

5-1-2010

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Recommended Citation

Alexandra W. Reimelt, *An Unjust Bargain: Plea Bargains and Waiver of the Right to Appeal*, 51 B.C.L. Rev. 871 (2010), <http://lawdigitalcommons.bc.edu/bclr/vol51/iss3/7>

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AN UNJUST BARGAIN: PLEA BARGAINS AND WAIVER OF THE RIGHT TO APPEAL

Abstract: The U.S. Supreme Court estimates that at least ninety percent of criminal convictions are based on guilty pleas. Frequently, criminal defendants are required to waive their appellate rights as a condition of the plea bargain. The Supreme Court has not addressed the validity of these waivers, but most federal and state courts to address the issue hold them enforceable when they are made knowingly and voluntarily. A minority of states grant defendants the statutory right to appeal adverse determinations on motions to suppress evidence following the entry of a guilty plea. California and New York hold that this additional appellate right may be waived in a plea agreement. This Note asserts that waivers of this specific right should not be enforceable because such waivers are often extracted under coercive circumstances that violate due process and contract law principles. Furthermore, waivers of this right contravene legislatures' interest in efficiency by encouraging defendants to proceed to trial solely to preserve their claims of error for appeal.

INTRODUCTION

On December 17, 1986, Police Officers Diaz and Atkins observed Alfredo Ventura walking down the street while patrolling a "drug prone" area of Manhattan.¹ Diaz became suspicious when he saw Ventura adjusting his jacket pocket.² Based on this observation, the officers parked their car and followed Ventura, who had entered a locked building and was in the vestibule area.³ Diaz and Atkins entered with their hands on their guns and approached Ventura as he attempted to open the door to the building's interior.⁴ When Ventura turned and responded to Diaz's questions, Diaz noticed a bulge on the left side of Ventura's jacket.⁵ Without making any inquiry, Diaz immediately put his hand on the bulge, felt that it was hard, and ordered Ventura to unzip his jacket.⁶

¹ *People v. Ventura*, 531 N.Y.S.2d 526, 528 (App. Div. 1988).

² *Id.*

³ *See id.*

⁴ *Id.*

⁵ *Id.* at 529.

⁶ *Id.*

Ventura complied, and Diaz reached inside the jacket and retrieved a brown paper bag containing nine ounces of cocaine.⁷

The government brought charges against Ventura for criminal possession of a controlled substance in the first and third degrees.⁸ The trial court denied Ventura's pretrial motion to suppress the cocaine evidence.⁹ The officers stated at the motion hearing that they believed Ventura may have had a gun in his jacket.¹⁰ The court concluded that Diaz's conduct in touching the visible bulge and ordering Ventura to open his jacket was reasonable under the circumstances.¹¹

Prior to the hearing, the government offered Ventura a plea to second-degree possession with a minimum sentence of three years if he withdrew his motion to suppress.¹² Because the government's entire case rested on the evidence of the cocaine, it would have been required to drop all charges if the judge granted the motion and excluded this evidence.¹³ The government, however, warned Ventura that if he proceeded with the motion and lost, the plea offer's sentence would be doubled to a minimum of six years.¹⁴ Furthermore, the government would require that Ventura waive his right to appellate review of the suppression motion in the subsequent plea.¹⁵

Nevertheless, Ventura proceeded with his suppression motion.¹⁶ After losing, he accepted the less-favorable plea bargain and came before the appeals court seeking a reversal of the suppression ruling.¹⁷ The government contended that the issue was not properly before the appellate court because Ventura had waived his right to appeal the suppression motion in his plea.¹⁸ The appeals court reached the issue,

⁷ *Ventura*, 531 N.Y.S.2d at 529.

⁸ *Id.* at 529 n.2.

⁹ *Id.* at 529. The Fourth Amendment grants individuals the right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." U.S. CONST. amend. IV. To justify a frisk or pat down of an individual during a street encounter, the U.S. Supreme Court requires that police have a reasonable belief that the suspect is armed and dangerous based on specific facts and the inferences drawn from those facts. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). The scope of this protective search is restricted to that which is necessary to discover weapons. *Id.* at 29.

¹⁰ *See Ventura*, 531 N.Y.S.2d at 528-29.

¹¹ *See id.* at 529.

¹² *Id.*

¹³ *See id.* at 531, 535.

¹⁴ *See id.* at 529.

¹⁵ *Id.*

¹⁶ *Ventura*, 531 N.Y.S.2d at 529.

¹⁷ *Id.*

¹⁸ *Id.*

“in the interest of justice,” and held the appellate waiver invalid.¹⁹ The court reviewed the merits of the suppression motion, granted suppression, reversed the guilty plea conviction, and dismissed the indictment.²⁰ These facts, excerpted from the New York Appellate Division’s 1988 decision in *People v. Ventura*, underscore the coercive role that appellate waivers can play in criminal plea bargains.²¹

Plea bargains are the predominant means of resolving criminal cases, and their prevalence leads commentators to conclude that this process “is not some adjunct to the criminal justice system; it is the criminal justice system.”²² The U.S. Supreme Court has estimated that at least ninety percent of criminal convictions are based on guilty pleas.²³ Increasingly, many criminal defendants are required to waive their right to appeal as a condition of the plea bargain.²⁴ Appeal waivers of pretrial motions to suppress evidence, like the one in *Ventura*, are especially significant because decisions on these motions determine whether certain evidence, often essential to the government’s case, is admissible or must be excluded from trial.²⁵ Because of the important role suppression motions play in final case outcomes, and the coercive manner in which suppression motion appeal waivers are often extracted, these waivers should be unenforceable.²⁶

This Note evaluates the legal arguments in federal and state courts for and against the waiver of appellate rights in plea bargains, specifically the waiver of the right to appeal suppression motion determinations.²⁷ Part I explains the significance of plea bargains in the criminal system.²⁸ It also identifies the appellate rights that remain following a guilty plea that may be subject to waiver.²⁹ Part II evaluates the arguments adopted by the majority of courts for enforcing appellate wai-

¹⁹ *Id.*

²⁰ *Id.* at 535.

²¹ *See id.* at 528–29; Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 129 (1995) (explaining that requiring a defendant to waive appellate rights is an increasingly common condition of plea agreements).

²² Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992).

²³ *Brady v. United States*, 397 U.S. 742, 752 n.10 (1970).

²⁴ *See, e.g., People v. Olson*, 264 Cal. Rptr. 817, 819 (Ct. App. 1989) (noting that appellate waivers in plea bargains are a “powerful tool” in limiting undeserving appeals); *People v. Burk*, 586 N.Y.S.2d 140, 141 (App. Div. 1992) (stating that the court normally insists on such waivers in plea bargains); Calhoun, *supra* note 21, at 128.

²⁵ *See* 531 N.Y.S.2d at 531.

²⁶ *See id.* at 531–33; *infra* notes 211–292 and accompanying text.

²⁷ *See infra* notes 116–210 and accompanying text.

²⁸ *See infra* notes 36–76 and accompanying text.

²⁹ *See infra* notes 36–76 and accompanying text.

ers.³⁰ These courts conclude that such waivers comport with due process, are supported by contract law, and advance public policy.³¹ Part III discusses the determinations made by the minority of courts, which hold these waivers per se invalid.³² These courts explain that the waivers contravene due process and contract law, and undermine public policies served by appellate review.³³ Part IV examines the courts' decisions on the specific waiver of the statutory right to appeal adverse suppression motion determinations following a guilty plea.³⁴ Finally, Part V argues that where states have granted the statutory right to appeal adverse suppression motions following a plea, the waiver of this right must never be valid.³⁵

I. PLEA BARGAINS AND THE WAIVER OF THE RIGHT TO APPEAL

This Part outlines the importance of plea bargains in the criminal system.³⁶ It begins by explaining the U.S. Supreme Court's endorsement of this process as an efficient and equitable means of adjudicating criminal cases.³⁷ It then details the waiver of constitutional rights in plea bargains.³⁸ Lastly, it introduces the rights that a defendant retains, following a guilty plea, that he may waive in an express appellate waiver.³⁹

A. Policy Arguments for Plea Bargains

In 1970, the U.S. Supreme Court explained in *Brady v. United States* that guilty pleas serve a number of public policies and that the State may justifiably extend a benefit to a defendant who has extended a benefit to the State.⁴⁰ By pleading guilty, a defendant who sees a small chance for acquittal can obtain concessions in his probable penalty, begin the correctional process promptly, and free himself from the burdens of a trial.⁴¹ For the State, avoiding a trial preserves scarce prosecutorial and judicial resources for those cases in which there is a substantial question

³⁰ See *infra* notes 77–115 and accompanying text.

³¹ See *infra* notes 77–115 and accompanying text.

³² See *infra* notes 116–161 and accompanying text.

³³ See *infra* notes 116–161 and accompanying text.

³⁴ See *infra* notes 162–210 and accompanying text.

³⁵ See *infra* notes 211–292 and accompanying text.

³⁶ See *infra* notes 36–76 and accompanying text.

³⁷ See *infra* notes 40–44 and accompanying text.

³⁸ See *infra* notes 45–58 and accompanying text.

³⁹ See *infra* notes 59–76 and accompanying text.

⁴⁰ See 397 U.S. 742, 752–53 (1970).

⁴¹ *Id.* at 752.

about the defendant's guilt or the State's capacity to meet its burden of proof.⁴² Additionally, the defendant's agreement to plead guilty satisfies the public's interest in prosecution of crime and increases the chance for successful rehabilitation through prompt punishment.⁴³ For these reasons, the Supreme Court has encouraged fair plea bargaining.⁴⁴

B. *The Valid Waiver of Constitutional Rights in Plea Bargains*

The Supreme Court addressed the waiver of constitutional rights in plea bargains in *Brady* when it held that defendants may waive these rights as a valid condition of a plea bargain.⁴⁵ To comport with due process, the Court required that waivers of constitutional rights in guilty pleas be "voluntary[,] . . . knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences."⁴⁶

The Supreme Court has instructed lower courts accepting guilty pleas to apply the knowing and voluntary test with great care.⁴⁷ Courts must satisfy themselves that defendants' admissions of guilt are accurate and reliable.⁴⁸ The Court has explained that factors such as a defendant's representation by competent counsel and awareness of the nature of the charges against him support the conclusion that a plea is constitutional.⁴⁹ The Court noted, however, that an otherwise valid plea is not rendered invalid because the defendant overestimated the

⁴² *Id.*

⁴³ *See id.* at 752–53.

⁴⁴ *See Santobello v. New York*, 404 U.S. 257, 260 (1971) ("If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities."); *Brady*, 397 U.S. at 752–53.

⁴⁵ *See* 397 U.S. at 752–53. The Court explained that by admitting guilt, a defendant waives his Fifth Amendment right to be free from self-incrimination and his Sixth Amendment right to a jury trial. *See id.* at 748–49. The Court held that the fear of being sentenced to death following a jury trial did not render a guilty plea involuntary. *See id.* at 749–50. The Court explained that it does not violate Fifth Amendment due process rights to encourage a guilty plea in exchange for leniency in the sentence recommendation. *See id.* One commentator has suggested that "[i]t is waiver of rights that permits the system of criminal justice to work at all." Daniel P. Blank, *Plea Bargain Waivers Reconsidered: A Legal Pragmatist's Guide to Loss, Abandonment and Alienation*, 68 *FORDHAM L. REV.* 2011, 2011 (2000). *See generally* Carl Takei, Note, *Terrorizing Justice: An Argument That Plea Bargains Struck Under the Threat of "Enemy Combatant" Detention Violate the Right to Due Process*, 47 *B.C. L. REV.* 581 (2006).

