WAIVING THE CRIMINAL JUSTICE SYSTEM: AN EMPIRICAL AND CONSTITUTIONAL ANALYSIS

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Constitutional criminal procedural guarantees are becoming increasingly marginalized in a world where "the criminal justice system is the plea bargaining system." Plea agreements are boilerplate, and the 97% of defendants who enter guilty pleas cannot, for the most part, negotiate individual terms, nor run the risk of rejecting the deal and going to trial. As we have transformed from an adversary process where guilt was determined by trial to an administrative process where guilt and penalties are determined by negotiation, the government has begun demanding the waiver of all constitutional criminal procedure rights, not just the trial and investigative-related ones inherent in replacing the trial with the plea.

In this essay, we will first describe the growth of two non-trial-related waivers that have not yet been accepted by the Supreme Court - waivers of the due process right to obtain exculpatory evidence as to guilt and punishment, and waivers of the newly-expressed Sixth Amendment right to effective assistance of counsel at the plea negotiation stage. We then offer the results of an empirical project that Professor Susan Klein undertook at the United States Sentencing Commission and a national survey of federal plea agreements conducted by Public Defender Donna Elm. After examining caselaw and practice in the area, we conclude that effective assistance of counsel waivers are unethical, unwise, and perhaps unconstitutional.

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I. Introduction—The World of Guilty Pleas

Constitutional criminal procedural guarantees are becoming increasingly marginalized in a world where plea-bargaining "*is* the criminal justice system."[1] The criminal justice process envisioned by the framers seems quaint by today's standards. The Fourth Amendment search, seizure, and warrant rules and Fifth Amendment self-incrimination privilege regulated the investigation of crime and the taking of confessions. The Fifth and Fourteenth Amendment rights to proof beyond a reasonable doubt on every element of a criminal offense and the Sixth Amendment protections of a public jury trial, compulsory process, confrontation of witnesses, and effective assistance of counsel governed criminal trials. The Eighth Amendment Cruel & Unusual Punishment prohibition limited the quality and quantity of punishments that could be imposed, especially for capital cases. Statutory and Fifth and Fourteenth Amendment Equal Protection doctrines ensured opportunities for direct and collateral appeals of convictions. These rights appeared so important during the Warren Court's heyday that we called their incorporation

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[1] Missouri v. Frye, 132 S. Ct. 1399, 1407 (2012) (emphasis in original).

and expansion a "revolution."[2] Yet today the exercise of any of these rights is quite a rarity.

Instead, our modern criminal justice system consists of one government official—the prosecutor—unilaterally making most significant decisions.[3] Criminal matters are resolved by plea rather than trial, and procedural protections are routinely waived as part of the bargain. Contract principles, rather than constitutional law, govern these agreements.[4] This movement from an adversarial to a *de facto* administrative regime now seems to us, with our perfect 20-20 hindsight, a foregone conclusion from the combination of resource restraint and the Supreme Court's high tolerance for government coercion. The transformation began in the 1970s when the Court accepted as non-coercive a government offer of a plea to life imprisonment to avoid the death penalty,[5] and a prosecutorial threat of adding a recidivism enhancement with a mandatory-life penalty if the defendant refused to plead guilty to a two to ten year felony.[6] Now that prosecutors are free to threaten suspects with additional and more serious charges, and to offer steep sentencing discounts only to those who will play ball, plea bargains have become the offer a defendant cannot refuse. Prosecutors regularly threaten to give notice of three strikes provisions and other recidivist enhancements, impose mandatory minimums or consecutive

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[2] Carol S. Steiker, *Counter-Revolution in Constitutional Criminal Procedure? Two Audiences, Two Answers*, 94 MICH. LAW REV. 2466 (1996).

[3] *See* Gerard E. Lynch, Our Administrative System of Criminal Justice, 68 FORDHAM L. REV. 2117, 2142 (1998) (arguing that our existing system of plea bargaining is one of prosecutorial administration without significant judicial input). *See also* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (correctly noting that "in criminal trials, the Constitution is omnipresent. In guilty pleas, it is nearly invisible").

[4] Santobello v. New York, 404 U.S. 257, 260–61 (1971), Ricketts v. Adamson, 483 U.S. 1 (1987) (treating a guilty plea entered into voluntarily and knowingly as a contract between the government and the defendant); Robert E. Scott and William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909 (1992).

[5] Brady v. United States, 397 U.S. 742 (1970).

[6] Bordenkircher v. Hayes, 434 U.S. 357 (1978).

sentences, and indict weapons charges with consecutive sentences and other enhancements if defendants refuse to sign on the dotted line. Likewise, prosecutors offer downward departures for substantial assistance, reductions rewarding acceptance of responsibility or remorse, and dismissal of various charges in exchange for the timely plea.[7] Where the charges are misdemeanors, state prosecutors suggest the nearly irresistible trade of allowing a defendant to go home immediately with time served and probation in exchange for a guilty plea.[8]

Not surprisingly, 97% of federal criminal felony convictions were by guilty plea in 2012,[9] while a slightly lower 94% of state criminal felony convictions were by guilty plea in 2006.[10] Considering the more inclusive universe of all cases charged, rather than just the percentage of convictions accomplished by guilty pleas, the percentage drops slightly. Just under 90% of all federal defendants charged with a federal felony pled guilty,[11] and approximately 70% of state defendants charged with felonies pled guilty.[12] While we hope that

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[7] Susan R. Klein, *Enhancing the Judicial Role in Criminal Plea and Sentencing Bargaining*, 84 TEXAS L. REV. 2023, 2037–38 (2006).

[8] Josh Bowers, *Punishing the Innocent*, 156 U. PA. L. REV. 1117, 1134 (2008) (suggesting that many wrongful convictions by plea involve low-level offenses); Human Rights Watch, *The Price of Freedom: Bail and Pretrial Detention of Low Income Nonfelony Defendants in New York City* (2011), *available at* http://www.hrw.org/sites/default/files/reports/us1210webcover_0.pdf.

[9] U.S. Sentencing Commission 2012 Annual Report at 42, *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/ar12toc.htm.

[10] Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, *Felony Sentences in State Courts*, 2006-Statistical Tables, p. 1, *available at* http://bjs.opj.usdoj.gov/content/pub/pdf/fssc06st.pdf.

[11] Of all defendants charged federally in 2010, 89% pled guilty, 8.7% had their cases either dismissed by the judge or acquitted at trial by the judge or jury, and 2.3% were convicted after trial. Sourcebook of Criminal Justice Statistics Online, table 5.22.2010, available at http://www.albany.edu/sourcebook/pdf/t5222010.pdf. *See also* Administrative Office of the United States Courts, *2011 Annual Report of the Director: Judicial Business of the U.S. Courts*, Table D-4 (2012) *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2011/JudicialBusiness2011.pdf (finding a high of 89% guilty plea rate for all federal defendant charged with a felony for the year 2012).

[12] When we review all persons charged with state offenses in a major urban area in 2006, the most

innocent persons are obtaining those dismissals or acquittals, and the least culpable are pleading to lesser charges, for the overwhelming majority of defendants plea bargaining is no longer done in the shadow of a criminal trial outcome. In fact, the term "bargaining" is a misnomer. Plea agreements are boilerplate, and defendants cannot, for the most part, negotiate individual terms, nor run the risk of rejecting the deal and going to trial.[13] Over-worked and underpaid defense lawyers frequently do not have the information or the resources to assess the government's case and accurately predict what the trial outcome might be.

Hand-in-hand with plea-bargaining's triumph[14] came the spread of waivers. Some prosecutors demanded that criminal defendants "voluntarily" waive every right that the Constitution or state or federal statutes provide as a condition of obtaining a plea agreement.[15] Trial rights necessarily have to be waived to replace the criminal trial with the plea bargain. Thus, the Rules Advisory Committee to the Federal Rules of Criminal Procedure developed a

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recent year for which data is available on state felony case outcomes in the largest 75 counties in the nation, 65% of those charged with a felony pled guilty to a felony or misdemeanor offense, 3% were convicted after trial, 1% were acquitted, 8% diverted, and 23% of those charged had their cases dismissed after being charged. Thomas H. Cohen & Tracey Kyckelhahn, Bureau of Justice Statistics, *Felony Defendants in Large Urban Counties, 2006* (May 2010), *available at* http://www.bjs.gov/content/pub/pdf/fdluc06.pdf. Due to inconsistent statistics gathering in various jurisdictions, it is difficult to determine accurately the number of state defendants pleading guilty.

[13] Only a very small percentage of defendants are situated so that they have a realistic shot of success at trial, and can therefore sensibly take the risk of rejecting the steeply discounted sentence available only by plea: (1) A defendant wholly innocent, who knows she can locate and obtain the exculpatory evidence she needs to prevail at trial; (2) a defendant who is rich enough to afford a dream team of lawyers and a bevy of investigators necessary to fight the charges by inundating the government with investigation and litigation; (3) an indigent defendant who has a cause organization like the ACLU interested in her case, and is not risk averse or has nothing to lose; and (4) a defendant who is guilty but knows the government cannot meet their burden.

[14] *See generally* GEORGE FISHER, PLEA BARGAINING'S TRIUMPH (2004) (tracing the evolution of the plea bargain through the present and highlighting the plea bargain's centrality in today's criminal justice system).

[15] *See generally* NORMAN ABRAMS, SARA SUN BEALE, & SUSAN R. KLEIN, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 913–15 (2010); Susan R. Klein, *Monitoring the Plea Process*, 51 DUQ. L. REV. 559 (2013). *See also* Parts II(A) and (B), *infra*.

standard list of trial rights a federal criminal defendant must waive, on the record, at her Rule 11 plea colloquy.[16] As we transformed from an adversary process where guilt was determined by trial to an administrative process where guilt and penalties are determined by negotiation, many prosecutors began demanding waiver of all constitutional criminal procedure rights, not just the trial and investigative-related ones inherent in replacing the trial with the plea. Prosecutors developed the bargaining clout to save their offices money and make their convictions unassailable, so they added waiver demands well beyond what was necessary to enter a plea.

First the waiver bug spread from trial rights to appellate rights in the 1980s and 1990s.[17] Though all appellate courts to rule on this issue have accepted them,[18] the Rules Advisory Committee has pointedly offered no opinion as to their constitutionality.[19] Next came *habeas corpus* waivers, some with exceptions for ineffective assistance of counsel claims and some without any exceptions.[20] Over the last decade, prosecutors began requesting waivers of all discovery materials, including not only impeachment evidence but also exculpatory evidence of actual innocence and claims of prosecutorial misconduct in failing to disclose such materials.[21]

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[16] FED. R. CRIM. P. 11(b)(1)(A)–(M) (West 2013) (requiring the judge to advise the defendant on the record regarding trial rights she must waive, such as the right to cross-examine witnesses, the right to a jury, the right to put the government to its burden of proof beyond a reasonable doubt, the right to counsel at trial, and the right to exercise the privilege against self-incrimination).

[17] Nancy J. King and Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (finding that of 1000 randomly selected federal criminal cases, nearly two-thirds contained waivers of defendants' right to direct appeal).

[18] *See, e.g.*, United States v. Khattak, 237 F.3d 557, 560–61 (3d Cir. 2005) (collecting cases).

[19] FED. R. CRIM. P 11(B)(1)(N) (requiring the judge to explain terms of such waiver, if applicable, to the defendant). The Committee noted in the commentary to its 1999 amendments that it "takes no position on the underlying validity of such waivers." FED. R. CRIM. P 11, Committee Notes on Rules—1999 Amendment.

[20] *See e.g.*, United States v. Mabry, 536 F.3d 231, 236–37 (3d Cir. 2008).

[21] Giglio v. United States, 405 U.S. 150 (1972) (holding that impeachment evidence concerning the biases of the government witnesses is included in the general rule of *Brady*); Brady v. Maryland, 373 U.S. 83 (1963) (holding that due process demands that prosecutors disclose favorable evidence favorable to an

Finally, even before two fractured 2012 Supreme Court cases clearly applying the right to effective defense counsel at the plea negotiation stage and expanding the remedy,[22] a fair number of prosecutors began demanding that a defendant waive her right to effective assistance of counsel in helping her investigate her case and negotiate her plea terms.[23] We will focus on these last two sets of waivers in the rest of this essay, particularly the latter one. We contend that effective assistance of counsel waivers are unjust and will topple our current plea bargaining system, and that therefore the Court and the Department of Justice should refuse to condone them.

This is not an essay castigating the transformation of our current criminal justice system, as we have described it above. Our plea regime is not necessarily worse than the system it replaced. The majority of criminal defendants are guilty of some crime, and encouraging those defendants to plead guilty saves judicial and government resources. There is significant scholarly disagreement on the advantages of plea-bargaining,[24] and our essay is not the venue to resolve this dispute. We merely note that there is no feasible return to our former system of trials. Once we accept that, we must be willing to regulate it, or the executive branches of the

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accused where that evidence is material either to guilt or punishment). *See also infra* Part II(A), apps.A, F (FOIA waivers); Part II(A), app.B (Brady Waivers); Part II(A), app.D (DNA waivers).

[22] Lafler v. Cooper, 132 S.Ct. 1376 (2012) (holding that defense counsel's failure to communicate the prosecutor's plea bargain to the defendant constituted deficient performance); Missouri v. Frye, 132 S.Ct. 1399 (2012) (holding that defense attorney's erroneous legal advice that the penalty imposed after trial would be better than the sentence offered at the plea deal constituted deficient performance).

[23] *See infra* nn.48–49, 50, 52, 58, 61 and accompanying text.

[24] *Compare* Darryl K. Brown, *The Decline of Defense Counsel and the Rise of Accuracy in Criminal Adjudication*, 93 CAL. L. REV. 1585, 1610 (2005); Stephen J. Schulhofer, *Plea Bargaining As Disaster*, 101 YALE L.J. 1979 (1992); Albert W. Alschuler, *The Changing Plea Bargaining Debate*, 69 CAL. L. REV. 652 (1981) *with* Ronald F. Wright, *Sentencing Commissions as Provocateurs of Prosecutorial Self-Regulation*, 105 COLUM. L. REV. 1000 (2005); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2467–68 (2004); Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 YALE L.J. 1909 (1992).

government will fill the vacuum with rules favorable to it. A mandatory plea bargaining system where the kind of deal received is fortuitous depending upon quality of prosecutor and defense attorney assigned, rather than level of guilt, leads to unequal sentences for similarly situated defendants and, in rare cases, the conviction of the innocent.[25] Five Justices of the Supreme Court recognized this last term in two decisions, *Lafler v. Cooper* and *Missouri v. Frye*, that we believe indicate a willingness to monitor the plea-bargaining process.[26] Much of the clear inequities in our current system can be mitigated by better discovery and more effective counsel at the plea stage.

Unfortunately, some state and federal prosecutors' immediate response to the application of the Sixth Amendment right to effective assistance of counsel to this earlier stage was to demand a waiver of the right as part of the plea deal.[27] In Part II of this essay, we will first describe the growth of non-trial-related waivers. We will focus here on two waivers that have not yet been ruled on by the Court: waivers of the due process right to obtain exculpatory evidence as to guilt and punishment, and waivers of the Sixth Amendment right to effective assistance of counsel at the plea negotiation stage. In Part A, we offer the results of an empirical project that Professor Klein undertook at the United States Sentencing Commission, counting discovery and *habeas* waivers. In Part B, we report Defender Elm's national survey of all waivers contained in federal plea agreements. In Part C, we examine post-*Lafler* and *Frye* state and federal case law regarding pre-trial waivers of effective assistance of counsel. In Part III, we argue that effective assistance of counsel waivers are unethical, unwise, and perhaps unconstitutional.

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[25] *See* Klein, *Monitoring the Plea Process*, *supra* note 15.

[26] *See supra* note 22 and accompanying text.

[27] *See infra* Part II(C) and accompanying text.

II. The Growth of Waivers

The Supreme Court naturally held that entering a guilty plea acts as a waiver of all trial rights.[28] Pleading guilty and proceeding to sentencing is a useless exercise unless the defendant waives all trial rights: his privilege against self-incrimination, his right to trial by jury and proof beyond a reasonable doubt, his right to representation by counsel or self-representation during his trial, and his right to confront the witnesses against him. All such rights are necessarily waived by the act of entering the plea and foregoing the trial.[29] "For this reason, a guilty plea not only must be voluntary but must be [a] knowing, intelligent ac[t] done with sufficient awareness of the relevant circumstances and likely consequences."[30] To attempt to police the validity of the trial-rights waivers, federal judges fully explain these rights to defendants before accepting the guilty plea, and most U.S. Attorney's Offices list them in written plea agreements.[31] The enforcement of waivers of trial rights appears relatively non-controversial. The give-and-take of the plea agreement process demands these tradeoffs to keep the criminal justice system on track and to preserve scarce prosecutorial and judicial resources. For the counseled defendant who knows the prosecutor has ample proof beyond a reasonable doubt of guilt, "the advantages of pleading guilty and limiting the probable penalty are obvious—his exposure is reduced, the correctional process can begin

[28] *See* United States v. Mezzanatto, 513 U.S. 196, 200–01 (1995) (collecting cases upholding a defendant's right to waive the double jeopardy defense, the right against self-incrimination, the right to trial by jury, the right to confront one's accusers, and the right to counsel during his trial).

[29] Also necessarily waived as part of the plea bargain is a defendant's right to plead double jeopardy if he violates the plea agreement, and the prosecutor re-charges him with the original offense. Ricketts v. Adamson, 483 U.S. 1 (1987) (holding that where defendant breached plea agreement by refusing to testify against his co-defendant, agreement clearly provided that parties would be returned to the *status quo ante*, in which case defendant would have no double jeopardy defense to waive).

[30] Brady v. United States, 397 U.S. 742, 748 (1970).

[31] FED. R. CRIM. P. 11(b)(1)(B)–(F).

immediately, and the practical burdens of a trial are eliminated."[32]

In addition to waiving the opportunity to challenge the factual findings underlying the criminal charge[33] and all trial rights ordinarily employed to help the jury make those factual determinations, plea agreements also necessarily contemplate the relinquishment of all constitutional rights antecedent to the plea. A defendant cannot demand at trial, since there will be no trial, the exclusion of evidence obtained by unconstitutional means (as with evidence obtained in violation of a defendant's Fourth Amendment protection against unreasonable searches and seizures) or that is unreliable (such as a coerced confession or pre-trial identification procedures that are unconstitutionally suggestive). In these situations, a defendant may obtain a pre-trial ruling on the propriety of the government action via a suppression motion[34] and, if she loses that and has the permission of the prosecutor, enter a conditional guilty plea that permits her to challenge the violation on direct appeal.[35] Additionally, an intelligent and voluntary plea of guilt generally bars the collateral attack of these same claims relating to the deprivation of constitutional rights that occurred antecedent to the entry of a guilty plea.[36] Thus, for the defendant who has not signed a

[32] *Brady*, 397 U.S. at 752 (1970).

[33] "A guilty plea is more than a confession which admits that the accused did various acts. It is an admission that [the accused] committed the crime charged against him." United States v. Broce, 488 U.S. 563, 570 (1989) (internal citation omitted).

