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**Message to Criminal Defendants--Waive at Your Own Risk: The Eight Circuit Enforces Waivers of Appellate Rights, The**

Ginger K. Gooch

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The Message to Criminal Defendants—Waive at Your Own Risk: The Eighth Circuit Enforces Waivers of Appellate Rights

*United States v. Michelsen*¹

I. INTRODUCTION

"The right to appeal at least once without obtaining prior court approval is nearly universal. [A]though its origins are neither constitutional nor ancient, the right has become, in a word, sacrosanct."² Likewise, the criminal defendant’s right to utilize appellate rights as a bargaining chip meets with widespread acceptance; nearly every circuit allows criminal defendants to waive their rights to appeal in conjunction with plea bargain agreements.

The circuits disagree, however, concerning whether a defendant’s waiver of appellate rights remains valid if a district court judge fails to explicitly discuss the waiver with the defendant during a Rule 11 colloquy³ and later advises the

3. See *United States v. Haliburton*, No. 95-1688, 1997 WL 242033, at *1 (6th Cir. 1997) ("Such a waiver provision made in connection with a Rule 11 plea agreement is enforceable and precludes [defendant’s] appeal in this case."); *United States v. Broughton-Jones*, 71 F.3d 1143, 1146 (4th Cir. 1995) ("A defendant may waive her right to appeal, if that waiver is the result of a knowing and intelligent decision to forgo the right to appeal.") (internal citations omitted); *United States v. Buchanan*, 59 F.3d 914, 917 (9th Cir.), *cert. denied*, 516 U.S. 970 (1995) ("A defendant may waive the statutory right to appeal his sentence."); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States v. Bushert*, 997 F.2d 1343, 1345 (11th Cir. 1993) ("[S]entence appeal waivers, made knowingly and voluntarily, are enforceable."); *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) ("The Supreme Court has repeatedly recognized that a defendant may waive constitutional rights as part of a plea bargaining agreement. It follows that a defendant may also waive statutory rights, including the right to appeal."); *United States v. Rutan*, 956 F.2d 827, 829 (8th Cir. 1992) ("[A] defendant who pleads guilty and expressly waives the statutory right to raise objections to a sentence may not then seek to appeal the very sentence which itself was part of the agreement."). But see *United States v. Raynor*, 989 F. Supp. 43, 44 (D.C. Cir. 1997) (holding that a defendant may never knowingly and voluntarily waive the right to appeal in conjunction with a plea bargain agreement).
4. *FED. R. CRIM. P. 11(c)* lists matters of which the court must advise the criminal defendant personally and in open court before accepting a plea of guilty or *nolo contendere* from the defendant. Rule 11(c) does not require that the court engage the defendant in a discussion concerning the defendant’s waiver of appellate rights. See *FED. R. CRIM. P. 11(c)*. Though Rule 11(c) is the primary colloquy provision, Rule 11(d)
defendant, without objection from the Government, of the right to appeal.\(^5\) In *United States v. Melancon*,\(^6\) the Fifth Circuit suggested that a Rule 11 colloquy addressing the defendant’s waiver of appellate rights constitutes a necessary component of an enforceable waiver. The court further ruled that a district court judge’s statement that the defendant may appeal, even if not objected to by the Government, does not invalidate a written waiver of appellate rights.\(^7\) In *United States v. Buchanan*,\(^8\) the Ninth Circuit held that no Rule 11 colloquy is required for the criminal defendant’s waiver of appellate rights to be deemed enforceable, but that a district court judge’s oral pronouncement that the defendant may appeal, received without objection from the Government, invalidates an otherwise enforceable waiver.\(^9\) In *United States v. One Male Juvenile*,\(^10\) the Fourth Circuit rejected *Buchanan* and adopted *Melancon*, while suggesting even more strongly than the *Melancon* court that a defendant’s waiver of appellate rights will only be declared valid if the district court judge engages the defendant in an explicit discussion of the waiver during the Rule 11 colloquy.\(^11\)

In *United States v. Michelsen*,\(^12\) the Eighth Circuit addressed both the Rule 11 colloquy issue and the oral pronouncement issue, siding with the Fifth and Fourth Circuits in rejecting the *Buchanan* court’s treatment of the oral pronouncement issue, but embracing *Buchanan* on the Rule 11 colloquy issue. The court made clear that criminal defendants will not be freed from validly executed waivers despite the absence of a Rule 11 colloquy on the waiver and despite a lower court judge’s erroneous pronouncement, without objection from the Government, that the defendant may appeal.\(^13\)
II. FACTS AND HOLDING

Harry Lee Michelsen, charged with failure to pay past due child support in violation of the Child Support Recovery Act,14 agreed to have his case heard by a magistrate judge and subsequently entered into a plea bargain agreement with the Government.15 Under the agreement, signed by both Michelsen and his private counsel,16 Michelsen clearly and expressly waived his right to appeal his conviction and his sentence.17

Specifically, in signing the agreement, Michelsen waived statutory and constitutional rights to which he was otherwise entitled.18 Michelsen

15. Michelsen, 141 F.3d at 867.
16. Id. at 868.
17. United States v. Michelsen, 141 F.3d 867, 871 (8th Cir.), cert. denied, 119 S. Ct. 363 (1998). "Michelsen does not dispute that his written plea agreement contains a clear and express waiver of the right to appeal both his conviction and his sentence." Id.
18. Id. at 867-68. Relevant portions of the plea agreement in question provide as follows:

1. ACKNOWLEDGMENT AND WAIVER OF RIGHTS AND UNDERSTANDING OF MAXIMUM PENALTIES: The defendant agrees that he has been fully advised of his statutory and constitutional rights herein, and that he has been informed of the charges and allegations against him and the penalty therefor, and that he understands these rights, charges and penalties. The defendant further agrees that he understands that by entering a plea of guilty as set forth hereafter, he will be waiving certain statutory and constitutional rights to which he is otherwise entitled.

