Stemming the Tide of Postconviction Waivers

BY ALAN ELLIS AND TODD BUSSERT

Over the last several years, waiver of a defendant's appellate and postconviction rights has become a standard feature of plea agreements in federal cases. While courts uphold a knowing and intelligent relinquishment of rights, these waivers are not without limits. This article suggests areas about which defense counsel should be aware in order to afford clients the greatest opportunity for postconviction relief. In particular, we explore ethical constraints on defense counsel's ability to advise clients and to shield themselves from ineffective assistance claims, as well as constraints on prosecutors' ability to demand such waivers or to shield themselves from prosecutorial misconduct claims.

General Waiver Considerations

Plea agreements have long involved the issue of a defendant waiving constitutional and fundamental rights, and courts have consistently affirmed such waivers provided they are made knowingly and voluntarily; that is, with an understanding of the consequences. (*See* Boykin v. Alabama, 395 U.S. 238, 243-44 (1969).) Practically speaking, a defendant's relinquishment of certain fundamental rights, such as the right to a jury trial or to cross-examine one's accuser(s), is an unavoidable result of electing to plead guilty. However, waiving the right to challenge constitutional and other legal errors concerning the process by which a conviction is obtained is another matter entirely, and thus a cause for concern as it pertains to the appeal and postconviction waiver language that federal prosecutors routinely insert into plea agreements consistent with the *U.S. Attorney's Manual*. (*See* 9 USAM: *Criminal Resource Manual* 626.) These provisions look to leave defendants with no meaningful chance at postconviction relief regardless of whatever meritorious issue may later present.

An example of the type of appeal and postconviction waiver language commonly found in federal plea agreements is: "The Defendant waives any and all rights, including those conferred by 18 U.S.C. § 3742 and/or 28 U.S.C. § 2255, to appeal or collaterally attack his conviction and any sentence of imprisonment of XX months or less, including any related issues with respect to the establishment of the Sentencing Guidelines range." Such a waiver differs from traditional waivers because it encompasses abandonment of the unknown: Did the prosecution withhold information favorable to the defense that would have affected the outcome of the case? Will the court sentence as the law requires? Did or will defense counsel render constitutionally effective representation? (*See*, *e.g.*, United States v. Raynor, 989 F. Supp. 43, 44 (D.D.C. 1997).) Yet, absent evidence of a miscarriage of justice or ineffective assistance of counsel as it concerns a defendant's entering into the plea agreement, courts enforce these provisions as part of an agreed-upon bargain wherein risks are allocated and benefits obtained to achieve finality and save resources. Defense counsel must therefore evaluate ways to secure changes to the boilerplate waiver to ensure a client's interests are protected.

Experience shows that the government can be receptive to revisions to standard agreement language if changes will facilitate a guilty plea while not too adversely affecting its interest in the certainty and finality of conviction. For instance, the government can be amenable to a conditional waiver that preserves a defendant's ability to obtain appellate review of a lost suppression issue. Similarly, where the parties concur that the defendant will likely be sentenced at no greater than the low end of the guideline range, the government can be persuaded to set the bar for a sentencing appeal waiver at the low-end number, therein giving the defendant some small measure of comfort should anticipated events go awry.

Regardless, it must be remembered that when scrutinizing appeal and postconviction waivers, courts look first to determine the stated parameters and then to whether the predicate events set forth in the plea agreement that are necessary to trigger the waiver have

ALAN ELLIS, *past president of the NACDL and former Fulbright Visiting Professor of Law, Shanghai, Jiaotong University, School of Law, practices in the area of federal sentencing, prison matters, postconviction remedies and international criminal law with offices in San Francisco, California, Philadelphia, Pennsylvania, and Shanghai, China. He is a contributing editor to* Criminal Justice *magazine. Contact him at AELaw1@aol.com or go to www.alanellis.com.* **TODD BUSSERT,** *past chair of the Section's Corrections & Sentencing Committee, is a defense attorney in New Haven, Connecticut, whose practice involves federal sentencing, appellate, postconviction, and Bureau of Prisons-related representation. He can be reached at tbussert@bussertlaw.com.*

been met. Moreover, waivers are construed narrowly and strictly against the government, meaning that any ambiguity is read in a defendant's favor. (*See* United States v. Isom, 580 F.3d 43, 50-52 (1st Cir. 2009).) And to the extent that a waiver is deemed applicable, relief is available to prevent miscarriages of justice, an open-ended concept that accounts for how clear and grave an error existed, the effect of the error on the parties, and the extent to which the defendant acquiesced in the error. Appellate courts tend to be most reluctant to enforce waivers where a constitutional right is implicated, such as where the trial court clearly violated a defendant's due process rights in imposing sentence.