[34] In federal court, a defendant must move to suppress evidence before trial. *See* FED. R. CRIM. P. 12(b)(3)(C). A defendant cannot appeal the denial of such a motion until after conviction, 28 U.S.C. § 1291 (final judgment rule), though the government may appeal the granting of such a motion immediately, 18 U.S.C. § 3731 (permitting appeal or a district court order suppressing or excluding evidence in a criminal proceeding).

[35] FED. R. CRIM. P. 11(a)(2) (allowing defendant, with consent of court and government, to enter conditional plea that permits appellate court review of an adverse determination of a specified pre-trial motion). *See also* Lefkowitz v. Newsome, 420 U.S. 282 (1975) (holding that a conditional federal plea and state plea that permits direct appellate review of adverse pre-trial evidentiary decision have the effect of preserving the claim for federal *habeas corpus* review as well).

[36] Haring v. Prosise, 462 U.S. 306, 321–22 (1983) (stating that a Fourth Amendment claim ordinarily may not be raised in a *habeas* proceeding following a plea of guilty); Tollett v. Henderson, 411 U.S. 258, 266

conditional plea (or who was charged in a state that has no conditional-plea analogue, and that also bars direct appeal of such constitutional claims), "a guilty plea results in the defendant's loss of any meaningful opportunity he might otherwise have had to challenge the admissibility of evidence obtained in violation of the Fourth Amendment."[37]

The bar to such antecedent constitutional claims rests not on a waiver theory, but rather because the defendant's admission of guilt in open court acts as a "break in the chain of events [that] preceded it in the criminal process."[38] Such a counseled admission is:

> so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case. In most cases, factual guilt is a sufficient basis for the State's imposition of punishment. A guilty plea, therefore, renders irrelevant those constitutional violations not logically inconsistent with the valid establishment of factual guilt.[39]

Such reasoning does not apply to statutory and constitutional rights that may be violated during the entry of the conviction by guilty plea or during the post-guilty plea sentencing hearing. A defendant has the statutory right to directly appeal her conviction by guilty plea.[40] Her admission of guilt does not bar the appeal of such matters as the right to be correctly advised regarding the trial rights waived by conviction by plea[41] or the requirement that the plea be entered

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(1973) (holding that defendant was not entitled to a writ of *habeas corpus* on the basis of infirmities in the selection of the grand jury); McMann v. Richardson, 397 U.S. 759, 770 (1970) (refusing to address merits in *habeas* proceeding regarding whether defendant's confession was coerced); Brady v. United States, 397 U.S. 742 (1970) (holding claim of impermissible burden on the right to jury trial resulting from structure of the Federal Kidnapping Act not cognizable in *habeas*).

[37] *Haring*, 442 U.S. at 317 (holding that although defendant's guilty plea bars raising the fourth amendment claim on *habeas*, it did not, under state and federal rules of collateral estoppel, bar a subsequent 42 U.S.C. § 1983 civil rights action challenging the legality of the search).

[38] Tollett v. Henderson, 411 U.S. 258, 266 (1973).

[39] *Haring*, 442 U.S. at 321 (citing Menna v. New York, 423 U.S. 61, 62–63 n.2 (1975)).

[40] 28 U.S.C. § 1291.

[41] United States. v. Vonn, 535 U.S. 55, 74–75 (2002) (holding on direct appeal that a defendant who

into intelligently and voluntarily.[42] Additionally, the defendant possesses the statutory right to challenge her sentence after conviction by plea.[43] Her admission of guilt does not bar claims based on the grounds that the sentence is outside the statutory maximum, unreasonable, or higher than contemplated by the terms of her bargain.[44] The Court has not yet ruled on the constitutionality of plea agreement waivers of the statutory right to direct appeal of conviction by plea or direct appeal of sentence after conviction by plea.[45] However, every appellate court to reach the issue has upheld waivers of direct appeal,[46] though most courts have recognized exceptions for the entry of pleas or

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fails to object to an error in the Rule 11 hearing must satisfy the plain-error rather than harmless-error rule, and allowing reviewing court to look beyond the plea proceeding to the record as a whole to determine the effect of the error); United States v. Timmreck, 441 U.S. 780 (1979) (denying relief under 28 U.S.C. § 2255 where the petitioner claimed only a technical violation of Rule 11, and suggesting that petitioner ought to have sought relief on direct appeal).

[42] "A plea is involuntary either because the accused does not understand the nature of the constitutional protections he is waiving, or because he does not understand the charge." Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976). *See also* McCarthy v. United States, 394 U.S. 459 (1969) (explaining Rule 11's dual purposes of ensuring voluntariness and creating a record through the plea colloquy).

[43] *See* 18 U.S.C. § 3742(a) (permitting appeal by defendant of her final sentence); FED. R. CRIM. P. 32(j)(B) (requiring judge to advise a defendant after sentencing, regardless of her plea, of any right to appeal);

[44] United States v. Booker, 543 U.S. 220 (2005) (holding that federal sentencing guidelines must be advisory to conform to Sixth Amendment, and federal sentences reviewed on appeal for "reasonableness"); Gall v. United States, 552 U.S. 38 (2007) (affirming below guidelines sentence as "reasonable"); Kimbraugh v. United States, 552 U.S. 85 (2007) (holding that judge may disagree with sentencing commission where guidelines yield a sentence greater than necessary to achieve the goals Congress set forth in 18 U.S.C. § 3553(a)).

[45] The only Supreme Court case mentioning direct appeal waivers that we could find is Whitmore v. Arkansas, 495 U.S. 149, 165–66 (1990) (noting that a capital defendant waived his right to appeal and accepted the death sentence). The *Whitmore* court did not comment upon the propriety of this waiver, as it was not challenged and not relevant to the issue of third-party standing in that case.

[46] *See* United States v. Alcala, 678 F.3d 574, 579–80 (2d Cir. 2012) (defendant who waives right to appeal in a plea also waives right to appeal court's denial of his motion to withdraw that plea); United States v. Khattak, 273 F.3d 557, 560–61 (3d Cir. 2005) (collecting cases upholding waivers of direct appeal). *But see* Editorial, *Trial Judge to Appeals Court: Review Me*, N.Y. TIMES, July 16, 2012, http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html (highlighting federal district Judge Kane's rejection of a plea bargain where the defendant waived his right to appeal, asserting that "indiscriminate acceptance of appellate waivers undermines the ability of appellate courts to ensure the constitutional validity of convictions and to maintain consistency and reasonableness in sentencing decision").

sentences imposed due to ineffective assistance of counsel, manifest injustice, or for a term higher than the statutory maximum.[47]

Similarly, the majority of courts to rule on the matter have upheld the right to waive collateral attack on the conviction by plea.[48] The vast majority of constitutional violations antecedent to the guilty plea are not cognizable on *habeas* because they are relinquished rather than expressly "waived."[49] .More importantly, "the focus of federal *habeas* inquiry is the nature of defense counsel's advice and the voluntariness of the plea."[50] Thus, in addition to raising issues such as the intelligence and voluntariness of the plea,[51] defendants can also theoretically raise all the antecedent claims barred on direct appeal and on *habeas* by reframing them as ineffective assistance of counsel claims. While the issue of the plea's intelligence and voluntariness is procedurally

[47] United States v. Andis, 333 F.3d 886 (8th Cir. 2003) (*en banc*) (dismissing appeal but recognizing that a court may refuse to honor appeal waiver where sentence imposed was in excess of exceeded the maximum allowed by law, was based on unconstitutional factors such as race or gender, or was tainted by ineffective assistance of counsel).

[48] *E.g.* United States v. Mabry, 536 F.3d 231 (3d Cir. 2008) (upholding waiver of collateral attack and refusing to apply the usual presumption of prejudice where counsel fails to file a requested appeal given defendant's waiver).

[49] A defendant can seek to set aside a conviction based on a very narrow list of prior constitutional claims that challenge "the very power of the State to bring the defendant into court to answer the charge against him," at least where this violation is clear from the facts of the record. Blackledge v. Perry, 417 U.S. 21, 30 (1974); Haynes v. United States, 390 U.S. 83 (1968) (holding that the defendant can assert his claim that the statute was unconstitutional despite his guilty plea); Menna v. New York, 423 U.S. 61 (1975) (double jeopardy claim may be raised in federal habeas proceedings following a state-court conviction based on a plea of guilty). *But see* United States v. Broce, 488 U.S. 563, 575 (1989) (holding that defendant who pleads guilty to two conspiracies cannot obtain a factual hearing on a double jeopardy claim, and distinguishing *Blackledge* and *Menna* on the grounds that those cases could be resolved "without any need to venture beyond the record").

[50] Haring v. Prosise, 462 U.S. 306, 320 (1983).

[51] Bousley v. United States, 523 U.S. 614, 622 (1998) (upholding habeas claim where defendant was misinformed about the nature of the 18 U.S.C. § 924(c)(1) charge to which he pled guilty, despite failure to raise claim on direct appeal of conviction, if he can demonstrate either "cause or prejudice" or that he is "actually innocent"); Henderson v. Morgan, 426 U.S. 637 (1976) (holding that plea was involuntary and therefore vacated on habeas where no one told defendant with below-average intelligence that intent-to-kill was an element of second-degree murder and defendant made no factual statement or admission implying such intent when he pled guilty).

defaulted unless raised first on direct appeal,[52] a Sixth Amendment ineffective assistance of counsel claim can be brought only on collateral attack. If the defendant can meet the nearly impossible burden of showing that counsel's handling of the constitutional issue fell below an objective standard of reasonableness, and that he would not have entered the plea agreement but for counsel's error, he can successfully withdraw his plea.[53]

The final set of waivers that concern us are waivers of statutory and constitutional rights to receive evidence that the government has or should have in its possession that might impeach the government's physical evidence or witnesses, or establish that the defendant is innocent of one of offense included in the charging instrument.[54] These can be trial rights, like *Brady*, or post-trial rights such as later DNA testing of evidence. The Supreme Court has thus far evaded the particular issue of whether a defendant can waive, as part of her plea negotiation, the right to obtain pre-plea *Brady* evidence of actual innocence. The Court in *United States v. Ruiz*[55] accepted a plea waiver to a defendant's due-process right to receive impeachment material under *Giglio*, but specifically

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[52] *Bousley*, 523 U.S. at 622.

[53] *See* Padilla v. Kentucky, 130 S.Ct. 1473 (2010) (holding that state counsel violated Sixth Amendment by failing to advise defendant on immigration consequences of guilty plea, and remanding for finding of prejudice); Hill v. Lockhart, 474 U.S. 52 (1985) (finding no prejudice where attorney failed to advise defendant about parole eligibility and denying habeas relief). We note that courts find that quantum of evidence only rarely nonetheless. *See, e.g.*, David Cole, Gideon v. Wainright *and* Strickland v. Washington, *Broken Promises*, *in* CRIMINAL PROCEDURE STORIES 101 (2010); Am. Bar. Ass'n, *Gideon's Broken Promise: America's Continuing Quest for Equal Justice*, v (Dec. 2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf.

[54] *See, e.g.*, FED. R. CRIM. P. 16 (discovery and inspection); FED. R. CRIM. P. 26.2 ((production of statements and reports of witnesses); 18 U.S.C. § 3500, The Jencks Act (same); 5 U.S.C. § 552, Freedom of Information Act; 18 U.S.C. § 3600, Innocence Protection Act of 2004 (giving federal convicts the right to request DNA testing); Giglio v. United States, 405 U.S. 150, 154 (1972) (holding that due process demands that government turn over impeachment evidence to defense); Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires that government turn over admissible, material evidence favorable to defense).

[55] 536 U.S. 622 (2002).

reserved the issue of actual innocence. This ruling quickly generated a circuit split on the issue.[56]

In the next three subsections, we will explore which, if any, explicit waivers are actually finding their way into federal and state plea agreements. In Parts A and B, we provide some empirical evidence regarding plea negotiations in federal courts around our nation. In part C, we review the lower federal and state courts' reactions to effective assistance of counsel waivers.

A. Discovery and *Habeas* Waivers—An Empirical Assessment

Waivers of discovery and appellate rights are sprouting up like wildfires in California. For example, in the Western District of Texas, discovery waivers became standard about a year ago. The boilerplate language for plea agreements in that district now provides:

> In addition to waiving pretrial motions, the Defendant agrees to give up and waive any claims he/she may have now or may acquire later to any information possessed by the prosecution team that might be subject to disclosure under discovery rules, including the Federal Rules of Criminal Procedure, the *Jencks* Act, local court rules, and Court Orders, including information that might be considered exculpatory or impeaching under *Brady v. Maryland* and *Giglio v. United States*.[57]

The Western District also requires a collateral attack waiver "except the defendant does not waive his right to raise a challenge based on ineffective assistance of counsel and prosecutorial misconduct."[58] To test the theory that such waivers are on the rise Professor Klein and Defender Elm independently decided to thoroughly gather what data was available.

Professor Klein entered into a Cooperation Agreement with the United States Sentencing Commission ("USSC") that gave her access to all written plea agreements entered in the federal

[56] United States v. Moussaoui, 591 F.3d 263, 286 (4th Cir. 2010) (collecting cases).

[57] *See, e.g.*, United States v. Bontello, No. 13-051, ¶2 (W.D. TX, April 3, 2013).

[58] *Id.*

courts.[59] This project was designed with two agendas: first, to discern what factors play a role in the decision to file charges in federal court for a crime with concurrent state and federal jurisdiction;[60] and second, to count constitutional rights waivers. During the winter of 2012,[61] she and her team reviewed all Arson cases from 2008 to 2010, charged under 18 U.S.C. section 844 *et. seq*., resulting in a plea of guilty or a verdict of guilt from trial. They also reviewed cases where the defendant may have been charged under section 844, but pled to a different offense and the section 844 charges were later dismissed. They did not review section 844 cases that did not result in an adjudication of guilt. In total, they reviewed and coded 359 arson cases. Additionally, they obtained data on all Robbery cases from 2006–2010 charged under 18 U.S.C. section 1951, which resulted in a plea of guilty or a verdict of guilt after trial. They eliminated all section 1951 causes that were charged "under color of official right." They excluded all bank robbery cases brought pursuant to 18 U.S.C. section 2113. Due to the extremely large number of robbery cases and limited resources, they hand-coded data for a random sample of these cases (every fifth case). In total, they reviewed and coded 267 robbery cases.

The USSC archives documents on every federal sentence in the United States, whether by plea or trial. These documents include the Pre-Sentencing Report (PSR), the sentence, a judicial statement of reasons, and written plea and cooperation agreements. The USSC uses these documents to construct a detailed file on each defendant. The USSC provided Professor Klein with

[59] United States Sentencing Commission Cooperation Agreement signed May 4, 2011, between Professor Susan R. Klein and Judith W. Sheon, Staff Director, U.S. Sentencing Commission, on file with author and law review. This agreement was entered pursuant to 28 U.S.C. § 995(a)(6)–(7).

[60] Those results are forthcoming. *See* Susan R. Klein, Michael Gramer, Daniel Graver, & Jessica Kindell Winchell, *Why Federal Prosecutors Charge: A Comparison of Federal and New York State Arson and Robbery Filings, 2006–2010*, symposium, Federal Sentencing at the Crossroads, ___ HOUS. L. REV. ___ (2014).

[61] Professor Susan Klein, UT law students Michael Gramer and Daniel Graver, and additional law students from Georgetown and George Washington Law School.

access to its data files and the underlying documents for all cases noted above. Her team used the underlying documents to hand-code a number of other variables of interest. Using the USSC's computers and database, the team read through all of the related documents and hand-coded the following relevant variables:

* Plea Agreement: Polygraph authorized or required
* Plea Agreement: Habeas Corpus waiver
* Plea Agreement: FOIA waiver
* Plea Agreement: Brady, Jencks, and/or actual innocence waiver

This study revealed a relatively substantial number of discovery waivers in federal pleas nationwide (about 25%), that increased as the United States Attorneys' Offices became larger. Of the 622 arson and robbery plea-bargains that her team coded, they found that 147 of them contained a *Brady*, *Giglio*, or Freedom of Information Act waiver. In 2009, 24.7% of pleas contained such a waiver. While 21.6% of plea bargains entered in small town or rural areas contained such waiver, 28.4% of pleas signed in major cities contained such waivers. Counting those same 622 cases, there were 279 habeas waivers.

More specifically, 27% of robbery plea agreements contained a FOIA waiver, 32% contained some combination of *Brady* waiver (actual innocence or *Giglio*), 29.8% permitted the destruction of DNA evidence, the right to test such evidence, or both, and 64% contained *habeas* waivers.[62] Of the arson plea agreements, 59.2% contained *habeas* waivers, 23% included FOIA waivers, and 71% appeared to contain some combination of *Brady* waiver (actual innocence or *Giglio*).[63] As this study was conducted over a year prior to *Lafler* and *Frye*, and Professor Klein had never encountered a request to waive effective assistance of counsel, her team did not code for this variable.

[62] *See infra* app.A–D.

[63] *See infra* app.E–G. DNA waivers were not coded for arson cases.

B. Plea Appeal and Collateral Attack Waivers

Federal Public Defender Donna Lee Elm wished to discover the types and breadth of appellate and collateral attack waivers that are typical in plea agreements offered by Assistant United States Attorneys in each of the ninety-four federal districts in the United States. She collected the boilerplate plea agreements from each of the districts from PACER[64] and some Federal Public Defenders,[65] and amalgamated the data into the chart attached as Appendix H. Because some U.S. Attorney's Offices utilize various versions of plea agreements with distinct waivers, there are more than ninety-four rows in this chart, so the totals in the last line represent all the various boilerplate plea waiver terms used in the federal system. Each of the districts that use a variety of plea agreements is listed as such in the third to last column "Variety" with a "Yes."

The chart breaks down into the following categories: "Broad, All" includes blanket waivers of all appellate and collateral attacks. "Broad, None" includes a lack of any waivers at all. Very few districts utilize this cut-and-dry language, with five districts requiring a complete waiver of all appellate and collateral attacks rights, and seventeen districts demanding no waivers at all. Some of the districts listed as having "Broad, All" waivers, however, have since backed off and included some exceptions in their boilerplate plea agreement. For example, in Kentucky's Eastern and Western Districts, some of the plea agreements in 2011 contained clauses waiving all appellate rights and 28 U.S.C. section 2255 collateral attack waivers.[66] By 2012, however, the Eastern District added some exceptions to this broad waiver of all post-plea rights, including the right to appeal the actual sentence imposed and the right to collaterally attack an invalid guilty plea and

[64] Public Access to Court Electronic Records (PACER) is an online service providing access to U.S. Appellate, District, and Bankruptcy court records and documents.

[65] In districts that did not have a Federal Public Defender, Defender Elm contacted CJA counsel.

[66] Appendix H, n.15.

sentence.[67] Where the district has different plea agreements over time, it is signified as such in the second to last column marked "Diffs over time."

