No. 19-___

IN THE

Supreme Court of the United States

VICTOR THOMAS,

Petitioner,

v.

STATE OF NEW YORK, NICOLE L. GREEN, AND STORM U. LANG

Respondents.

On Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a provision in a waiver of appeal that forbids a criminal defendant from filing a notice of appeal, and in so doing also strips superior courts of jurisdiction to hear even unwaivable issues, conflicts with *Garza v. Idaho,* 139 S. Ct. 738 (2019), and therefore violates the Sixth Amendment right to counsel?

PARTIES TO THE PROCEEDING

The Petitioner here is Victor Thomas, who was defendant-appellant in the New York Court of Appeals.

The Respondents here are the State of New York, which was plaintiff-appellee in the New York Court of Appeals, Nicole L. Green, who was defendant-appellant in the New York Court of Appeals, and Storm U. Lang, who was defendant-appellant in the New York Court of Appeals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings in the Supreme Court of the State of New York, the Supreme Court of the State of New York, Appellate Division First Department, and the Court of Appeals of New York:

The People of the State of New York v. Green, No. 387 KA 16-00295 (N.Y. Supreme Ct. Dec. 1, 2015);

The People of the State of New York v. Lang, No. 877 KA 16-00063 (N.Y. Supreme Ct., Dec. 8, 2015);

The People of the State of New York v. Thomas, No. 2760-2015 (N.Y. Supreme Ct., Aug. 10, 2016);

The People of the State of New York v. Thomas, No. 2760-2015 (N.Y. Supreme Ct., Aug. 16, 2016);

The People of the State of New York v. Thomas, No. 2760-2015 (N.Y. Supreme Ct., Aug. 24, 2016);

The People of the State of New York v. Thomas, No. 2760-2015 (N.Y. Supreme Ct., App. Div. 1st Dept., Feb. 1, 2018);

The People of the State of New York v. Green, No. 387 KA 16-00295 (N.Y. Supreme Ct., App. Div. 4th Dept., Apr. 27, 2018);

The People of the State of New York v. Lang, No. 877 KA 16-00063 (N.Y. Supreme Ct. App. Div. 4th Dept., Oct. 5, 2018);

The People of the State of New York v. Thomas, No. 87 (Court of Appeals of New York, Nov. 26, 2019).

The People of the State of New York v. Green, No. 88 (Court of Appeals of New York, Nov. 26, 2019).

The People of the State of New York v. Lang, No. 89 (Court of Appeals of New York, Nov. 26, 2019).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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Petitioner Victor Thomas respectfully petitions this Court for a Writ of Certiorari to review the judgment of the New York Court of Appeals in this case.

OPINION AND ORDER BELOW

The opinion of the New York Court of Appeals is reported at 34 N.Y.3d 1019 (2019) (Pet. App. 1a–77a). The opinion of the New York Supreme Court, Appellate Division, First Department, is reported at 158 A.D.3d 434 (1st Dep't 2018) (Pet. App. 78a–80a). The New York Supreme Court's sentencing decision is unpublished and is reproduced in Appendix C (Pet. App. 81a–85a). The New York Supreme Court's decision on Petitioner's motion to suppress is unpublished and is reproduced in Appendix E (Pet. App. 90a–104a).

JURISDICTION

The Judgment of the New York Court of Appeals was entered on November 26, 2019. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides that "In all criminal prosecutions the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

INTRODUCTION

This Court has held that where counsel fails to file a notice of appeal when requested, and thus deprives a defendant of an appeal, counsel's performance is constitutionally deficient and prejudice to the defendant on an ineffective assistance of counsel claim must be presumed. *Roe v. Flores-Ortega*, 528 U.S. 470, 483–84 (2000).

Last year in *Garza v. Idaho*, this Court extended *Flores-Ortega*'s presumption of prejudice, holding that counsel is *per se* ineffective when she fails to heed a client's request to file a notice of appeal *even if* the client has executed a waiver of appeal as part of a plea agreement. 139 S. Ct. 738, 742 (2019). The Court reasoned that prejudice must be presumed because "even the broadest appeal waiver does not deprive a defendant of all appellate claims." *Id.* at 749–50. The Court observed that "it should be clear . . . that simply filing a notice of appeal does not necessarily breach a plea agreement, given the possibility that the defendant will end up raising claims beyond the waiver's scope." *Id.* at 746.

