

APPEAL RIGHTS WAIVERS: ***A Constitutionally Dubious Bargain***

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One of the most common provisions in plea agreements in federal criminal cases is the appeal rights waiver. In such a provision, the defendant consents to waive any right to file an appeal from the conviction and sentence or to otherwise challenge the judgment after its entry. These provisions, among the most ubiquitous in plea agreements, are also among the most constitutionally dubious.

Appeal rights waivers began appearing in federal plea agreements in the 1970s, gained popularity in the 1990s, and have now become nearly universal in many districts. Some U.S. attorney offices require their inclusion in every plea agreement offered, and many more follow this approach as a matter of practice if not policy. A sizable majority of plea agreements nationwide now include some form of appeal rights waiver.¹

These waivers, although so far upheld in the circuit courts,² suffer from a number of constitutional infirmities. Criminal defendants undoubtedly may and must waive a number of trial-related rights as part of a plea of guilty, including most obviously the right to trial by jury, but they should not and cannot be required to waive other rights and guarantees under the U.S. Constitution or statute merely for the privilege of accepting a plea agreement and admitting guilt. This is particularly true of the statutory right to appeal, which exists for the very purpose of ensuring that other rights and guarantees are protected.

Compelling individuals to waive their appeal rights, especially as part of an across-the-board prosecutorial policy, infringes on fundamental guarantees of due process and impermissibly interferes with the function of the judiciary. It is time for the lower courts to reevaluate, or the U.S. Supreme Court to address, the legality of appeal rights waivers and the circumstances, if any, in which they may be adopted by the parties to a plea agreement and be enforced by a court.

The Impact of Appeal Rights Waivers

Appeal rights waivers can appear to a criminal defendant, faced with the myriad other concerns associated with prosecution in the federal system, as among the most innocuous of provisions. That perception may be why these provisions are often accepted so readily by defendants (and by defense counsel). It is also dead wrong.

Provisions of this type, in their common form, preclude the defendant from filing any direct appeal from the judgment in the circuit court or from filing any post-conviction motion in the district court.

The waiver is indefinite and permanent, and it need not (and commonly does not) include any exception. Regardless of the nature or gravity of any error in the proceeding, any intervening change in law, or any other mitigating or extenuating factor, the defendant cannot seek review of the judgment in any court, at any time.

The result, in many cases, is nothing short of a stark miscarriage of justice. Convictions obtained through the most blatant forms of prosecutorial misconduct—whether coercion of a false confession, tampering with evidence, or withholding exculpatory materials—may nevertheless stand. Guilty pleas entered on reliance of advice of defense counsel so unfounded or so negligent as to constitute constitutionally ineffective assistance of counsel cannot be withdrawn. An individual who pleads guilty to an offense under an unconstitutional statute, or under a statute that does not even set forth a crime at all, may still be forced to serve the resulting sentence in full. All of these errors, and innumerable others, may be immune from challenge under the appeal rights waiver.

Even attempting to challenge or avoid an appeal rights waiver can, in fact, carry disastrous consequences for a criminal defendant. An individual who files an appeal from a judgment notwithstanding a prior waiver may be (and often will be) deemed to have materially breached the plea agreement. The government will then be allowed, in its discretion, to declare the agreement void, renew the prosecution of the defendant, and use admissions made in prior proceedings to convict the defendant in short order. The sentence imposed on the defendant following this second prosecution may be (and, again, often will be) materially higher or harsher than the prior sentence.³

Challenges to appeal rights waivers are, for this reason, more infrequent than might otherwise be guessed. Facing little likelihood of success, and a real possibility of an increased sentence, many defendants are understandably reticent about attacking the constitutionality of these waivers, regardless of their decidedly harsh impact.

Constitutional Concerns Over Appeal Rights Waivers

Notwithstanding the relative rarity of challenges to appeal rights waivers (compared to their prevalence), their constitutionality is very much in doubt. Courts have in a number of cases expressed concern that waivers may cross constitutional limits, particularly when applied to preclude appeal of a clearly meritorious claim, but they have struggled to identify the precise nature of the violation or the constitutional basis for addressing it. They have, as a result, fallen back on ill-defined presumptions in favor of plea agreements and ill-conceived notions of historical practice to uphold waivers in all but the most extraordinary cases.⁴

These notions cannot mask the serious concerns associated with appeal rights waivers, however. Those concerns are numerous and varied, but at the constitutional level they include three central prob-

lems: appeal rights waivers are unknowing, they are unconscionable, and they are undemocratic.