The next categories listed on the chart, "Waiver, App." and "Waiver, Coll. Att.," include the remaining districts that do not utilize broad, blanket waivers of either all or none of the appellate and collateral attack rights. The vast majority of the districts' standard plea agreements have waivers of both appellate and collateral attacks, but allow some exceptions. In just a few districts, the parties negotiate exceptions. The third category, "Exceptions," with the numerous sub-categories listed in the row below, details the types of waiver exceptions each district generally includes. For example, the standard plea agreement in the Western District of Michigan includes waivers of both appellate and collateral attacks, but includes exceptions for challenges for ineffective assistance of counsel, voluntariness of the plea agreement, invalid plea, and violations of matters objected to and preserved at sentencing.[68]

The chart covers 114 different boilerplate plea agreements, including at least one plea agreement from each of the ninety-four federal districts plus some variations within the same district or old and new versions of the district's boilerplate agreement. Seventy-seven (77) of the agreements mandate a waiver of collateral attack and, of those, forty-nine (49) of the agreements explicitly except ineffective assistance claims from the collateral attack waivers, while twenty-eight do *not* include such waivers. Thus, sixty-seven and a half percent (67.5%) of the agreements contain a waiver of collateral attack, and, of those agreements, sixty-four percent (64%) except ineffective assistance of counsel while thirty-six percent (36%) do not except ineffective assistance of counsel claims. Fourteen of the eighty-eight districts that require waivers of appellate rights only,

[67] Appendix H, n.14.

[68] *See* Appendix H n.19.

and seventy-seven districts that include waivers collateral attacks, provide an exception for prosecutorial misconduct. In summary, the majority of the districts' agreements preclude all appellate and *habeas* petitions (even in cases where the prosecutor violates a statutory or constitutional prohibition, such as the right to discovery under Rule 16, or the right to *Brady* evidence of actual innocence under the Due Process Clause).

The most prevalent exception in those majority districts that require appellate and collateral attack waivers allows for claims of ineffective assistance of counsel. Forty-nine boilerplate agreements that mandate waivers of collateral attack also include an exception for ineffective assistance claims. The inclusion of this exception in many of the plea agreements can be attributed to lobbying on the part of the defense bar and various state bar ethics committees. For example, in the Southern District of California, the Federal Defender wrote to the United States Attorney in the district and agreed that the proposed boilerplate plea could include a waiver of 28 U.S.C. section 2255 and appellate rights only so long as the waiver excepted ineffective assistance of counsel claims.[69] Following an ethics inquiry with the Florida Bar Ethics Committee, the United States Attorney in the Middle District of Florida simply removed the 28 U.S.C. section 2255 waiver language altogether.[70]

The data in the chart provides the empirical backdrop to many of the cases discussed throughout our essay. Although many plea agreements require the defendant to waive her to collateral attack, more than half of the boilerplate agreements included in this survey except ineffective assistance from the waiver provisions. Some members of the Federal Defenders and the defense bar generally refuse to allow their clients to sign waivers of effective assistance of counsel

[69] *See* Appendix H, n.3.

[70] *Id.* at n.7. *See also infra* Section III(B).

rights, or have convinced the government to remove them altogether.

C. Judicial Reaction to Effective Assistance of Counsel Waivers

Since *Lafler* and *Frye*, a relatively small but not insignificant number of federal and state prosecutors have begun to request *Lafler*/*Frye*, or explicit "ineffectiveness," waivers. Some very broadly bar any future ineffective assistance of counsel claim on collateral review,[71] and some contain a slightly weaker version that waives only known claims not raised by the time of sentencing but permits claims based on ineffective assistance not known to the defendant at the time of the guilty plea.[72] However, though many of these cases discuss ineffective assistance claims on collateral appeal, none of them explicitly upholds an express waiver of ineffective assistance in a plea agreement.[73] None discuss—much less analyze—the constitutionality of said waiver, nor the impact of such practice on the legal system; the waivers are merely mentioned.

Many of these cases are unpublished opinions,[74] and therefore cannot be used as precedent

[71] *See, e.g.*, *Infra* app.H, n.30 (highlighting two versions of pleas in the Western District of Virginia, one of which includes a broad waiver barring future ineffectiveness claims on collateral review); Nancy J. King, *Plea Bargains that Waive Claims of Ineffective Assistance - Waiving* Padilla *and* Frye, 51 DUQ. L. REV. 647, 648–50 (2013) (citing broad plea agreements requiring defendant to waive "the right to appeal or collaterally attack the conviction and sentence in any post-conviction proceeding on any ground, except [if the sentence exceeds the statutory maximum]").

[72] *See, e.g.*, United States v. Smith, 10-7564, 2012 WL 5503972 (4th Cir. Nov. 14, 2012) (unpublished). That plea contains the following provision: "I waive all rights to contest the conviction or sentence in any post-conviction proceeding, excepting an appeal or motion based upon grounds of ineffective assistance of counsel not known to me at the time of my guilty plea, and I waive any claim I may have for ineffective assistance of counsel known and not raised by me with the Court at the time of sentencing." The Department of Justice dropped this waiver argument, even though the question of whether Smith had waived his claim of ineffective assistance was part of the Fourth Circuit's grant of the certificate of appealability. *Id.* at *2, n.6. The Fourth Circuit never discussed the waiver, and instead upheld the plea on the ground that defendant was unable to show a reasonable probability of receiving a lower sentence in the absence of any alleged error by counsel.

[73] *But see* Nancy J. King, *supra* note 71 (writing that state and federal courts have accepted such waivers, and arguing that they are constitutional).

[74] *See* United States v. Smith, 10-7564, 2012 WL 5503972 (4th Cir., Nov. 14, 2012); United States v. Kaiser, 216 Fed. App'x. 590 (7th Cir. 2007); United States v. Baldwin, 2010 WL 749746 (D. Neb. 2010); People v. Valenzuela, 2012 WL 1238507 (Cal. App. 2012).

in their respective jurisdictions.[75] The most common reaction to a collateral attack waiver is an outright dismissal, without a hearing. Putting aside the problems of unpublished opinions and outright denials, the remaining federal cases fall into broad categories: the court simply ignores the waiver and goes on to consider the claim on the merits;[76] the court mentions a waiver of the right to raise an ineffectiveness claim, but goes on to find that the claim is without merit anyway;[77] the court finds that the claim is either unripe or is better saved for a collateral attack;[78] the court expressly

[75] *Cf.* FED. R. APP. PROC. 32.1. Some circuits have expressly approved lawyers to cite to unpublished opinions. *See* Robert Timothy Reagan, *Citing Unpublished Federal Appellate Opinions Issued Before 2007*, Federal Judicial Center 2–4, *available at* https://bulk.resource.org/courts.gov/fjc/citrules.pdf (summarizing the federal courts of appeals' local rules on citations to unpublished opinions).

[76] *See, e.g.*, United States v. Smith, No. 10-7564, 2012 WL 5503972 (4th Cir. Nov. 14, 2012) (unpublished) (upholding the district court's denial of the defendant's 28 U.S.C. section 2255 motion, which had been based in part on defendant's waiver of his ineffective assistance claim, because even had counsel been effective and objected to the sentence, the trial judge would have overruled his objection, and thus defendant would not have been able to successfully show prejudice, as required by *Strickland*) (citing *Strickland v Washington*, 446 U.S. 668, 694 (1984)).

[77] *See, e.g.*, United States v. Baldwin, 2010 WL 749746 (D. Neb. 2010) (unreported) (denying defendant's claims of ineffective assistance where his plea agreement included a waiver of "the right to seek post conviction relief based upon ineffective assistance of counsel or prosecutorial misconduct if the grounds for such claim could not be known by the Defendant at the time the Defendant enters the guilty plea contemplated by this plea agreement" where trial judge taking plea assured himself that defendant understood that he was waiving the claims he had raised in his 37-page *pro se* motion alleging ineffective assistance of counsel, and judge also considered merits and found record refuted any claims of ineffectiveness and the defendant could not show prejudice).

[78] *See, e.g.*, United States v. Nance, 500 Fed. App'x 171, 179 (3d Cir. 2012) (declining to pass judgment on the counsel's effectiveness for failing to preserve the defendant's right to later challenge the judge's failure to recuse himself on direct appeal, and therefore permitting a waiver of appellate rights to stand until later collateral review) (unpublished); Bigelow v. Culpepper, No. 2:09-cv-107-FtM-29SPC, 2012 WL 1057974 (M.D. Fla. Mar. 28, 2012) (finding that claims against appellate counsel for ineffective assistance were unexhausted and timebarred); Haynes v. New York, 10-CV-5867 JFB, 2012 WL 6675121 (E.D.N.Y. Dec. 21, 2012) (finding that the ineffective assistance claim was not proper for direct appeal and noting waiver of right to challenge effective assistance, except to the extent that the ineffective assistance affected the voluntariness of the plea; also finding that defendant's claim was meritless); United States v. Kaiser, 216 Fed. App'x 590 (7th Cir. 2007) (unpublished) (noting that defendant's claim of his counsel's ineffectiveness contradicted his statement at the colloquy that his guilty plea was knowing and voluntary, and he did not want to have his plea set aside even though this was the only way to obtain a lower sentence; and stating that ineffective assistance claims are "better saved for collateral proceedings under 28 U.S.C, section 2255 where the record can be fully developed").

recognizes an exception to the plea deal's waivers for ineffective assistance;[79] or the court finds that a knowing and voluntary plea is an implicit waiver of later review, but then highlights the claim's lack of merit.[80]

[79] *See, e.g.*, United States v. Apodaca, 512 Fed. App'x 509, 515–16 (6th Cir. Jan. 23, 2013) (highlighting that one of the three "specific reservations" of the defendant's waiver of his appellate rights was for ineffective assistance); United States v. Carrillo-Castellon, 4:11CR3086, 2013 WL 66641 at *2 (D. Neb. Jan. 4, 2013) (highlighting that the plea did carve out an exception for "(b) The right to seek post conviction relief based on ineffective assistance of counsel, or prosecutorial misconduct, if the grounds for such claim could not be known by the defendant at the time the Defendant enters the guilty plea contemplated by this plea agreement"); United States v. Barrera-Cabello, No. 7:10CR00050, 2012 WL 5418291, at *2 (W.D. Va., Nov. 6, 2012) (denying the government's motion to dismiss the defendant's section 2255 motion for ineffective assistance of counsel despite waiver of collateral attack, because a claim that an attorney was ineffective for failing to file direct appeal fell outside the scope of the waiver) (citing United States v. Embree, 169 Fed. App'x 761, 762 (4th Cir. 2006)); Robledo-Soto v. United States, No. 1:11-CR-00328, 2012 WL 5396395, at * 3 (E.D. Cal., Nov. 2, 2012) (finding the plain language of the defendant's waiver of his right to contest his plea, conviction, and sentence under section 2255, in pertinent part, did not bar the defendant's ineffective assistance claim); Fuller v. United States, 7:10-CR-21-1-BO, 2012 WL 5183559 at *1 (E.D.N.C. Oct. 18, 2012) (highlighting an exception in defendant's waiver of right to appeal for ineffective assistance and stating that defendant wrote "Ground for Ineffective Assistance" on his motion in attempt to circumvent appeal waiver when his actual and meritless claims concerned certain procedural defects in the indictment). *See also* United States v. Hidalgo-Aviles, No. 11-0067, 2012 WL 5949115, at *3 (N.D. Okla. Nov. 28, 2012) (finding a plea waiver that specifically exempted ineffective assistance claims challenging the validity of the guilty plea or the waiver did not also exempt ineffective assistance claims regarding sentencing, and finding defendant waived his right to challenge his attorney's failure to request a two-level reduction at sentencing).

[80] *See, e.g.*, Lebron v. United States, No. 12-2925, 2013 WL 132675, at *3, *5 (D.N.J. Jan. 9, 2013) (denying defendant's claim of ineffective assistance because the defendant did not argue the ineffectiveness caused him to agree to the waiver, and highlighting that the claims were without merit nonetheless); Jones v. United States, No. 12-914, 2013 WL 24226 (M.D. Fla. Jan. 2, 2013) (barring the defendant's ineffective assistance claims because he waived all non-jurisdictional grounds for relief at the time of his plea, but continuing to discuss the merit (or lack thereof) of the defendant's ineffective assistance claims); Fisher v. United States, No. 07-00288, 2012 WL 6680315, at * 6 (S.D. Ala. Dec. 3, 2012) (barring the defendant's section 2255 motion to vacate based on his counsel's failure to file appropriate motions to suppress evidence, considered non-jurisdictional defects, because non-jurisdictional defects are waived and the failure to file motions to suppress could not be shown to have caused an involuntary, unknowing, or unintelligently given plea under and could not overcome *Strickland*); Johnson v. Williams, 1:12-CV-01186-TWT, 2012 WL 6700751 (N.D. Ga. Nov. 27, 2012) (magistrate report denying federal *habeas* claim because state *habeas* court correctly found that plea was knowing and voluntary and that his plea counsel provided effective assistance with respect to the plea hearing); Bigelow v. Culpepper, No. 2:09-cv-107-FtM-29SPC, 2012 WL 1057974 (M.D. Fla. Mar. 28, 2012) (finding that ineffective assistance claim was barred because plea was knowing and voluntary, but also considering the claim on its merits and finding it did not overcome the *Strickland* analysis); Dennis v. Ludwick, 2:10-CV-11056, 2012 WL 5379461 (E.D. Mich. Oct. 31, 2012) (finding that a no contest plea forecloses claims of earlier claims of deprivation of right to obtain exculpatory evidence before

This last argument is relied on in many of the state waiver cases.[81] These cases come closest to supporting the claim that some courts are accepting effective assistance of counsel waivers; the court transmutes the knowing and voluntary standard for the plea agreements into an implicit waiver of ineffective assistance claims. This type of implied waiver sometimes has an effect on a petitioner's ability to later claim ineffective assistance, but it is not a direct waiver in the plea agreement.[82] Moreover, we believe those cases are incorrectly decided, especially after *Lafler* and *Frye*.

The impact of *Lafler* and *Frye* are seen, for example, in *State v. Bregitzer*.[83] Defendant attempted to withdraw her no-contest plea to DUI on the basis that her original counsel failed to appear to argue a motion to suppress the results of her field sobriety test, hence the motion was summarily denied. She claimed she was not intoxicated, and the government test would confirm that. Her second attorney advised that she plead no contest, so she did, though she continued to ask the judge that her motion to suppress be "re-filed." On appeal, the court found that a plea "waives

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pleading no contest, limiting defendant's rights to challenging the knowing and voluntariness of the plea, and finding that petitioner also failed to show that his counsel was ineffective for advising him to plead rather than prepare a defense, and failed to show that he would not have pled no contest had he received effective advise).

[81] Spoone v. State, 379 S.C. 138, 140 (2008); People v. Bellamy, 925 N.Y.S.2d 701 (App.Div.2011); Allen v. Thomas, 458 S.E.2d 107, 108 (Ga. 1995); Bryan v. State, 296 Ga. App. 341 (2009).

[82] In *Castro v. State*, the Iowa Supreme Court reversed the lower court's grant of summary judgment for the state even though "a criminal defendant waives all defenses and objections to the criminal proceedings by pleading guilty, including claims of ineffective assistance of counsel," *except* where the ineffectiveness bears on the knowing and voluntary nature of the plea. 795 N.W.2d 789, 792 (Iowa 2011). The defendant had been heavily medicated at the time of the plea. His motion for post-conviction relief stated that his attorney was ineffective for failing to further investigate his mental state and for failing to file a motion to suppress evidence. *Id.* at 793. The state improperly failed to argue that the claim of ineffectiveness did not bear on the *voluntariness* of the plea; instead, the state simply argued the defendant had waived his right to relief. *Id.* at 794. Even though the general rule in Iowa was that a defendant waives later objections simply by pleading guilty, certain kinds of ineffective assistance claims—when pertaining to the voluntariness of the plea, itself—cannot be waived.

[83] 2012 Ohio-5586, 2012 WL 5995060 (Ohio Ct. App. Dec. 3, 2012).

any prejudice a defendant suffers arising out of his counsel's alleged ineffective assistance, except with respect to a claim that the particular failure alleged impaired the defendant's knowing and intelligent waiver of his right to a trial." Failure to pursue the suppression motion was not prejudicial because the conviction was based upon her no contest plea and did not result from the unsuppressed evidence. Just because her attorney failed to pursue a motion did not make her plea involuntary.

Yet this seems to us exactly the kind of thing that the *Lafler* Court hoped to prevent. If Bregitzer was in fact innocent, or was guilty of a lesser offense (such as turning without a signal) with a lesser penalty then she needed a competent attorney at the plea negotiation stage to demand that the government turn over the test results, analyze them, and explain their import to the prosecutor and judge. A reasonably competent attorney might well have advised her innocent client to wait to take a plea bargain until they could determine if the government had any admissible evidence. The Court was wrong to find that the plea was voluntary, or that such a "voluntary" plea acts as an implicit waiver of any prejudice suffered from her counsel's ineffectiveness. The ineffectiveness *did* cause the no-contest plea, and the defendant clearly suffered prejudice by pleading "no contest." She was denied effective assistance of counsel under *Lafler* if she paid a discounted price for a crime she did not commit—a crime for which other similarly situated defendants with competent attorneys would pay less or nothing at all.

In none of the reported waiver cases did the defendant have a potentially successful ineffective assistance claim that was barred because of an explicit waiver of the right to claim ineffective assistance in the plea agreement.[84] To the contrary, even when courts claimed to uphold

[84] There is a case that *suggests* that an ineffective assistance claim may be unconstitutional. In Davila v. United States, 258 F.3d 448, 451–53 (6th Cir. 2001), the Court denied the defendant's petition for section 2255 relief for ineffective assistance of counsel, holding that the "waiver effectively foreclosed

a plea waiver of effective assistance of counsel (usually based on the fact that the plea had been knowing, voluntary, and intelligent), they included a discussion of why the claims would fail if they had been considered.[85] We have yet to find a case in which a plea agreement requires the defendant to explicitly waive any right to a later ineffective assistance claim, and a federal court enforces that waiver when the defendant has a plausible claim. However, courts (especially a few state courts) are ignoring effective assistance claims concerning deficient performance before the plea based upon the defendant's "voluntary" statement that she is guilty.

III. The Future of Effective Assistance of Counsel Waivers

Our examination of recent federal plea agreements and court rulings indicates that a significant number of prosecutors seek waivers of all statutory and constitutional claims regardless of whether such violations occurred pre-trial, during the entry of the verdict of guilt by plea, during the sentencing hearing, or thereafter. Prosecutors seek finality of judgments, and such claims might later disrupt the bargain. Direct appeals and collateral attacks run counter to the primary purposes underlying plea-bargaining: closure and finality. The government and courts wants to close the case and move on to the next one. The result of the withdrawal of plea or vacation of guilty verdict is that the government is forced to litigate or dismiss a conviction thought to be final. We hope that state

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his right to bring a § 2255 petition based on the claim of ineffective assistance of counsel because a knowing, intelligent, and voluntarily waived right to collaterally attack a sentence precludes a claim of ineffective assistance of counsel based on 28 U.S.C. § 2255"). *Davila* may not be the "right" case on which to rest an argument about the constitutionality of waiving ineffective assistance at the plea stage. First, *Davila* was decided before *Lafler* and *Frye*. Second, Davila was an attorney, a fact that the Court noted repeatedly throughout its analysis. *Id.* at 452. Additionally, the defendant failed to bring some of the issues on direct appeal.