2. PLEA AGREEMENT PROCEDURE—NO RIGHT TO WITHDRAW PLEA IF COURT REJECTS RECOMMENDATION: The United States and the defendant agree that this Plea Agreement is presented to the Court pursuant to Rule 11(e)(1)(B) of the Federal Rules of Criminal Procedure, which provides, among other things, that the government will make a recommendation or agree not to opposed [sic] the defendant's request for a particular sentence, but that SUCH RECOMMENDATIONS ARE NOT BINDING ON THE COURT and that the DEFENDANT MAY NOT WITHDRAW HIS PLEA OF GUILTY if the Court rejects such recommendations.

4. Further, the United States will recommend a period of incarceration of 6 months, that the period of incarceration shall be suspended and defendant placed on supervised probation for a period of 5 years during which period the defendant shall make any required child support arrearages payments as ordered by the Court. Failure to make the required payments may result in imposition of the court's sentence of incarceration.

6. WAIVER OF DEFENSE AND APPEAL RIGHTS: Defendant hereby waives any right to raise and/or appeal and/or file any post-conviction writs
acknowledged that if the magistrate judge chose not to follow Government recommendations that Michelsen be placed on probation for five years and be made to pay past due child support payments as ordered by the court pursuant to the plea agreement, the waiver remained effective. Michelsen also waived any right to appeal or bring a defense subsequent to the court's entry of a judgment against him.

United States Magistrate Judge Thomas D. Thalken accepted the plea agreement at a hearing commenced the same day the agreement was executed. During the hearing, Judge Thalken asked Michelsen several questions, but neither the judge nor the prosecutor made explicit reference to the portion of the plea agreement in which Michelsen waived the right to appeal his conviction and his sentence.

The court rejected the Government's recommendation, sentenced Michelsen to imprisonment for six months, and ordered restitution in the amount of $89,420.64, plus a special assessment of ten dollars. At the sentencing hearing, Judge Thalken also explicitly advised Michelsen, without objection from the Government, that he had ten days after the filing of the judgment to appeal his sentence. In addition, the written judgment explained that the court had advised Michelsen of his right to appeal.

of habeas corpus or coram nobis concerning any and all motions, defenses, probable cause determinations, and objections which defendant has asserted or could assert to this prosecution and to the Court's entry of judgment against defendant and imposition of sentence under 18 U.S.C. § 3742 (sentence appeals).

Id.

19. Id.

20. Id.

21. Id. at 868. The Honorable Thomas D. Thalken serves as a United States Magistrate Judge for the District of Nebraska.

22. Id. Prior to the sentencing hearing, after his counsel's motion to withdraw was granted, Michelsen waived his right to counsel and proceeded pro se. Id. at 867-68.

23. Id. at 870.


25. Id. Judge Thalken stated:
Mr. Michelsen, you're advised that you may appeal this sentence within ten days after the filing of the judgment in this matter. That will probably happen within the next day or so. When that is filed you will have ten days to appeal that sentence to one of the judges of the United States District Court.

Id.

26. Id. The written judgment read as follows:
Following the imposition of sentence, the court advised the defendant of his right to appeal pursuant to the provisions of Fed. R. Crim. P. 32 and the provisions of 18 U.S.C. § 3742(a) and that such Notice of Appeal must be filed with the clerk of this court within ten (10) days of this date.
Michelsen appealed to the district court, challenging the constitutionality of the Child Support Recovery Act\(^\text{27}\) as well as the sentence imposed by the magistrate judge.\(^\text{28}\) The district court granted the Government's motion to dismiss the appeal with prejudice, ruling that Michelsen waived his appellate rights under the plea agreement.\(^\text{29}\) Michelsen then sought relief from the Eighth Circuit Court of Appeals.\(^\text{30}\)

In a majority opinion\(^\text{31}\) written by Judge Wollman, the Eighth Circuit confronted the above-referenced circuit split regarding the validity of a waiver of a right to appeal executed in conjunction with a plea bargain agreement. The court held that such waivers remain valid even if the trial judge fails to question the defendant about the waiver during the Rule 11 colloquy at the sentencing hearing and even if the trial judge explicitly states, without objection from the Government, that the defendant may appeal the conviction and sentence.\(^\text{32}\)

### III. LEGAL BACKGROUND

Plea bargain agreements constitute an integral part of the federal criminal justice system.\(^\text{33}\) Although plea bargain agreements themselves find acceptance at all levels of the judiciary, the United States Supreme Court has not yet addressed the question of whether a federal criminal defendant may waive his appellate rights as part of a plea bargain agreement.\(^\text{34}\) An overwhelming

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\(^{27}\) Id. 18 U.S.C. § 228 (1994).


\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Id. at 867. Judge Bright filed a dissenting opinion. Id.

\(^{32}\) Id. at 871-72.

\(^{33}\) See Fed. R. CRIM. P. 11 (specifically authorizing plea bargain agreements); see also Brady v. United States, 397 U.S. 742, 752 (1970) (discussing the "mutuality of advantage" inherent in plea bargains). In Brady, the court noted: For a defendant who sees slight possibility of acquittal, the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional processes can begin immediately, and the practical burdens of a trial are eliminated. For the State there are also advantages—the more promptly imposed punishment after an admission of guilt may more effectively attain the objectives of punishment; and with the avoidance of trial, scarce judicial and prosecutorial resources are conserved for those cases in which there is a substantial issue of the defendant's guilt or in which there is substantial doubt that the State can sustain its burden of proof.