⁴⁶ *Brady*, 397 U.S. at 748.

⁴⁷ *See id.* (characterizing the admission of guilt and relinquishment of constitutional rights as a "grave and solemn" act).

⁴⁸ *Id.* at 758.

⁴⁹ *Id.* at 756.

strength of the State's case or the likely penalties stemming from a trial.⁵⁰ Furthermore, although guilty pleas may dissuade a defendant from exercising constitutional rights, the Constitution does not bar criminal defendants from making those difficult decisions.⁵¹

Rule 11 of the Federal Rules of Criminal Procedure ("FRCP") provides additional guidelines for district courts accepting guilty pleas.⁵² The courts must address defendants directly and determine that they understand that their guilty pleas waive, amongst other things, their right to a jury trial, right to confront witnesses, and right to be free from self-incrimination.⁵³ The court must also determine that the plea is voluntary and did not result from force or threats.⁵⁴

States tend to follow the *Brady* guidelines and the FRCP when accepting guilty pleas.⁵⁵ For example, Michigan courts require that no guilty plea shall be accepted by a trial judge until facts "sufficient to establish the defendant's guilt have been set out in the record."⁵⁶ The court must make an inquiry "to ascertain that the plea was freely, understandably, and voluntarily made . . ."⁵⁷ Rule 17 of the Arizona Rules of Criminal Procedure states that a guilty plea must be accepted only when knowingly and voluntarily made by the defendant personally in open court.⁵⁸

C. *Rights That Survive Guilty Pleas and Are Subject to Waiver*

Increasingly, plea agreements in federal and state courts are conditioned on the defendant's express waiver of the right to appeal.⁵⁹ For example, the guilty plea at issue in the U.S. Court of Appeals for the

⁵⁰ *Id.* at 757.

⁵¹ See *Chaffin v. Stynchcombe*, 412 U.S. 17, 30–31 (1973) (noting that although the fear of the death penalty following a jury trial may have dissuaded the defendant from exercising his Sixth Amendment right to a jury trial, this discouragement did not render the plea involuntary).

⁵² See FED. R. CRIM. P. 11.

⁵³ See *id.* 11(b)(1)(A)–(F).

⁵⁴ See *id.* 11(b)(2).

⁵⁵ See, e.g., ARIZ. R. CRIM. P. 17.3 (requiring courts to address defendants in open court and determine that they voluntarily wish to forgo certain constitutional rights); *People v. Carlisle*, 195 N.W.2d 851, 852–53 (Mich. 1972) (requiring that a trial judge establish a factual basis for the plea and determine that it is knowingly and voluntarily made).

⁵⁶ *Carlisle*, 195 N.W.2d at 852.

⁵⁷ *Id.* at 853.

⁵⁸ ARIZ. R. CRIM. P. 17.3.

⁵⁹ See, e.g., *People v. Olson*, 264 Cal. Rptr. 817, 819 (Ct. App. 1989) (encouraging waivers as a way to avoid frivolous appeals); *People v. Burk*, 586 N.Y.S.2d 140, 141 (App. Div. 1992) (observing that appellate waivers are generally required in pleas); Calhoun, *supra* note 21, at 129.

Fourth Circuit's 1990 decision in *United States v. Wiggins* contained a provision stating that the defendant "expressly waives the right to appeal his sentence on any ground" in exchange for the concessions made by the government in this agreement.⁶⁰ Explained one New York judge, "I normally insist on that on [*sic*] the price of my plea agreement."⁶¹

Even in the absence of these express waivers, a guilty plea constitutes a knowing and voluntary admission of factual guilt that forfeits a defendant's ability to raise many, though not all, claims on appeal.⁶² In 1973, the U.S. Supreme Court stated in *Tollett v. Henderson* that a defendant's open-court admission to the charged offenses represents a break in the series of events that preceded it in the criminal process.⁶³ Consequently, a guilty plea sacrifices the defendant's right to appeal independent constitutional violations that occurred prior to the entry of the guilty plea.⁶⁴

The Court clarified this rule when it stated that a guilty plea does not inevitably "waive" all prior constitutional violations.⁶⁵ It explained that several violations do survive a guilty plea and can be appealed after the taking of the plea.⁶⁶ A guilty plea merely renders irrelevant the constitutional violations logically consistent with the establishment of the defendant's guilt.⁶⁷ For example, the constitutional claim of double jeopardy survives a guilty plea.⁶⁸ Additionally, violations that occur during the taking of the plea, such as claims of ineffective assistance of counsel, survive a guilty plea.⁶⁹ Sentencing issues that arise after the court accepts a guilty plea can also be appealed.⁷⁰ Lastly, certain states

⁶⁰ 905 F.2d 51, 52 (4th Cir. 1990).

⁶¹ *Burk*, 586 N.Y.S.2d at 141 (responding to a prosecutor's statement during the Rule 11 colloquy that the defendant had agreed to a "waiver of any rights he may have to appeal the plea or the hearing in this matter").

⁶² See *Tollett v. Henderson*, 411 U.S. 258, 266–67 (1973) (concluding that defendant's guilty plea foreclosed independent inquiry into the claim of discrimination in grand jury selection).

⁶³ *Id.* at 267.

⁶⁴ See *id.* at 266–67.

⁶⁵ See *Menna v. New York*, 423 U.S. 61, 63 & n.2 (1975) (per curiam) (holding that the defendant did not waive his double jeopardy claim when he entered the plea because the defendant's claim was that the State could not convict him regardless of whether his factual guilt was established).

⁶⁶ See *id.* at 63 n.2.

⁶⁷ See *id.*

⁶⁸ See *id.*

⁶⁹ See *Tollett*, 411 U.S. at 267 (permitting a defendant to challenge the proceedings of the plea but not an antecedent constitutional violation).

⁷⁰ Cf. *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) (explaining that the statutory right to appeal a sentence can be waived); *United States v. Navarro-Botello*, 912

have carved out statutory exceptions to the general rule stated in *Tollett* and permit defendants to appeal suppression motions despite the fact that their convictions were based on a guilty plea.⁷¹ All of these claims survive a guilty plea and can be subject to express appellate waivers.⁷²

Although the U.S. Supreme Court has not addressed the validity of appellate waivers in plea agreements, most U.S. courts of appeals and state courts to address the issue hold that a defendant may waive his right to appeal in a knowing and voluntary plea agreement.⁷³ One federal district court and a minority of state courts, however, hold appellate waivers invalid because they find them per se violations of due process that contravene the public interest in appellate review and fair negotiations.⁷⁴ California courts hold the specific waiver of the additional statutory right to appeal suppression motions valid so long as the waiver is knowing and voluntary.⁷⁵ New York appellate courts, in con-

F.2d 318, 319 (9th Cir. 1990) (refusing to hear defendant's appeal because he had validly waived his right to appeal his sentence as part of his plea agreement).

⁷¹ See, e.g., CAL. PENAL CODE § 1538.5(m) (West 2007) (permitting the defendant to appeal the suppression motion following the plea provided that the defendant moved for suppression before the plea was entered); N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 1970) (permitting an appeal of a suppression motion following a plea-based conviction); N.C. GEN. STAT. ANN. § 15A-979(b) (West 1979) (permitting an appeal of a suppression motion following a plea-based conviction); WIS. STAT. ANN. § 971.31(10) (West 2009) (allowing a defendant to challenge the denial of a motion to suppress evidence following a guilty plea).

⁷² See, e.g., *Wiggins*, 905 F.2d at 53 (holding that the defendant could not appeal his sentence after he knowingly and voluntarily waived his appellate rights as a condition of his plea bargain); *People v. Charles*, 217 Cal. Rptr. 402, 406 (Ct. App. 1985) (holding that a defendant may knowingly and voluntarily waive his right to appeal the denial of a suppression motion); *People v. Williams*, 331 N.E.2d 684, 684 (N.Y. 1975) (per curiam) (holding that the right to appeal suppression motions following a plea may be waived in certain circumstances).

⁷³ See, e.g., *Wiggins*, 905 F.2d at 54 (dismissing defendant's appeal because his waiver was a knowing and voluntary act); *Olson*, 264 Cal. Rptr. at 819 (encouraging waiver of the right to appeal). Commentators suggest that although the Supreme Court has not ruled on the issue specifically, its approval of prosecutorial solicitation of waivers of the protections of Rule 11(e)(6) of the FRCP and Rule 410 of the Federal Rules of Evidence suggest that the Court would approve the practice of conditioning pleas on appellate waivers if the issue came before it. Calhoun, *supra* note 21, at 139 & n.63 (citing *United States v. Mezzanatto*, 513 U.S. 196, 214–16 (1995)).

⁷⁴ See, e.g., *United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997) (classifying these waivers as unfair contracts of adhesion); *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (invalidating a waiver because of the impermissible burden it placed on the right to appeal).

⁷⁵ See *People v. Berkowitz*, 40 Cal. Rptr. 2d 150, 152 (Ct. App. 1995); *Charles*, 217 Cal. Rptr. at 406.

trast, are split over whether a knowing and voluntary waiver of the additional right must also be justified by a legitimate State interest.⁷⁶

II. THE MAJORITY OF COURTS' REASONING FOR ENFORCING APPELLATE WAIVERS

Courts upholding appellate waivers utilize contract law, and due process and public policy considerations to justify their decisions.⁷⁷ The majority of federal and state courts addressing the constitutionality of plea bargains conditioned on the express waiver of appellate rights hold these agreements valid so long as they are knowing and voluntary.⁷⁸ Courts that hold these waivers enforceable under a due process analysis also explain that these waivers serve the public interest in finality, efficiency, and the preservation of resources in the criminal justice system.⁷⁹ Furthermore, certain courts upholding these waivers reason that contract law principles require enforcement because the parties to these agreements must be held to their promises.⁸⁰

A. *Due Process Justifications and a Knowing and Voluntary Relinquishment*

Courts enforcing appellate waivers conclude that because defendants may waive constitutional rights in plea agreements, it follows that rights not protected by the Constitution, such as the statutory right to appeal, must also be waivable.⁸¹ Most U.S. courts of appeals and state

⁷⁶ Compare *People v. Ventura*, 531 N.Y.S.2d 526, 531–32 (App. Div. 1988) (requiring implicitly that the waiver further a legitimate State interest in addition to being knowing and voluntary), with *People v. Gray*, 432 N.Y.S.2d 153, 153 (App. Div. 1980) (dismissing a defendant's appeal because his waiver was knowing and voluntary).

⁷⁷ See, e.g., *United States v. Navarro-Botello*, 912 F.2d 318, 319, 321 (9th Cir. 1990) (holding that a defendant could not appeal following his plea because his knowing and voluntary waiver of the right to appeal as part of his negotiated plea agreement did not violate due process or public policy); *State v. Hinnners*, 471 N.W.2d 841, 845 (Iowa 1991) (holding that a defendant may expressly waive the right to appeal in a plea bargain when the waiver is knowing and voluntary).

⁷⁸ See, e.g., *Navarro-Botello*, 912 F.2d at 319, 321; *Hinnners*, 471 N.W.2d at 845; see also *infra* notes 81–93 and accompanying text.

