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626. PLEA AGREEMENTS AND SENTENCING APPEAL WAIVERS -- DISCUSSION OF THE LAW

1. Legality

At the outset, it is important to note that the Supreme Court has repeatedly held that a criminal defendant can elect to waive many important constitutional and statutory rights during the plea bargaining process. See *United States v. Mezzanatto*, 115 S. Ct. 797, 801 (1995); *Tollett v. Henderson*, 411 U.S. 258, 267 (1973); *Blackledge v. Allison*, 431 U.S. 63, 71 (1977, *cert. denied*, 116 S. Ct. 548 (1995)). Consistent with that principle, the courts of appeals have upheld the general validity of a sentencing appeal waiver in a plea agreement. See, e.g., *United States v. Allison*, 59 F.3d 43, 46 (6th Cir. 1995); *United States v. Schmidt*, 47 F.3d 188, 190 (7th Cir. 1995); *United States v. Attar*, 38 F.3d 727, 731 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1957 (1995); *United States v. Bushert*, 997 F.2d 1343, 1350 (11th Cir. 1993), *cert. denied*, 115 S. Ct. 652 (1994); *United States v. DeSantiago-Martinez*, 980 F.2d 582, 583 (9th Cir. 1992), amended, 38 F.3d 394 (1994), *cert. denied*, 115 S. Ct. 939 (1995); *United States v. Melancon*, 972 F.2d 566, 567-568 (5th Cir. 1992); *United States v. Rivera*, 971 F.2d 876, 896 (2d Cir. 1992); *United States v. Rutan*, 956 F.2d 827, 829-830 (8th Cir. 1992).

A sentencing appeal waiver provision does not waive all claims on appeal. The courts of appeals have held that certain constitutional and statutory claims survive a sentencing appeal waiver in a plea agreement. For example, a defendant's claim that he or she was denied the effective assistance of counsel at sentencing, *United States v. Attar*, *supra*; that he or she was sentenced on the basis of race, *United States v. Jacobson*, 15 F.3d 19 (2d Cir. 1994); or that the sentence exceeded the statutory maximum, *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992), will be reviewed on the merits by a court of appeals despite the existence of a sentencing appeal waiver in a plea agreement.

2. Scope of Sentencing Appeal Waivers

A plea bargain is a contract between the prosecutor and the defendant. Thus, the scope of a sentencing appeal waiver in a plea bargain will depend upon the precise language used in the sentencing appeal waiver provision.

A broad sentencing appeal waiver requires the defendant to waive any and all sentencing issues on appeal and through collateral attack.

SAMPLE WAIVER PROVISION

The following waiver provision is an example of a broad approach that may be used in plea agreements:

- The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. Acknowledging all this, the defendant knowingly waives the right to appeal any sentence within the maximum provided in the statute(s) of conviction (or the manner in which that sentence was determined) on the grounds set forth in 18 U.S.C. § 3742 or on any ground whatever, in exchange for the concessions made by the United States in this plea agreement. The defendant also waives his right to challenge his sentence or the manner in which it was determined in any collateral attack, including but not limited to a motion brought under 28 U.S.C. § 2255.

The advantage of a broad sentencing appeal waiver is that it will bar the appeal of virtually any Sentencing Guideline issue. For example, in *United States v. Johnson*, 67 F.3d 200 (9th Cir. 1995), the Ninth Circuit dismissed the defendant's appeal because he had agreed to waive his appeal in the plea agreement. The court relied on the broad "any sentence" waiver language in the plea agreement to reject the defendant's claim that the waiver did not encompass appeal of issues arising out of a law enacted in the period between his plea and sentencing.

The disadvantage of the broad sentencing appeal waiver is that it could result in guideline-free sentencing of defendants in guilty plea cases, and it could encourage a lawless district court to impose sentences in violation of the guidelines. It is imperative to guard against the use of waivers of appeal to promote circumvention of the Sentencing Guidelines. All charging decisions and plea agreements are subject to the rules set forth in this chapter. In this regard it is also important to note that the Sentencing Commission's policy statements allow judges to accept plea agreements that do not undermine the statutory purposes of sentencing or the Sentencing Guidelines; the policy statements also admonish the parties when using stipulations to set forth the relevant facts and circumstances of the actual offense conduct and offender characteristics and not to include misleading facts. USSG §§ 6B1.2 and 6B1.4 (Nov. 1994).