The Inherent Difficulties with Postconviction Waivers

It is fair to say even the most seasoned criminal defense attorney will struggle with the complexities and arcane jurisprudence of habeas corpus, of which applications under 28 U.S.C. § 2255 are a part. (*Cf.* Holmes v. Buss, 506 F.3d 576, 579 (7th Cir. 2007).) More specifically, this is an area of the law that is not readily summarized when meeting with a client to review and discuss a multiple-page plea agreement—a few sentences of which seek to have the defendant relinquish his or her right to collaterally attack the conviction and/or sentence. In this regard, it is unfair to presume that from whatever explanation counsel might offer beyond reading the waiver provision, a reasonably educated layperson will digest how little recourse exists to bring a postconviction challenge. The cold reality is that most defendants do not comprehend, nor could they articulate, the array of claims that could potentially be brought through a direct appeal or a 2255 petition, especially those concerning prospective, postplea claims. This is significant because, with all due respect to the judiciary and the drafters of the Federal Rules, a defendant's affirmative response to a court's all too often perfunctory inquiry during a plea colloquy—that the defendant understands the meaning of the plea agreement's appeal and postconviction language—does not, in fact, usually reflect the intentional relinquishment of a *known* right. (*See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Fed. R. Crim. P. 11(b)(1)(N).)

A more global dilemma, however, is how ethical boundaries constrain both the prosecution and the defense. Criminal defendants are entitled to effective, conflict-free legal representation at every stage of prosecution. (U.S. Const. amend. VI; *see* Alabama v. Shelton, 535 U.S. 654 (2002); Strickland v. Washington, 466 U.S. 668, 687 (1984).) Yet, when faced with reviewing and explaining a plea agreement that contains a waiver provision like that above, defense counsel is put in the untenable position of having to render advice to a client about quality of legal representation to date—for example, that counsel has theretofore rendered constitutionally sufficient performance—or opine about the quality of future representation (between a change of plea and sentencing). (*See* ABA, *Model Rules of Professional Conduct*, Rule 1.1 (2002).) The conflict of interest that necessarily permeates that discussion is akin to a doctor handing a patient a liability waiver just as the patient is being wheeled into surgery or, more aptly, like advising a client regarding an agreement that would limit the lawyer's prospective malpractice liability. Such advice is not permissible. (*See Model Rules*, Rule 1.8(h); *cf.*, John Wesley Hall, *Professional Responsibility in Criminal Defense Practice* § 10:27 at 417 (3d ed. 2005).)

An equally obvious problem is that these waivers work to insulate the plea and government and defense counsel's respective actions from any review. Importantly, ethics bodies in five of six jurisdictions, which have considered the question, have issued opinions excluding ineffective assistance of counsel claims from the scope of permissible postconviction waivers. (See sidebar, *Ethical Limitations on Waivers*.) In the most recent of these opinions, Missouri's governing ethics body explains the inherent, unwaivable conflict these provisions present:

> It is not permissible for defense counsel to advise the defendant regarding waiver of claims of ineffective assistance of counsel by defense counsel. Providing such advice would violate Rule 4-1.7(a)(2) because there is a significant risk that the representation of the client would be materially limited by the personal interest of defense counsel. Defense counsel is not a party to the post-conviction relief proceeding but defense counsel certainly has a personal interest related to the potential for a claim that defense counsel provided ineffective assistance to the defendant. *It is not reasonable to believe that defense counsel will be able to provide competent and diligent representation to the defendant regarding the effectiveness of defense counsel's representation of the defendant.* Therefore, under Rule 4-1.7(b)(1), this conflict is not waivable.

