New York State Office of Indigent Legal Services

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WAIVER OF THE RIGHT TO APPEAL

The right to appeal from a judgment of conviction to an intermediate appellate court is guaranteed by the New York State Constitution and by statute (*see* NY Const, art VI, § 4 [k]; CPL 450.10; *People v Farrell*, 85 NY2d 60, 65 [1995]). This important right is often waived—usually as part of a plea bargain. To be binding, the appeal waiver must be voluntary, knowing, and intelligent (*see People v Seaberg*, 74 NY2d 1, 11 [1989]).

Several appellate claims cannot be waived because of a larger societal interest in their correct resolution (*see People v Callahan*, 80 NY2d 273, 280 [1992]). Among the issues that survive an enforceable appeal waiver are the right to appellate review of the voluntariness of the plea, the legality of the sentence, and the jurisdiction of the court (*see People v Seaberg*, 74 NY2d at 9).

Appellate courts play a significant and important role in protecting the rights of criminal defendants by reviewing appeal waivers to ensure that they were made knowingly and voluntarily (*see id.* at 280). The scrutiny of appeal waivers has intensified since the Court of Appeals issued its seminal decision in *People v Thomas* (34 NY3d 545 [2019]), resolving three companion cases and exploring misrepresentations of the rights actually abandoned by a valid waiver.

Totality of Circumstances

To assess the validity of a waiver, the trial court must consider the surrounding circumstances, such as the nature and terms of the agreement and the age, experience, and background of the defendant, including any history of mental illness (*see id.*; *People v Kang*, 183 AD3d 640, 641 [2d Dept 2020]; *People v R.O.*, 136 AD3d 1400, 1401 [4th Dept 2016]). The waiver cannot be accepted if any such factors reveal that it was not knowing, voluntary, and intelligent.

Appeal waivers are enforceable only if the totality of the circumstances shows that the defendant understood the nature of the rights being waived and the consequences of the waiver. Overbroad language does not necessarily prevent the enforcement of waivers if relevant facts indicate that they were knowingly, intelligently, and voluntarily entered (*see People v Thomas*, 34 NY3d at 560). Since *Thomas*, it has become clear that appellate courts must seriously and realistically assess whether the record demonstrates that the defendant fully appreciated the consequences of the plea and the appeal waiver.

This is especially true where there was no detailed written waiver correctly explaining the appellate process and sufficiently addressing any ambiguities in the court's colloquy (*see id.* at 568). But an accurate written waiver will not necessarily cure a deficient on-the-record explanation of the nature of the waiver of appeal (*see People v Blauvelt*, 211 AD3d 1175, 1175 [3d Dept 2022]). Proper consideration

must be given to all relevant elements—the colloquy; the written waiver; the defendant's consultation with counsel; on-the-record acknowledgments of the defendant's understanding; and the defendant's age, experience, and prior experience with the criminal justice system (*see People v Thomas*, 34 NY3d at 559-560).

Separate and Distinct

The trial court must also ensure that the defendant understood that the right to appeal is separate and distinct from the numerous other trial rights automatically forfeited upon pleading guilty—the *Boykin* constitutional rights—a requirement frequently disregarded by trial courts (*see Boykin v Alabama*, 395 US 238 [1969]; *People v Lopez*, 6 NY3d 248, 256 [2008]).

When a trial court conflates the right to appeal and the rights forfeited by a guilty plea, the appellate court is unable to determine whether the defendant understood the nature of the waiver of appellate rights (*see People v Johnson*, 37 NY3d 1166, 1166-1167 [2022]; *People v Lopez*, 6 NY3d 248, 256 [2006]). While a defendant automatically forfeits certain rights by pleading guilty, the waiver of appeal requires the defendant to voluntarily relinquish a known, separate right that would otherwise have survived the guilty plea (*see id*.).

Absolute Bar

An appeal waiver is also invalid if it is characterized as an absolute bar to taking an appeal and/or pursuing post-conviction relief, such as a CPL article 440 motion or federal habeas corpus petition (*see People v Shanks*, 37 NY3d 244, 253 [2021]). It is well established that a waiver of appeal is not an absolute bar to taking a direct appeal (*see People v Callahan*, 80 NY2d 273, 280 [1992]).[1] Yet plea courts often indicate otherwise (*see People v Bisono*, 36 NY3d 1013, 1017-1018 [2020]; *People v Thomas*, 34 NY3d at 565-566).

It is also serious error when a trial court describes appellate rights being waived as encompassing not only the direct appeal and the rights to counsel and poor person relief, but also all post-conviction relief (*see id.* at 565). After all, when a trial court has utterly "mischaracterized the nature of the right a defendant was being

[1] The Model Colloquy for the waiver of the right to appeal drafted by the Criminal Jury Instructions and Model Colloquy Committee of the Unified Court System provides that a defendant who pleads guilty should be able to pursue an intermediate appeal as of right.

> "By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal ... within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, including a claimed error in the denial of your motion to suppress and to consider whether the sentence I impose…is excessive and should be modified."

The model colloquy makes no mention made of an absolute bar to the taking of an appeal or any purported waiver of collateral or federal relief or to the complete loss of the right to counsel to prosecute the direct appeal.

asked to cede," an appellate court cannot be sure that the defendant comprehended the nature of the waiver (*id.* at 566-567).

No particular litany is required to explain the distinction between a so-called "waiver of the right to appeal" and the reality that, at most, appellate review of certain issues can be forfeited (*see People v Thomas*, 34 NY3d at 559). However, courts must keep in mind that shorthand terms can misleadingly suggest "a monolithic end to all appellate rights, when, in fact, no appeal waiver serves as an absolute bar to all appellate claims" (*id.*, quoting *Garza v Idaho*, 139 S Ct 738, 744 [2019]).