Use of waiver of appeal rights in a manner resulting in sentences in violation of the Sentencing Guidelines could prompt a court of appeals to reconsider its decision to uphold the validity of a sentencing appeal waiver. Alternatively, the reviewing court could construe a sentencing appeal waiver narrowly in order to correct an obvious miscarriage of justice. To avoid these concerns, in a case involving an egregiously incorrect sentence, the prosecutor should consider electing to disregard the waiver and to argue the merits of the appeal. That would avoid confronting the court of appeals with the difficult decision of enforcing a sentencing appeal waiver that might result in a miscarriage of justice.

A second kind of sentencing appeal waiver is limited in some respect, most likely with regard to a particular sentence, sentencing range, or guideline application. For example, a sentencing appeal waiver could preclude appeal of sentences consistent with a recommended sentence, sentencing range, or particular guideline application agreed to by the parties. Thus, if the plea agreement provides that the prosecutor will recommend the lower half of the available sentences for a particular offense level applicable to the case (subject to a determination of the criminal history category), the plea agreement could also provide for a waiver of the defendant's right to appeal any sentence imposed within the agreed-upon lower half of the applicable range. Alternatively, the sentencing appeal waiver could be narrowed to apply to a particular guideline application. For example, if the parties agree that a two-level reduction for acceptance of responsibility applies, the plea agreement could provide for a waiver of the defendant's right to appeal any sentence on the basis of such a two-level reduction.

A variation of the above limited sentencing appeal waiver could be used where the parties do not agree to a particular sentencing or guideline application. The defendant can, nevertheless, agree not to appeal the court's determination of a particular factor. Thus, a waiver of appeal rights could apply to any determination by the court regarding acceptance of responsibility. Or, in a fraud case, where the amount of loss is disputed, the defendant could waive the right to appeal any determination within a specified range. Finally, a waiver could provide that the defendant will not appeal his or her sentence unless the sentence constitutes an upward departure from the guideline range deemed applicable by the sentencing court, in which case the defendant's appeal will be limited to contesting the upward departure.

The above are just some of the restricted types of waivers that can be constructed in appropriate cases; all of these waivers can extend to post-conviction rights. The advantage of a limited sentencing appeal waiver is that it is flexible and can be modified to meet the parties' needs. A limited sentencing appeal waiver may be useful when the government seeks a plea agreement, but the defendant is unwilling to plead guilty without some assurance that he or she will be entitled to appeal an erroneous sentence. The disadvantage of a limited appeal waiver is that it will not reduce the number of sentencing appeals as much as a sentencing appeal waiver that requires the defendant to relinquish appeal of all sentencing issues.

3. Government's Right to Appeal

The use of a sentencing appeal waiver in a plea agreement to bar an appeal by the defendant does not require the government to waive its right to appeal an adverse sentencing ruling. The government's retention of its right to appeal the sentence while requiring the defendant to waive his or her right to appeal does not violate any right of the defendant. *Cf. United States v. Marin, supra* (noting existence of "one-sided" sentencing appeal waiver provisions in plea agreement). However, the Fourth Circuit has held that if the government wishes to retain its right to appeal the sentence while requiring the defendant to waive his or her right to appeal the sentence, the government must explicitly reserve its right to appeal the sentence in the plea agreement. The government's retention of its appeal rights will not be inferred by silence or omission in the plea agreement. *United States v. Guevara*, 941 F.2d 1299 (4th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992). Of course, in the interest of striking a bargain, a United States Attorney's office may decide that it is necessary for the government to waive its appeal rights when the defendant takes such action. This may be especially appropriate when a negotiated plea reflects the parties' agreement in connection with a particular sentence, sentencing range, or guideline application.