⁷⁹ See *Hinnners*, 471 N.W.2d at 845; *infra* notes 94–102 and accompanying text.

⁸⁰ See *United States v. Howle*, 166 F.3d 1166, 1168–69 (11th Cir. 1999) (explaining that under contract law principles, appellate rights may freely be traded for something more highly valued); *infra* notes 103–115 and accompanying text.

⁸¹ See, e.g., *United States v. Melancon*, 972 F.2d 566, 567 (5th Cir. 1992) (noting that if a defendant can waive constitutional rights in a plea, it follows that a defendant should also be able to waive statutory rights in a plea); *Navarro-Botello*, 912 F.2d at 321 (explaining that if due process permits the waiver of a constitutional right, then a defendant's waiver of a statutory right must also be enforceable).

courts that have reviewed appellate waivers enforce them under the knowing and voluntary test.⁸²

The U.S. Supreme Court holds that defendants may knowingly and voluntarily waive even uncertain rights.⁸³ For this reason, circuit courts conclude that defendants may validly waive the right to appeal future sentencing errors.⁸⁴ In 1990, the U.S. Court of Appeals for the Ninth Circuit in *United States v. Navarro-Botello* rejected the defendant's argument that his plea was involuntary because he could not know what sentencing issue might arise until after sentencing.⁸⁵ The court reasoned that the defendant knew he was giving up possible appeals, and even though he did not know exactly what the nature of those appeals might be, this knowledge sufficiently rendered his plea voluntary.⁸⁶ Similarly, the U.S. Court of Appeals for the Eighth Circuit has explained that because plea bargains are upheld when the defendant waives his right to a jury trial without knowing how well the State will make its case, they must be upheld when a defendant waives his right to appeal without knowing all the potential issues on appeal.⁸⁷

Furthermore, in 1992, the Ninth Circuit held in *United States v. De-Santiago-Martinez* that an appellate waiver was knowing and voluntary even when the Rule 11 colloquy did not specifically mention its inclusion in the plea.⁸⁸ The court explained that the text of the waiver in the plea bargain was simple and clear.⁸⁹ The U.S. Court of Appeals for the Eleventh Circuit, in contrast, held in 1993 in *United States v. Bushert* that

⁸² See, e.g., *United States v. Michelsen*, 141 F.3d 867, 871 (8th Cir. 1998) (stating that the court's review was limited to whether the defendant's decision to bind himself to the provisions of the agreement was knowing and voluntary); *Navarro-Botello*, 912 F.2d at 319; *People v. Seaberg*, 541 N.E.2d 1022, 1026 (N.Y. 1989). Commentators advocating for such waivers note that trial judges are permitted not to honor a plea or to vacate a plea already taken if they find it does not satisfy the knowing and voluntary test. See Derek Teeter, Comment, *A Contracts Analysis of Waivers of the Right to Appeal in Criminal Plea Bargains*, 53 U. KAN. L. REV. 727, 741 (2005). Furthermore, the fact that a "price" is placed upon the right to appeal by prosecutors does not contravene due process because prosecutors and defendants place value upon all the "goods" they trade during the plea bargaining process to establish the plea's conditions. See *id.* at 740. This limitation on the right to appeal, importantly, is not one imposed by the State to dissuade others from exercising that same right, but rather one accepted by the defendant during the exchange. *Id.*

⁸³ See *Newton v. Rumery*, 480 U.S. 386, 394 (1987) (permitting an individual to give up a somewhat unknown right in agreeing not to file a § 1983 claim in exchange for the prosecutor's dismissal of pending criminal charges).

⁸⁴ *Navarro-Botello*, 912 F.2d at 320 (discussing *Newton*, 480 U.S. 386).

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ See *United States v. Rutan*, 956 F.2d 827, 830 & n.2 (8th Cir. 1992).

⁸⁸ See 38 F.3d 394, 395 (9th Cir. 1992).

⁸⁹ See *id.*

most circumstances require an explicit Rule 11 discussion of the waiver for it to be valid.⁹⁰ This discussion assures the judge that the defendant made a voluntary decision with an understanding of both the charges against him and the rights he was sacrificing.⁹¹ The government must show that the district court specifically questioned the defendant about the appeal waiver during the Rule 11 colloquy, or that there is a “[m]anifestly clear indication in the record that the defendant otherwise understood the full significance of the sentence appeal waiver”⁹² Although there are variations in the knowing and voluntary test, the majority of U.S. courts of appeals that have evaluated appeal waivers permit them because they satisfy a due process analysis.⁹³

B. *Public Policy Justifications*

The judicial support for appellate waivers rests on public policies favoring finality, efficiency, and the preservation of judicial resources.⁹⁴ U.S. courts of appeals have explained that public policy supports these waivers because they save the time and money spent on appellate review.⁹⁵ For example, the Eighth Circuit has reasoned that the government grants the defendant sentencing concessions in exchange for the knowledge that it will not need to expend resources preserving the judgment on appeal.⁹⁶ The court has explained that a chief virtue of plea bargains is finality, and that appeal waivers serve this interest by preserving the finality of convictions reached through guilty pleas.⁹⁷

In 1989, the New York Court of Appeals announced in *People v. Seaberg* that there was no affirmative public policy served by encouraging appeals or prohibiting their waiver.⁹⁸ Rather, the court identified final and expedient settlement of litigation that is free from coercion as a critical policy goal.⁹⁹ The court concluded that the negotiation proc-

⁹⁰ 997 F.2d 1343, 1351–52 (11th Cir. 1993) (noting that a defendant’s knowing and voluntary waiver of the right to appeal is generally enforceable, but holding that the appeal waiver in question was unenforceable because it was not specifically discussed during the Rule 11 colloquy).

⁹¹ *See id.* at 1352.

⁹² *Id.*

⁹³ *See id.* at 1351–52; *DeSantiago-Martinez*, 38 F.3d at 395.

⁹⁴ *See Seaberg*, 541 N.E.2d at 1024–25.

⁹⁵ *See Michelsen*, 141 F.3d at 873; *Navarro-Botello*, 912 F.2d at 321–22.

⁹⁶ *See Michelsen*, 141 F.3d at 873 (dismissing appeal to preserve “bargained-for” finality).

⁹⁷ *Rutan*, 956 F.2d at 829.

⁹⁸ 541 N.E.2d at 1025.

⁹⁹ *Id.*

ess serves little purpose if parties are not bound to their agreements.¹⁰⁰ That same year, the California Court of Appeal suggested in *People v. Olson* that trial judges and prosecutors obtain a defendant's waiver of appellate rights in guilty pleas.¹⁰¹ The court explained that the public interest in an efficient and economical criminal justice system encouraged the inclusion of such waivers in pleas to free taxpayers and overwhelmed appellate courts from frivolous appeals.¹⁰²

C. Contract Law Justifications

Some federal and state courts examine plea bargains under a contract law analysis and conclude that appeal waivers constitute a mutually beneficial agreement.¹⁰³ The U.S. Court of Appeals for the Eleventh Circuit has characterized plea agreements as contracts between the defendant and the government; a defendant waives his appeal rights in consideration for something more highly valued—a lesser sentence.¹⁰⁴ The Eleventh Circuit has explained that although it may appear unjust to allow criminal defendants to bargain away meritorious appeals, con-

¹⁰⁰ *Id.* at 1026.

¹⁰¹ See 264 Cal. Rptr. 817, 819 (Ct. App. 1989) (noting that although little can be done to affect criminal appeals in cases that have gone to trial, appellate waivers in plea bargains are a "powerful tool" in limiting undeserving appeals). Commentators explain that many courts support waivers based on the idea that because there is a right to a free appeal, there is little incentive for defendants not to appeal, and thus the system is overwhelmed by meritless appeals. See Calhoun, *supra* note 21, at 180. Courts frequently view such appeals as "endless quest[s] for technical errors unrelated to guilt or innocence" that make a mockery of the criminal justice system. See *id.* (quoting Warren E. Burger, *Annual Report to the American Bar Association by the Chief Justice of the United States*, 67 A.B.A. J. 290, 292 (1981)). This explanation, however, is critiqued by scholars who note that an increase in criminal appeals may be the result of factors outside of the control of the individual criminal defendants. *Id.* at 183. For example, complex federal sentencing statutes provide ample room for judicial error and create an appellate right where none previously existed. *Id.*

¹⁰² See *Olson*, 264 Cal. Rptr. at 819.

¹⁰³ See, e.g., *Howle*, 166 F.3d at 1169 (explaining that plea agreements are bargains); *Seaberg*, 541 N.E.2d at 1025 (explaining that defendants have the choice of whether or not to accept the plea bargain). Scholars advocating a contract law approach to plea bargains state that because plea bargaining is driven by the interests of the parties to a case, the law should allow the parties broad discretion to maximize their interests by mutual agreement. Teeter, *supra* note 82, at 731. These commentators assert that contract law, rather than due process jurisprudence, should be used to analyze appeal waivers because contract law can most adequately assure a free, fair, and efficient bargaining process that brings about just results. *Id.* at 750. Furthermore, restricting a defendant's ability to waive his right to an appeal—a "good" he can offer in exchange for a reduced sentence—may make it more difficult for a defendant to receive an advantageous bargain. See *id.* at 749.

¹⁰⁴ See *Howle*, 166 F.3d at 1169.

tract law principles justify this free trading of rights.¹⁰⁵ In 1995, the U.S. Court of Appeals for the Seventh Circuit concluded in *United States v. Wenger* that rights holders are benefited when they can choose between exercising the right and exchanging it for something more valuable.¹⁰⁶ The court explained that allowing defendants to benefit from the existing agreement without being bound by the appellate waiver would render their promises meaningless and be destructive to the entire plea process.¹⁰⁷

The U.S. Court of Appeals for the Second Circuit has cautioned, however, that a plea bargain “contract” involves constitutional rights.¹⁰⁸ Thus, the relationship between plea agreements and contract law is not completely analogous because pleas implicate significant fairness concerns absent in commercial contracts.¹⁰⁹ Furthermore, the Second Circuit has explained that contract law requires courts to construe the plea against the government as the agreement’s drafter and holder of advantageous bargaining power.¹¹⁰

New York state courts also have adopted the contract law approach to appeal waivers.¹¹¹ The New York Appellate Division has concluded that when the defendant receives the benefit of sentencing concessions in exchange for the appeal waiver, courts must uphold waivers to assure the State receives its benefit from the bargain.¹¹² The New York Court of Appeals in *Seaberg* implicitly addressed the fairness concerns present in contract law when it stated that bargains made fairly should signal an

¹⁰⁵ *See id.* The Eleventh Circuit held that after the defendant had signed his appeal waiver, the district court’s erroneous statement that the defendant could appeal had no effect on the bargain. *See id.* Just as any attempt to modify a contract after its acceptance is invalid, the district court could not attempt to change the terms of the plea after its acceptance. *See id.*

¹⁰⁶ 58 F.3d 280, 282 (7th Cir. 1995).

¹⁰⁷ *See id.* (stating that the defendant “cannot have his cake and eat it too,” the court held the defendant’s waiver of his right to appeal valid and dismissed his appeal).

¹⁰⁸ *United States v. Ready*, 82 F.3d 551, 558 (2d Cir. 1996).

¹⁰⁹ *See id.* *But see Howle*, 166 F.3d at 1168 (stating that “a plea agreement is, in essence, a contract between the Government and a criminal defendant”).