[85] In United States v. Jackson, No. 08–20150–02–CM, 2012 WL 5869822, at *2 (D. Kansas, Nov. 19, 2012), the court claimed to enforce the defendant's waiver of her right to appeal or collaterally attack "any matter in connection with th[e] prosecution," and denied her section 2255 motion, which was based on her attorney's ineffective assistance on four different bases. The judge differentiated her claim as a "general ineffectiveness claim[]" that fell within the waiver provisions in the plea agreement, as opposed to a claim that the alleged ineffectiveness affected the validity of the plea agreement or the waiver, itself.

bar opinions opposing these waivers will cause these waiver requests by prosecutors to gradually recede. However, as long as the practice is legal and acceptable in some jurisdictions, or unenforced in the jurisdictions finding waivers to be a defense conflict of interest, many prosecutors will request Brady, direct appeal, collateral attack, and ineffective assistance of counsel waivers.

Why, then, balk at the inexorable march toward the waiver of claims of ineffective assistance of counsel? We believe the above argument overlooks the fundamental ethics flaw inherent in a waiver of effective assistance. Effective representation before and during the plea hearing is an indispensable means of ensuring that the waiver of every procedural and substantive constitutional right eliminated by that plea was voluntary and intelligent. Effective assistance waivers and other broad waivers of the right to collaterally attack one's conviction are different in kind than the waiver of the pre-trial and trial rights, themselves. Waivers of pre-trial and trial rights, such as the right to file a suppression motion based on a coerced confession, or the right to have a jury determine factual guilt beyond a reasonable doubt, are acceptable in part because an effective attorney has evaluated a defendant's chances of winning and properly advised the defendant to waive these rights and plead guilty.

If, on the other hand, an attorney provides poor advice, and relying on that, a defendant waives effective assistance, then the defendant will be virtually barred from raising Sixth Amendment effective representation challenges. The defendant is left without a forum for judicial review of the potentially serious constitutional violations, matters that will never be considered because of the attorney's incompetence. Instead, a defendant must retain her right to argue ineffective counsel at the plea stage, a claim that can only be raised by collateral attack, in case the decision to plead guilty (or to reject the plea) turns out to be unjust. Competent counsel would have countermanded that decision, but a waiver of effective assistance and collateral attack ensures the

defendant is precluded from raising the issue.

Similar to plea waivers of effective assistance, we believe that broad waivers of collateral attack on convictions and sentences should be barred or seriously disfavored. Many claims can only be raised on collateral attack because they involve facts outside the record. Some of these claims—DNA could exonerate the defendant, undisclosed exculpatory evidence exists, or prosecutorial misconduct—concern events that occur or are discovered only after the plea is entered. A defendant cannot accurately predict what claims she is waiving.[86] A judge may try to strictly and adequately explain to the defendant that she is waiving her right to ever have a judge hear of any past or future (some unknown and perhaps unknowable) claims involving injustice. This will not resolve the problem. A defendant cannot knowingly and intelligently agree to such a waiver.

We might want to reconsider fostering a system that eliminates effective assistance of counsel during the judicial proceeding that replaces the trial. Ineffective assistance of counsel waivers in plea agreements should not be tolerated for three reasons: First, state bars across the country have found that these waivers violate ethics rules against conflicted counsel. The person advising the defendant to waive her constitutional claim of ineffective assistance of counsel has an interest in obtaining that waiver to protect their reputation, avoid bar complaints, and prevent malpractice suits. Trial judges should reject individual plea agreements containing such waivers and should refer defense attorneys and prosecutors who request them to state disciplinary action. Second, courts could ban such waivers as a prophylactic to ensure that overall our "plea bargaining system" contains intelligent guilty pleas.[87] Third and finally, we suggest that such waivers belong

[86] We are not sure whether such waivers cover motions for a new trial based upon newly discovered evidence. *See* FED. R. CRIM. P. 33.

[87] *See* Dickerson v. United States, 120 S.Ct. 2326 (2000) (describing *Miranda* as a "prophylactic rule" protecting the privilege against self-incrimination); Susan R. Klein, *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, 99 MICH. L.

in the very narrow category of constitutional rights that cannot be waived by the individual defendant.[88] While we are not prepared to conclude that waivers of effective assistance of counsel at plea necessarily violate the Sixth Amendment, we believe that the public interest in the fairness of criminal justice procedures will suffer if we allow ineffective counsel to act as the buffer between a defendant and the government.

A. Unethical Waivers of Conflict of Interest

Ethically thoughtful prosecutors offer the simplest method to avoid pitfalls by not putting these waiver terms in their plea agreements at all. But, if they insist on defendants waiving ineffective assistance of counsel claims, ethics canons barring conflicts of interest are the primary means to remove those waivers. Requiring a defendant to waive effective assistance of counsel is a violation of several ethical rules governing prosecutors and defense attorneys.[89] The defense attorney has a professional and ethical obligation to be loyal to her client. When a defense attorney advises her client to waive the right to present claims of ineffective assistance of counsel in a post-sentencing collateral attack, the attorney is effectively shielding herself from future findings of ineffective representation—which in turn shields her from referral to the bar and malpractice liability. This creates an inherent conflict of interest, in violation of ethical rules 1.6 and 1.8.[90]

However, defense attorneys are not the only lawyers who protect their personal interests (to the detriment of their clients) by these waivers. Prosecutors, too, shield themselves from bar

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REV. 1030 (2001) (suggesting that the Supreme Court has ample authority to create prophylactic rules to protect criminal procedural guarantees); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190 (1988) (identifying prophylactic rules protecting the First Amendment).

[88] If the Supreme Court rejects this solution, courts might still apply a "miscarriage of justice" exception to all such waivers.

[89] *See* MODEL RULES OF PROF'L COND. R. 1.8 (prohibiting an attorney from asking client to waive potential malpractice claims); 3.8 (prescribing special responsibilities of a prosecutor); 8.4 (prohibiting conduct prejudicial to administration of justice).

[90] MODEL RULES OF PROF'L COND. 1.8(h)(1).

complaints through the waivers. Waiver of all collateral attacks also precludes the defendant from raising allegations that the prosecution withheld exculpatory or favorable sentencing evidence (*Brady* evidence), if that becomes apparent later. By agreeing to waive collateral attack, the defendant will also be hard-pressed to later complain that the state wrongfully forced defense counsel and the defendant to acquiesce to the conflict of interests that the waiver created.

The Sixth Amendment's guarantee of effective assistance includes an unwaivable requirement of conflict-free counsel. This right is so important to the trial process that district courts are given significant leeway to refuse to accept an individual waiver of the right, even where no apparent present conflict exists. In a closely-decided conspiracy case, *Wheat v. United States*,[91] Wheat hired Iredale, an attorney who had represented co-conspirator Bravo who had already pled guilty, and a second co-conspirator Gomez-Barajas who had been acquitted of the drug conspiracy but plead guilty to tax evasion; this plea had not yet been accepted by the court.[92] The government objected on the grounds that Wheat might be called to testify at a trial of Gomez-Barajas if the plea was rejected, and Bravo might be called to testify against Wheat at Wheat's trial. These scenarios would require the attorney to cross-examine his own clients, therefore preventing him from providing zealous advocacy to Wheat. Wheat, however, stood on his right to have the counsel of his choice, and his broad entitlement to waive constitutional rights as well as conflicts under ethical rule 1.6. Further, all three of Iredale's clients consented to this arrangement and waived any

[91] 486 U.S. 153, 163 (1988) (a 5-4 decision of the Supreme Court, stating that district courts have "substantial latitude in refusing waivers of conflicts of interest" even where only a potential for conflict exists).

[92] *Id*. at 155–56. There was never a question that Wheat was a highly competent attorney, that he was already thoroughly familiar with the case, and that the potentiality of a conflict arising was in fact slim. Wheat contended that "the Government was manufacturing implausible conflicts in an attempt to disqualify Iredale, who had already proved extremely effective in representing Gomez-Barajas and Bravo." *Id.* at 157. *See also id.* at 165–72 (Marshall, and Brennan, JJ., dissenting) and *id.* at 172–73 (Stevens and Blackmun, JJ., dissenting) (disputing each factual allegation cited by government and majority in support of potential conflict).

potential conflicts in writing and on the record.[93] The District Court weighed the Sixth Amendment rights to be represented by counsel of choice and conflict-free counsel, and overrode the defendant's waiver, forcing him to hire other counsel. The Ninth Circuit affirmed.[94] As a consequence, Wheat, unlike both of the other co-conspirators represented by Iredale, was convicted of all charges.

In affirming the refusal to allow Iredale as counsel, the Supreme Court noted that "not only the interest of a criminal defendant but the institutional interest in the rendition of just verdicts in criminal cases may be jeopardized by unregulated multiple representation."[95] Citing ABA Model Rule of Professional Conduct 1.7 and similar rules of the California Bar Association, the Court held that personal waivers by all affected defendants do not necessarily cure Sixth Amendment violations. "Federal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them."[96] Thus the presumption of counsel of choice may be overcome by a showing of a "serious potential for conflict." Moreover, where a court finds an *actual* conflict of interest, "there can be no doubt that it may decline a proffer of waiver."[97]

The *Wheat* decision has important implications to the issue addressed in this Article. The plea agreement waivers are intended to address matters *not* already known and apparent to the

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[93] Wheat also noted the highly speculative nature of potential conflicts, as Bravo intended to testify that he did not know Wheat, and Wheat had no knowledge of the tax charges against Gomez-Barajas.

[94] *Id.* at 157–58.

[95] *Id.* at 160.

[96] *Id.* at 160. This reasoning arguably contradicts the earlier case of *Faretta v. California*, 422 U.S. 806 (1975), where the Court held that the defendant had a constitutional right to self-representation, even though, as dissenters argued, "one who is his own lawyer has a fool for a client." (quoting a proverb). In *Faretta* the defendant's right to autonomy won, and in *Wheat*, society's interest in fair trial (and in the appearance of a fair trial) triumphed. Faretta had free choice to waive appointed counsel, even to his own detriment. It is not clear that *Faretta* has much support left. See, in addition to *Wheat*, *Martinez v. Court of Appeal of California*, 528 U.S. 152 (2000), holding that there is no right to self-representation on appeal.

[97] *Wheat*, 486 U.S. at 162.

defendant. If an attorney already knows she has been ineffective in representing her client, she should withdraw rather than advise the client to waive an ineffective assistance challenge.[98] Thus the collateral attack waivers being sought in plea agreements refer to potential conflicts. *Wheat* suggests that even these potential conflicts cannot be waived.

Although a waiver of effective assistance might not create the direct conflict of multiple representations that were the concern in *Wheat*, the attorney would be placed in a substantially similar situation. By advising that a defendant waive her right to effective assistance of counsel at the plea stage (or waive a claim of known ineffective assistance, depending on the language in the agreement), an attorney would have to prospectively limit her own liability to her client. In most states, a successful ineffective assistance claim is a prerequisite for a legal malpractice suit, and failure to prove ineffective assistance in court is often grounds to collaterally estop a malpractice claim.[99] Thus the defense attorney who advises a client to waive collateral attack in effect also advises her client to limit her liability in malpractice, in violation of ethical rule 1.8.[100]

Because plea agreements containing waivers of collateral attack were so ethically compromised, in 2013, the ABA House of Delegates enacted Resolution 113E, which became

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[98] *See* The Supreme Court of Texas, Prof'l Ethics Comm. Op. No. 571 (2006), 2006 WL 2038683.

[99] 3 RONALD E. MALLEN & JEFFEREY M. SMITH, LEGAL MALPRACTICE § 27:13 (2012 ed.); *see also, e.g.*, McCord v. Bailey, 636 F.2d 606, 610 (D.C. Cir. 1980) ("[E]stoppel saves . . . their former law firm from the burden of defending a lawsuit on an issue that has already been fully adjudicated"); Brodie v. Jackson, No. 11-1769, 2013 WL 3808048, at *4 (D. D.C. July 23, 2013) ("Collateral estoppel may preclude a plaintiff from raising legal malpractice claims if the plaintiff has previously presented an unsuccessful ineffective assistance of counsel claim that raised the same factual and legal issues.").

[100] An attorney may not "prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement." A request at the plea stage for a waiver of a future effective assistance of counsel (and thereby also a malpractice) claim is in many cases only a potential rather than an actual conflict of interest, assuming that later all parties can agree that counsel was indeed effective. For those defense attorneys who are later found ineffective, the recommendation to sign the waiver constitutes an actual conflict of interest.

official ABA policy.[101] This resolution opposes plea or sentencing agreements that require a waiver of post-conviction claims of ineffective assistance of counsel and prosecutorial misconduct.[102] In a recent and as of this writing unanswered letter to Attorney General Eric Holder, the President of the ABA asked the Attorney General to stop one United States Attorney's Office from seeking effective assistance of counsel waivers, and prohibit any other similar waivers in states with ethics opinions opposing them.[103] The letter voiced concern over the state of indigent defense, and the toll that waivers of effective assistance issues would have on the "national difficulty to meet the obligations recognized in *Gideon*."[104]

The position of the defense bar has been robust. The National Association of Criminal Defense Lawyers ("NACDL") issued Advisory Committee Formal Opinion 12-02 in October 2012, which opined that it is unethical for defense attorneys to advise clients regarding plea agreements that bar collateral attacks on convictions under § 2225.[105] Opinion 12-02 also imposed a duty on defense counsel to object to such language. The opinion goes further however, finding it

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[101] ABA Formal Op. 113E (Aug. 12–13, 2013), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2013_hod_annual_meeting_113E.docx. The proposed resolution was approved by the Criminal Justice Section Counsel of the ABA (the submitting entity) at its May 12, 2013 meeting. *Id.* at 10.

[102] The Resolution adds one caveat, that claims of past ineffectiveness *may* be waived if the ineffective conduct that is the subject of the waiver is clearly identified in the plea agreement. *Id.*

[103] *Id.*

[104] James R. Silkenat, President, ABA, Letter to Attorney General Eric Holder, at 1 (Sept. 13, 2013), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2013Sept13_indigentdefense_l.authcheckdam.pdf; ABA Formal Op. 113E, *supra* note 19. The letter was in response to the request by the United States Attorney's Offices in the Eastern and Western District of Kentucky to vacate a recent Kentucky Bar Association ethics opinion. *See infra* notes 143–157 and accompanying text. President Silkenat's letter specifically requested the Attorney General's office to intervene in that case and require the U.S. Attorney's Offices in Kentucky to "substantially amend" or withdraw their motion.

[105] NACDL Ethics Advisory Comm., Formal Op. 12-02, at 4 (Oct. 2012). The NACDL had deferred a similar question in 2003 by issuing an informal opinion on the matter. After further inquiry regarding these waivers, the NACDL came out with a formal opinion.

unconstitutional under the Fifth, Sixth, and Fourteenth Amendments for the defendant to be required, as a condition of the plea, to waive his right to effective assistance of counsel.[106] The responsibility is not one way; the NACDL also finds it unethical for prosecutors to propose or require such a waiver.[107] Defense attorneys faced with these plea agreements now have the duty to raise the issue with the district court.[108]

Many states have, both pre- and post-*Lafler* and *Frye*, published ethics opinions finding it unethical for a prosecutor to negotiate, and a defense attorney to advise, a defendant to waive post-conviction claims of ineffective assistance of counsel. For example, in response to a question regarding the propriety of advising a client to enter into a plea containing a waiver of effective assistance of counsel, the Alabama Bar prohibited defense counsel from advising a client to accept such a plea because it would violate state ethical rules.[109] Alabama Rules of Professional Conduct 1.7 and 1.8, like their Model Rule counterparts, proscribe conflicts of interest and limit the lawyer's liability to the client for malpractice.[110] The Alabama Bar also prohibits a prosecutor from seeking a waiver of effective assistance because it would, by extension, require the defense attorney to violate rules of professional conduct.[111]

The Missouri Bar issued an opinion in response to the following inquiry: "[W]hether it is

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[106] The NACDL found that a waiver of effective assistance denied the defendant loyal counsel under the Sixth Amendment and violated due process under the Fifth and Fourteenth Amendments. *Id.* ("It is the opinion of the NACDL Ethics Advisory Committee that such a plea agreement provision creates a personal conflict of interest between the criminal defense lawyer and the client that rises to the level of denial of the right to loyal counsel under the Sixth Amendment. It is also a violation of due process of law under the Fifth and Fourteenth Amendments.").

[107] *Id.* at 4.

[108] *Id.* at 7.

[109] Ala. State Bar Office of General Counsel Op. 2011-02 (Feb. 2011), *available at* http://www.alabar.org/ogc/fopDisplay.cfm?oneId=429.

[110] ALA. R. PROF'L COND. 1.7, 1.8.

[111] Ala. State Bar Office of General Counsel Op. 2011-02, *supra* note 21.

permissible for defense counsel in a criminal case to advise the defendant regarding waiver of the right to seek post-conviction relief under Rule 24.035, including claims of ineffective assistance by defense counsel? We understand that some prosecuting attorneys have expressed intent to require such a waiver as part of a plea agreement."[112] The Missouri Bar answered this question the same way as the Alabama Bar,[113] but also prohibited a prosecutor from requiring a waiver of those rights in a plea agreement.[114] The North Carolina State Bar excepted effective assistance of counsel and prosecutorial misconduct from allowable waiver provisions in plea agreements when it opined that prosecutors and defense attorneys were allowed to negotiate plea agreements waiving post-conviction and appellate rights.[115]

In Ohio, the Board of Commissioners on Grievances and Discipline answered that it is, indeed, unethical "for a prosecutor to negotiate and a criminal defense attorney to advise a defendant to enter a plea agreement that waives the defendant's appellate or post-conviction claims of ineffective assistance of trial counsel or prosecutorial misconduct."[116] The Board relied on the significant limitation waiving effective assistance claims would have on later-claimed malpractice suits; it concluded that advising a client to waive effective assistance violates the ethical rule against proscriptively limiting the lawyer's liability.[117] Similarly, the Tennessee Board of Professional

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[112] Missouri Advisory Comm. Formal Op. 126 (2009), *available at* http://www.mobar.org/uploadedFiles/Home/For_Lawyers/Professionalism/Formal_Opinions/formal-126.doc.

[113] *Id.* at 1.

[114] *Id.* ("We believe that it is inconsistent with the prosecutor's duties as a minister of justice and the duty to refrain from conduct prejudicial to the administration of justice for a prosecutor to seek a waiver of post-conviction rights based on ineffective assistance of counsel or prosecutorial misconduct.")

[115] N.C. State Bar RPC 129 (1993) *available at* http://www.ncbar.com/ethics/ethics.asp?id=129.

[116] Ohio CPR Op. 2001-6 (2001), *available at* http://www.sconet.state.oh.us/Boards/BOC/Advisory_Opinions/2001/Op%2001-006.doc.