Because the terms of Garza's appeal waiver did not specifically command him to refrain from the "ministerial" task of filing a notice of appeal and thus jurisdictionally forfeit all chance of further review, this Court did not address whether counsel's accepting a "no-notice-of-appeal" waiver also constitutes ineffective assistance.

Here, on an arranged plea, Petitioner admitted his guilt in open court and allocuted to the facts of his crime. But then, he was ambushed by the prosecutor's surprise inclusion of a written waiver of

appeal provision that purported to preclude Petitioner from even filing a notice of appeal, subject to certain non-exhaustive limitations. The trial judge then supplemented the written waiver with contradictory oral admonitions. A splintered New York Court of Appeals held that the no-notice-of-appeal provision was "incorrect" but the waiver was nonetheless "knowing and voluntary" under the "totality of the circumstances." Pet. App. at 21a. A dissenting judge disagreed, asserting that the waiver in question was incapable of providing "any meaningful knowledge as to the rights" being waived and calling the State's waiver jurisprudence a "Daedalean maze." Pet. App. at 60a–65a.

This case presents a question of national importance because no-notice-of-appeal waivers (and their functional equivalents, waivers that strip a defendant of any right "to file an appeal" or "to appeal") are in common use throughout the United States. *See infra* § II. These provisions ignore *Garza* and violate the Sixth Amendment—including by chilling meritorious appeals on unwaivable issues. Moreover, attempts by counsel to explain no-notice-of-appeal waivers to clients will only lead to nonsensical advice that guarantees counsel's ineffectiveness. Using these waivers in plea agreements also pits counsel's interests against those of her client by insulating counsel's performance from review, violating American Bar Association standards of practice, and requiring counsel to ignore court rules and ethics guidance.

The remedy is clear, simple and minimally intrusive: this Court should extend *Garza* to cover no-notice-of-appeal waivers and their equivalents,

hold that counsel's acceptance of such waivers constitutes *per se* ineffectiveness, and combine that ruling with a prophylactic rule voiding appeal waivers containing such provisions. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Weeks v. United States*, 232 U.S. 383 (1914). Absent review and reversal in this Court, this case will encourage prosecutors to use no-notice-of-appeal waivers to circumvent *Garza*, a result that undermines both the constitutional rights of criminal defendants and the functioning of the courts, by purporting to create waivers of jurisdiction where none can exist.

The Court should grant certiorari.

STATEMENT OF THE CASE

The Underlying Incident

Petitioner allegedly was seen by the police in a video of a street fight, in which one group of men was beating another man, whose companions were held at bay by a man pointing a gun at them. CR 29–30, 44.[1] A police officer recognized Petitioner as the man with the gun, and that officer was ordered to arrest

[1] "CR" refers to the court record on file with the Court of Appeals of the State of New York, No. APL-2018-00094.

Petitioner and bring him back to the police station for questioning. *Id.*

After Petitioner was located and arrested, he was not advised of his *Miranda* rights at that or any other time. CR 58. Upon and after arrest, the officer told Petitioner that "the detectives . . . wanted to ask him some questions." CR 33–34. In response Petitioner repeatedly inquired "for what?" CR 34. The officer responded with variations of "you'll see when . . . the detective . . . speaks to you" and "the detectives . . . have a few questions for you." *Id.* These interactions between the officer and Petitioner continued on the street, in the squad car and at the precinct. CR 56–63.

Entering the station-house, Petitioner had become "loud," "hostile" and "belligerent." He "kept moving" and asked the same thing repeatedly: "what do the detectives want to speak to me about?" The officer once again replied "you'll see when . . . the detective speaks to you." CR 34–36.

Precinct prisoner protocol required that Petitioner be logged-in downstairs and then taken to the second floor for any interrogation. CR 58–60. In this case, however, those standard procedures were not followed. CR 62–63. Instead, the Detective "immediately" came down to the first floor, showed Petitioner a still picture from the video of him holding a gun, and told him, "you're here to speak . . . about this." CR 35–37, 60. Petitioner replied "You got me" and then "stopped shouting" and "calmed down after that." CR 35–36, 60–61.