¹¹⁰ *See Ready*, 82 F.3d at 559. Although the Second Circuit has held that appeal waivers are theoretically valid, it did not uphold the waiver at issue because the district court did not explain to the defendant that his appeal waiver included the waiver of the right to appeal an illegally imposed sentence. *See id.* at 560. Because the defendant waives the “valuable” right to correct a district court’s unknown and unannounced sentence in an appeal waiver, this court explained that a “knowing” waiver requires the district court to ensure that the defendant understands the full consequences of this act. *See id.* at 558.

¹¹¹ *See, e.g., Seaberg*, 541 N.E.2d at 1025; *People v. Burk*, 586 N.Y.S.2d 140, 145 (App. Div. 1992) (giving effect to defendant’s waiver and dismissing his appeal).

¹¹² *See Burk*, 586 N.Y.S.2d at 142.

end to the litigation, not the beginning.¹¹³ It reasoned that trial courts protect defendants by guaranteeing that plea bargains are reasonable and fair.¹¹⁴ The court noted that defendants are not required to seek plea bargains, and consequently, there is nothing inherently coercive about giving defendants the option to accept or reject a bargain.¹¹⁵

III. A MINORITY OF COURTS HOLD APPEAL WAIVERS PER SE INVALID

Courts that hold appeal waivers per se invalid do so because the waivers violate due process, conflict with the public interest, and cannot comport with contract law requirements.¹¹⁶ One district court and a minority of state courts have held that plea bargains can never be conditioned on appellate waivers because these waivers cannot satisfy the due process “knowing and voluntary” test.¹¹⁷ Additionally, these courts reason that appellate waivers undermine the public policies of uniform application of the law and error correction served through appellate review.¹¹⁸ Lastly, certain courts determine that appellate waivers violate contract law because the parties do not hold equal bargaining power.¹¹⁹

A. A “Chilling Effect” on Appellate Rights That Violates Due Process

The U.S. District Court for the District of Columbia has held that plea agreement provisions waiving appeal rights are facially invalid because these waivers can never be knowing and voluntary.¹²⁰ In its 1997 decision in *United States v. Raynor*, the court explained that a waiver of future rights is by definition “uninformed and unintelligent.”¹²¹ The court cited the U.S. Supreme Court’s statement that a valid waiver under Rule 11 must constitute “an intentional relinquishment or aban-

¹¹³ See 541 N.E.2d at 1024.

¹¹⁴ See *id.* at 1025.

¹¹⁵ See *id.*

¹¹⁶ See, e.g., *United States v. Raynor*, 989 F. Supp. 43, 49 (D.D.C. 1997) (holding such waivers coercive and unfair); *People v. Butler*, 204 N.W.2d 325, 330 (Mich. Ct. App. 1972) (explaining that these waivers violate public policy by insulating convictions from appellate review).

¹¹⁷ See *Raynor*, 989 F. Supp. at 44; *infra* notes 120–134 and accompanying text.

¹¹⁸ See, e.g., *United States v. Melancon*, 972 F.2d 566, 570–73 (5th Cir. 1992) (Parker, J., concurring); *Raynor*, 989 F. Supp. at 45–48; *Butler*, 204 N.W.2d at 331; see also *infra* notes 135–152 and accompanying text.

¹¹⁹ See *United States v. Johnson*, 992 F. Supp. 437, 439 (D.D.C. 1997); *infra* notes 153–161 and accompanying text.

¹²⁰ See *Johnson*, 992 F. Supp. at 439.

¹²¹ 989 F. Supp. at 44 (refusing to accept the government’s plea conditioned on the defendant’s waiver of the right to appeal a sentence that had yet to be imposed).

donment of a known right or privilege.”¹²² The court in *Raynor* concluded that a defendant cannot know what right he is waiving until a sentence is imposed.¹²³

Furthermore, the district court explained that the waiver of appellate rights is not analogous to the typical waiver of constitutional rights in guilty pleas.¹²⁴ Unlike appellate waivers, most constitutional waivers in guilty pleas involve the relinquishment of a presently known, clearly defined right.¹²⁵ Concurring in the U.S. Court of Appeals for the Fifth Circuit’s 1992 decision in *United States v. Melancon*, Judge Robert M. Parker added that the act of waiving a right typically occurs at the moment the waiver is executed; one waives the right to be free from self-incrimination and then admits guilt.¹²⁶ In contrast, waiving the right to appeal a future sentencing error frees the defendant from none of the uncertainties surrounding the sentencing process.¹²⁷

One state court has held appellate waivers unenforceable because their particular characteristics can never satisfy due process requirements.¹²⁸ The Court of Appeals of Michigan in *People v. Butler* stated in 1972 that, although statutory, the right to appeal plays an essential role in the criminal justice system.¹²⁹ The court concluded that the government has no right to put a price on the right to appeal; it must be “free and unfettered.”¹³⁰ Appellate waivers, however, undermine this right by deterring defendants from raising valid issues before the State’s appellate courts.¹³¹ The court explained that the trading of appellate rights allows prosecutors to insulate from review guilty pleas accepted in violation of due process standards.¹³² To cure this “chilling effect” and protect a defendant’s right to appeal, the court in *Butler* decided that any

¹²² *Id.* (citing *McCarthy v. United States*, 394 U.S. 459, 466 (1969)).

¹²³ *See id.*

¹²⁴ *See id.*

¹²⁵ *See id.*

¹²⁶ 972 F.2d at 571 (Parker, J., concurring).

¹²⁷ *See id.* at 572.

¹²⁸ *See Butler*, 204 N.W.2d at 330.

¹²⁹ *See id.*

¹³⁰ *See id.* at 329 (quoting *Worcester v. Comm’r*, 370 F.2d 713, 718 (1st Cir. 1966)). As one commentator explained, if a defendant gets less time in exchange for waiving the right to appeal, then the defendant who refuses to waive the right in the plea must receive more time, and that greater amount constitutes the price of the appeal. Calhoun, *supra* note 21, at 147. Furthermore, this price may not be “rational” because a prosecutor would likely offer greater concessions in exchange for the appellate waiver when the defendant would have a valid issue to appeal. *Id.* Thus, the waiver would remove cases with legitimate issues from the appellate docket rather than those cases that are frivolous. *Id.* at 148.

¹³¹ *See Butler*, 204 N.W.2d. at 331.

¹³² *See id.* at 330.

plea conviction must be vacated when it required a defendant to waive appeal rights.¹³³ Consequently, certain courts find that appellate waivers violate due process by requiring the forfeiture of unknown future claims and by placing an impermissible burden on the assertion of a right.¹³⁴

B. Appeal Waivers as Offensive to the Public Interest in Appellate Review

Courts that hold appellate waivers invalid explain that the public interest in appellate review requires that these waivers be unenforceable.¹³⁵ Judge Parker contended in a concurrence in *Melancon* that even if the right to appeal is a “mere” statutory right, it does not necessarily follow that this right may be waived simply because it is “lesser” than waivable constitutional rights.¹³⁶ Parker claimed that appellate waivers contravene broader institutional concerns for legislative intent and judicial integrity.¹³⁷ Federal courts have concluded that appellate waivers insulate sentences from review and undermine the U.S. Sentencing Commission’s goal of limiting trial court discretion and sentencing disparities.¹³⁸ State and federal courts have explained appellate review as essential to upholding judicial integrity.¹³⁹

The federal Sentencing Commission was established to promulgate federal Sentencing Guidelines (the “Guidelines”) for courts to use in determining criminal sentences.¹⁴⁰ Although the U.S. Court of Appeals for the Second Circuit permits appellate waivers in limited circumstances, it has noted that a defendant’s right to appeal a sentence “serves an important public interest in avoiding the sentencing disparities that were seen to be a great problem with the pre-guidelines sys-

¹³³ *Id.* at 331.

¹³⁴ *See, e.g., Raynor*, 989 F. Supp. at 44; *Butler*, 204 N.W.2d at 331.

¹³⁵ *See Raynor*, 989 F. Supp. at 44–46.

¹³⁶ *See Melancon*, 972 F.2d at 573 (Parker, J., concurring).

¹³⁷ *See id.*

¹³⁸ *See* 28 U.S.C. § 991(b)(1)(B) (2006); *United States v. Ready*, 82 F.3d 551, 556 (2d Cir. 1996); *Raynor*, 989 F. Supp. at 45. Section 991(b)(1)(B) states that a purpose of the Sentencing Commission is to “provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct . . .” 28 U.S.C. § 991(b)(1)(B).

¹³⁹ *See, e.g., Raynor*, 989 F. Supp. at 46; *cf. State v. Gibson*, 348 A.2d 769, 785 (N.J. 1975) (Pashman, J., dissenting) (stating that appellate review is essential to the integrity of the judicial system).

¹⁴⁰ *See* 28 U.S.C. § 994(a) (2006). The Guidelines include determinations on whether to impose a sentence of probation, a term of imprisonment, or a fine, and a determination on the appropriate length of the probation or imprisonment or the appropriate amount of the fine. *See id.* § 994(a)(1).

tem.”¹⁴¹ The court added that “allowing a defendant to waive appeal of any and every sentence imposed ‘in violation of law’ would ‘invite[] disrespect for the integrity of the court[s].’”¹⁴² The Second Circuit has concluded that appellate review is necessary to enforce the Guidelines and ensure greater sentence uniformity.¹⁴³ Furthermore, the U.S. District Court for the District of Columbia has explained that these waivers permit only the government to appeal erroneous applications of the Guidelines.¹⁴⁴ It has cautioned that widespread use of these waivers guarantees that the only appeals of sentencing error are those brought by the government to correct mistakes in favor of defendants.¹⁴⁵

In the Supreme Court of New Jersey’s 1975 decision in *State v. Gibson*, Justice Morris Pashman asserted in dissent that appellate waivers must be unenforceable because appeals courts protect the judicial system from prosecutorial and trial court impropriety.¹⁴⁶ Pashman alleged that there is a clear potential for abuse in plea negotiations.¹⁴⁷ Consequently, such waivers must be invalid so that appellate courts can vindicate the rights of criminal defendants and maintain the integrity of the judicial system.¹⁴⁸ Citing similar arguments, the Supreme Court of Arizona held in 1979 in *State v. Ethington* that defendants could raise an appeal following a guilty plea regardless of an express appellate waiver.¹⁴⁹ The court explained that the right to appeal cannot be negotiated away in plea bargains because such waivers contradict public policy by insulating attorneys from review.¹⁵⁰ The U.S. District Court for the District of Columbia in *Raynor* refused to enforce the government’s proposed waiver because the waiver prohibited the defendant from raising even egregious claims of prosecutorial misconduct on appeal.¹⁵¹ Courts holding appellate waivers invalid have explained that it is unac-

¹⁴¹ *Ready*, 82 F.3d at 556.

¹⁴² *Id.* (quoting *Wheat v. United States*, 486 U.S. 153, 162 (1988)).

¹⁴³ *See id.*

¹⁴⁴ *See Raynor*, 989 F. Supp. at 46.

¹⁴⁵ *See id.*

¹⁴⁶ *See* 348 A.2d at 784, 786 (Pashman, J., dissenting). Scholars have stated that appellate review is essential because decisions by three people having more time to think can correct decisions made by one person under time pressure. *See* Judith Resnik, *Precluding Appeals*, 70 CORNELL L. REV. 603, 620 (1985).