\(^{34}\) See Recent Case: Criminal Law and Criminal Procedure — Criminal Law — Plea Agreements — Second Circuit Upholds Plea Provision That Waives Appeal Without Fixed Sentence Range — United States v. Rosa, 123 F.3d 94 (2d Cir. 1997), 111 HARV.
majority of federal circuit courts hold that such rights may be waived in
conjunction with a plea agreement.\[^{35}\] Additionally, the American Bar
Association recognizes the validity of express waivers of appellate rights in the
case of plea bargain agreements.\[^{36}\] The circuit courts recognizing waivers of
the right to appeal uniformly maintain that a criminal defendant must have
executed the waiver "knowingly" and "voluntarily" in order for the waiver to be
deemed valid.\[^{37}\]

The question upon which circuit courts have split, and the question at issue
in the instant decision, concerns whether a waiver of appellate rights, knowingly
and voluntarily sacrificed as part of a criminal defendant’s plea bargain
agreement, remains valid: (1) when a trial judge fails to engage the criminal
defendant in a Rule 11 colloquy\[^{38}\] regarding the waiver; and (2) when a trial
judge, without objection from the Government, explicitly states that the criminal
defendant’s sentence and conviction may be appealed.

Of the three circuits that have addressed the question, two have determined
that such statements by the judge do not affect the validity of an otherwise
knowing and voluntary waiver.\[^{39}\] These same two courts also suggested that a
Rule 11 colloquy would be necessary under such circumstances for the waiver
of appellate rights to be deemed knowing and voluntary.

In United States v. Melancon,\[^{40}\] the Fifth Circuit ruled that a trial judge’s
statements regarding the defendant’s right to appeal, even if not objected to by
the Government, do not invalidate a knowing and voluntary waiver executed by
a criminal defendant as part of a plea agreement.\[^{41}\] The court also suggested that
a Rule 11 colloquy is a necessary component of a knowing and voluntary
waiver.\[^{42}\] In United States v. Buchanan,\[^{43}\] the Ninth Circuit reached an opposite

\[^{35}\]See supra note 3 and accompanying text.
\[^{36}\]See Project on Standards for Criminal Justice, A.B.A. STANDARDS RELATING
TO CRIM. APPEALS § 2.2(c). See generally Kristine C. Karnezis, Annotation, Validity and
Effect of Criminal Defendant’s Express Waiver of Right to Appeal As Part of Negotiated
\[^{37}\]United States v. Michelsen, 141 F.3d 867, 871 (8th Cir. 1998); United States
v. One Male Juvenile, No. 96-4023, 1997 WL 381955 (4th Cir. 1997), cert. denied, 118
S. Ct. 1191 (1998) (waiver must be "knowing" and "intelligent"); United States v.
Broughton-Jones, 71 F.3d 1143, 1146 (4th Cir. 1995) (waiver must be "knowing"
and "intelligent"); United States v. Buchanan, 59 F.3d 914, 917 (9th Cir.), cert. denied,
516 U.S. 970 (1995); United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995);
United States v. Bushert, 997 F.2d 1343, 1350 (11th Cir. 1993); United States v. Melancon, 972
F.2d 566, 567 (5th Cir. 1992) (waiver must be "informed" and "voluntary").

\[^{38}\]See supra note 4 and accompanying text.
\[^{39}\]See One Male Juvenile, 1997 WL 381955 at *1; Melancon, 972 F.2d at 566.
\[^{40}\]972 F.2d 566 (5th Cir. 1992).
\[^{41}\]Id. at 568.
\[^{42}\]Id.
\[^{43}\]59 F.3d 914 (9th Cir.), cert. denied, 516 U.S. 970 (1995).
WAIVERS OF APPEALABLE RIGHTS

Conclusion, holding that the district judge’s pronouncements concerning the defendant’s right to appeal control despite a knowing and voluntary waiver of those rights by the defendant in a plea bargain agreement. The Ninth Circuit also held that a Rule 11 colloquy is not required for a waiver to be knowing and voluntary. In the final case of the trilogy, United States v. One Male Juvenile, the Fourth Circuit explicitly declined to adopt Buchanan, ruling instead that a district judge’s statements concerning the defendant’s right to appeal, even if not objected to by the Government, do not invalidate a knowing, voluntary waiver of appellate rights executed in conjunction with a plea bargain agreement. Like Melancon, One Male Juvenile suggests that a waiver will only be upheld as knowing and voluntary if an explicit discussion of the waiver occurs during the Rule 11 colloquy.

In Melancon, the criminal defendant, pursuant to a plea agreement, waived his appellate rights and pled guilty to conspiracy to distribute MDMA or “ecstasy.” On appeal, Melancon argued that the Fifth Circuit should invalidate his waiver of appellate rights because the waiver was neither knowing nor informed due to the trial judge’s statements at the sentencing hearing, received without objection from the Government, that the defendant had the right to appeal his conviction and sentence.

The Fifth Circuit summarily rejected Melancon’s argument that his plea agreement was uninformed. The court found that the Rule 11 colloquy between the judge and the defendant concerning the defendant’s waiver of the right to appeal made the waiver informed. The court also held that Melancon’s waiver of the right to appeal was knowing, despite the district court judge’s reasoning.

44. Id. at 917-18.
45. Id. at 916-917.
47. Id. at *4.
48. Id.
50. Id.
51. Id.
52. Id. During the portion of the Rule 11 colloquy concerning the defendant’s waiver of appellate rights, the court stated:

[Y]ou understand that paragraph six of this and this is very important that you knowingly, that means you know what you are doing, and by reasoning, have exercised the choice to intelligently and voluntarily would waive the right to appeal the sentence imposed in this case on any ground, including the right of appeal conferred by Title 18, United States Code, section 3742, in exchange for the concessions made by the United States of America in this agreement, do you understand that?