4. Ensuring that the Waiver is Knowing and Voluntary

A waiver of an important constitutional or statutory right must be knowing and voluntary to be valid. *See United States v. Mezzanatto*, 115 S. Ct. at 801; *Boykin v. Alabama*, 395 U.S. 238, 243 (1969). Therefore, prosecutors should ensure that the record reflects that the defendant knowingly and voluntarily waived his or her right to appeal the sentence. *See, e.g., United States v. Johnson, supra; United States v. Attar, supra; United States v. Bushert, supra.*

It is recommended that both the plea agreement and the Rule 11 colloquy specifically spell out the sentencing appeal waiver. The plea agreement should expressly state that the defendant understands the meaning and effect of the agreement and that his or her waiver of rights is knowing and voluntary. The defendant and counsel can be required to sign those provisions separately. Two courts of appeals have found sentencing appeal waivers to be knowing and voluntary solely on the basis of the clear language of the plea agreements. *See United States v. Portillo*, 18 F.3d 290 (5th Cir.), *cert. denied*, 115 S. Ct. 244 (1994); *United States v. DeSantiago-Martinez, supra.*

Nonetheless, relying solely on the text of the plea agreement is risky. The better practice is for the district court to supplement the plea agreement by specifically referring the defendant to the sentencing appeal waiver provision and obtaining the defendant's express waiver of his or her right to appeal during the Rule 11 hearing. The courts of appeals will readily find a knowing and intelligent waiver of appeal in those circumstances. *See, e.g., United States v. Marin, supra; United States v. Melancon, supra.* If a district court judge fails to obtain the defendant's express waiver of appeal during the Rule 11 hearing, a reviewing court can remand the case to the district court for that purpose. *See United States v. Stevens*, 66 F.3d 431 (2d Cir. 1995).

5. Other Concerns

The general acceptance of the sentencing appeal waiver in the courts of appeals has caused criminal defendants to mount systemic challenges to the sentencing appeal waiver. One common and repeated challenge to the sentencing appeal waiver is the argument that a sentencing appeal waiver is involuntary as a matter of law because the defendant will not know his or her actual sentence at the time that the waiver is executed. That argument has been rejected by two courts of appeals. *See United States v. Rutan, supra; United States v. Navarro-Botello*, 912 F.2d 318, 320 (9th Cir. 1990), *cert. denied*, 112 S. Ct. 1448 (1992). *Rutan* reasoned that the validity of a waiver does not depend on the defendant's knowledge of all of the consequences of the waiver to be valid. When a defendant agrees to plead guilty, he or she does not know whether the government can prove its case and how witnesses will testify. Nonetheless, those uncertainties do not make the defendant's waiver of his or her right to contest the government's case invalid as a matter of law. For that same reason, the defendant's lack of knowledge of his or her actual sentence when the waiver is executed does not make a sentencing appeal waiver unknowing as a matter of law.

Criminal defendants are also attempting to find language in the plea agreement that allegedly authorizes them to appeal sentences despite the sentencing appeal waiver. For example, some sentencing appeal waiver provisions contain language that the defendant will be sentenced "in accordance" or "in conformity" with the Sentencing Guidelines. Although the obvious purpose of those provisions is to remind the defendant that he or

she will be sentenced under the Sentencing Guidelines, some defendants have argued that the "in accordance" or "in conformity" language means that the defendant will be sentenced correctly under the Sentencing Guidelines. Thus, if the district court errs in applying the guidelines to sentence the defendant, the plea agreement has been violated, which nullifies the sentencing appeal waiver. The Ninth Circuit has rejected that argument, reasoning that the defendant's position would effectively eviscerate the sentencing appeal waiver, which assumes that an error may be committed at sentencing. See *United States v. Bolinger*, 940 F.2d 478, 480 (9th Cir. 1991).

Of course, that problem might be avoided by redrafting the plea agreement to make clear that although the defendant will be sentenced under the Sentencing Guidelines, he or she will have no right to challenge an incorrect application of the guidelines.

[cited in [JM 9-16.001](#); [JM 9-16.330](#)]

◀ [625. Federal Rule of Criminal Procedure 11\(e\)](#).

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[627. Inadmissibility of Pleas—Federal Rule of Criminal Procedure 11\(e\)\(6\)](#) ▶

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