[117] *Id.* The Board also determined that "a prosecutor does not serve justice by attempting to shield his or her past or future misconduct from scrutiny by obtaining a criminal defendant's waiver of appellate or

Responsibility issued Formal Opinion 94-A-549 proscribing defense counsel and prosecutor from including waivers of ineffective assistance or prosecutorial misconduct in a plea agreement.[118]

In Nevada, the Standing Committee on Ethics and Professional Responsibility issued a similar opinion on October 27, 2011 which echoes many of the other states' opinions addressed in this section.[119] A defense attorney practicing in federal court inquired whether a plea agreement may include a waiver of all appellate and post-conviction claims, including ineffective assistance, (except where the ineffectiveness directly affected the plea).[120] The Committee concluded that a plea waiver must exclude *all* potential claims of ineffective assistance, not just those affecting the plea, itself.[121] Citing both the personal conflict of interest rule[122] and the rule prohibiting an attorney from proscriptively limiting personal liability for malpractice,[123] the Standing Committee followed Ohio and North Carolina[124] in finding that a defense attorney may not "ethically execute a plea agreement that purports to waive a defendant's claims of ineffective assistance of counsel."[125] Under Nevada state law, a defendant may not bring a claim against a defense attorney for

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post-conviction claims based on allegations of prosecutorial misconduct. This Board's view is that waiver of appellate or post-conviction claims of prosecutorial misconduct is an improper attempt to insulate the prosecutor from his or her duties under" certain Ohio Code of Professional Responsibility. *Id.* at 3–4.

[118] Tenn. Bd. Prof'l Resp. Advisory Formal Op. 94-A-549 (1994).

[119] State Bar of Nev. Standing Comm. on Ethics and Prof'l Resp. , Formal Op. No. 48 (Oct. 27, 2011), *available at* https://www.nvbar.org/sites/default/files/Ethics_Op_48.pdf [hereinafter Nev. Formal Op. No. 48]

[120] *Id.*

[121] *Id.*

[122] NEV. R. PROF'L COND. 1.7(a)(2).

[123] *Id.* 1.8(h)(1).

[124] The Nevada Standing Committee called the reasoning in the Supreme Court of Texas Professional Ethics Committee opinion, *see infra* at 41–42, into question. The Nevada Committee argued that "[a]n attorney should not be in a position to make a decision as to the effectiveness of his own representation, particularly when, as here, the decision will be final and unreviewable." Nev. Formal Op. No. 48, *supra* note 117, at 3.

[125] Nev. Formal Op. No. 48, *supra* note 117, at 4.

malpractice unless the defendant has first obtained appellate or post-conviction relief from the conviction.[126] As such, any plea agreement with a waiver of all post-conviction and appellate rights would make a claim for malpractice unavailable to a defendant. The Nevada opinion also concluded that a prosecutor may not ethically include a waiver of post-conviction and appellate rights because doing so would induce another attorney to violate the ethical rules in violation of Nevada Rule of Professional Conduct 8.4(a).[127]

The Vermont Bar Association issued an opinion in response to a question from a defense attorney regarding the following provision in a plea agreement from a state's attorney's office:

> [T]he Defendant . . . hereby understands and agrees to waive all rights to appeal his convictions based on any errors which may have been committed in pre-trial matters any collateral matters including, but not limited to, post-conviction relief and habeas corpus which may be available to him in either a state or federal forum . . . .[128]

The Bar concluded that a defendant's waiver of his right to attack effective assistance and to attack the prosecutor's conduct in pre-plea and pre-trial proceedings would cause both the defense attorney and the prosecutor to violate the code of ethics forbidding an attorney from limiting his liability for malpractice.[129]

In Virginia's Legal Ethics Opinion 1857, the Committee opined that a criminal defense attorney may not ethically advise a client to accept a plea agreement that includes a waiver of effective assistance of counsel claims.[130] Following *Lafler* and *Frye*, the Florida Bar recently

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[126] Nev. Formal Op. No. 48, *supra* note 117, at 3 (citing Morgano v. Smith, 879 P.2d 735 (Nev. 1994).

[127] Nev. Formal Op. No. 48, *supra* note 117, at 4.

[128] Vermont Advisory Ethics Op. 95-04 (1995).

[129] *Id.*

[130] Virginia State Bar Legal Ethics Opinion 1857 (2011), *available at* http://www.vsb.org/site/regulation/leo-1857-final.

affirmed an opinion by the Board of Governors finding that a both criminal defense and prosecuting attorneys have an "unwaivable conflict of interest when advising a client about accepting a plea offer in which the client is required to expressly waive ineffective assistance of counsel and prosecutorial misconduct."[131] The opinion surveyed other states' opinions on the matter and concluded that "it is improper for the prosecutor to make such an offer and for the defense lawyer to advise the client on accepting the offer."[132]

In one of the most recent state bar decision following *Lafler* and *Frye*,[133] the Kentucky Bar Association issued an Advisory Ethics Opinion in November of 2012, holding that a criminal defense attorney has a personal conflict of interest when he advises a client to accept a plea bargain containing a provision barring the client from pursuing a claim of ineffectiveness against the defense attorney.[134] Unlike concurrent conflicts of interest in which an attorney may represent two defendants if she reasonably believes she will be able to be competent and diligent in her representation, "[a] lawyer cannot reasonably believe that he or she can provide competent representation when the lawyer is tasked with advising the client about a plea agreement involving a waiver of the right to pursue a claim of ineffective assistance of counsel."[135] The Committee argued by analogy; if an attorney may not prospectively limit liability for malpractice under

[131] Professional Ethics of the Florida Bar Opinion 12-1 (June 22, 2012), *available at* http://www.floridabar.org/tfb/TFBETOpin.nsf/b2b76d49e9fd64a5852570050067a7af/6a2611d9cdcc8db485257ad00070e3fb!OpenDocument.

[132] *Id.*

[133] In addition to Kentucky, there are now opinions from Pennsylvania and Utah both agreeing that ineffective assistance of counsel waivers and prosecutorial misconduct waivers violate the Rules of Professional Conduct. Penn. Bar Ass'n, Conflicts of Interest and Other Misconduct Related to Waivers of Claims for Ineffective Assistance of Counsel, Formal Op. 2014-100; Utah State Bar Ethics Advisory Op. Cmte., Op. No. 13-04 (Sept. 30, 2013).

[134] Ky. Bar Ass'n Ethics Op. E-435 (Nov. 17, 2012), *available at* http://www.kybar.org/documents/benchbar/2013/bb_0313_12.pdf.

[135] *Id.*

Kentucky Rule of Professional Conduct 1.8(h), a defense attorney may not prospectively limit liability for ineffective assistance of counsel through a waiver.[136] The Kentucky Opinion applies this same reasoning to prohibit a prosecutor from proposing a plea agreement requiring a waiver of effective assistance of counsel, finding it "inconsistent with the prosecutor 's role as minister of justice."[137] Requiring a defense attorney to present a plea with a waiver of effective assistance would require the prosecutor to "assist[] or induc[e] another lawyer, defense counsel, to violate" ethical rules.[138]

Despite the prevalence of similarly themed ethics opinions in other states, the United States Attorney's Office for the Eastern and Western Districts of Kentucky filed a motion with the Supreme Court of the state requesting that it review and vacate Opinion E-435.[139] The Government doubted the Kentucky Bar Association's view that a defense attorney would face a personal conflict of interest by advising her client to waive effective assistance.[140] Instead, "[c]ourts and the government will face more frivolous collateral attacks, defense counsel will face more unwarranted attacks on the effectiveness of their performance, and defendants will lose an important bargaining chip.[141] In response to this motion, the Kentucky Bar Association filed its own brief in support of the opinion in May 2013.[142] As of this paper's publication, the Kentucky Supreme Court had not

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[136] *Id.*

[137] *Id.*

[138] *Id.*

[139] Brief of the United States in Support of Motion for Review of Ethics Opinion at *7, United States v. Ky. Bar Ass'n, 2013-SC-270, 2013 WL 473646434 (Apr. 29, 2013).

[140] *Id.* at 12. (suggesting a defense attorney should be allowed to simply counsel his client about the waiver's ramifications himself, rather than having to "provide his client with an objective evaluation of his representation").

[141] *Id.* at *18.

[142] Brief of Ky. Bar Ass'n in Response to Mot. For Rev. of Ethics Op., United States v. Ky. Bar Ass'n, 2013-SC-000270 (May 28, 2013), *available at* http://apps.courts.ky.gov/Supreme/briefs/2013-SC-

yet decided to vacate or affirm the opinion.[143]

Though none of the above state or other bar organizations' opinions ventures into the issue of constitutionality, each firmly recognizes the inherent conflict where a defense attorney advises a waiver of effective assistance of counsel in a plea agreement and when the prosecutor seeks such a waiver. Whether intentional or not, such a waiver unethically limits future liability for malpractice claims.

Texas and Arizona have found these waivers are not unethical, only if certain safeguards are in place. In Arizona, the Ethics Committee provided a very narrow answer to a question regarding ethical rule 1.8, limiting liability in malpractice. The answer the Arizona Ethics Committee gave, which is in disagreement with every other state ethics opinion on the same issue, was that the waiver language in a plea agreement applies only to collateral attack and not to malpractice and therefore does not violate the rule.[144] In a strongly worded dissent, some members of the Arizona Ethics Committee disagreed: "Never before in our experience has the Committee so diluted the ethical rules for a particular class of client."[145] The dissenting members relied on previous Arizona,

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270-RT.pdf. The NACDL and Legal Ethics Professors and Legal Ethics Practitioners, including Professor Klein, filed a brief in support of the Bar Association in July 2013. Brief Amicus Curiae Nat'l Ass'n of Crim. Def. Lawyers, Legal Ethics Profs. and Legal Ethics Practitioners In Support of Respondent, United States v. Ky. Bar Ass'n, 2013-SC-00270, 2013 WL 6847476 (July 24, 2013). Amicus Curiae were also filed by the Western Kentucky Community Defender, Inc. and The Innocence Network. Docket, United States v. Ky. Bar Ass'n, 2013-SC-00270, *available at* http://162.114.92.78/dockets/CaseDetail.asp?CaseNumber=2013SC000270.

[143] Docket, United States v. Ky. Bar Ass'n, *supra* note 133.

[144] State Bar of Ariz. Ethics Op. 95-08 (Nov. 1995), *available at* http://m.azbar.org/RulesofPC/Opinion.aspx?id=460. Arizona was never asked to opine on ethical rule 1.7 regarding conflicts of interest.

[145] *Id.* (dissent). Note that Committee Rules prohibit the publication of the number of dissenters joining any written dissent to a formal opinion. For a dissent to be published along with the formal opinion, a vote must be a taken and a majority of the quorum (minimum thirteen voting members). State Bar of Ariz. Comm. on the Rules of Prof'l Cond., *Statement of Jurisdiction*, at 2, *available at* http://www.azbar.org/media/56493/state%20bar%20of%20arizona%20committee%20on%20the%20rules%20of%20professional%20conduct%20-%20statement%20of%20jurisdiction%20-%2011-19-2010.pdf.

Tennessee, and North Carolina bar opinions foreclosing attorneys from conditioning a settlement on a client waving his right to file a bar complaint, and on the majority's failure to discuss a provision of the plea agreements that impact malpractice ("I am satisfied that my defense attorney has represented me in a competent manner."). "Criminal defendants should not be singled out for disparate treatment simply because they usually seek habeas corpus relief rather than malpractice damage awards."[146] The majority, the dissenters claimed, read the ethical rule too strictly and too formalistically.

The Professional Ethics Committee in Texas, addressing the same question as the other states' committees, found that a prosecutor is not prohibited from obtaining a waiver of post-conviction rights in a plea agreement, so long as the defendant is represented.[147] With regard to criminal defense attorneys, the Committee assumed in its opinion that in a suit for malpractice, the court or other arbiter would "not allow a waiver in the plea agreement to be used or interpreted as an agreement limiting a defendant's malpractice claim."[148] Through this reliance on a future hypothetical decision, the Committee attempted to avoid the persuasive argument that a waiver of effective assistance is effectively a prospective limitation on malpractice claims. When actually confronted with a malpractice claim against an attorney by a defendant who had pleaded guilty and waived his right to appeal, however, a Texas Court of Appeals affirmed summary judgment against the plaintiff.[149] With regard to potential conflicts of interest, the Committee considers whether an

[146] *Id.* (dissent).

[147] The Supreme Court of Texas, Prof'l Ethics Comm. Op. No. 571 (2006), 2006 WL 2038683.

[148] *Id.* at 2.

[149] Cathcart v. Scott, No. 01–10–00952, 2012 WL 4857349 (Tex. App.—Houston [1st Dist.], Oct. 11, 2012, no pet. h.). Mr. Cathcart's appeal of his conviction was dismissed based on his plea waiver. *Id.* at *1. His writ of habeas corpus arguing ineffective assistance of counsel and involuntary and unlawfully induced plea was denied. *Id.* Finally, Mr. Cathcart filed a civil suit, claiming his attorney's failure to withdraw as criminal defense counsel when Mr. Cathcart requested he do so amounted to breach of fiduciary duty. The

attorney has a reasonable basis for concern that he may have rendered ineffective assistance. Under this bifurcated approach, attorneys concerned that they may have rendered ineffective assistance would be required to disclose the circumstances to their clients and obtain consent to continue representing the client or, where consent would impossible under the circumstances, to advise their client to seek separate counsel regarding the proposed waiver.

The Texas approach hinges on some big "if's": *if* the waiver of effective assistance of counsel is not treated as a limitation of malpractice, and *if* an attorney is capable of determining whether he should be concerned that he was ineffective in his representation, and *if* he is concerned about ineffectiveness to such an extent that he discloses to the client the concern, and *if* the client understands sufficiently to consent, and *if* the consent is effective, then a waiver of effective assistance is not improper. The Texas Committee arrives at its conclusion without any discussion of the possibility that a defense attorney, particularly an ineffective one, would be so self aware as to know of his ineffectiveness and to share the possible conflict with the client with sufficient detail as to obtain a valid waiver of the potential conflict.

We find the majority state bar and NACDL opinions, as well as the ABA Resolution, convincing, especially post-*Lafler* and *Frye*. The two minority bar opinions permitting such waivers in some circumstances were drafted before the Court recognized a constitutional right to effective counsel to evaluate the benefits and detriments of going to trial versus negotiating and accepting a plea.[150] If state bars find such waivers to be unethical, local prosecutors cannot include them in plea agreements, as both state and federal prosecutors are bound by the state rules of

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Court affirmed summary judgment against him in this malpractice claim because the trial judge prohibited the attorney from withdrawing pre-trial, and therefore the attorney breached no duty to Mr. Catchcart. *Id.* at *4.

[150] Missouri v. Frye, 132 S.Ct. 1399, 1407 (2012).

professional responsibility.[151]

Courts share an interest in ensuring ethical standards are followed and legal proceedings are fair.[152] Even where a defendant hopes to waive his right to conflict-free counsel, as in *Wheat*, the trial judge may countermand that desire and insist, for the sake of accuracy and fairness throughout the criminal justice system, that conflict-free counsel represent the defendant.[153] This same reasoning applies even more forcefully to waivers of effective counsel given that a post-conviction claim of ineffectiveness is directed to the lawyer advising the client to accept the waiver. That is the sine que non of conflict. One cannot differentiate potential from actual conflicts; defense counsel is *per se* conflicted the second she advises her client to waive an ineffectiveness claim.

B. A Voluntary, Intelligent Plea Bargaining System Depends Upon Counsel

If effective assistance of counsel and *Brady* waivers become boilerplate, it would be extremely difficult for a judge to determine, at either the hearing accepting such plea or on direct appeal, whether any particular such waiver was voluntary and intelligent.[154] We believe these waivers could rarely, if ever, be voluntary and intelligent ones.[155] Because only knowing, intelligent, and voluntary guilty pleas comport with constitutional requirements, these waivers might be considered unconstitutional.

Defendants who are thoughtful and were well-counseled about the waivers will go ahead

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[151] *See* 18 U.S.C. § 5300 (The McDade Amendment) and 28 C.F.R § 77.3 (federal prosecutors shall conform their conduct to state rules).

[152] *See supra* notes 96–101 and accompanying text.

[153] Wheat v. United States, 486 U.S. 153, 163 (1988).

[154] Of course such claims would also be barred on collateral review, as that would be the defendant's only opportunity to establish a record and raise an ineffective assistance of counsel claim.

[155] We presume for purposes of this section, that a federal defendant cannot waive her right to a Rule 11 colloquy, or her right to enter into a plea only voluntarily and intelligently.

with them because sentencing risks can be so onerous.[156] When a defendant facing 30 years can be guaranteed no more than a 5-year sentence, can get an stipulation to probation, or can get a life sentence (when facing the death penalty), they *need* to accept those plea agreements despite problematic waiver language. Even innocent defendants may need to reduce their risk of conviction and sentence by pleading guilty to a lesser offense.[157] The need to limit consequences can be a greater priority than the mere possibility of raising an ineffective assistance claim (which is almost never successful anyway) in the future.

Given the current Rule 11 colloquy's requirement of a voluntary and intelligent acceptance of plea agreements,[158] it seems that, presented with a defendant waiving a known or as yet unknown or unknowable claim of ineffectiveness, the judge should explain to the defendant exactly what that deficiency might have already been, all future deficiency issues that might arise, and determine why the defendant is waiving this right, to assure that the waiver is constitutionally voluntary and intelligent. The judge will have to assume the role of the effective counsel that the defendant

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[156] Some pleas containing such waivers contain an exception in these waivers for ineffectiveness *not known to the defendant* at the time. See United States v. Smith, 2012 WL 5503972 (4th Cir. 2012) (unpublished).

[157] BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHEN CRIMINAL PROSECUTIONS GO WRONG (2011) (reviewing hundreds of cases of exonerated defendants, some of whom pled guilty); Lucian E. Dervan, *Bargained Justice: Plea Bargaining's Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51, 56–64 (2012) (citing research literature that establishes that innocent people plead guilty to avoid lengthy prison terms with greater frequency than once imagined); Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocence?*, 49 RUTGERS L. REV. 1317 (1997) (arguing that innocent persons plead guilty and these cases remain hidden to researchers).

[158] "Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands" fifteen different rights belonging to the defendant, obligations of the government, and possible effects of pleading guilty. FED. R. CRIM. P. 11(c)(1). *See, e.g.*, United States v. Isom, 85 F.3d 831, 835–36 (1st Cir. 1996) ("We have identified three 'core concerns' of Rule 11: 1) absence of coercion; 2) the defendant's understanding of the charges; and 3) the defendant's knowledge of the consequences of the guilty plea. Failure to address one of these concerns requires that the guilty plea be set aside.") (internal citations omitted).

waived. Even if the waiver of collateral attack could be adequately explained to a layperson,[159] the real problem is trying to predict in what ways the defense counsel was or will be ineffective that are unknown now, or what *Brady* evidence the government has that it has not disclosed. It also makes little sense to us to grant a defendant a Sixth Amendment right to effective assistance of counsel in making all waiver decisions except the decision as to whether to waive effective assistance of counsel.

One might analogize an uncounseled decision to waive effective assistance of counsel to a defendant's decision to self-represent at trial. While a split Supreme Court recognized *pro se* representation as a constitutional right in *Faretta v. California*,[160] the reality of its aftermath has been that it has not worked well.[161] Moreover, it is not at all clear that this 1975 decision is currently fully supported by the Court.[162] The *Faretta* decision was undercut by *Wheat v. United States*.[163] The *Wheat* Court's refusal to allow a defendant's voluntary and intelligent waiver of potentially conflicted counsel (because of harm to the public's perceived fairness of trials) is inconsistent with the reasoning underlying *Faretta*. In *Faretta* the defendant's interest in autonomy prevailed, even though "one who is his own lawyer has a fool for a client."[164] If waiving counsel for trial and appeal is waning, then waiving effective counsel for trial and pleading guilty should be

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[159] Alan Ellis and Todd Bussen, *Stemming the Tide of Postconviction Waivers*, 25 CRIM. JUST. 28 (Spring 2010).