¹⁴⁷ *See Gibson*, 348 A.2d at 784–85 (Pashman, J., dissenting).

¹⁴⁸ *See id.* at 785.

¹⁴⁹ 592 P.2d 768, 769–70 (Ariz. 1979) (permitting defendants to bring a timely appeal from a conviction notwithstanding an agreement not to appeal).

¹⁵⁰ *Id.*

¹⁵¹ 989 F. Supp. at 46 (noting that the proposed waiver required the defendant to sacrifice appellate rights in cases where his lawyer was ineffective, under the influence of drugs, or not working on behalf of his client’s best interest).

ceptable to value “gains” in speed and finality over appellate supervision of trial courts.¹⁵²

C. *Unequal Bargaining Power Producing Unconscionable Contracts*

Even if guilty pleas are contractual agreements, the U.S. District Court for the District of Columbia has explained that an appellate waiver condition renders these contracts unenforceable.¹⁵³ The court observed in *Raynor* that prohibiting only the defendant from appealing the sentence was “inherently unfair; it is a one-sided contract of adhesion; it will undermine the error correcting function of the courts of appeals in sentencing”¹⁵⁴ In its 1997 decision in *United States v. Johnson*, the U.S. District Court for the District of Columbia explained that it would not accept the appellate waiver offered to the defendant because of the inequity in proscribing his appellate rights without analogously limiting the government’s appellate rights.¹⁵⁵ The court found that the government already possessed superior bargaining power in plea negotiations with defendants.¹⁵⁶ Prosecutors determine the precise charges brought, and the charges determine the ultimate sentence imposed under the Guidelines.¹⁵⁷ The court observed that to provide the State with the additional power to require the waiver of appellate rights would only increase this advantage.¹⁵⁸

Similarly, Justice Pashman asserted in his *Gibson* dissent that plea negotiations occur between parties with unequal bargaining power and alleged that such negotiations are prone to producing unconscionable outcomes.¹⁵⁹ Pashman stated that appellate review of a sentence im-

¹⁵² See *Melancon*, 972 F.2d at 573 (Parker, J., concurring).

¹⁵³ See, e.g., *Raynor*, 989 F. Supp. at 49 (explaining that these waivers produce contracts of adhesion); see also *United States v. Howle*, 166 F.3d 1166, 1168 (11th Cir. 1999) (stating that plea bargains are essentially contracts between the government and the defendant). Legal commentators have suggested that the differences in bargaining power between the government and the defendant in the plea bargaining process result in circumstances similar to “a contract made under duress.” Blank, *supra* note 45, at 2072. Furthermore, scholars argue that “it is not at all clear that the ability to waive appeal rights does, in fact, operate as a bargaining chip. In more and more jurisdictions, waiver of appeal rights is a precondition to plea bargaining.” Calhoun, *supra* note 21, at 193.

¹⁵⁴ 989 F. Supp. at 49. The plea expressly stated that the defendant could not invoke his statutory right to appeal the sentence after a guilty plea, but that the agreement did not limit the government’s statutory right to appeal a sentence. *Id.* at 43.

¹⁵⁵ See 992 F. Supp. at 439.

¹⁵⁶ See *id.*

¹⁵⁷ See *id.* at 439–40.

¹⁵⁸ *Id.* at 440.

¹⁵⁹ See 348 A.2d at 784–85 (Pashman, J., dissenting).

posed pursuant to a plea bargain comports with the contractual nature of the agreement because this review is necessary to prevent exploitation.¹⁶⁰ For these reasons, some decisions hold that contract law does not permit the government to utilize plea agreements to insulate convictions from appellate review.¹⁶¹

IV. SPECIFIC WAIVER OF THE RIGHT TO APPEAL SUPPRESSION MOTIONS

A. *Statutory Exceptions That Permit Appeals of Suppression Motions Following Guilty Pleas*

Several states have carved out a statutory exception to the general rule in federal and state courts that a knowing and voluntary guilty plea bars subsequent constitutional challenges to the pretrial proceedings.¹⁶² Defendants in these states can appeal pretrial motions to suppress evidence despite the fact that their convictions were based on guilty pleas.¹⁶³ This right is significant because pretrial decisions to admit or exclude evidence are often determinative of trial outcomes.¹⁶⁴

¹⁶⁰ See *id.* at 786.

¹⁶¹ See *Raynor*, 989 F. Supp. at 49; *Johnson*, 992 F. Supp. at 439–40.

¹⁶² See, e.g., CAL. PENAL CODE § 1538.5(m) (West 2007); N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 1970); N.C. GEN. STAT. ANN. § 15A-979(b) (West 1979); WIS. STAT. ANN. § 971.31(10) (West 2009); see also *Lefkowitz v. Newsome*, 420 U.S. 283, 289 (1975) (explaining that in New York, a guilty plea is not treated as a “break in the chain of events” in regards to certain constitutional claims raised in pretrial proceedings). Section (m) of the California statute states:

[a] defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty . . . provided that at some stage of the proceedings prior to conviction he or she has moved for the return of property or the suppression of the evidence.

CAL. PENAL CODE § 1538.5(m). Section (2) of the New York statute states, “[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.” N.Y. CRIM. PROC. LAW § 710.70(2). Section (b) of the North Carolina statute states, “[a]n order finally denying a motion to suppress evidence may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty.” N.C. GEN. STAT. ANN. § 15A-979(b). Section (10) of the Wisconsin statute states, “[a]n order denying a motion to suppress evidence or a motion challenging the admissibility of a statement of a defendant may be reviewed upon appeal from a final judgment or order notwithstanding the fact that the judgment or order was entered upon a plea of guilty” WIS. STAT. ANN. § 971.31(10).

¹⁶³ See, e.g., CAL. PENAL CODE § 1538.5(m); N.Y. CRIM. PROC. LAW § 710.70(2); N.C. GEN. STAT. ANN. § 15A-979(b); WIS. STAT. ANN. § 971.31(10).

¹⁶⁴ See *People v. Ventura*, 531 N.Y.S.2d 526, 531 (App. Div. 1988). Here the court explained that the entire prosecution on the charge of criminal possession of a controlled

Although federal law does not permit such appeals, the U.S. Supreme Court has approved of states granting this appellate right.¹⁶⁵

In 1975, the U.S. Supreme Court in *Lefkowitz v. Newsome* evaluated New York Criminal Procedure Law section 710.70(2).¹⁶⁶ The Court noted that in states without such statutes, defendants who have suffered adverse pretrial rulings often proceed to trial solely to preserve their right to appeal claims of illegal seizures or involuntary confessions.¹⁶⁷ In New York state courts, however, a defendant experiences no practical difference in appellate review following a guilty plea or a trial because neither conviction forecloses review of his constitutional claims.¹⁶⁸ The Supreme Court stated that defendants who have lost suppression motions on which their defenses rest can preserve their right to appeal by pleading guilty instead of undergoing a full trial with a foregone conclusion.¹⁶⁹ This statutory right serves the public interest by permitting defendants to appeal pretrial constitutional claims without the cost of inefficient, resource-wasting trials.¹⁷⁰ The Court noted that section 710.70(2) represented a “commendable effort[]” to relieve the overcrowded court system without infringing on constitutional rights.¹⁷¹ Similarly, the Supreme Court of Wisconsin explained in its 1973 decision in *State v. Meier* that the legislative history of Wisconsin Criminal Procedure Law section 971.31(10) made it apparent that this statute was adopted to “reduce the

substance rested on the constitutionality of the seizure of the cocaine. *See id.* If the court determined that the police violated the defendant’s Fourth Amendment rights to be free from unreasonable searches and seizures, the evidence of the cocaine would be excluded at trial and consequently, the indictment would be dismissed. *See id.* at 531, 535.

¹⁶⁵ *See* *McMann v. Richardson*, 397 U.S. 759, 766 (1970). The Court explained that the plea waives the right to contest the admissibility of any evidence the State might have offered against the defendant, “unless the applicable law otherwise provides.” *Id.*

¹⁶⁶ 420 U.S. at 289–90. The Court rejected the government’s argument that the New York defendant could not raise constitutional claims in his habeas corpus proceeding because his guilty plea sacrificed his right to raise prior, independent claims of constitutional violations. *See id.* at 293. Precluding the defendant from pursuing his constitutional claims in a federal habeas corpus proceeding would undermine legislative intent by discouraging such defendants from pleading guilty only to preserve their later right to assert constitutional claims. *See id.* at 292.

¹⁶⁷ *See id.* at 289.

¹⁶⁸ *See* N.Y. CRIM. PROC. LAW § 710.70(2); *Lefkowitz*, 420 U.S. at 289.

¹⁶⁹ *See Lefkowitz*, 420 U.S. at 289.

¹⁷⁰ *See id.* at 292–93.

¹⁷¹ *Id.* at 293. Legal scholars have interpreted these statutes to be premised on the policy of protecting public finances by avoiding the expense of “pro forma” trials, which would otherwise be required in order to preserve search and seizure issues for appeal. *See* Calhoun, *supra* note 21, at 175.

number of fully contested trials when the only issue is whether or not the order denying a motion for suppression of evidence was proper.¹⁷²

California and New York courts have held that a defendant may knowingly and voluntarily waive the statutory right to appeal suppression motions as a condition of a guilty plea.¹⁷³ California courts enforce such waivers if they satisfy the knowing and voluntary test applied to general appeal waivers.¹⁷⁴ New York appellate courts, in contrast, are split over whether satisfying the knowing and voluntary test is sufficient for a valid section 710.70(2) waiver.¹⁷⁵

B. *California Courts Upholding Knowing and Voluntary Waivers of the Statutory Right to Appeal Suppression Motions*

A California appeals court first considered whether the “nonfundamental” right conferred by section 1538.5(m) could be waived in a plea bargain in 1985 in *People v. Charles*.¹⁷⁶ It held that a knowing and voluntary waiver of the section 1538.5(m) right validly prohibits post-plea appeals of suppression motions.¹⁷⁷ The court concluded that a defendant’s ability to waive significant constitutional rights to gain the benefits of a plea agreement naturally permits a defendant to waive the statutory right to appeal an adverse suppression motion.¹⁷⁸ Because a defendant tacitly waives a search and seizure issue by failing to make an appropriate objection at trial, the court noted that no legal justification existed for prohibiting the defendant from expressly making a knowing and voluntary waiver.¹⁷⁹ Moreover, it explained that a defendant’s voluntary and knowing waiver of the right to appeal suppression motions in exchange for something he values more highly brings mutual advantages to the defendant and the State.¹⁸⁰

¹⁷² 210 N.W.2d 685, 689–90 (Wis. 1973) (concluding that a defendant was not required to move to withdraw a plea of guilty or *nolo contendere* to preserve his right to review the denial of a motion to suppress evidence).

¹⁷³ See, e.g., *People v. Charles*, 217 Cal. Rptr. 402, 406 (Ct. App. 1985); *People v. Williams*, 331 N.E.2d 684, 684 (N.Y. 1975) (per curiam).

¹⁷⁴ See *Charles*, 217 Cal. Rptr. at 406.

¹⁷⁵ Compare *Ventura*, 531 N.Y.S.2d at 531–32 (requiring implicitly that the waiver further a legitimate State interest in addition to being knowing and voluntary), with *People v. Gray*, 432 N.Y.S.2d 153, 153 (App. Div. 1980) (dismissing a defendant’s appeal because his waiver was knowing and voluntary).