Unknowing

One of the fundamental principles of due process underlying our criminal justice system is that a person may be found to have waived a right only if he or she did so “knowingly.” The individual must be advised both of the nature of the right at issue and also of the consequences of waiver. Only if the defendant understands the specific privilege that is being relinquished and the potential ramifications of that choice—and only if proof of the defendant’s understanding can be offered in court—will the waiver be recognized as “knowing,” and thus as constitutionally legitimate.⁵

Appeal rights waivers are not, and really cannot be, “knowing” in this sense. A defendant presented with such a waiver will normally be advised in general terms that he or she has a right to appeal the judgment of conviction or sentence, but that, under the agreement, this right will be forfeited and the judgment will no longer be subject to challenge. But, in too many cases, there is no discussion of the specific issues that might be raised on appeal or of the likelihood of success and potential outcomes associated with any of those issues.

The defendant in this situation cannot be said to have “knowingly” waived his or her appeal rights, any more than a defendant who pleads guilty to an indictment could be said to have done so “knowingly” merely because he or she was advised of the right to a jury trial. Unless the defendant was also informed of the nature of the specific charges in the indictment and the maximum (and mandatory minimum) sentences associated with them, the plea is not “knowing” and cannot stand.⁶ Likewise, a waiver of appeal rights is not valid if—as is almost invariably the case—the defendant is not advised of the possible issues for appeal and the consequences of waiving those issues.

It is, in fact, literally impossible for a defendant (or defense counsel) to know of all possible issues for appeal at the time of a plea agreement. Those agreements are executed in advance of entry of the plea and sometimes far in advance of sentencing; therefore, any errors that may arise in those hearings—or any other post-agreement proceedings—cannot be anticipated with any certainty when the agreement is made. And the errors that may occur in these proceedings are far from minor or inconsequential: a mistake in assessing a defendant’s criminal history could, for example, result in a decades-long increase in the ultimate sentence. To suggest that a defendant facing this outcome somehow should have known that it might occur, or that he or she “knowingly” waived the right to raise the mistake on appeal, strains not only credulity but basic notions of fairness.

Unconscionable

A related constitutional principle, also grounded in the concept of due process, forbids the government from demanding that an individual relinquish a right or benefit based solely on a threat of punishment or enforcement action if the individual declines. The government must offer something in return for the requested waiver and must give the individual a meaningful option to refuse, or else it must demonstrate independent constitutional authority to secure the result it seeks. Phrased differently, the government cannot act as an extortionist.⁷

That is, however, precisely how the government is acting in the

context of provisions waiving appeal rights. These provisions are commonly not subject to any independent negotiation, and the defendant is normally offered no additional reduction in sentence or other benefit in exchange. They are, rather, presented by the prosecution as a necessary element of the plea agreement, which the defendant must accept—or face trial.

It is important to recognize that, unlike with respect to other waivers that may be included in a plea agreement (which also may be subject to little or no negotiation), a defendant does not obtain any inherent benefit whatsoever from a waiver of appeal rights. Waiving the right to a jury trial, for example, avoids the risk of conviction on all charges in the indictment and thereby offers the defendant a significant benefit in and of itself. Waiving the right to appeal, by contrast, offers nothing but downside for the defendant since an appeal presents no risk of greater punishment but only the opportunity for relief from an unlawful conviction or sentence.

This point lays bare an underlying infirmity of appeal rights waivers. The effect of such a waiver, in a case in which an error has been committed, is simply to preclude the defendant from challenging a judgment that is unlawful and to require him or her to serve a sentence that is illegal. For the prosecution to pursue this objective, especially without offering the defendant any actual benefit in return, can only be described as unconscionable and must be deemed unconstitutional.

Undemocratic

Waivers of appeal rights also implicate “structural” aspects of our constitutional system, including separation of powers. Those principles prohibit the distinct branches of the federal government from interfering with other branches or intruding upon the authorities vested in them, except as expressly permitted by the Constitution. Put simply, no branch of government can command or control another.⁸

Provisions precluding appellate review, as they are currently interpreted and enforced, have just this effect. They are crafted by the prosecution—part of the executive branch—not to secure a concession by the defendant on certain issues, which might then be used by the government if the issue is raised on appeal, but to preclude the appeal itself regardless of the circumstances and the issues presented. They serve, in effect, to withdraw jurisdiction from the court of appeals.⁹

This result cannot be squared with separation-of-powers doctrine. Congress is empowered under Article I of the Constitution to define (with some limitations) the jurisdiction of the judiciary and has granted jurisdiction over appeals from criminal judgments to circuit courts; the courts are authorized under Article III to adjudicate any cases falling within their jurisdiction and have adopted practices and procedures for resolving criminal appeals.¹⁰ The executive branch has no power to alter the legislature’s grant of jurisdiction over criminal appeals or to interfere with the judiciary’s exercise of it. Yet, a waiver of appeal rights does exactly that.