(Emphasis added).)

Like several of its sister states, Missouri also finds that prosecutors can neither request ineffective assis-

ETHICAL LIMITATIONS ON WAIVERS

Missouri, Ohio, Vermont, Tennessee and North Carolina have all imposed ethical restrictions on postconviction waivers. Arizona has not.

- Advisory Comm. of the Supreme Court of Missouri, Formal Op. 126 (May 19, 2009)
- Ohio Board of Commissioners on Grievance and Discipline, Op. 2001-6 (Dec. 7, 2001) (waiver that limits IAC claims akin to limiting personal malpractice liability; prosecutor who seeks such an agreement engages in conduct prejudicial to the administration of justice)
- Vt. Bar Ass'n Advisory Ethics Op. 95-04 ("an attorney should not recommend to a defendant in a criminal case that the defendant enter into a plea agreement that contains a provision limiting the client's right to assert a claim of ineffective assistance of counsel in a postconviction proceeding")
- Tenn. Bd. Prof'l Resp. Advisory Op. 94-A-549 (1994) (neither defense counsel nor prosecutor can include waiver of IAC or prosecutorial misconduct in plea agreement)
- N.C. State Bar Ethics Comm'n, Formal Op. RPC 129 (2d Rev.) (approved Jan. 15 1993) (same)
- Ariz. State Bar Comm. on the Rules of Prof'l Conduct, Op. 95-08 (1995) (While avoiding constitutional question, finding that ethically "[a] criminal defendant may, as part of a plea agreement, waive a claim of ineffective assistance of counsel, without waiving a claim that his lawyer is liable to him for the lawyer's legal malpractice")

tance of counsel claim waivers nor attempt to limit claims of prosecutorial misconduct:

> We have also been asked whether it is permissible for a prosecuting attorney to require waiver of all rights under Rule 24.035 when entering into a plea agreement. We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct. See, Rules 4-3.8 and 8.4(d).

This approach, which is consistent with the Model Rules, applies to federal prosecutors practicing in those jurisdictions. (*See* 28 U.S.C. § 530B; *Model Rules*, Rule 8.4 and Rule 3.8, Comments ¶1.)

Three practice points stem from the preceding. First, defense counsel should be assertive in seeking revisions to plea agreements that preserve a client's claims of ineffective assistance of counsel or prosecutorial misconduct. Counsel must make clear to the government that notwithstanding a guilty plea, the client retains the right to file a motion pursuant to 28 U.S.C. § 2255 (and AEDPA) that challenges the constitutional quality of trial or appellate counsel's representation not merely representation as it concerns counsel's advice and performance related to entry of the guilty plea—the consideration on which courts ordinarily focus. Second, to the extent that the proposed plea agreement includes the common refrain that the "defendant also acknowledges his complete satisfaction with the representation and advice received from his undersigned attorney," counsel should compel the government to add "though his attorney could not, and did not, advise him in this regard." If the government balks as to either, counsel is obliged to raise the points on the record so that the issue(s) is preserved.

Finally, where the foregoing steps have not been taken or the record is silent as to the same, counsel in postconviction proceedings seeking to advance an ineffective assistance of counsel claim should point out that the defendant was deprived of counsel, contrary to the protections of the Sixth Amendment, as to that portion of a plea agreement, thereby rendering that portion of the agreement unenforceable. Given the state of the law, the distinction between seeking to invalidate a plea agreement's waiver provision, as opposed to the agreement as a whole, is an important one. This line of argument can also support a request for discovery and/or an evidentiary hearing to permit further development of the record since the issue of whether a defendant intentionally abandoned a known right is fact-specific.

While we recognize that there exists a systemic interest in finality and minimizing meritless claims, the appeal and postconviction waivers that have crept into the federal plea negotiation process require diligent attention. Justice is not served by impediments to valid claims that would otherwise afford relief. Defense counsel, in particular, are obliged to voice ethical considerations that can and should prevent the government from foreclosing available avenues and to ensure that every client's relinquishment of rights is knowing and voluntary. ■