreme Court shall specify by rules which shall, however, provide in all cases an absolute right to . . . review and revision of sentences for defendants in all criminal cases."[172] Additionally, it aligns with current practice for the court to hold the waiver of post-conviction relief as unenforceable while nevertheless enforcing a plea agreement that contains such a provision.[173] Likewise, in pending cases with pleas containing over-broad waivers or in future cases with pleas that do not conform to the proposed criminal rule, appellate courts should sever the waiver of appeal as to the sentence while leaving the conviction and remaining terms of the plea agreement in place, as advanced in *Lee v. State* and in line with current practice regarding pleas that contain a waiver of the right to seek post-conviction relief.[174]

CONCLUSION

Given the serious concerns with the current landscape of plea agreements containing waivers of the right to appeal one's sentence in Indiana—from efficacy to ethics, professional responsibility to insufficient remedy—reforms should be made. Rather than promoting the finality of a trial court's sentencing, the rule laid down in *Creech* has churned out appeal after appeal with the threshold question of whether appeals can be brought at all.[175] Indiana's appellate courts have struggled to form and stick to a consistent rule outlining when appeals can be brought despite a waiver. And the precedent puts defendants in the place of taking the mis-justice handed to them with no viable remedy.[176]

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171. United States v. Wenger, 58 F.3d 280, 282 (7th Cir. 1995).

172. IND. CONST. art. VII, § 6.

173. *See* Majors v. State, 568 N.E.2d 1065, 1067–68 (Ind. Ct. App. 1991) (holding that plea agreement waivers of the right to seek post-conviction relief, "are void and unenforceable" while simultaneously declining to invalidate the defendant's guilty plea).

174. 816 N.E.2d 35, 40 (Ind. 2004); *Majors*, 568 N.E.2d at 1067–68.

175. *See supra* Part III, sect. A.

176. Philhower v. State, 192 N.E.3d 173 (Ind. 2022) (David, J., dissenting from denial of transfer) ("[A] defendant's front-end waiver of her appellate rights requires that she surrender the

These ills can be addressed by confining the use of appellate sentencing waivers. Waivers can be limited to scenarios where the defendant's plea agreement contained the specific sentence to which the defendant then seeks to appeal. Where those exact details are missing in the plea, the court should err on the side of the defendant and allow the appeal to proceed.

ability to appeal various errors potentially committed by the trial judge at the sentencing hearing, such as a misstatement of law, inflammatory or prejudicial commentary, or, . . . reliance on improper aggravators in reaching a sentencing decision . . . .").