To be sure, the prosecution is not prohibited from proposing actions that would limit the role of the judiciary, as it does routinely when it offers a plea agreement that calls for the dismissal of certain charges and cancellation of trial by the district court. But, in these circumstances, the limitation on the district court’s role becomes effective only upon review and approval by that very same court in the exercise of its constitutionally vested discretion. An appeal rights

waiver, by contrast, becomes effective upon approval of the plea agreement by the district court, without ever having been reviewed or adopted by the court whose authority is actually affected—the court of appeals. Whether one views this as the prosecution controlling the judiciary or the district court commanding the court of appeals, it represents a fundamental and unconstitutional distortion of our federal structure.

A New Framework for Appeal Rights Waivers

The question then becomes, if provisions waiving appeal rights are unconstitutional in their current incarnation, whether they can be reconceived so as to be lawful. It is not inherently illegitimate, after all, for the prosecution to seek greater certainty with respect to issues that may be raised on appeal, and a defendant certainly may have a reasonable interest in conceding particular points in exchange for a more favorable plea agreement. And courts undeniably have the authority to recognize such concessions when made and to limit or even dismiss appeals when appropriate in light of them.

These provisions can indeed be recrafted so as to be in accord with the Constitution. To do so, and to avoid the concerns noted above, an issue-specific approach is necessary.

Specify Scope and Impact

First, to ensure that the waiver is not “unknowing,” the waiver must set forth the particular issues that the defendant is conceding for purposes of appeal. The issues must be stated with at least the level of specificity required to raise and preserve issues on appeal and the nature of the defendant’s concession—whether complete or only partial—should be indicated. Any issue not listed is not conceded, and thus not waived.

This requirement would provide greater clarity and certainty for all parties. The defendant would be aware of the specific issues being waived and could be advised of the scope and impact of the waiver before agreeing to it. The prosecution would similarly be fully informed of the issues in play and could tailor plea negotiations accordingly. And, contrary to current practice, the district court itself would have an opportunity to review and consider the scope of the waiver, allowing it to better judge whether the agreement is reasonable and being entered into knowingly.

This approach would, it should be stated, mean that a defendant could not through a plea agreement waive any issues that had not yet arisen—including any that might arise at sentencing. But those issues could still potentially be included within a waiver. The parties could, for example, include within the plea agreement a condition that calls for a hearing to be held after sentencing, but before final judgment is entered, in which the parties present for court approval an addendum to the original agreement. That addendum could identify additional issues, relating to the sentencing decision, that the defendant agrees to concede. This would ensure, again, that the waiver is “knowing” with respect to all issues included.

Free, Voluntary Negotiation

Second, to ensure that the waiver is not “unconscionable,” the waiver would have to be freely negotiated by the parties. Prosecutors could not adopt an across-the-board policy of demanding such waivers, and they could not unilaterally require that a defendant enlarge the scope of a waiver in any given case on penalty of withdrawal of the offer. The defendant’s waiver, in other words, would be valid only if

given voluntarily and for valid consideration.

This does not mean that, for each and every issue waived, the prosecution must recite a particular benefit granted to the defendant, whether an additional count dropped, a favorable sentencing recommendation, or otherwise. Agreements could still be offered and negotiated as a whole, with no need to link individual provisions or concessions with others. It means only that prosecutors cannot—as they often do now—treat the appeal rights waiver as a mandatory part of any agreement, which defendants must accept but for which they receive no benefit.

Courts Retain Jurisdiction, Discretion

Third, to ensure that the waiver is not “undemocratic,” waiver provisions could not be designed or applied so as to restrict the jurisdiction of the courts in any way or to preclude them from hearing an otherwise proper appeal. Defendants may not be prohibited from filing an appeal in the first instance or be subject to greater punishment if they do. Any issue raised in an appeal could be addressed by the court.

The court’s consideration would, however, be informed (though not controlled) by the waiver provision. Issues included in that provision would normally be deemed waived, and as such they would in general deserve scant attention by the prosecution or the court. Indeed, if it appeared that an appeal raised only issues that were previously conceded as part of the waiver, it would be entirely appropriate for the prosecution to file—and the court to grant—a motion for summary affirmance.

An appeals court would, though, retain discretion in any case to consider even those issues included within such a provision. Courts have traditionally recognized and exercised the power to rectify errors in the lower court proceedings that are “plain,” notwithstanding a party’s failure to raise them earlier, and there is no reason to deem that option unavailable in circumstances in which the waiver is express, as set forth in a plea agreement, rather than merely implied.¹¹ To the contrary, if the mistake below was so obvious as to rise to the level of “plain error,” it calls into serious doubt whether the agreement to concede the issue was knowing and voluntary and whether it should have been accepted by the district court. Appellate review is all the more appropriate, and constitutionally necessary, in that circumstance.