¹⁷⁶ See 217 Cal. Rptr. at 405.

¹⁷⁷ *Id.* at 406 (explaining that the defendant could knowingly and voluntarily waive his right to appeal an adverse suppression motion in exchange for a more lenient punishment).

¹⁷⁸ See *id.*

¹⁷⁹ See *id.* at 407.

¹⁸⁰ See *id.* at 405, 407.

Subsequent California decisions consistently have followed *Charles* and upheld section 1538.5(m) waivers.¹⁸¹ In 1995 the California Court of Appeal held in *People v. Berkowitz* that a valid section 1538.5(m) waiver did not require the trial court to specifically inform the defendant that the appeal waiver concerned suppression issues.¹⁸² The court explained that the scope of the waiver must be analyzed in terms of the reasonable expectations of the parties, and the waiver at issue clearly included all of the defendant's appellate rights.¹⁸³ It also stated that a knowing and voluntary waiver is enforced according to its terms regardless of whether the waiver is written or spoken.¹⁸⁴ The court concluded that a defendant should be permitted to determine whether such a waiver would be favorable under the circumstances, and that such bargains promote judicial economy.¹⁸⁵

C. *New York Courts Applying Different Standards of Review to
Suppression Motion Waivers*

New York appellate courts have held the section 710.70(2) appeal right waivable, but do not have a uniform standard to determine when such waivers are valid.¹⁸⁶ In 1975, the New York Court of Appeals held in *People v. Williams* that the defendant validly waived his section 710.70(2) right to appeal the denial of his suppression motion "in the circumstances of this case."¹⁸⁷ There, the court observed that if the defendant successfully appealed his motion to suppress statements following the guilty plea, the prosecution would have been unfairly prejudiced at the

¹⁸¹ See, e.g., *People v. Berkowitz*, 40 Cal. Rptr. 2d 150, 152 (Ct. App. 1995); *People v. Nguyen*, 16 Cal. Rptr. 2d 490, 492-93 (Ct. App. 1993).

¹⁸² 40 Cal. Rptr. 2d at 152 (discussing defendant who claimed he believed the appeal waiver related only to the merit of his charged offenses).

¹⁸³ See *id.* at 153 (explaining that the defendant had a right of appeal that he was giving up in the plea); see also *Nguyen*, 16 Cal. Rptr. 2d at 493.

¹⁸⁴ See *Berkowitz*, 40 Cal. Rptr. 2d at 153.

¹⁸⁵ See *id.*

¹⁸⁶ Compare *Williams*, 331 N.E.2d. at 684-85 (holding a knowing and voluntary waiver of the right to appeal an adverse ruling on suppression motions enforceable "under the circumstances"), with *Ventura*, 531 N.Y.S.2d at 531 (requiring, in addition, that the waiver further a legitimate government interest).

¹⁸⁷ 331 N.E.2d. at 684-85. The defendant indicated his desire to plead after losing his motion to suppress statements. *Id.* at 685. The prosecutor stated he would only accept the plea if the defendant agreed to an appellate waiver because the State had witnesses who were ready to testify at trial and had incurred significant expense in preparing a videotape showing the defendant's admissions to the police. *Id.* Because the statements were not the sole basis for the People's case, reversal of the suppression motion would have resulted in a new trial where the State's witnesses may have been unavailable. *Id.*

subsequent trial.¹⁸⁸ The court noted that the State had justification for imposing the appeal waiver condition.¹⁸⁹ Additionally, the court explained that there was no doubt that the plea was knowing and voluntary because the defendant had thoroughly discussed it with counsel and been subjected to a methodical interrogation by the trial court regarding the plea and the specific waiver.¹⁹⁰ Under these conditions, the court in *Williams* held the defendant to the waiver of his right to appeal the suppression motion.¹⁹¹

The Second, Third, and Fourth Departments of the New York Appellate Division have interpreted *Williams* as permitting section 710.70(2) waivers when knowing and voluntary.¹⁹² Applying only the knowing and voluntary test, in 1980 the Second Department in *People v. Gray* dismissed a defendant's appeal because the "defendant made a knowing and intelligent waiver of his right to appeal the denial of his motion to suppress evidence."¹⁹³ The Fourth Department engaged in a similar analysis in its 1984 decision in *People v. Durant* when it dismissed the defendant's appeal because following the denial of his suppression motion, he had knowingly and voluntarily entered into a plea that waived his appellate rights.¹⁹⁴ That same year, the Third Department in *People v. Di Orio* reiterated the principle that a knowing and voluntary waiver of the statutory right to appeal a suppression motion is an acceptable condition of a plea bargain.¹⁹⁵ The court noted that the prosecutor stated during the taking of the plea that the defendant's appeal waiver concerned "all of the pretrial motions and earlier suppression hearings had in this particular case."¹⁹⁶

The First Department, however, has characterized this widespread enforcement as giving prosecutors carte blanche to condition pleas on section 710.70(2) appellate waivers.¹⁹⁷ In 1988, the First Department upheld the defendant's conviction in *People v. Velazquez* without reaching the validity of the appeal waiver.¹⁹⁸ Justice Robert S. Smith wrote sepa-

¹⁸⁸ *Id.*

¹⁸⁹ *See id.*

¹⁹⁰ *See id.*

¹⁹¹ *Id.*

¹⁹² *See, e.g.,* *People v. Durant*, 476 N.Y.S.2d 671, 671 (App. Div. 1984); *People v. Di Orio*, 471 N.Y.S.2d 701, 702 (App. Div. 1984); *People v. Gray*, 432 N.Y.S.2d 153, 153 (App. Div. 1980).

¹⁹³ 432 N.Y.S.2d at 153.

¹⁹⁴ *See* 476 N.Y.S.2d at 671-72.

¹⁹⁵ *See* 471 N.Y.S.2d at 702.

¹⁹⁶ *Id.*

¹⁹⁷ *Ventura*, 531 N.Y.S.2d at 528.

¹⁹⁸ *See* 527 N.Y.S.2d 972, 972 (App. Div. 1988).

rately to express concern for appellate jurisdiction and advocated for a fact-specific inquiry to determine each waiver's validity.¹⁹⁹ He claimed that effectuating the waiver would be inconsistent with the holding in *Williams*.²⁰⁰ He argued that the *Williams* court only permitted the appellate waiver "[i]n the circumstances of [that] case" because the prosecution would have been unfairly burdened had the suppression motion been reversed on appeal.²⁰¹ Justice Smith contended that the parties to a plea cannot, even by agreement, usurp appellate court jurisdiction to review any determination on a motion to suppress evidence.²⁰²

In 1988, the First Department addressed a waiver of the section 710.70(2) right in *People v. Ventura* and explained that unchecked appellate waivers offend the public interest in appellate review.²⁰³ The court stated that appellate courts have a "compelling duty" to assure themselves of the constitutionality of any waiver of rights.²⁰⁴ This responsibility is especially important in the realm of plea bargains where prosecutors wield so much power.²⁰⁵ It noted that the court in *Williams* only upheld a waiver of this right because under the specific facts of *Williams*, the waiver produced genuine, mutual benefits.²⁰⁶ Thus, the waiver served as a proper bargaining element in the plea.²⁰⁷ In contrast, many appellate waivers of adverse determinations on suppression motions insulate errors of constitutional significance from appellate review without advancing any legitimate State interest.²⁰⁸

¹⁹⁹ See *id.* at 972–73 (Smith, J., concurring in part and dissenting in part).

²⁰⁰ See *id.* at 973 (citing *Williams*, 331 N.E.2d. at 685) (agreeing that defendant knowingly and voluntarily pled guilty to second degree murder, but noting that the prosecution demanded the defendant waive his right to appeal the suppression motion in exchange for recommending a sentence of fifteen years to life rather than the maximum twenty-five years to life).

²⁰¹ See *id.* (citing *Williams*, 331 N.E.2d. at 685).

²⁰² See *id.* at 972–73.

²⁰³ 531 N.Y.S.2d at 528. The waiver at issue prohibited the defendant from appealing an adverse ruling on a suppression motion as a condition of his plea. *Id.* at 533. Because he had lost the motion on which his entire defense rested, the court stated that he realistically had no option but to accept the plea with the waiver condition. See *id.*

²⁰⁴ *Id.* at 530.

²⁰⁵ See *id.*

²⁰⁶ See *id.* (noting that in *Williams*, the State was assured that it would not need to try a stale case after an appellate reversal and that the defendant avoided the uncertainties of trial and pled to a reduced offense).

²⁰⁷ See *id.*

²⁰⁸ See *id.* at 528, 531 (explaining that using waivers to spare the State the expense of appellate review is offensive to the State's policy of providing the right of appellate review and bearing the cost of that review).

In light of these grave consequences, the *Ventura* court concluded that “the public policy of this State requires that before the People can condition a plea to the defendant’s waiver of his right to appellate review, it must advance some legitimate State interest”²⁰⁹ The court explained that appellate courts protect against trial court error or impropriety and must preserve the right to appeal by permitting only those knowing and voluntary waivers that serve a legitimate government purpose.²¹⁰

V. WAIVERS OF SUPPRESSION MOTION APPELLATE RIGHTS MUST BE UNENFORCEABLE

Where state legislatures grant the statutory right to appeal adverse determinations on suppression motions following a guilty plea, this right must never be waivable.²¹¹ Even if certain appeal waivers are generally enforceable, suppression motion appellate waivers must be invalid because the coercion involved in their execution violates due process.²¹² Additionally, these particular waivers undermine public policy by nullifying express legislative intent.²¹³ Statutes granting the right to appeal an adverse suppression motion following a plea further public policies because they preserve defendants’ right to appeal without resource-wasting trials.²¹⁴ Because the efficiency that these statutory rights guarantee is undercut by suppression motion appellate waivers, however, states that grant this right must prohibit its waiver.²¹⁵ Lastly, contract law proscribes these waivers because of the inequity between the parties when these waivers are executed.²¹⁶

This Part advances many of the arguments utilized by the New York Appellate Division’s First Department in 1988 in *People v. Ventura* to invalidate the suppression motion appeal waiver, but argues that the “le-

²⁰⁹ 531 N.Y.S.2d at 531.

²¹⁰ *Id.*

²¹¹ See *infra* notes 212–292.

²¹² See *id.* at 532; *infra* notes 219–231 and accompanying text.

²¹³ See *Ventura*, 531 N.Y.S.2d at 532; *infra* notes 232–253 and accompanying text.

²¹⁴ See CAL. PENAL CODE § 1538.5(m) (West 2007) (permitting the defendant to appeal the suppression motion following the plea provided that the defendant moved for suppression before the plea was entered); N.Y. CRIM. PROC. LAW § 710.70(2) (McKinney 1970) (permitting an appeal of a suppression motion following a plea-based conviction); see also *Lefkowitz v. Newsome*, 420 U.S. 283, 293 (1975).

²¹⁵ See *Lefkowitz*, 420 U.S. at 292.