The Suppression Hearing

At a hearing on suppression of Petitioner's statement, counsel argued that his confession was the "product of the functional equivalent of custodial interrogation in the absence of *Miranda*" warnings and that the Detective's showing Petitioner dispositive inculpatory evidence violated established New York precedent and must be suppressed. CR 77–81. The court denied suppression, finding that Petitioner's statement was voluntary. CR 82–87.

The Plea and No-Notice-of-Appeal Waiver

Petitioner, a predicate felon, entered into a plea agreement under which he would plead guilty to first-degree attempted assault in return for a five-year determinate sentence. CR 89–90. Only *after* Petitioner agreed to the deal and allocuted to the facts of the crime in open court did the prosecutor inform the parties *and* the court that the plea agreement would also include a waiver of the right to appeal. CR 92–94. The court noted that it "was unaware of that . . . up to this point." CR 94. There was then an unexplained "pause in the proceedings," after which the court asked Petitioner if he understood that, by the appeal waiver, he was giving up his right to challenge the plea and sentence, to which Petitioner responded yes. CR 94–95.

Only then did the court instruct Petitioner and his counsel to review the written waiver of appeal, after which it was to be signed "in open court." CR 95. The written waiver contained in three places a waiver of the right to file a notice of appeal, with certain limited exceptions.[2] Pet. App. 107a–108a.

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[2] Petitioner's "Waiver of the Right to Appeal" states:

The defendant, in consideration of and as part of the plea agreement being entered into hereby waives any and all rights to appeal including the right to file a notice of appeal from the judgment of conviction herein, with the exception of any constitutional speedy trial claim which may have been advanced, the legality of the sentence, my competency to stand trial, and the voluntariness of this plea and waiver.

The undersigned defendant executed this waiver after being advised by the Court of the nature of the rights being waived. The defendant has been advised of the right to appeal (CPL 450.10), to prosecute the appeal as a poor person, to have an attorney assigned in the event that the defendant is indigent, and to submit a brief and argue before the appellate court on any issue relating to the conviction or sentence.

I waive my right to appeal and to file a notice of appeal voluntarily and knowingly after being fully apprised of my appellate rights by the Court and my attorney [defense counsel] standing beside me. I have had a full and fair opportunity to discuss these matters with my attorney and any questions which I may have had have been answered to my satisfaction.

The above defendant appeared before this court on this date and in open Court, in the presence of this Court and with the approval of this Court, and with the advice and consent of

Only after Petitioner signed the waiver did the court inquire whether he had had "a full opportunity to speak with [counsel] about what signing this waiver means, what rights you're giving up." CR 95. At the very end of a later sentencing hearing, the court stated in passing to counsel that "even though your client waived the right to appeal, you can provide him with a notice of right to appeal for any rights that may survive the waiver." CR 103–104.

Appeal to the Appellate Division, First Department

Petitioner appealed his conviction to the New York Appellate Division, First Department, on the basis that denial of his motion to suppress his un-*Mirandized* custodial confession was erroneous. Petitioner argued that he did not and could not waive his right to appeal the suppression ruling because, under established New York precedent, the written waiver of the right to file a notice of appeal voided the entire waiver. The People argued that the waiver was enforceable, and that the oral waiver during the plea allocution cured any deficiencies in the written waiver. Pet. App. 78a-80a.

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defendant's attorney, signed the foregoing waiver of said defendant's right to appeal and to file a notice of appeal. CR 202 (emphasis added).

The First Department upheld Petitioner's conviction, finding that the no-notice-of-appeal waiver was enforceable, and then denied a subsequent Motion to Reargue. Pet. App. 105a–106a.