[160] 422 U.S. 806 (1975).

[161] *See generally*, Erica J. Hasimoto, *Defending the Right of Self-Representation: An Empirical Look at the Pro Se Felony Defendant*, 85 N.C. L. Rev. 423, 434–37 (2007) (collecting cases and scholarly challenges to the right of self-representation); Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621 (2005).

[162] *See* Martinez v. Court of Appeal of California, 528 U.S. 152 (2000) (holding that a defendant has no right to represent himself on appeal).

[163] 486 U.S. 153 (1988).

[164] *Faretta*, 422 U.S. at 852 (Blackmun, J., dissenting).

waning as well. Having ineffective counsel is much worse, than having no counsel at all,[165] so there is even greater reason for judges to reject plea agreements with these waiver terms.

Equally important, when a defendant represents herself at trial, courts actively question her decision to ensure that she understands why this may be unwise. However, far less time, detail, and attention is devoted in a guilty plea colloquy to the waiver of effective assistance of counsel claims. A conversation between a judge and a defendant at a plea hearing to probe this issue might be more consuming and expensive for the system as a whole, and certainly less just, than simply allowing competent counsel at the plea stage.[166] Even if a judge wished to allow such a waiver, and was prepared to delve into many scenarios and potentialities when querying the defendant,[167] he could not possibly begin to cover the gamut of potential ineffectiveness and prosecutorial misconduct claims.

A prophylactic rule ensuring that our criminal justice system of pleas assuring competent counsel during plea negotiations is necessary for courts to be sure that defendants understands the waiver of their pre-plea rights, much less rights to effective counsel. Advice that in hindsight was wrong, either because incompetent when given or because based on incomplete information, still

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[165] Albert W. Alschuler, Lafler *and* Frye*: Two Small Band-Aids for a Festering Wound*, 51 DUQ. L. REV. 673 (2013).

[166] *See* Klein, *Monitoring the Plea Process*, *supra* note 15 at 565–76 (suggesting that Federal Rules Advisory Committee implement a pre-plea conference as an extra safeguard to ensure adequate discovery and effective counsel). Such a conference creates a record of the evidence the government had and the plea offer on the table to facilitate resolution of a future claim of ineffective assistance of counsel (if not waived) or involuntary plea (if effective assistance of counsel is waived).

[167] Professor Klein provides a number of examples in *Identifying and (Re)formulating Prophylactic Rules, Safe Harbors, and Incidental Rights in Constitutional Criminal Procedure*, *supra* note 90, including: the *Miranda* warnings; the *Missouri v. Hunter* presumption that offenses the same under the *Blockburger* test cannot result in multiple punishments in the same trial; the *Wade* rule excluding all in-courtroom identifications after a post-indictment counsel-less lineup; the *Cuyler v. Sullivan* rule conclusively presuming incompetency of counsel without proof of prejudice in instances of actual conflict due to multiple representations; *North Carolina v. Pearce*'s rebuttable presumption of judicial vindictiveness upon higher sentence imposed after a successful appeal; the *Smith v. Robbins* procedure for attorneys to advise the Court of *Anders* issues, among others.

cuts off collateral review. Though we live with rights without remedies in some contexts,[168] there is inadequate cause to do so here, when the problem is simple to fix at a relatively low cost. Allowing waiver eliminates the defendant's only opportunity to convince a judge that his counsel was deficient in recommending or rejecting the plea.[169] Given how many obstacles we already place before a successful claim, the better course is to allow grievous injustices to be corrected.

Coupling discovery waivers with effective assistance of counsel waivers makes it even less likely that pleas are voluntary and intelligent. Like waivers of effective counsel, discovery waivers have some appeal. They relieve the prosecutor of the time and effort to collect Rule 16, *Brady*, and *Giglio* materials where a defendant intends to plead guilty anyway. For a defendant who knows she is guilty of every offense in the charging instrument, there appears to be no reason not to trade "useless" discovery for less prison time. But the defendant may not truly know if she is legally guilty, as she is not a legal expert and will not understand all the *mens rea* and other elements that the government has to prove. More significantly, even if she is guilty, the question for the trier of fact is whether the prosecution can prove it beyond a reasonable doubt; for that, she would have to know what evidence the government has – which means she ought not waive discovery. A defense attorney needs at least a minimum amount of discovery (certainly including evidence substantiating the crimes and proof of actual innocence) before she can competently advise the defendant as to whether or not to accept the plea.

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[168] *See* Erwin Chemerinsky, *Against Sovereign Immunity*, 53 Stan. L. Rev. 1201, 1213 (2001) (arguing that sovereign immunity is inconsistent with government accountability inherent in the Constitution's structure because it denies relief to plaintiffs); Richard H. Fallon, Jr. and Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1371 (1991) (developing general theory of constitutional remedies that demands redress to keep the government within bounds of law but that sometimes permits the denial of individual relief in particular cases).

[169] Antiterrorism and Effective Death Penalty Act, enacted 1996, amending 28 U.S.C. sections 2241–2255 (West 2013) (ordinarily providing defendant only a single opportunity to file habeas action).

An additional problem with allowing a defendant to waive collateral attacks (which sweep in both ineffective assistance of counsel claims and withheld *Brady* claims) is that prosecutors already may fail to provide full discovery—even where a plea agreements are devoid of such waivers. Courts, bar associations, and state bar groups disagree on the whether *Brady* even applies pre-trial.[170] Additionally, even where prosecutors intend to follow legal rules regarding discovery and believe that such discovery is mandated pre-plea, many substitute *Brady*'s "materiality" standard for the much more favorable Model Rule 3.8 (which requires prosecutors to turn over all evidence which "tends to negate the guilt of the accused or mitigate the offense charged or which would tend to reduce the punishment").[171] Thus, they do not turn over exculpatory evidence unless, in their opinion, there is a reasonable probability that the material would result in an acquittal.[172] Finally there is no possibility of policing discovery violations by filing a later 42 U.S.C. § 1983

[170] *See, e.g.*, ABA Comm on Ethics & Prof'l Responsibility, Formal Op. 454 (2009) (opining that prosecutors must disclose exculpatory evidence before a plea-agreement is signed, and this cannot be waived); United States Attorneys' Manual and Criminal Justice Resource Manual 165 (2010) (not requiring federal prosecutors to disclose exculpatory information to defendant before plea entered). *See also* United States v. Avellino, 136 F.3d 249, 255 (2d Cir. 1998) ("Thus, we have noted that where prosecutors have withheld favorable material evidence, even a guilty plea that was knowing and intelligent may be vulnerable to challenge.") (internal quotations and citations omitted); Sanchez v. United States, 50 F.3d 1448, 1453 (9th Cir, 1995) (pre-*Ruiz* holding that defendant can argue that his plea was not voluntary and intelligent because it was made in the absence of withheld *Brady* material, reasoning that this is an exception to the general rule that a defendant who pleads guilty waives independent claims of constitutional violations). *But see* Matthew v. Johnson, 201 F.3d 353, 361–61 ("Because a *Brady* violation is defined in terms of the potential effects of undisclosed information on a judge's or jury's assessment of guilt, it follows that the failure of a prosecutor to disclose exculpatory information to an individual waiving his right to trial is not a constitutional violation.").

[171] Model Rule of Professional Responsibility 3.8(d). Pamela R. Metzer pointed this out on her 3/16/14 post to the Criminal Law Professors blog, citing to the oral argument in *Smith v. Cain*, 132 S.Ct. 627 (2012). Despite numerous pointed questions from Justices Kennedy and Sotomayor, the District Attorney from New Orleans was unable to even comprehend that the ex post standard for reversing a conviction due to a *Brady* violation might be stricter than the ex ante standard for disclosing material prior to trial.

[172] Strickler v. Greene, 527 U.S. 263, 281 (1999) (holding that "there is never a real '*Brady*' violation unless the nondisclosure was so serious that there is a reasonable probability that the suppressed evidence would have produced a different verdict").

action because of prosecutorial immunity.[173] When these issues are coupled with a discovery and/or ineffective assistance of counsel waivers, there will be no information produced by the government to better educate the defendant for his "knowing and intelligent" guilty plea. The defense attorney has to advise her client to plead guilty without knowing whether the government can prove her guilt beyond a reasonable doubt. This leaves the defendant, the courts, and the criminal justice system as a whole without the most promising mechanism for determining whether the Brady doctrine is regularly followed. Imposing a prophylactic rule requiring effective assistance of counsel during plea negotiations would mitigate this issue.

C. Effective Assistance of Counsel During Plea Negotiation as a Non-Waivable Right

Though the Supreme Court has accepted a wide array of knowing and intelligent waivers,[174] it may be that waiving the rights to effective assistance of counsel at plea entry would destroy the integrity of the criminal justice system. We believe the constitutionality of waivability may rest, at least in part, on whether the right at issue is a personal one that belongs to the individual defendant, or a systemic or institutional right granted for the public good. Where the defendant is the primary beneficiary of the Constitutional right as is the case with most pre-trial and trial rights, she can likely "spend" it to purchase a shorter prison sentence. Where the right has policy implications beyond the defendant's personal preferences and affects the fairness or perception of fairness of our criminal justice system, such as the right to conflict-free counsel,[175] the Court has shown reluctance in allowing a waiver.

It is telling that the only example we could find of the Court refusing to accept the waiver of

[173] Van de Kamp v. Goldstein, 129 S. Ct. 855, 861 (2009); Lawrence Rosenthal, *Second Thoughts on Damages for Wrongful Convictions*, 85 CHICAGO-KENT L. REV. 127 (forthcoming 2014).

[174] *See supra* Part I, notes 14–23 and accompanying text.

[175] *See* Wheat v. United States, 486 U.S. 153 (1988) (refusing a waiver of the right to conflict free counsel).

a criminal procedural right is the 5-4 *Wheat* case denying the defendant the counsel of his choice because the government believed that the desired counsel might have a conflict.[176] The case provides one example of the Court selecting the public's right to the appearance of a fair trial over a defendant's option to exchange this right for a personal benefit. The right to a public trial comes close to another right the Court would not allow a defendant to waive, and the Court ultimately did protect it from a personal waiver by utilizing the First rather than the Sixth Amendment.[177] Though a defendant can waive her right to a public trial to ensure a fair one, the public is fully protected through the more robust right given to the media. Thus, the defendant is free to exchange her right for better plea terms without affecting the apparent fairness of criminal trials. Had the Court not granted public access to criminal trials through the media, and were defendants to routinely waive their right to a public trial in boilerplate plea agreements, the Court might well have second thoughts. A secret and hidden criminal system would be unlikely to be a fair one.

Perhaps there is so little case law on rights we consider to clearly have a public aspect because no prosecutor would think to request such a waiver. For example, the Eighth Amendment protects both individual defendants and the larger social structure. The historical impetus behind the Eighth Amendment was the distrust of the British Crown's omnipotence and the fear that those in power might be tempted toward cruelty.[178] The Eighth Amendment thus affords the defendant a personal right to be free from inhumane modes of punishment and prison sentences (or the

[176] *Id.* at 155.

[177] The Sixth Amendment provides that an "accused shall enjoy the right to a . . . public trial." U.S. CONST. AM. 6. However, the Court clearly stated that this right belongs to the defendant, not to the public. Gannett Co. v. DePasquale, 443 U.S. 368 (1979) ("[I]n conspicuous contrast with some of the early state constitutions that provided for a public right to open civil and criminal trials, the Sixth Amendment confers the right to public trial only upon a defendant and only in a criminal case."). A separate First Amendment right applies to the press and the American public. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).

[178] Weems v. United States, 217 U.S. 349, 369–71, 373 (1910).

imposition of a capital sentence) disproportionate to the offense committed. The Amendment also limits the legislature and the executive branches from imposing barbaric and disproportionate penalties and ensures a humane and moral system of justice.

How should the Court respond if a defendant opted for cruel and unusual or disproportionate punishment in exchange for a better deal? In *Weems v. United States*[179] the Court found cruel a sentence of fifteen years imprisonment plus "accessory" punishments including "a chain at the ankle and wrists of the offender, hard and painful labor, no assistance from friend or relative, no marital authority or parental rights or rights of property, no participation even in the family counsel" for the offense of falsifying an official document.[180] Would we permit a defendant to waiver her right against public flogging or strip searches, assuming we could find a jurisdiction willing to impose these?

In *Roper v. Simmons*, the Court held that "the evolving standards of decency that mark the progress of a maturing society" dictate that the punishment of death for a child is so disproportionate to the crime as to be cruel and unusual.[181] How would the Court react if an eighteen year old, sixteen when he committed a murder, waived his Eighth Amendment right not to be executed as part of a plea agreement dismissing charges against his mother?[182] The answer turns, in part, on whether the right to proportional punishment is personal to the defendant, or is the

[179] 217 U.S. 349 (1910) (holding that the Philippines adopted the United States' Eighth Amendment, and that defendant's punishment of fifteen years imprisonment coupled with the "accessory" punishments was cruel and unusual for the crime of falsifying an official document resulting in 500 pesos of loss).

[180] *Id.* at 366.

[181] 543 U.S. 551, 560–61 (2005) (reconsidering whether the Eighth and Fourteenth Amendments bar states from executing a juvenile offender who was older than fifteen but younger than eighteen when he committed a capital crime).

[182] *See* United States v. Spilman, 454 F.3d 657, 658 (7th Cir. 2006) (upholding as voluntary plea deal where defendant pled guilty to Medicaid fraud as part of package deal that included dismissal of all charges against his wife); United States v. Hodge, 412 F.3d 470 (3d Cir. 2005) (allowing a "package plea deal" between brothers).

public's right not to condone the execution of children after concluding that such executions are indecent. If the latter, then perhaps certain constitutional criminal procedural rights cannot be individually waived, even by a defendant who does so voluntarily, knowingly, and intelligently.

Effective assistance at the plea stage bestows an important public benefit in the appearance of a fair and accurate criminal justice system. A waiver of effective assistance in the plea agreement would have dual implications, preventing *both* the defendant's right to claim that his attorney was ineffective at the negotiation stage and also claims regarding as-yet unknown post-conviction issues. Some argue that allowing a defendant to waive effective assistance may be in the defendant's best interest because it may lead to a more beneficial plea deal,[183] or that excepting ineffective assistance from all waivers would allow the defendant to challenge any "failure to achieve the desired result."[184] This argument ignores the societal interest in ensuring that defendants are properly advised at this critical phase of a criminal case,[185] and equally important, that outcomes in criminal cases are fair and accurate.

Our system could no longer be considered adversarial if a defendant were "permitted" to waive her right to claim ineffective assistance of counsel at the plea agreement stage. Once this

[183] *See* Krupp v. State, 356 S.W.3d 142, 147 (Mo. 2011) ("[The defendant] received a substantial benefit in exchange for his waiver of post-conviction relief."). *See also* ABA Formal Op. 113E, *supra* note 107 ("A specifically identified waiver based upon past conduct of counsel does not implicate the same constitutional, ethical or practical implications that arises in broad waives [sic] of ineffective assistance of counsel.").

[184] United States v. White, 307 F.3d 336, 343 (5th Cir. 2002).

[185] We note that in 2004 before *Lafler* and *Frye*, the Supreme Court allowed a defendant to waive counsel at his misdemeanor plea hearing. Iowa v. Tovar, 541 U.S. 77 (2004). Tovar was originally charged with a misdemeanor drunk driving offense and, at his arraignment, he chose to represent himself and pleaded guilty. *Id.* at 83. After being charged with his third drunk driving offense—this time a felony—Tovar's attorney argued that his first conviction should not be counted as an aggravating factor to ratchet up the misdemeanor to the felony level because the court never made the defendant aware of the "dangers and disadvantages of self-representation." *Id.* at 85. This decision was narrow, holding only that two specific admonishments created by the Iowa Supreme Court were not required by the Sixth Amendment during the plea colloquy when a defendant represents himself. *Id.* at 92–93.

waiver becomes the explicit price of every bargain, and courts enforce it, there will be no safeguard to ensure the defendant was properly represented and advised. Stripped of any right to challenge the charges against her, a defendant may as well simply walk into an office, take a number, and wait for the government to dole out her sentence. This scenario seems Orwellian, but without the important safety net of constitutionally guaranteed effective assistance, other procedural and substantive constitutional rights could be jeopardized. An attorney can be ineffective by failing to raise an early Fourth Amendment suppression claim (which could, in turn, remove probable cause and render the defendant's indictment insufficient) or for failing to interview an eyewitness who saw another individual commit the offense. Without collateral attack, later-found DNA evidence would be difficult to raise.[186] Ineffective assistance claims are a defendant's only opportunity to challenge a plea deal that most would recognize as unjust or otherwise inappropriate.

IV. Conclusion

While we are gratified that the Department of Justice's only official public position opposes requesting effective assistance of counsel waivers as a condition of pleading guilty,[187] and that most federal and state courts have not yet accepted their legality, we have great concern about the future. Every waiver to be accepted by the Court has been immediately incorporated into the standard plea

[186] The Innocence Protection Act ("IPA") provides a mechanism for federal felons claiming actual innocence to obtain DNA testing of specific evidence, but only if the individual did not waive his right to request DNA testing after the enactment of the IPA. 18 U.S.C. § 3600. The Department of Justice has included waivers of later DNA testing in some plea agreements, in addition to waivers of collateral attack under 18 U.S.C. § 2255. *See, e.g.*, Guilty Plea Agreement, United States v. Nam Quoc Nguyen, No. 08-522-1 at *5 (Mar. 12, 2010), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/nguyenn/03-12-10nguyen-plea.pdf.

[187] *See, e.g.*, DOJ Memo to Prosecutors: Department Policy on Early Disposition or "Fast-Track" Programs, 25 F.S.R. 53 (2012) (noting that DOJ policy on "fast-track" pleas exempts claims of ineffective assistance of counsel from appeal and habeas waivers). Unfortunately, the position at Main Justice is not shared by every one of the 94 United States Attorney's Offices. *See* Defender Elm's Chart, Appendix H; Motion by the United States Attorney's Offices for the Eastern and Middle District of Kentucky to the Supreme Court of Kentucky to Vacate KY Bar Ass'n Ethics Opinion E-435 (2012), *supra* n. 130.

agreement offered by the government. Should effective assistance of counsel waivers be viewed as appropriate by courts and state bar associations, they will see the same fate. Such waivers will become ubiquitous, and the twin problems that the Court recognized in *Lafler* and *Frye*—disparate sentences for similarly situated defendants based on fortuity and the risk of convicting the innocent—will continue to worsen.