Id. The defendant replied: “Yes, sir.” Id.
"misstatement" at the sentencing hearing that Melancon had the right to appeal his sentence and conviction.53 The court stated:

The court's statements . . . were made four months after Appellant entered into the plea agreement with the Government; they could not have influenced Appellant's decision to plead guilty. [A]ny alleged uncertainty on behalf of the district court as to the legality of the agreement does not affect our determination that Appellant's waiver was knowing, voluntary, and permissible.54

Although the Fifth Circuit left unanswered the question of whether a Rule 11 colloquy regarding the defendant's waiver of appellate rights must occur for such a waiver to be enforceable, the court's emphasis on the adequacy of the Rule 11 colloquy between Melancon and the district court judge suggests that the court viewed the Rule 11 colloquy as a necessary factor in its determination that the waiver was informed, knowing, voluntary, and ultimately, enforceable. Thus, while the Melancon court refused to invalidate the defendant's waiver of appellate rights, the court left open the question of whether an insufficient or nonexistent Rule 11 colloquy, coupled with a misstatement by the judge, would render a waiver of appellate rights uninformed, unknowing, and therefore, unenforceable.

Finally, the Fifth Circuit addressed Melancon's argument that the Government abandoned its right to enforce the waiver when it failed to object to the judge's statements that Melancon could appeal his conviction and sentence.55 The court noted that the Government's failure to object, "though not commendable," was not itself sufficient to make the waiver invalid.56 The court held that in timely notifying the court of Melancon's waiver contained in the plea agreement, the Government retained its right to enforce the agreement.57

Three years later, in 1995, the Ninth Circuit faced the same issues in United States v. Buchanan,58 taking a stance in conflict with the Fifth Circuit's approach in Melancon. The Ninth Circuit held that while a Rule 11 colloquy specifically addressing the defendant's waiver of appellate rights is not necessary for a waiver of such rights to be deemed knowing and voluntary, an otherwise knowing and voluntary waiver becomes unenforceable when the district judge, without objection from the Government, advises the defendant that he may appeal his conviction and sentence.59

53. Id. at 568. In its opinion, the Fifth Circuit did not provide the lower court's statement to Melancon concerning Melancon's right to appeal.
55. Id.
56. Id.
57. Id.
58. 59 F.3d 914 (9th Cir.), cert. denied, 516 U.S. 970 (1995).
59. Id. at 917-18.
Buchanan, charged with mail fraud and failure to appear, entered into a plea agreement waiving the right to appeal his sentence, provided the sentence was within the applicable United States Sentencing Guidelines. At the plea hearing, the prosecutor read the entire agreement out loud in open court, and the district court judge asked Buchanan whether he understood the plea agreement. At a later sentencing hearing, Buchanan moved to withdraw his guilty plea, arguing that his counsel failed to advise him of unfavorable provisions in the agreement, such as the portion of the agreement that barred arguments for downward departures from the sentencing guidelines. During this discussion, the district court judge told Buchanan that he “could appeal the sentencing findings.” Buchanan’s sentencing was delayed, the plea agreement was modified to permit both parties to argue for a departure from the sentencing guidelines, and Buchanan then reappeared for sentencing on a later date. At the second sentencing hearing, the district judge explicitly stated to Buchanan, without objection from the Government, that Buchanan had the right to appeal his sentence.

Unlike the Melancon court, the court in Buchanan directly addressed the question of whether a Rule 11 colloquy concerning the defendant’s waiver of appellate rights must be conducted in order for the defendant’s waiver of those rights to be declared valid. Whereas the Fifth Circuit in Melancon strongly suggested that a Rule 11 colloquy addressing the defendant’s waiver is required, the Ninth Circuit adopted the contrary position that “[t]he district court need not warn a defendant specifically that he has waived his right to appeal his sentence during [ ] a [Federal Rule of Criminal Procedure] 11 colloquy ... so long as the record indicates a knowing and voluntary waiver.” The court stated that the district court judge’s questions regarding Buchanan’s understanding of the plea, coupled with the prosecutor’s recitation of the plea agreement out loud in open

60. Id. at 916.
61. Id.
62. Id.
64. Id.
65. Id. at 916, 918. At the second sentencing hearing, the district court judge and Buchanan engaged in the following exchange:

THE COURT: “I want to advise you as well that under the provisions of Rule 32 of the Federal Rules of Criminal Procedure [sic] you have the right to appeal findings which I make today regarding sentencing. To do that, you must file that notice of appeal within ten (10) days of this date. Do you understand that?” THE DEFENDANT: “Yes, sir.”

Id. at 917.
66. Id. at 917 n.2.
67. Id. (citing United States v. DeSantiago-Martinez, 38 F.3d 394, 395-96 (9th Cir. 1992), cert. denied, 513 U.S. 1128 (1995)).
court, fulfilled the requirements for a knowing and voluntary waiver of appellate rights, even though Buchanan was never specifically questioned about the waiver. 68

Despite the court’s acknowledgment that Buchanan’s waiver of appellate rights was knowing and voluntary, the court 69 nonetheless refused to enforce the waiver, holding that the judge’s “oral pronouncement must control.” 70 More specifically, the court stated that “where there is a direct conflict between a trial judge’s unambiguous oral pronouncement of sentence and the written judgment, the oral pronouncement must control, even if erroneous.” 71

The court noted that the district court twice told Buchanan that he had a right to appeal his sentence. 72 Additionally, according to the court, “Buchanan’s answer of ‘Yes, sir’ to the district court’s question of whether he understood that he had a right to appeal indicate[d] Buchanan’s expectation that he could appeal his sentence and evince[d] a misunderstanding of the substance of his plea agreement.” 73 Finally, the court noted that because the Government failed to object to the judge’s statements regarding Buchanan’s right to appeal, “Buchanan could have [had] no reason but to believe that the court’s advice on the right to appeal was correct.” 74