²¹⁶ See *Ventura*, 531 N.Y.S.2d. at 531; *infra* notes 254–263 and accompanying text.

gitimate state interest” test cannot be effectively administered.²¹⁷ To guarantee defendants’ rights and uphold legislative intent, there must be a blanket prohibition on all appellate waivers of suppression motions.²¹⁸

A. *Suppression Motion Waivers Violate Due Process*

Appellate waivers of adverse determinations on suppression motions violate due process because they are inherently coercive and punish defendants who assert their rights.²¹⁹ The U.S. Supreme Court has held that the imposition of a penalty upon a defendant for exercising the right to appeal violates due process.²²⁰ For example, due process is contravened when a defendant is subjected to a harsher sentence following a successful appeal, retrial, and reconviction.²²¹ The Court explained that vindictiveness against a defendant for exercising his rights must not affect his sentencing.²²² Analogously, due process prohibits the prosecution from retaliating against a defendant who exercises his right to bring a suppression motion and loses by subsequently offering a plea with a harsher sentence and the requirement that he forgo his right to appeal this critical determination.²²³ The New York Court of Appeals upheld a sentencing appeal waiver in *People v. Seaberg* in 1989 because the defendant had the choice to accept or reject the offer.²²⁴ In contrast, a defendant may be required to accept a suppression motion waiver because he has no practical alternative; he no longer possesses a trial defense following the adverse determination.²²⁵

The facts of *Ventura* evidence the coercive manner in which waivers of appellate rights to adverse suppression motions can be extracted.²²⁶ Under the prosecutor’s plea offer in *Ventura*, the defendant risked doubling his sentence recommendation and waiving his right to appeal

²¹⁷ See *Ventura*, 531 N.Y.S.2d. at 531–33 (explaining the coercive nature of plea bargaining); see also *People v. Olson*, 264 Cal. Rptr. 817, 819 (Ct. App. 1989) (encouraging appeal waivers in plea bargains).

²¹⁸ See *Ventura*, 531 N.Y.S.2d. at 532; *infra* notes 264–292 and accompanying text.

²¹⁹ See *Ventura*, 531 N.Y.S.2d. at 529, 533.

²²⁰ See *North Carolina v. Pearce*, 395 U.S. 711, 724–25 (1969); Gregory M. Dyer, Note, *Criminal Defendant’s Waiver of the Right to Appeal—An Unacceptable Condition of a Negotiated Sentence or Plea Bargain*, 65 NOTRE DAME L. REV. 649, 656–57 (1990) (asserting that the Court has explained that the Due Process Clause requires that states not limit the opportunity to appeal in a criminal case).

²²¹ See *Pearce*, 395 U.S. at 724–25.

²²² See *id.*

²²³ See *id.*; *Ventura*, 531 N.Y.S.2d at 532–33.

²²⁴ See 541 N.E.2d 1022, 1025, 1027 (N.Y. 1989).

²²⁵ See *id.* at 1025; *Ventura*, 531 N.Y.S.2d at 533.

²²⁶ See *supra* notes 1–21 and accompanying text.

his suppression claim if he lost his motion.²²⁷ The court characterized this plea negotiation as “punitive and coercive” because realistically, the defendant could not have rejected the prosecutor’s plea offer.²²⁸ The defendant’s only viable defense rested on suppressing evidence that was ruled admissible.²²⁹ Because the defendant had no legitimate alternative, conditioning the plea bargain on the waiver of the right to appeal the suppression motion rendered the plea involuntary and coercive.²³⁰ The government ignored the concerns for fairness and justice present in the knowing and voluntary test in pursuing its single-minded goal of preventing the defendant from appealing his meritorious constitutional claim.²³¹

B. *Suppression Motion Appeal Waivers Are Contrary to Public Policy*

Appeal waivers of adverse suppression motions must be invalid because they contravene public policy.²³² These specific waivers undermine the express goals behind legislatures’ codification of the statutory right to appeal suppression motions.²³³ Additionally, these waivers remove issues of constitutional magnitude from appellate review.²³⁴

In codifying the right to appeal adverse determinations on suppression motions following a guilty plea, state legislatures have sought to avoid the cost of unnecessary trials.²³⁵ Many defendants know that they cannot prevail at trial unless they succeed in suppressing evidence.²³⁶ In states that apply the general rule that pleas foreclose further review of constitutional challenges, defendants often proceed to trial for the sole purpose of preserving these claims.²³⁷ In contrast, under California Penal Code section 1538.5(m) and New York Criminal Procedure Law section 710.70(2), a defendant who pleads guilty may still seek appellate review of the suppression motion without having to

²²⁷ See 531 N.Y.S.2d at 532–33.

²²⁸ See *id.* at 533.

²²⁹ See *id.*

²³⁰ See *id.*

²³¹ See *id.*

²³² See *id.* 531–32.

²³³ See *Ventura*, 531 N.Y.S.2d at 532.

²³⁴ See *id.* at 528; *supra* notes 203–210 and accompanying text.

²³⁵ See N.Y. CRIM. PROC. LAW § 710.70(2) (1970); *Lefkowitz*, 420 U.S. at 285, 289, 292–93 (1975) (evaluating the procedure for a defendant to raise a suppression motion appeal following a plea under N.Y. CRIM. PROC. LAW § 710.70(2)).

²³⁶ See *Lefkowitz*, 421 U.S. at 292.

²³⁷ See *id.*

undergo a full trial to preserve this right.²³⁸ The guilty plea permits the constitutional issues to be litigated while sparing the expense and time of a trial.²³⁹ All parties expect that the plea will not foreclose judicial review of the alleged constitutional violation.²⁴⁰

Although the defendant in *Ventura* accepted the guilty plea with the waiver condition, other defendants who know that the plea forecloses appellate review of their suppression motions may be dissuaded from pleading guilty.²⁴¹ Thus, if the prosecution requires these waivers, defendants will need to reject the plea to preserve this right through a trial, as though the right had not already been granted by statute.²⁴² This result undermines legislatures' purpose of improving efficiency in the criminal system without infringing on defendants' abilities to assert constitutional rights.²⁴³ Therefore, even courts that uphold appellate waivers generally by citing efficiency concerns must hold suppression motion appeal waivers invalid because they encourage defendants to undergo a full trial solely to maintain their appellate rights.²⁴⁴

Furthermore, suppression motion appellate waivers may insulate convictions based on constitutional violations from review without advancing any public interest.²⁴⁵ The U.S. Supreme Court has held that avenues of appellate review are so fundamental that, once established, they must be kept free of unreasonable conditions that impede open and fair access to the courts.²⁴⁶ The New York Court of Appeals has characterized the right to appeal as an "integral part of our judicial sys-

²³⁸ See CAL. PENAL CODE § 1538.5(m) (West 2007) (permitting the defendant to appeal the suppression motion following the plea provided that the defendant moved for suppression before the plea was entered); N.Y. CRIM. PROC. LAW. § 710.70(2) (permitting an appeal of a suppression motion following a plea-based conviction).

²³⁹ *Lefkowitz*, 420 U.S. at 289–90 (characterizing this law as preventing the unnecessary waste of time and energy consumed in such trials).

²⁴⁰ See *id.*

²⁴¹ See *id.*; *Ventura*, 531 N.Y.S.2d at 529. In *Lefkowitz*, the Supreme Court addressed the ability of a New York defendant to file a federal habeas corpus petition claiming an unconstitutional seizure. 420 U.S. at 291. The Court predicted that if it did not grant these defendants federal habeas corpus, they would not be inclined to plead guilty, but rather to proceed to trial solely to preserve their right to a federal forum in which to litigate their constitutional claims. *Id.* at 293. Such a result, the Court concluded, would undermine New York's attempt to limit such wasteful trials. See *id.*

²⁴² See *Lefkowitz*, 420 U.S. at 292.

²⁴³ See *id.* at 293.

²⁴⁴ See *id.* at 292–93.

²⁴⁵ See *Ventura*, 531 N.Y.S.2d at 530–31.

²⁴⁶ *Blackledge v. Perry*, 417 U.S. 21, 25 & n.4 (1974) (addressing defendant's claim that being charged with a higher offense for the same acts following an appeal violated due process by penalizing him for exercising his statutory right to appeal).

tem [I]t has been the consistent policy of our courts to preserve and promote that right as an effective, if imperfect, safeguard against impropriety or error in the trial”²⁴⁷ The public policy of New York is to provide the right of appellate review to convicted defendants and to bear the cost of that appeal.²⁴⁸ The only rationale for imposing the waiver requirement in *Ventura*, however, was to assure that the appeals court did not hear the appeal, reverse the decision, and dismiss the indictment.²⁴⁹ When prosecutors can impose these waivers in pleas, it is the prosecutor, rather than the appeals court, who determines that a conviction remains unquestioned without review of the constitutional violations that may have preceded it.²⁵⁰

Additionally, although courts enforcing general appeal waivers often cite their effectiveness in reducing “frivolous” appeals, the facts of *Ventura* evidence that appellate waivers of constitutional challenges may limit appellate review of meritorious claims.²⁵¹ For example, when the prosecution’s entire case relies on evidence that the defendant seeks to suppress, the prosecution will be more inclined to offer the defendant a generous plea bargain to a reduced offense if he agrees not to raise his suppression claim.²⁵² If the defendant proceeds with a motion to suppress and loses, the prosecutor may impose the appellate waiver condition on the subsequent plea to assure there is no appellate reversal resulting in the dismissal of charges.²⁵³

C. *Suppression Motion Waivers Violate Contract Law Principles*

Suppression motion appellate waivers violate contract law requirements because they may be executed after the defendant has lost his

²⁴⁷ *People v. Pride*, 147 N.E.2d 719, 720 (N.Y. 1958).

²⁴⁸ *Ventura*, 531 N.Y.S.2d at 532.

²⁴⁹ *See id.* at 532, 535.

²⁵⁰ *See id.* at 532. Commentators assert that the complexity of the constitutional issues in suppression motions raises concerns over whether a single authority, not subject to appellate review, can generate consistent and accurate results over time. Calhoun, *supra* note 21, at 176. Scholars argue that the more remote the court and diluted the evidence, the easier it becomes for a court reviewing a motion to focus on the procedural aspects of the case rather than the question of the defendant’s guilt or innocence. *See id.* at 177.

²⁵¹ *See Olson*, 264 Cal. Rptr. at 819; *Ventura*, 531 N.Y.S.2d at 531.

²⁵² *See Ventura*, 531 N.Y.S.2d at 531.

²⁵³ *See id.* at 531–32. In *Ventura*, the court explained that by doubling the defendant’s sentence recommendation and conditioning the plea on the appellate waiver, the prosecution acted primarily to punish the defendant for exercising his right to raise the suppression motion and prevent him from raising the suppression motion on appeal. *Id.*

pretrial motion and the State's power is heightened.²⁵⁴ The appellate waiver is no longer a bargaining chip that can be freely traded but rather a condition imposed by a prosecutor who knows the defendant possesses a weak or non-existent trial defense.²⁵⁵ The defendant has no choice but to accept the plea with the appellate waiver condition.²⁵⁶ In 1997, the U.S. District Court for the District of Columbia in *United States v. Johnson* held a waiver of the right to appeal sentencing issues unenforceable because the government already possessed superior bargaining power in plea negotiations and this waiver would only increase its advantage.²⁵⁷ Likewise, in situations where this inequity between the parties is increased following the denial of the defendant's suppression motion, the government's power must not be further enhanced through suppression motion appellate waivers.²⁵⁸

Moreover, contract law requires that an agreement that surrenders the right to appeal be based upon consideration.²⁵⁹ State courts utilizing a contract law analysis have upheld general appeal waivers to assure that both the defendant and the government receive the benefit of the bargain.²⁶⁰ Under this mutuality of advantage premise, the State cannot impose the condition of appellate waiver in a plea without offering the defendant something additional in exchange.²⁶¹ As shown in *Ventura*, however, the government may try to impose the suppression motion waiver without granting the defendant any additional benefit.²⁶² Thus, these specific waivers cannot be enforced under a contract law analysis.²⁶³

²⁵⁴ See *United States v. Johnson*, 992 F. Supp. 437, 439–40 (D.D.C. 1997) (refusing to uphold an appellate waiver because of the government's superior bargaining power); *State v. Gibson*, 348 A.2d 769, 784–85 (N.J. 1975) (Pashman, J., dissenting).