We appreciate that plea agreements are an integral part of the criminal justice system, conserving judicial resources and providing defendants the opportunity to obtain often much-needed reductions in sentences or dismissal of charges in return for a plea and the waivers of all trial rights. However, we also agree with the Court that, "in order that these benefits can be realized . . . criminal defendants require effective counsel during plea negotiations. Anything less . . . might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him.'"[188] "Asking" a defendant to waive the newly found right skirts this acknowledged declaration of the critical nature of effective assistance at the plea stage. A minimally competent defense attorney with adequate information to assess the government's case against her client is one of the only remaining "checks" in our system of plea-agreement justice. If the defendant is allowed to give up this right at the plea stage, there is little cushion left to protect her against unwise tactical decisions, prosecutorial misconduct or overzealousness, or waiver of important other rights. There is also no method for a defendant to raise or a judge to review claims of miscarriages of justice in future proceedings, no matter how egregious the error. A lack of effective assistance will eclipse all other constitutional rights. As plea negotiations become more coercive and defense counsel less effective, our administrative system will become ever more

[188] Missouri v. Frye, 132 S. Ct. 1399, 1407–08 (2012).

efficient but less just.

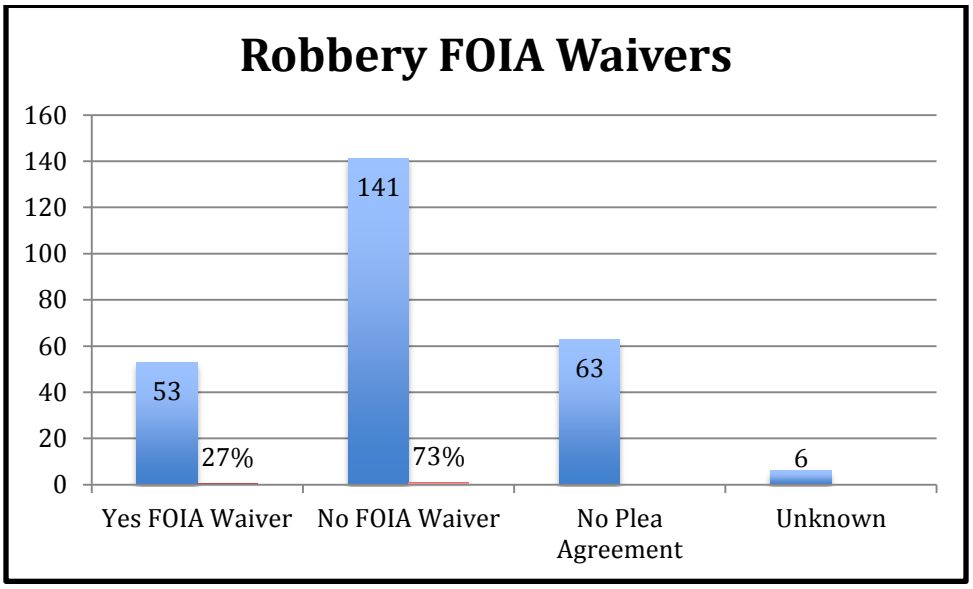
Appendix A

Robbery FOIA Waiver

Question #20A: Is there a FOIA Waiver?
(See Plea Agreement)

1 = Yes - FOIA WAIVER
2 = No - No FOIA Waiver
3 = No - No PLEA Agreement
4 = Unknown

Robbery FOIA Waivers	Count	Percentage*
Yes FOIA Waiver	53	27%
No FOIA Waiver	141	73%
No Plea Agreement	63	
Unknown	6	
Grand Total	263	
**Percentages exclude No Waiver / No Plea*		



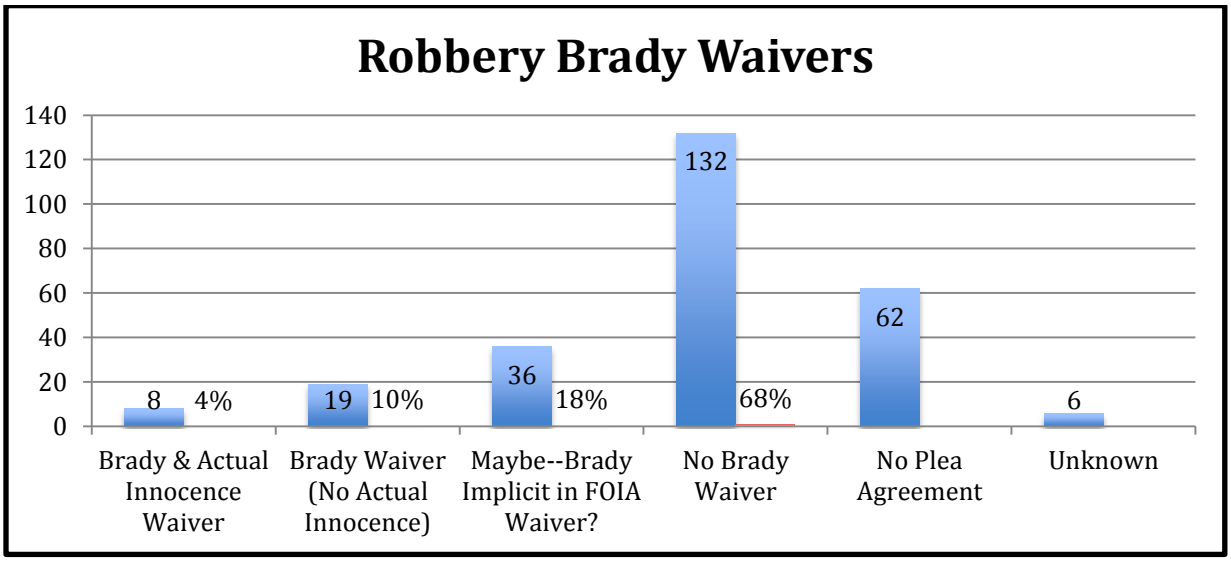
Appendix B

Robbery Brady Waiver

Question #20B: Is there a BRADY Waiver?
(See Plea Agreement) ALSO CALLED: ADDITIONAL DISCOVERY WAIVER

1 = Yes—BRADY Waiver INCLUDING Evidence of ACTUAL INNOCENCE
2 = Yes—BRADY Waiver (may mention Giglio & Jencks) BUT EXCLUDING Actual Innocence
3 = Maybe—Brady Waiver IMPLICIT In FOIA Waiver (waive right to receive ANY record from Any Dept or Agency, including FOIA).
4 = No—No Brady Waiver
5 = No—No PLEA Agreement
6 = Unknown

Robbery Brady Waiver	Count	Percentage*
Brady & Actual Innocence Waiver	8	4%
Brady Waiver (No Actual Innocence)	19	10%
Maybe--Brady Implicit in FOIA Waiver?	36	18%
No Brady Waiver	132	68%
No Plea Agreement	62	
Unknown	6	
Grand Total	263	
**Percentages exclude No Waiver / No Plea*		



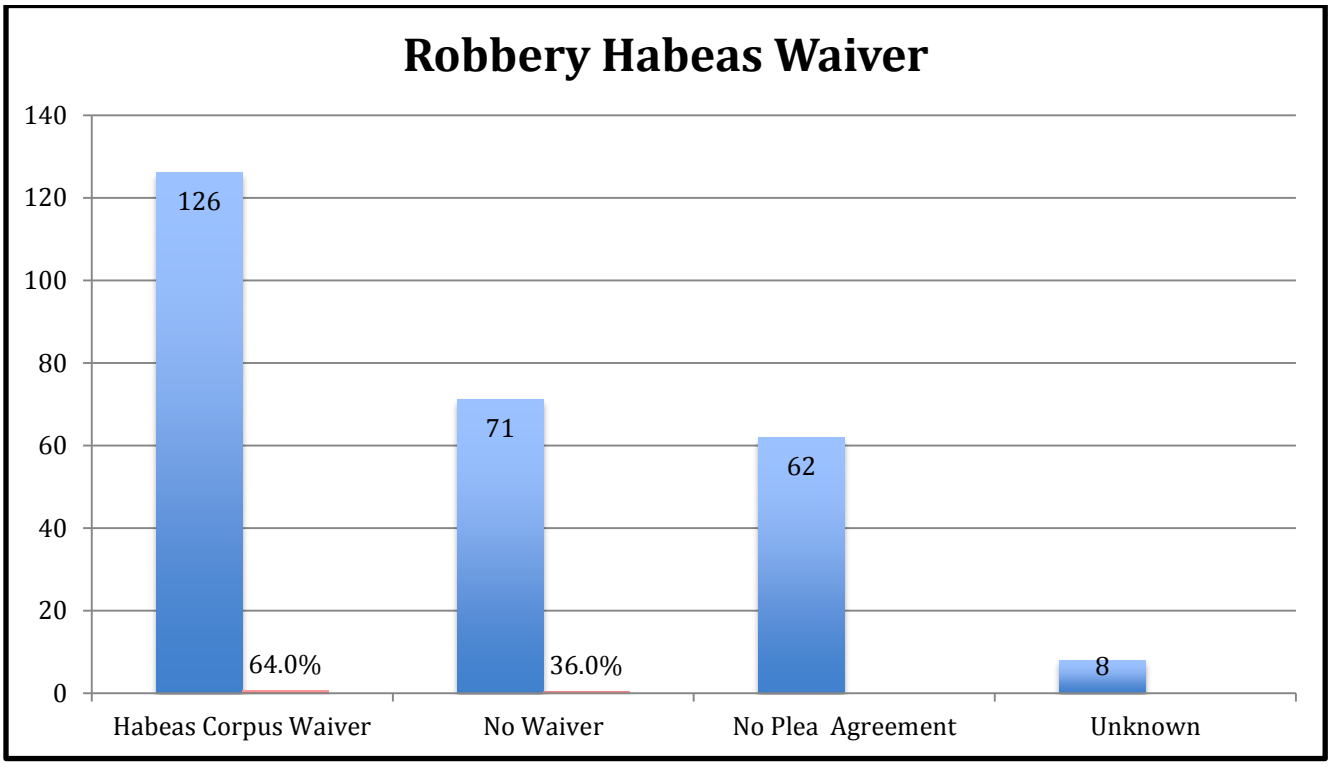
Appendix C

Robbery Habeas Waiver

Question #20: Is there a HABEAS CORPUS Waiver? (See Plea Agreement)
(In Plea Agreement. Also called "Waiver of Collateral Attack")

1 = Yes - Habeas Corpus Waiver
2 = No - No Waiver
3 = No - No PLEA Agreement
4 = Unknown

Robbery—Habeas Waiver	**Count**	**Percentage***
Habeas Corpus Waiver	126	64.0%
No Waiver	71	36.0%
No Plea Agreement	62	
Unknown	8	
Grand Total	**267**	
**Percentages exclude No Waiver / No Plea*		



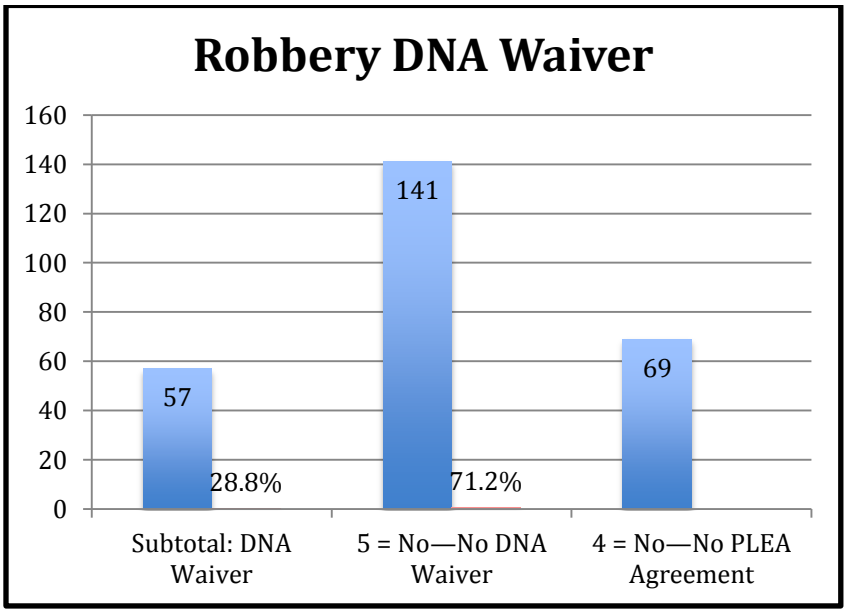
Appendix D

Robbery DNA Waiver

Question #20C: Waiver of DNA Testing
In Plea Agreement.

1 = YES—Waiver of Right to Request DNA Testing (likely 18 USC 3600A(C)(2))
2 = YES—D Allowed Government to Destroy DNA Samples
3 = Yes—BOTH Destruction of DNA and Waiver of Right to Testing
4 = No—No PLEA Agreement
5 = No—No DNA Waiver

Robbery—Waiver of DNA Testing	**Count**	**Percentage***
1 = YES—Waiver of Right to Request DNA Testing (likely 18 USC 3600A(C)(2))	14	7.1%
2 = YES—D Allowed Government to Destroy DNA Samples	4	2.0%
3 = Yes—BOTH Destruction of DNA and Waiver of Right to Testing	39	19.7%
Subtotal: DNA Waiver	**57**	**28.8%**
5 = No—No DNA Waiver	**141**	**71.2%**
4 = No—No PLEA Agreement	69	
Grand Total	**267**	
**Percentages exclude No Waiver / No Plea*		



Appendix E

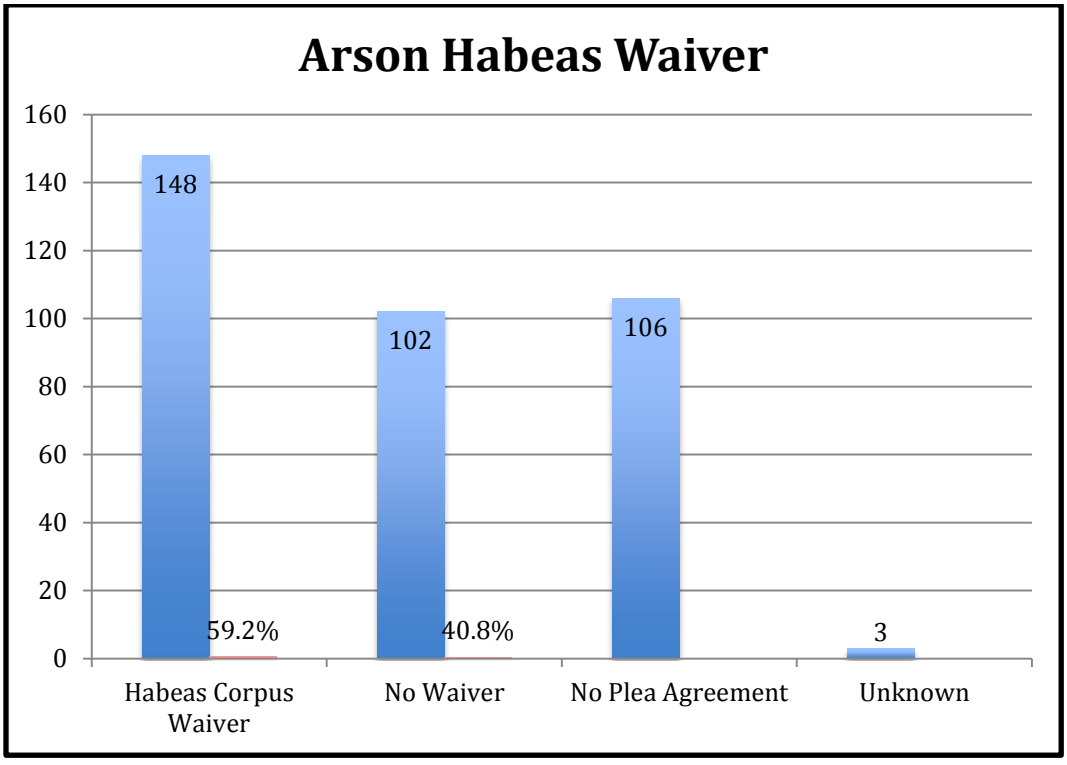
Arson Habeas Waiver

Question #20: Is there a HABEAS CORPUS Waiver? (See Plea Agreement)
(In Plea Agreement. Also called "Waiver of Collateral Attack")

1 = Yes - Habeas Corpus Waiver
2 = No - No Waiver
3 = No - No PLEA Agreement
4 = Unknown

Arson

Count of Habeas Waiver	Count	Percentage
Habeas Corpus Waiver	148	59.2%
No Waiver	102	40.8%
No Plea Agreement	106	
Unknown	3	
Grand Total	359	
**Percentages exclude No Waiver / No Plea*		



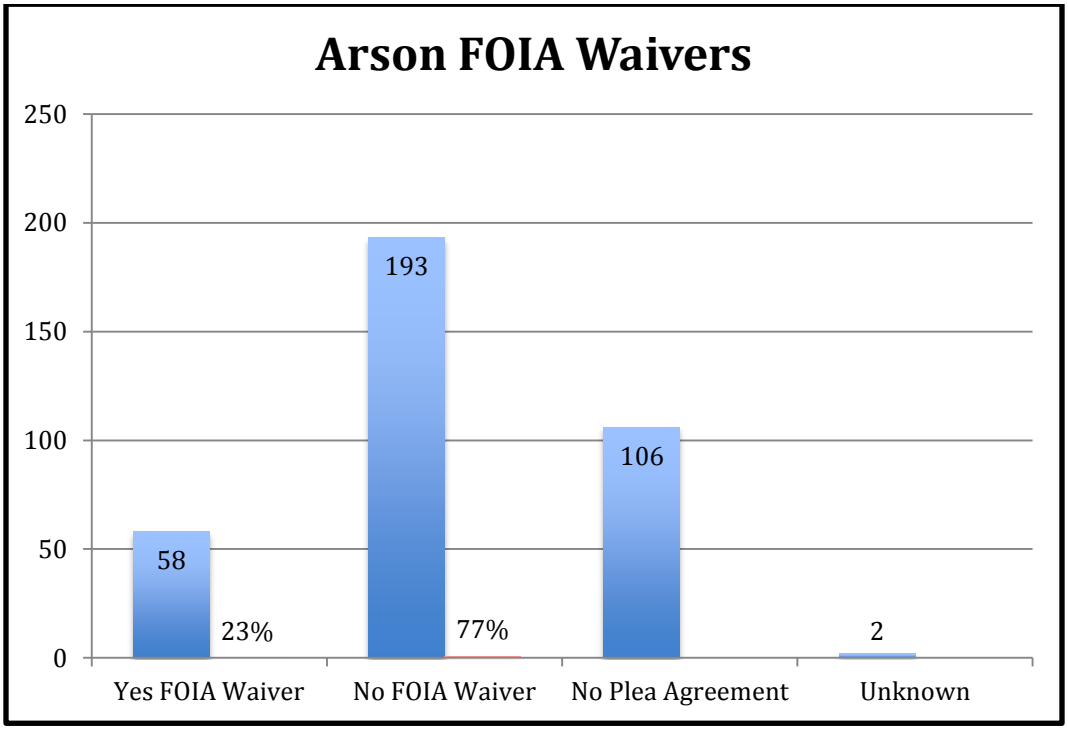
Appendix F

Arson FOIA Waiver

Question #20A: Is there a FOIA Waiver?
(See Plea Agreement)

1 = Yes - FOIA WAIVER
2 = No - No FOIA Waiver
3 = No - No PLEA Agreement
4 = Unknown

Arson FOIA Waivers	Count	Percentage*
Yes FOIA Waiver	58	23%
No FOIA Waiver	193	77%
No Plea Agreement	106	
Unknown	2	
Grand Total	359	
**Percentages exclude No Waiver / No Plea*		