The Buchanan court appears to have implemented a three-part test for determining when waivers of appellate rights, knowingly and voluntarily executed, will nevertheless be held unenforceable. The court stated: “Given the district court judge’s clear statements at sentencing, the defendant’s assertion of understanding, and the prosecution’s failure to object, . . . the district court’s oral pronouncement controls and the plea agreement waiver is not enforceable.” 75 Based on the reasoning in Buchanan, whenever a district court judge states that a defendant may appeal, the defendant responds to this statement with a simple

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69. Circuit Judge Reinhardt filed a concurring and dissenting opinion, in which he stated that he concurred with the court’s findings in regard to the portion of the opinion relevant to this Note. Id. at 920.
70. Id. at 917.
71. Id. The court referred to United States v. Munoz-Dela Rosa, 495 F.2d 253 (9th Cir. 1974). In Munoz-Dela Rosa, the district court judge, in conflict with the written judgment, incorrectly informed the defendant that his federal sentence would run concurrently with an earlier sentence imposed by a magistrate judge. Id. The written judgment stated that the sentences were to run consecutively, not concurrently. Id. at 254.
72. United States v. Buchanan, 59 F.3d 914, 917 (9th Cir.), cert. denied, 516 U.S. 970 (1995). At both the first and second hearings, the court told Buchanan that he had a right to appeal. Id.
73. Id. at 917-18.
74. Id. at 918.
75. Id.
“yes” or “no,” and the Government fails to object, the defendant’s waiver of appellate rights has been voided.

Finally, unlike the court in Melancon, the Buchanan court offered a policy justification for its holding. The court stated simply that “[l]iti gants need to be able to trust the oral pronouncements of district court judges.”

More recently, the Fourth Circuit, in United States v. One Male Juvenile, confronted the issues addressed by the Melancon and Buchanan courts. A majority of the court held that a knowing and intelligent waiver confirmed during a Rule 11 colloquy remains enforceable, despite a district court judge’s statements, received without objection from the Government, that the defendant may appeal.

In One Male Juvenile, the defendant waived his right to appeal pursuant to a plea agreement in which he pled guilty to two counts of stealing property valued in excess of one hundred dollars from an Indian tribal organization in violation of 18 U.S.C. § 1163. The One Male Juvenile court was not required to determine whether a Rule 11 colloquy addressing the defendant’s waiver of appellate rights must occur for such a waiver to be enforceable because, as was the case in Melancon, the district court judge clearly addressed the waiver of appellate rights in his colloquy with the defendant, and the defendant affirmed that he understood the implications of the waiver. However, the Fourth Circuit, like the court in Melancon, strongly suggested that a Rule 11 colloquy concerning the defendant’s waiver of appellate rights constitutes a requirement of an enforceable waiver. In its holding, the court made special mention of the Rule 11 colloquy, noting that “[o]nce a defendant has knowingly and intelligently waived his right to appeal and that waiver is confirmed during a Rule 11 hearing, the requirements for an effective waiver of appeal have been satisfied, and the waiver should be enforced.” In fact, the court stated that a contrary holding would ignore “the purpose and implication of a Rule 11 hearing.”

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76. Id. In United States v. Schuman, 127 F.3d 815 (9th Cir. 1997), the Ninth Circuit appears to have distanced itself from its Buchanan policy justification. See infra notes 121-22 and accompanying text.


78. Id. at *4. Circuit Judge Mumaghan dissented, specifically disagreeing with the rule adopted by the majority, and arguing that Buchanan should have been followed. Id. at *5-6. See infra notes 87-89 and accompanying text.

79. Id. at *1.

80. Id.

81. Id. at *4.


83. Id.
The court next considered whether the district court judge’s statement at the sentencing hearing regarding the defendant’s right to appeal rendered the defendant’s waiver of appellate rights unenforceable.\textsuperscript{84} The court, without addressing the Government’s failure to object, expressly refused to adopt the Ninth Circuit rule.\textsuperscript{85} The court noted:

We are not persuaded by the holding in \textit{Buchanan} that a waiver of a right to appeal contained in a plea agreement that has been entered knowingly and intelligently may be held unenforceable because of subsequent erroneous and apparently inadvertent statements by the district court to the effect that the defendant has a right to appeal.\textsuperscript{86}

Essentially, the \textit{One Male Juvenile} court adopted an oral pronouncement rule nearly identical to the one set out in \textit{Melancon}. Additionally, like the Fifth Circuit in \textit{Melancon}, the Fourth Circuit merely suggested, without definitively explaining, that a Rule 11 colloquy addressing the defendant’s waiver of the right to appeal must occur in order for such a waiver to be upheld.

A strong dissent accompanied the rule set out in \textit{One Male Juvenile}. The dissent embraced the rule and policy justifications set forth by the Ninth Circuit in \textit{Buchanan}.\textsuperscript{87} Circuit Judge Murnaghan, in his dissenting opinion, focused on the wide-ranging implications of the majority’s rule. The judge stated that “this case is not about one district court judge’s inadvertence during the sentencing of [the defendant], rather, this case is about whether the brunt of a district court’s mistakes, coupled with the complicity of the prosecution who never alerted the district court to its error, should be borne by a criminal defendant.”\textsuperscript{88} Citing with approval the \textit{Buchanan} court’s policy that litigants should be able to trust the oral pronouncements of judges, Judge Murnaghan concluded, “Here, two important constituent parts of our criminal justice system, the federal district court and the Assistant United States Attorney (AUSA), failed [One Male Juvenile].”\textsuperscript{89}

The decision in \textit{Buchanan} created a clear circuit split concerning whether a criminal defendant who waives his appellate rights knowingly and voluntarily in a plea agreement may nonetheless appeal when a district court judge, without objection from the Government, explicitly advises the criminal defendant of a

\textsuperscript{84} \textit{Id.} at *2-*4. The district court judge told the defendant that “‘[h]e ha[d] an absolute right to appeal [his] sentence.’ When asked whether he understood that right, appellant responded, ‘yes.’” \textit{Id.} at *2.