Conclusion

Adopting a new framework for appeal rights waivers—one that respects the due process rights of defendants and comports with constitutional separation-of-powers principles—will undoubtedly limit the power of prosecutors across the nation. They will no longer be allowed to insist upon waivers in every plea agreement in every case and every circumstance. They will be unable to demand that a defendant abandon any and all possible issues, whether known or unknown, on appeal. And they could not compel a defendant to relinquish even the right to file an appeal, or cause them to face even greater punishment should he or she later attempt to exercise that right.

None of these changes would fundamentally alter or inhibit prosecutions, however. Prosecutors could and would still negotiate plea agreements, and as part of those agreements they could include waivers of issues on appeal. Those waivers would still be enforceable and would continue to spare prosecutors the need to address those issues in any detail—or at all—if later raised in an appeal. There is, thus, no real reason to reject these changes.

Quite the opposite: There is every reason to embrace them. Requiring that appeal rights waivers specify the issues to be conceded will lend greater certainty and clarity to the criminal justice process. Mandating that prosecutors actually negotiate these provisions with defendants will ensure that, when accepted, they are knowing and voluntary. And allowing courts to review waivers for errors that are “plain” will avoid the risk—troublingly common in our current system—of a serious miscarriage of justice in any given case.

Defendants across the nation face precisely that risk in light of the prevalence, and in some districts ubiquity, of appeal rights waivers adopted under the current system. This situation must change. The time for change is now. ☉



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Endnotes

¹STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 5 (3d ed. 2003).

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³V.A.C. GATRELL, *THE HANGING TREE: EXECUTION AND THE ENGLISH PEOPLE 1770-1868* 7 (1994).

⁴*Id.* at 46.

⁵HUGO ADAM BEDAU, *THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 4 (1997).

⁶GATRELL, *supra* note 3, at 46.

⁷DEATH PENALTY INFO. CTR., <https://deathpenaltyinfo.org> (last visited July 17, 2018).

⁸BEDAU, *supra* note 5, at 4.

⁹MARK ESSIG, *EDISON AND THE ELECTRIC CHAIR: A STORY OF LIGHT AND DEATH* 2 (2003).

¹⁰*In re Kemmler*, 136 U.S. 436 (1890).

¹¹ESSIG, *supra* note 9, at 2.

¹²*Wilkerson v. Utah*, 99 U.S. 130, 135 (1878).

¹³*In re Kemmler*, 136 U.S. at 447.

Endnotes

¹See Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 *AM. CRIM. L. REV.* 73 (2015).

²See, e.g., *United States v. Khattak*, 273 F.3d 557, 560-61 (3d Cir. 2005).

³See, e.g., *United States v. Erwin*, 765 F.3d 219, 223-29 (3d Cir. 2014).

⁴See, e.g., *Khattak*, 273 F.3d at 560-61.

⁵See, e.g., *United States v. Tanner*, 721 F.3d 1231, 1233 (10th Cir. 2013); see also, e.g., *Khattak*, 273 F.3d at 560-61.

⁶See, e.g., *Jamison v. Klem*, 544 F.3d 266, 277-79 (3d Cir. 2008).

⁷See, e.g., *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); see also Jason Mazzone, *The Waiver Paradox*, 97 *NW. U. L. REV.* 801 (2003).

⁸See, e.g., *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 809 F.2d 979, 989 (3d Cir. 1986) (citing *INS v. Chadha*, 462 U.S. 919, 963 (1983) (Powell, J., concurring in judgment)).

⁹See, e.g., *Khattak*, 273 F.3d at 563 (holding that appeal rights waiver deprives the court of “jurisdiction” to consider issues on appeal).

¹⁰See, e.g., *Palmore v. United States*, 411 U.S. 389, 400-01 (1973).

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¹⁵RICHARD MORAN, *EXECUTIONER'S CURRENT: THOMAS EDISON, GEORGE WESTINGHOUSE, AND THE INVENTION OF THE ELECTRIC CHAIR* xix (2003 ed.).

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¹⁸LOUIS J. PALMER JR., *THE DEATH PENALTY: AN AMERICAN CITIZEN'S GUIDE TO UNDERSTANDING FEDERAL AND STATE LAWS* 180 (1998).

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²⁰*Gregg v. Georgia*, 458 U.S. 153 (1976).

²¹*Woodson v. North Carolina*, 428 U.S. 280 (1976).

²²*Coker v. Georgia*, 97 S. Ct. 2861 (1977).

²³*Bucklew v. Precythe*, 138 S. Ct. 1706, 1323 (2018).

²⁴*Missouri v. Bucklew*, 973 S.W. 2d. 83, 86 (Mo. 1998).

²⁵*Bucklew*, 138 S. Ct. at 1323.

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²⁹*Bucklew v. Precythe*, No. 17-3052 (8th Cir. 2018) (citing *Zink v. Lombardi*, 783 F.3d 1089, 1101(2015)).

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