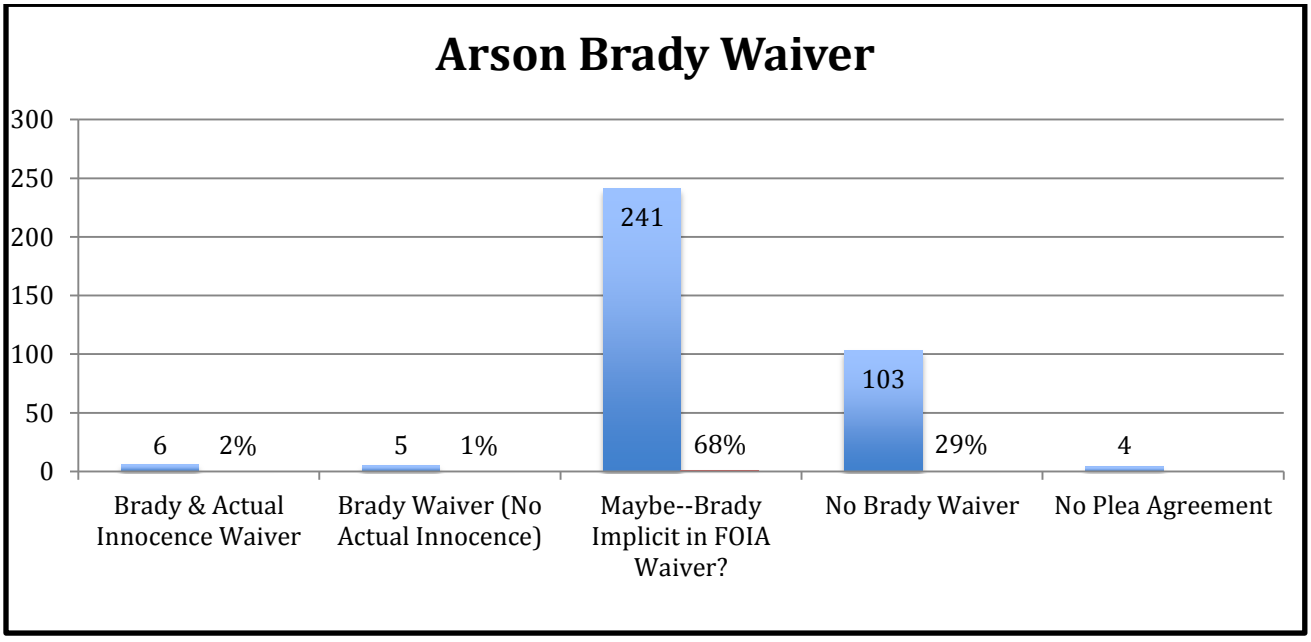
Appendix G

Arson Brady Waiver

Question #20B: Is there a BRADY Waiver?
(See Plea Agreement) ALSO CALLED: ADDITIONAL DISCOVERY WAIVER

1 = Yes—BRADY Waiver INCLUDING Evidence of ACTUAL INNOCENCE
2 = Yes—BRADY Waiver (may mention Giglio & Jencks) BUT EXCLUDING Actual Innocence
3 = Maybe—Brady Waiver IMPLICIT In FOIA Waiver (waive right to receive ANY record from Any Dept or Agency, including FOIA).
4 = No—No Brady Waiver
5 = No—No PLEA Agreement
6 = Unknown

Arson Brady Waiver	Count	Percentage*
Brady & Actual Innocence Waiver	6	2%
Brady Waiver (No Actual Innocence)	5	1%
Maybe--Brady Implicit in FOIA Waiver?	241	68%
No Brady Waiver	103	29%
No Plea Agreement	4	
Unknown		
Grand Total	359	
**Percentages exclude No Waiver / No Plea*		



Appendix H

PLEA APPEAL AND COLLATERAL ATTACK WAIVERS CHART

District	BROAD		WAIVER		EXCEPTIONS																			
											NEW		EXCEEDS			ERROR								
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Concurren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
Ala. M.D.			■	■				■	■					■					■			Yes	---	1
Ala. N.D.			■	■									■	■								No	---	
Ala. SD			■	■								■	■	■								No	---	
Alaska			■	■	■			■					■									No	---	
Ariz.			■	■																		No		
Ark. E.D.			■	■			■	■	■					■								No		33
Ark. W.D.			■	■			■	■					■									No		
Cal. C.D.			■		■								■		■							Yes		2
"			■	■	■								■		■							Yes		2
"			■	■			■				■	■			■		■					Yes		2
Cal. E.D.			■	■									■									No	2010	
"	■																					No	2012	
Cal. N.D.			■					■														No		
Cal. S.D.			■	■				■						■								No	Change 2011	3
Colo.		■																				No	2011	

District	BROAD		WAIVER		EXCEPTIONS																			
											NEW		EXCEEDS			ERROR									
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Concurren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
"			■	■				■	■			■	■	■	■								No	2012	
Conn.			■	■											■			■					No		
Del.			■	■				■					■	■									No	2012	4
"			■	■									■	■									No	2013 early	4
"			■	■				■					■	■									No	2013 later	4
D.C.		■																					No	2012	5
"			■	■							■												Yes	2013	5
" DOJ		■																						2010	6
"			■	■				■	■						■									2013	6
Fla. M.D.			■	■						■			■	■									No	2011	7
"			■							■			■	■									No	2012	7
Fla N.D.		■																					No		
Fla. S.D.			■										■	■									Yes		8
Ga. M.D.			■	■										■									No		
Ga. N.D.			■	■										■									Yes		9
Ga. S.D.			■	■									■	■									No		

District	BROAD		WAIVER		EXCEPTIONS																			
											NEW		EXCEEDS			ERROR									
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Conc urren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
Guam			■	■																	■	No		10
Haw.			■	■				■					■	■								No		
Idaho			■	■				■					■	■								No		
Ill. C.D.			■	■				■														No		11
Ill. N.D.			■	■	■	■		■				■	■									No		12
Ill. S.D.			■	■		■	■															No		
Ind. N.D.			■	■				■														No		13
Ind S.D.	■																					No		
Iowa N.D.			■	■		■		■					■	■								No		
Iowa S.D.			■	■				■	■													No		
Kan.			■	■				■	■					■								No		
Ky. E.D.	■																					No	2010	
"			■	■	■		■	■													■	No	2012	14
Ky. W.D.	■																					No		15
La E.D.			■	■				■					■									No	2010	
"			■	■			■	■					■									No	2012	

District	BROAD		WAIVER		EXCEPTIONS																		
											NEW		EXCEEDS			ERROR								
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Concurren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
La. M.D.			■	■				■					■	■								No		
La. W.D.		■																				No		
Me.			■	■								■			■							No		
Md.			■										■								■	No		16
Mass.			■	■				■							■							Yes	2011	17
"	■																					Yes	2011	17
"			■	■				■							■							Yes	2013	17
Mich. E.D.			■										■	■								Yes		18
"			■	■									■	■								Yes		18
Mich. W.D.			■	■	■	■	■	■					■	■							■	No		19
Minn.			■	■											■							Yes		20
Miss. N.D.		■																				No		
Miss. S.D.		■																						
Mo. E.D.			■	■				■	■								■							
Mo. W.D.			■	■				■	■					■							■	Yes		21
Mont.			■	■				■			■											No		
Neb.			■	■				■	■													Yes		22
"		■																				Yes		22

District	BROAD		WAIVER		EXCEPTIONS																			
											NEW		EXCEEDS			ERROR									
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Concurren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
Nev.			■	■				■						■								No		
N.H.			■	■	■			■				■		■								No		
N.J.			■	■										■			■					No		
N.M.			■	■				■						■								No		
N.Y. E.D.			■												■							No		
N.Y. N.D.			■	■											■							No		
N.Y. S.D.			■	■											■							No		
N.Y. W.D.			■	■											■							No		23
N.C. E.D.			■	■				■	■					■								No		
N.C. M.D.		■																				No		
N.C. W.D.			■	■				■	■													No		
N.D.			■	■				■				■		■								Yes	2010	24
"			■	■				■						■								Yes	2012	24
Ohio N.D.			■	■				■	■				■	■								No		
Ohio S.D.		■																				No		25
Okla. E.D.			■	■				■					■									No		
Okla. N.D.			■	■				■					■									No		
Okla. W.D.			■	■										■								No		

District	BROAD		WAIVER		EXCEPTIONS																			
											NEW		EXCEEDS			ERROR									
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Concurren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
Or.		■																				No		
Pa. E.D.			■	■		■							■	■						■		No		
Pa. M.D.		■																				Yes		26
Pa. W.D.			■	■									■	■								No		
P.R.			■																			No		
R.I.			■											■								No		
S.C.		■																				Yes		27
S.D.			■											■						■		No		
Tenn. E.D.			■	■				■	■					■								Yes		28
Tenn M.D.			■	■	■			■	■					■								No		
Tenn. W.D.			■																			No		
Tex. E.D.			■	■				■					■									No		
Tex. N.D.			■	■	■			■					■								■	Yes	2009	29
"			■	■	■								■									Yes	2010	29
"			■	■				■					■									Yes	2012	29
Tex. S.D.	■																					No		
Tex. W.D.			■	■				■	■													No		

District	BROAD		WAIVER		EXCEPTIONS																			
											NEW		EXCEEDS			ERROR									
	All	None	App	Coll Att	Vol.	Constl Can't Waive	Invalid Plea / Entry	IAC	Pros Miscdt	8th Amen.	Evid	Retro Sent	Stat Max	USSG	Stips	Mand Min	Crim Hx	Con-sect./ Concurren	Deny accpt	*Booker* Unreas	Sent	Variety	Diffs over time	Fn.
Utah			■	■									■	■									No		
Vt.		■											■										No		
V.I.			■	■									■										No		
Va. E.D.			■										■										No		
Va. W.D.	■																						Yes	2010	30
"			■	■		■		■															Yes	2012	30
Wash. E.D.			■	■				■						■									No		
Wash. W.D.			■	■				■					■	■									No		
W.V. N.D.		■																					No		31
W.V. S.D.			■	■				■															No		31
Wis. E.D.			■	■		■		■					■										No		
Wis. W.D.			■											■									No		
Wyo.		■																					Yes		32
"			■																				Yes		32
TOTALS	5	17	88	77	10	7	6	49	14	1	3	7	41	42	14	1	3	1	1	2	6				

Abbreviations Key (from left to right on second row):

- Broad
  - All: Agreements including blanket waivers of all appellate and collateral attack rights.
  - None: Agreements including no waivers of any appellate or collateral attack rights.
- Waiver
  - App.: Appellate rights
  - Coll Att: Collateral attack rights
- Exceptions
  - Vol.: Voluntariness
  - Const'l can't waive: Constitutionally cannot waive
  - Invalid Plea/Entry: Plea agreement itself is invalid or entry of plea is invalid
  - IAC: Ineffective assistance of counsel
  - Pros Miscdt: Prosecutorial misconduct
  - 8th Am: 8th Amendment
  - New Evid: Newly discovered evidence
  - New Retro Sent: Retroactive changes in sentencing
  - Exceeds Stat Max: Exceeds statutory maximum
  - Exceeds USSG: Exceeds United States Sentence Guidelines
  - Exceeds Stips: Exceeds any stipulations in the plea agreement
  - Error Mand Min: Error regarding mandatory minimum
  - Error Crim Hx: Error calculating criminal history
  - Con-sect./Concurren: Error in assignment of consecutive or concurrent sentence
  - Deny accpt: Judge denies acceptance of responsibility decrease
  - *Booker* Unreas: Unreasonable sentence departure under *Booker*
  - Sent: Right to appeal the sentence imposed but not conviction
- Variety: Indicates that the district utilizes more than one boilerplate plea agreement
- Diffs over time: Indicates that the boilerplate plea agreement has changed over time
- Fn.: Numbers correspond to the Footnotes below

Footnotes

1. In the Middle District of Alabama, the appeal of upward departures is "often excepted."

2. In the Eastern District of California, there are three varieties of standard waiver language. The most common is the first one listed :(a) that is no waiver of collateral attack, but waiver of appeal with exceptions of involuntariness, exceeding the stat max, and stipulated sentence terms. The other varieties are less common, and may be negotiated terms. They include: (b) waiver of appeal and 28 U.S.C. section 2255, but excepting involuntariness, stipulated terms, and exceeding the stat max; or (c) Waiver of appeal and 28 U.S.C.section 2255, but excepting stipulated terms, criminal history calculation, ineffective assistance of counsel, new evidence, and retro sentencing.

3. In 2011, Federal Defender of San Diego Reuben Cahn wrote to the United States Attorney regarding the proposed new boilerplate plea agreement and told the U.S. Attorney that the plea could waive 28 U.S.C. section 2255 and appellate rights, except for ineffective assistance of counsel. That has remained an exception in the plea Defender Elm found.

4. There had been standard waivers of appeal and 28 U.S.C. section 2255, but with exceptions for statutory maximum, United States Sentencing Guidelines calculation errors, and ineffective assistance of counsel In 2013, the United States Attorney began expressly waiving ineffective assistance of counsel challenges, too. The Federal Public Defenders objected and there were many fights over it. Finally, the U.S. Attorney's Office agreed to take the ineffective assistance of counsel waiver out of the agreements, unless there was a special reason for it.

5. Per the Federal Public Defender, the District of Columbia did not use to have appeal and 28 U.S.C. section 2255 waivers at all. Recently, the District started putting those in; when the defense objects, the U.S. Attorneys usually remove it. More recently, the Federal Public Defender noticed that the U.S. Attorneys put in the appeal and 28 U.S.C. section 2255 waivers but except

new information.

6. Department of Justice attorneys appear to have changed their practice between 2010 and 2013.

7. After successful litigation with the Florida Bar ethics committee, the United States Attorney simply removed 28 U.S.C. section 2255 from waiver language altogether.

8. Because the Federal Public Defender objected to the waiver of appeal in the agreements, the United States Attorneys Office usually took them out of the agreements but often leave the appeal waivers in agreements that non-Federal Public Defenders got. Sometimes it would be a negotiated term, especially if the defendant got an especially good offer.

9. Once in a while the Federal Public Defenders see an agreement that has no appeal or 28 U.S.C. section 2255 waiver provision at all—but that is the aberration.

10. Guam is different. It provides broad appeals and 28 U.S.C. section 2255 waivers, but makes an express exception for only one thing: the defendant can appeal the actual sentence imposed.

11. In the Central District of Illinois, the United States Attorney had broad language of waiving all appeal and 28 U.S.C. section 2255 rights. The Federal Public Defender prevailed upon the U.S. Attorney, however, to include an exception for ineffective assistance of counsel.

12. The Northern District of Illinois has an express waiver of ineffective assistance of counsel for alleged failure to file an appeal notice.

13. The Northern District of Indiana has a broad appellate and 28 U.S.C. section 2255 waivers, and expressly waives ineffective assistance of counsel except as to negotiation of a deal.

14. The Eastern District of Kentucky had broad waivers of both appellate and collateral attack rights, but by 2012, they added in some very broad exceptions: reserving the right to appeal the actual sentence imposed and the right to collaterally attack the guilty plea, conviction, and sentence.

15. Defender Elm found an agreement from 2011 that waived not only all appeal and 28 U.S.C section 2255 rights, but also expressly waived ineffective assistance of counsel claims! That latter waiver is not, however, in agreements Defender Elm saw from 2012.

16. Maryland only has an appeal waiver, though it allows for appeal when a sentence exceeds the statutory maximum or is below the mandatory minimum.

17. Maine had two types of provisions, one for 11(b) sentences and one for 11(c) sentences. If an 11(b), the defendant waives all appeal and 28 U.S.C. section 2255, except for stipulated terms and ineffective assistance of counsel. But if an 11(c) plea, then there is merely the broad waiver. However in 2012, the Federal Public Defenders got a plea agreement that was an 11(c) stipulation with the usual broad waiver, however, it now included a waiver of ineffective assistance of counsel.

18. In the Eastern District of Michigan, there are Northern and Southern Divisions that have different boilerplate terms. Both have broad waivers with exceptions for statutory maximum and errors in guidelines calculations (USSG), but the Northern Division does so while waiving both appellate and 28 U.S.C. section 2255 rights, whereas the Southern Division waives only appeal.

19. The Western District of Michigan has a lot of exceptions. It specifies an exception for the manner in which the sentence was determined and incorrect determination of Guidelines range. Note, too, that it has an exception for any matters objected to and preserved at sentencing.

20. The Minnesota Federal Public Defender continues to resist these waivers, with varying success.

The chart denotes the most common form in which it still exists.

21. In Western District of Missouri, the parties truly can negotiate waiver terms. However, when there are such terms, they are as represented above in the chart.

22. The District of Nebraska usually does not have appeal and 28 U.S.C. 2255 waivers in its agreements. But when it does, there is always language excepting ineffective assistance of counsel and prosecutorial misconduct.

23. The Western District of New York has a broad appeal and 28 U.S.C. section 2255 waiver, excepting only stipulated terms. The collateral attack is unusual, in that it specifies that the defendant waives newly discovered evidence and changes in the law.

24. There is little difference between the 2010 and 2012 agreements, except that the latter did not include the exception for changes in the law that would be retroactive.

25. Per the Federal Public Defender, when the government tried to put appeal and collateral attack waivers into their agreements, the Federal Public Defenders, as well as the judges, were adamantly opposed to them. Finally, the United States Attorney gave up.

26. In the Middle District of Pennsylvania, the waivers are terms that can be bargained for, but primarily, they are absent altogether.

27. The practice in South Carolina is a "mixed bag," per their Federal Public Defender. The Federal Public Defenders seldom accept pleas with waivers unless there is a big benefit. Additionally, some judges will not accept pleas with waivers, and then the government strikes those terms. The Federal Public Defender notes that Fourth Circuit case law states that agreement waivers do not deprive the lower court or appeals court of jurisdiction to correct errors, so the waivers have very little effect anyway.

28. In the Eastern District of Tennessee, one judge refuses to accept pleas with any waiver at all. But for most pleas, the chart reflects what the terms are.

29. The Northern District of Texas has had abroad appeals and 28 U.S.C. section 2255 waivers consistently, but has made different exceptions in different years. Defender Elm contacted the Federal Public Defender to determine whether it varies or was just different policies during different time periods.

30. The Western District of Virginia had different waivers in 2010 and 2012. It is unclear if that is because of variations or changes of consistent policy over time. Federal Public Defender Larry Shelton informed Defender Elm that the new (2012) waivers are something they negotiated and is now consistent boilerplate.

31. Defender Elm understands that the United States Attorney had put waivers in their agreements, and that the defense brought it to the Bar ethics committee. After the defense was successful in securing an informal opinion, the U.S. Attorney agreed to remove the terms from the agreement—so no formal opinion was published. This could explain why there are no waivers at all in the Northern District agreement (from 2011), whereas there are waivers in the Southern District's 2010 agreement.

32. In Wyoming, they almost never see these waivers in their agreements. There is one Assistant United States Attorney who adds appeal waivers (but not 28 U.S.C. section 2255 waivers); when that happens, the defense will not sign the agreements, and eventually he relents.

33. In the recent past, this changed from no waivers whatsoever to the one in the chart