²⁵⁵ See *United States v. Howle*, 166 F.3d 1166, 1169 (11th Cir. 1999); see also *Ventura*, 531 N.Y.S.2d at 533.

²⁵⁶ See *Ventura*, 531 N.Y.S.2d at 533.

²⁵⁷ See 992 F. Supp. at 439–40.

²⁵⁸ See *id.*

²⁵⁹ See *Ventura*, 531 N.Y.S.2d at 531.

²⁶⁰ *People v. Burk*, 586 N.Y.S.2d 140, 142 (App. Div. 1992) (explaining that when the defendant receives sentencing concessions in exchange for his generalized waiver of the right to appeal, the waiver must be enforced so that the State receives its benefit from the bargain).

²⁶¹ See *Ventura*, 531 N.Y.S.2d at 531. The court provides an example of valid consideration by citing a civil case in which both parties to the litigation, each of whom disputed certain rulings, mutually agreed to waive appellate review. *Id.* (citing *Townsend v. Master-son*, 15 N.Y. 587, 589–90 (1857)); see also *Tceter*, *supra* note 82, at 740 (explaining when waivers constitute valid consideration in a contract).

²⁶² See 531 N.Y.S.2d at 529.

²⁶³ See *id.* at 531.

D. *Suppression Motion Appellate Waivers Must Be Prohibited to Prevent Coercion and Uphold Legislative Intent*

Waivers of the statutory right to appeal suppression motions must never be enforced because they frequently violate due process and contract law requirements and undermine public policies.²⁶⁴ The First Department in *Ventura* held such waivers valid only when knowing and voluntary and in furtherance of a legitimate State interest.²⁶⁵ This standard protects defendants' rights and prosecutors who may, under certain circumstances, be unfairly prejudiced by a defendant's appeal following a guilty plea.²⁶⁶

The court, however, did not define what constitutes a "legitimate state interest."²⁶⁷ It only stated, without further examples, that prejudice to a prosecutor in a subsequent trial following appellate reversal justifies the government's imposition of an appellate waiver.²⁶⁸ Additionally, it is not clear whether the government could ever claim that it would be unfairly prejudiced in the absence of an appeal waiver when, as in *Ventura*, appellate reversal would result in the dismissal of charges rather than a new trial.²⁶⁹ This ambiguity is problematic because courts that hold appellate waivers generally enforceable explain finality and efficiency as legitimate state interests, whereas courts that hold them per se invalid emphasize the importance of sentence uniformity and judicial integrity assured through appellate review.²⁷⁰ Therefore, courts applying this test may determine the waiver's enforceability based on their arguments for or against appeal waivers generally rather than on the particular waiver's characteristics.²⁷¹

Furthermore, the legitimate state interest test may not be objectively applied because it is administered and reviewed by trial and appellate judges who, in both California and New York, have expressed support for appellate waivers generally.²⁷² The California Court of Ap-

²⁶⁴ See *id.* at 531–33.

²⁶⁵ See *id.* at 531.

²⁶⁶ See *id.* at 530–31.

²⁶⁷ See *id.*

²⁶⁸ See *Ventura*, 531 N.Y.S.2d at 530.

²⁶⁹ See *id.* at 530, 535.

²⁷⁰ See *United States v. Raynor*, 989 F. Supp. 43, 46 (D.D.C. 1997); *Seaberg*, 541 N.E.2d at 1024–25.

²⁷¹ See *Raynor*, 989 F. Supp. at 46; *Seaberg*, 541 N.E.2d at 1024–25.

²⁷² See, e.g., *Olson*, 264 Cal. Rptr. at 819 (encouraging appeal waivers as a "powerful tool" to limit frivolous appeals); *Burk*, 586 N.Y.S.2d at 141 (stating that the judge normally requires such waivers in plea agreements); see also *supra* notes 98–102 and accompanying text.

peal in 1989 in *People v. Olson* explained that prosecutors and trial judges should consider obtaining appellate waivers when “appropriate” to reduce the number of frivolous appeals.²⁷³ The court implied that prosecutors and trial judges, parties interested in avoiding appellate reversal, should determine whether or not the defendant has a valid or frivolous appellate claim.²⁷⁴

The New York Appellate Division, Second Department, has stated that “[t]he Trial Justice should not participate in plea discussions.”²⁷⁵ Despite this disapproval of judicial involvement in plea negotiations, however, the same court in *People v. Burk* in 1992 enforced an appellate waiver after the trial judge stated that he usually required their inclusion in any plea agreement he accepted.²⁷⁶ Furthermore, the court in *Burk* explained that the State had a legitimate interest in finality and holding defendants to their bargains.²⁷⁷ Thus, even if this court had adopted the legitimate state interest test, the waiver would have met this court’s standard, even though the *Ventura* court indicated that finality alone was not a valid policy goal.²⁷⁸ The legitimate state interest test must not be adopted because it relies on the objective determinations of trial judges with divergent conceptions of valid policy goals.²⁷⁹

Additionally, under the legitimate state interest test prosecutors are charged with stating the government’s legitimate interest.²⁸⁰ Even the First Department in *Ventura* recognized the conflict of interest between prosecutors seeking final convictions and the protection of criminal defendants’ rights.²⁸¹ It stated, “[s]adly, it is sometimes necessary to remind prosecutors of the delicate role they play in the criminal justice system: . . . [i]t is not enough for him to be intent on the prosecution of his case.”²⁸² The court explained that prosecutors do not have the singular function of advancing the rights of their side, but

²⁷³ See 264 Cal. Rptr. at 819.

²⁷⁴ See *id.*

²⁷⁵ *People v. Ramos*, 292 N.Y.S.2d 938, 939–41 (App. Div. 1968) (criticizing the trial court’s attempt to insulate the defendant’s sentence from appellate review).

²⁷⁶ See 586 N.Y.S.2d at 141.

²⁷⁷ See *id.* at 142.

²⁷⁸ See *id.* But see *Ventura*, 531 N.Y.S.2d at 532 (explaining there was no legitimate interest in preserving a conviction for the sake of the conviction alone).

²⁷⁹ See, e.g., *Olson*, 264 Cal. Rptr. at 819 (discussing the need to reduce appeals); *Burk*, 586 N.Y.S.2d at 141–42 (stating that the State has a legitimate interest in finality).

²⁸⁰ See *Ventura*, 531 N.Y.S.2d at 531; see also *People v. Stevenson*, 231 N.W.2d 476, 477 (Mich. Ct. App. 1975) (explaining that a prosecutor cannot avoid review by bargaining away a defendant’s right to appeal).

²⁸¹ See 531 N.Y.S.2d at 532.

²⁸² *Id.* (quoting *People v. Zimmer*, 414 N.E.2d 705, 707 (N.Y. 1980)).

must also remember that the defendant, as a member of the public, is entitled to fair treatment.²⁸³ The same court that set forth a test that relies on prosecutorial transparency felt obliged to instruct that the prosecutor's mission is not so much to convict as to assure a just result.²⁸⁴ Consequently, under the legitimate state interest test, prosecutors seeking to uphold convictions explain the waiver's justification and courts determine its enforceability, often employing varying definitions of valid government goals.²⁸⁵

In certain situations, the prohibition on suppression motion appeal waivers may prejudice the prosecution who has entered into a plea and must later try a stale case following appellate reversal.²⁸⁶ The due process, contract law, and public policy arguments against suppression motion waivers, however, justify this limited and forewarned risk.²⁸⁷ Additionally, this argument concedes that because courts find that waivers of the right to appeal unknown future sentences satisfy the due process knowing and voluntary test, arguably waivers of the right to appeal a known determination on a suppression motion must also satisfy due process.²⁸⁸ Because the U.S. Supreme Court has held that even unknown rights may be waived when this represents a rational decision, however, the timing of the appealed error, either before or after the plea is taken, is an insignificant difference and does not provide suppression motion appellate waivers a greater indicia of validity.²⁸⁹ In both situations, due process requires only that the defendants know that they are giving up possible appeals.²⁹⁰ To the extent that suppression motion and sentencing error appeal waivers are distinguishable, suppression motion appellate waivers are more offensive to due process because of the coercive manner in which they can be extracted and implicate greater public policy concerns because they undermine efficiency by encouraging defendants to undergo full trials to preserve appellate rights.²⁹¹ The importance of suppression motions in criminal adjudica-

²⁸³ *See id.*

²⁸⁴ *See id.* at 531–32.

²⁸⁵ *See State v. Ethington*, 592 P.2d 768, 769 (Ariz. 1979). *Compare Olson*, 264 Cal. Rptr. at 819 (identifying efficiency and conservation of scarce judicial resources as valid state interests), *with Ventura*, 51 N.Y.S.2d at 532 (describing access to appellate review as a public policy of the State).

²⁸⁶ *See People v. Williams*, 331 N.E.2d 684, 685 (N.Y. 1975) (per curiam).

²⁸⁷ *See Ventura*, 531 N.Y.S.2d at 531–33.

²⁸⁸ *See Newton v. Rumery*, 480 U.S. 386, 394 (1987).

²⁸⁹ *See id.*

²⁹⁰ *See id.*

²⁹¹ *See Ventura*, 531 N.Y.S.2d at 531–33.

tions, along with the need to balance defendants' rights with the efficiency concerns in the criminal system, require that courts ensure the viability of these statutory rights by holding suppression motion appellate waivers invalid.²⁹²

CONCLUSION

The reversal of the suppression motion in *People v. Ventura* demonstrates the danger of enforcing suppression motion appellate waivers: that it will insulate erroneous trial court determinations from appellate review. Some defendants may seek appellate waivers in exchange for more favorable conditions in the plea bargain. In the context of suppression motions, however, there is a greater likelihood that these waivers are unilaterally imposed on a plea agreement that the defendant has little choice but to accept. Such waivers substantiate the arguments advanced by the minority of courts that hold all appellate waivers per se invalid because they violate due process, public policy, and contract law. Prosecutors may utilize these waivers to dissuade defendants from raising suppression motions and to punish defendants who proceed with their motions and lose. Additionally, the waiver of this right, in contrast to appellate waivers of other rights, expressly contravenes certain states' legislative intent. Assuming that the majority of courts are correct in advancing efficiency as a policy goal, these waivers contravene this goal by encouraging defendants to proceed to trial solely to preserve their suppression motion appellate rights. Although prosecutors may sometimes have a valid reason for requiring such waivers, judicial partiality towards appeal waivers generally make clear that only a complete prohibition on suppression motion appellate waivers can protect defendants' rights and advance public policy.

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²⁹² See, e.g., *Olson*, 264 Cal. Rptr. at 819 (explaining the need to conserve judicial resources); *Burk*, 586 N.Y.S.2d at 142 (noting the importance of holding defendants to their bargains to ensure the State's legitimate interest in finality).