\textsuperscript{85} \textit{Id.} at *4.

\textsuperscript{86} \textit{Id.}


\textsuperscript{88} \textit{Id.} at *6.

\textsuperscript{89} \textit{Id.}
right to appeal. The Buchanan decision also created an implicit split regarding whether a judge must specifically question the criminal defendant about the waiver of appellate rights in the Rule 11 colloquy in order for the waiver to be deemed knowing and voluntary, and thus enforceable. Whereas the courts in both Melancon and One Male Juvenile strongly suggested that such a discussion during the Rule 11 colloquy constitutes a requisite element of a knowing and voluntary waiver of appellate rights, the court in Buchanan embraced a contrary view, flatly declaring that a district court judge need not engage the defendant in a discussion of the defendant’s waiver of appellate rights in a Rule 11 colloquy in order for the waiver to be upheld as knowing and voluntary.

In 1998, the Eighth Circuit confronted similar factual circumstances, weighing in with both its view on the Rule 11 colloquy issue and on the validity of a criminal defendant’s waiver of appellate rights in a plea agreement in light of a district court judge’s oral pronouncements, with no objection from the Government, that the defendant may appeal.

IV. INSTANT DECISION

In United States v. Michelsen,90 the Eighth Circuit addressed the two questions upon which the Fifth, Fourth, and Ninth Circuits disagreed. The majority held that no explicit discussion of the waiver need occur during the Rule 11 colloquy and that a judge’s erroneous oral pronouncement that the defendant may appeal, received without objection from the Government, does not invalidate the defendant’s waiver of appellate rights.91 In effect, the Eighth Circuit adopted the Buchanan court’s view on the Rule 11 colloquy issue, while adopting the Melancon and One Male Juvenile courts’ views on the oral pronouncement issue.

The court first addressed Michelsen’s argument that his waiver could not be considered knowing and voluntary because the magistrate judge did not specifically discuss Michelsen’s waiver of appellate rights during the Rule 11 colloquy.92 The court rejected Michelsen’s contention, noting that while “it

91. Id. at 871-72.
92. Id. at 871. The court first noted that Michelsen did not dispute that his plea agreement contained a clear and express waiver of his appellate rights. Id. The court also noted that Michelsen did not dispute any of the following: that he signed the agreement; that he was represented by competent counsel at the time he entered the plea agreement; that he understood the plea provisions, “including the clear, bold-faced waiver of appellate rights;” that he was not incapacitated or incompetent at the time; and that he was physically and mentally capable of comprehending the agreement and knowingly assenting to its terms. Id. Additionally, the court noted that Michelsen did not allege that his privately retained counsel was ineffective; that he was misled as to the nature of the agreement; that he was coerced into entering the agreement; or that the plea agreement resulted from duress. Id. Michelsen also argued that the waiver should not
might have been preferable” for the lower court judge to engage Michelsen in an explicit discussion of his waiver of appellate rights, such a discussion “is not a prerequisite for a valid waiver of the right to appeal.” The court ruled that, based on the circumstances of Michelsen’s case, his waiver of appellate rights was both knowing and voluntary.

Next, the court discussed Michelsen’s argument that the magistrate judge’s oral and written statements indicating that Michelsen could appeal negated his prior waiver of appellate rights. The court “decline[d] to adopt the reasoning of Buchanan,” instead citing Melancon and noting that “[a]ny statement made by the court at the sentencing hearing could not have affected Michelsen’s decision, made nearly three months earlier, to plead guilty and waive his appellate rights.” The court deemed “irrelevant” Michelsen’s “apparent later belief . . . that he might be allowed to escape from his commitments.”

The court looked to Melancon in addressing the consequence of the Government’s failure to object to the judge’s oral statement regarding Michelsen’s right to appeal. The court stated that while “the government might well have clarified the issue by speaking up, a formal objection to the statement was not dictated by the circumstances.” The court also upheld Michelsen’s

be enforced because the sentence imposed by the magistrate judge varied from the sentence recommendation in the plea agreement. The court summarily dismissed this argument as meritless. Id. at 873. Since this argument has no bearing on the circuit split at issue, this argument will not be discussed in the text of the Note.

93. Id. at 871.
94. Id. at 872. The court stated:
Michelsen, who turned fifty shortly after his sentencing, is a competent, articulate high school graduate with military service, managerial experience in the private sector, and prior experience in the criminal justice system. His attorney of choice negotiated the agreement to which Michelsen gave his assent. Michelsen and his attorney possessed a copy of the signed agreement at the plea hearing. Michelsen’s statements at the hearing indicate that he fully understood the finality of his decision to plead guilty and that the agreement was in complete accordance with his prior understanding; that it was, in fact, the bargain to which he had agreed. In light of these circumstances, we conclude that Michelsen’s decision to waive his appellate rights was knowing and voluntary.

Id.

96. Id. The court referenced its decision in Lindner v. Wyrick, 644 F.2d 724, 728 (8th Cir.), cert. denied, 454 U.S. 872 (1981) (holding that the voluntariness of a plea agreement should be determined by looking to the circumstances at the time the agreement was executed).
97. Michelsen, 141 F.3d at 872.
98. Id. at 872 n.4.
99. Id.

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waiver on the grounds that Michelsen was not prejudiced by the Government’s failure to object.\textsuperscript{100}

Finally, the court advanced an argument in support of the waiver raised in neither \textit{Melancon} nor \textit{One Male Juvenile}. The court noted that the judge’s oral statement regarding Michelsen’s right to appeal was not completely in conflict with Michelsen’s waiver because even though Michelsen waived his appellate rights, he implicitly retained the right to appeal on the grounds that his sentence was illegal or imposed in violation of the plea agreement.\textsuperscript{101} The court concluded that “\[b\]y informing Michelsen of the statutory right to file an appeal, the court was simply complying with its duty to do so.”\textsuperscript{102}

The court devoted the rest of its opinion to considering the policy arguments supporting its ruling.\textsuperscript{103} The court determined that criminal defendants would be best served by being given the option of choosing, as part of a plea agreement, to forsake certain rights, such as appellate rights, in exchange for something they would value more highly, such as a reduced sentence recommendation from the Government.\textsuperscript{104} However, according to the court, “[e]mpty promises are worthless promises,” and plea bargain agreements only retain their value for both the criminal defendant and the Government if properly enforced.\textsuperscript{105} Specifically, such waivers benefit the Government only if the Government can rely upon the waivers being enforced.\textsuperscript{106} If the Government refuses to allow criminal defendants to waive appellate rights, then criminal defendants suffer because they lose one of their most valuable bargaining chips in the plea bargaining process—the waiver of appellate rights.\textsuperscript{107}

In his dissenting opinion, Circuit Judge Bright rejected the majority rule based on the facts of Michelsen’s case and the Ninth Circuit’s policy discussion in \textit{Buchanan}.\textsuperscript{108} Judge Bright would have invalidated Michelsen’s waiver based on a number of factors.\textsuperscript{109} First, the judge noted that because severe epilepsy and asthma rendered Michelsen unable to work, Michelsen arrived at court with no

\begin{itemize}
  \item 100. United States v. Michelsen, 141 F.3d 867, 872 n.4 (8th Cir.), cert. denied, 119 S. Ct. 363 (1998).
  \item 101. Id. at 872.
  \item 102. Id.
  \item 103. Id. at 873.
  \item 104. Id.
  \item 106. Id.
  \item 107. Id. \textit{But see} Robert K. Calhoun, \textit{Waiver of the Right to Appeal}, 23 \textit{HASTINGS CONST. L.Q.} 127, 192-94 (rejecting the bargaining chip argument and contending that, even if true, the argument does not justify waivers of appellate rights).
  \item 108. Michelsen, 141 F.3d at 874-75 (Bright, C.J., dissenting).
  \item 109. Id.
\end{itemize}
assets and many medical bills. Judge Bright stated that, based on Michelsen’s ill health and his inability to make the child support payments at issue, “it would seem that neither Michelsen nor the prosecution anticipated that Michelsen would actually serve time in prison.” Second, Judge Bright argued that the magistrate judge’s two references at the sentencing hearing to Michelsen’s right to appeal did not constitute “slips of the tongue or misstatements.” Rather, because the magistrate judge saw Michelsen’s ill financial and physical health and recognized that Michelsen had no knowledge of his probation officer’s unfavorable report, the magistrate judge intended that Michelsen be given the right to appeal based on his atypical circumstances. Third and finally, Judge Bright would have deemed the waiver unenforceable based on the Ninth Circuit’s policy justification in Buchanan that criminal defendants need to be able to rely on the statements of district court judges.

V. COMMENT

In Michelsen, the Eighth Circuit adopted a rule that can be easily applied and is supported by compelling policy interests. The alternative rule adopted in Buchanan, while supported by a strong policy argument, unreasonably requires appellate courts to draw conclusions from matters outside the record and fosters judicial imprecision.

The Buchanan rule, advocated by Judge Bright in his dissenting opinion in Michelsen, expects appellate courts to draw inferences about a criminal defendant’s understanding of the proceedings below, despite the fact that the record generally gives appellate courts no grounds for making any determination as to a defendant’s thoughts and feelings during the lower court action. Thus,

111. Id.
112. Id. at 875.
113. Id. at 874. Judge Bright noted that the magistrate judge, in rendering Michelsen’s sentence, may have been influenced by Michelsen’s probation officer’s recommendation that Michelsen be given the maximum sentence, a recommendation which the magistrate judge did not disclose to Michelsen. Id. The judge noted that disclosure of the probation report is discretionary under FED. R. CRIM. P. 32, but that, under the same rule, a judge must usually grant the defendant and the defendant’s counsel an opportunity to comment on information upon which the sentence is based. Id. Judge Bright noted that because Michelsen appeared pro se at the sentencing hearing, he “did not have an attorney . . . to protect his rights.” Id.
114. Id. at 875. Judge Bright stated: “I believe the magistrate judge, by his oral direction, and the prosecutor, by failing to object, recognized that the defendant should have the right to an appeal in this unusual case.” Id.
in *Buchanan*, a criminal defendant’s rote response of “Yes, sir” to one of the district court judge’s many questions earns him freedom from his waiver because, according to the Ninth Circuit, such a statement “indicates [the defendant’s] expectation that he could appeal his sentence and evinces a misunderstanding of the substance of his plea agreement.”

Worse yet, requiring appellate courts to speculate about a defendant’s thoughts and feelings in the prior proceeding can lead to wide-scale guessing games. For example, in his *Michelsen* dissent, Judge Bright conjectured about the motivations behind both the prosecutor’s and the magistrate’s actions during Michelsen’s sentencing hearing. While it is entirely possible that Judge Bright and the Ninth Circuit reached correct conclusions through guessing, appellate court judges should not be forced to adhere to a rule requiring such speculation because too much potential for misinterpretation and other error exists.

Furthermore, a rule allowing a judge’s oral statement regarding the right to appeal to trump a defendant’s knowing and voluntary waiver of appellate rights fosters judicial imprecision. If in fact a judge believes that exceptional circumstances render a defendant’s waiver of appellate rights invalid, the judge should clearly and explicitly state this belief on the record. By allowing a judge’s vague statement to trump Buchanan’s written waiver of his right to appeal, the *Buchanan* court lowered the bar for judges throughout the Ninth Circuit. While the *Buchanan* court’s primary policy consideration that “[l]itigants need to be able to trust the oral pronouncements of district court judges” unquestionably constitutes an important policy objective, ensuring that a competent, knowledgeable, and thoughtful judiciary exists constitutes an equally, if not more, important policy consideration. In giving the defendant in *Buchanan* the benefit of the doubt regarding the district court judge’s statements advising the defendant of his right to appeal, the Ninth Circuit wasted a valuable opportunity to address the critical issue in the case and the source from which the

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117. See supra notes 112-14 and accompanying text.

118. See United States v. Schuman, 127 F.3d 815 (9th Cir. 1997). In *Schuman*, a district court judge from the Ninth Circuit, understandably confused about how to handle the waiver situation in light of *Buchanan*, informed the defendant that he had a right to appeal, and the prosecutor promptly objected to this statement. *Id.* at 817. Instead of leaving the Ninth Circuit to guess at his motivations in advising the defendant of his right to appeal, the district judge clearly and explicitly stated: “I don’t know whether under these circumstances whether his right of appeal has been lost or not. I’m making a finding it’s up to the Ninth Circuit . . . It’s up to the Ninth Circuit to decide whether under the circumstances he’s lost his right of appeal.” *Id.* When the district court judge clearly and explicitly states his purpose in advising the defendant of appellate rights, the appellate court, at least, must no longer guess as to whether the lower court judge misspoke or fully intended to say what he said.

119. *Buchanan*, 59 F.3d at 918.
appeal stemmed—the district court judge’s lack of clarity. The Ninth Circuit should have issued a statement explaining that if a district judge believes that a waiver needs to be declared invalid due to special circumstances, the judge should state this belief on the record. Additionally, the Ninth Circuit should have advised district court judges of how to inform defendants of the appellate rights they retain without making statements that render a previously executed waiver invalid in the event that the prosecutor fails to object.  

Most telling about the soundness of the rules and policies advocated by Michelsen and Buchanan is the direction subsequent courts have taken in confronting similar issues. In United States v. Schuman, the Ninth Circuit distanced itself from the Buchanan holding. Nowhere in Schuman does the Ninth Circuit reference its policy interest in ensuring that litigants are able to rely on the statements of district court judges. Schuman suggests that once the Government objects to the judge’s erroneous statement that the defendant has a right to appeal, the policy in favor of allowing defendants to rely on the statements of district court judges disappears.

In contrast, the rules and policy interests set out in Michelsen have been embraced and further developed by at least one other circuit. Additionally, the

120. See Schuman, 127 F.3d at 818-19. The concurring judge attempted to explain how district court judges should handle the appellate waiver issue in their address to defendants. Id.

121. 127 F.3d 815 (9th Cir. 1997).

122. Id. at 817. In Schuman, the court held that the judge’s statement that the defendant could appeal did not invalidate the defendant’s waiver of appellate rights because the government promptly objected and because, after the objection, the judge stated that he was sending the issue to the Ninth Circuit because he was unsure whether the defendant had waived his right to appeal. Id. The court stated that unlike Buchanan, who “could have no reason but to believe that the court’s advice on the right to appeal was correct,’ Schuman was made aware by both the court and the prosecutor’s objection that the waiver of his right to appeal could preclude an appeal.” Id. (quoting United States v. Buchanan, 59 F.3d 914, 918 (9th Cir.), cert. denied, 516 U.S. 970 (1995)).

123. In United States v. Atterberry, 144 F.3d 1299, 1300-01 (10th Cir. 1998), the Tenth Circuit rejected the defendant’s argument that based on Buchanan, his knowing and voluntary waiver was nonetheless invalid because the district court judge, without objection from the State, informed him that he could appeal. Id. The Tenth Circuit distinguished Buchanan, but went on to state that “even if this case was comparable to Buchanan, we would not reach the same result.” Id. at 1301. While explicitly recognizing the policy advanced by the Buchanan court, the Tenth Circuit, citing both Michelsen and Melancon, stated that it was:

more persuaded by the circuits that have held statements made by a judge during sentencing concerning the right to appeal do not act to negate written waivers of that right, because statements like those made by the court during Mr. Atterberry’s sentencing do not affect a defendant’s prior decision to plead guilty and waive appellate rights.

Id.
Eighth Circuit has shown no signs that it plans to retreat from the rules and policies outlined in *Michelsen*. 124

Finally, just as the *Michelsen* rule concerning the oral pronouncement issue is both easy to understand and apply, the *Michelsen* rule regarding the Rule 11 colloquy issue is similarly clear and easily applied. The rule also serves to ensure that a criminal defendant may not bootstrap his way into the appellate courts by virtue of the lower court judge failing to mention the words “waiver” and “right to appeal” during the Rule 11 colloquy. While the *Michelsen* court made clear that the district court judge would be well-advised to explicitly discuss the defendant’s waiver during the Rule 11 colloquy, the court refused to bind itself to a rule declaring that a waiver cannot be knowing and voluntary in the absence of such a discussion during the colloquy. 125 From reading the opinion, district court judges should be able to easily understand the procedures they must follow during future Rule 11 colloquies, without fear that if they once inadvertently fail to discuss the waiver during the colloquy, the appellate court will free the criminal defendant from the strictures of the plea agreement and the waiver of appellate rights.

VI. CONCLUSION

In *United States v. Michelsen*, the Eighth Circuit addressed a split in the circuits concerning the enforceability of a defendant’s knowing and voluntary written waiver of the right to appeal executed in conjunction with a plea bargain agreement. The court held that such a waiver remains valid even if not specifically addressed during the Rule 11 colloquy and even if the lower court judge, without objection from the Government, erroneously informs the criminal defendant that appeal may be taken. In sum, the Eighth Circuit made clear that it will not tolerate criminal defendants attempting to sidestep their valid waivers of appellate rights on a technicality.

GINGER K. GOOCH