Appeal to the New York Court of Appeals

Petitioner's Criminal Leave Application to the New York Court of Appeals was granted. Petitioner argued to the New York Court of Appeals, among other things, that the no-notice-of-appeal waiver provision is unenforceable and voids the entire appeal waiver because it deprived him of his Sixth Amendment right to counsel, improperly divested the superior court of jurisdiction, runs counter to court rules and ethical and professional guidance, violates American Bar Association standards of practice, and results in unconscionable pleas and bad public policy.[3]

A splintered New York Court of Appeals affirmed. Pet. App. 1a. A four-judge majority, joined by two concurrences, found that while the no-notice-of-

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[3] Petitioner also argued that the no-notice-of-appeal provision was contrary to settled New York law, and sought suppression of his confession because the police elicited his confession through the functional equivalent of interrogation in the absence of *Miranda*.

appeal language was "incorrect," it did not invalidate the entire waiver because:

> [I]t was coupled with clarifying language in the same form that appellate review remained available for certain issues, most importantly, the validity of the appeal waiver itself, and indicating, therefore, that the right to take an appeal was retained. The court's oral colloquy, specifically its inquiry of Thomas and resulting assurances that he had ample opportunity to discuss with counsel the meaning of the waiver and appellate rights he was surrendering, was sufficient to support a knowing and voluntary waiver under the totality of the circumstances.

Pet. App. 21a.

The court reached this conclusion despite striking down "mischaracterized" appeal waivers in two companion cases. Pet. App. 23a. The court also noted that it had previously held appeal waivers unenforceable where courts had incorrectly advised defendants as to the rights relinquished in a plea agreement. Pet. App. 40a–41a.

In a dissent adopting all of Petitioner's arguments, Judge Wilson expressed bewilderment at the "Daedalean maze" created by the majority's distinction between a "mischaracterization" by the court of waived rights (as in the companion cases), which results in an invalid waiver, and an "incorrect" waiver (in Mr. Thomas's case), which apparently does not. Pet. App. 63a–65a. He likewise noted that "most criminal lawyers (and judges, myself included) could not produce a comprehensive list of the waivable and unwaivable rights without conducting

substantial research—let alone assess the value of those rights in the context of a particular case." Pet. App. 61a.

REASONS FOR GRANTING THE PETITION

I. No-Notice-Of-Appeal Waivers and Their Equivalents Violate the Sixth Amendment, *Garza v. Idaho*, and Counsel's Professional and Ethical Obligations

No-notice-of-appeal waivers and their functional equivalents are pernicious provisions that simultaneously preclude appellants from filing meritorious appeals on unwaivable issues and improperly strip superior courts of jurisdiction to hear otherwise valid appeals and thereby develop the law. They therefore violate *Garza* because they prohibit the "ministerial" gateway task of filing a notice of appeal, *Garza*, 139 S. Ct. at 745, and thus after a short[4] time, trigger a jurisdictional default forfeiting the right to appeal entirely.

No-notice-of-appeal provisions also require counsel to provide conflicted and nonsensical advice:

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[4] For example, 30 days in New York, N.Y. CRIM. P. LAW § 460.10(1)(a), 14 days in federal court, FED. R. APP. P. 4(b)(1)(A), and 10 days in Oklahoma, OKLA. CT. CRIM. APP. R. 2.1(B).

counsel must both advise her client that he is prohibited from filing a notice of appeal and yet explain to him that she must and will file a notice of appeal if he so requests. *Flores-Ortega*, 528 U.S. at 480 (counsel has a constitutional duty to consult with client about an appeal when there is reason to think a rational defendant would want to appeal); *Padilla v. Kentucky*, 559 U.S. 356, 373–74 (2010) (counsel has a constitutional duty to advise her client on the consequences of her plea agreement); *Garza*, 139 S. Ct. at 747.

No-notice-of-appeal provisions create still another conflict of interest and ethical dilemma for counsel by requiring her to advise her client on whether to accept a plea agreement that shields her own performance from appellate review. *See Caplin & Drysdale v. United States*, 491 U.S. 617, 632 n.10 (1989) (a lawyer "advis[ing] a client to accept an agreement entailing a more harsh prison sentence but no forfeiture—even when contrary to the client's interests—in an effort to preserve the lawyer's fee . . . would surely constitute ineffective assistance of counsel."); *Wheat v. United States*, 486 U.S. 153, 160 (1988) ("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."); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) (stating that "[a]s a matter of professional ethics . . . the decision to appeal should turn entirely on the client's interest" and not on an attorney's personal interest, which may not coincide with the interests of the client) (citing ABA Model Rules of Professional Conduct 1.7(b), 2.1 (1985)). No-notice-

of-appeal provisions and their equivalents make it impossible for counsel to provide effective assistance, and thus violate a defendant's Sixth Amendment right to counsel. They also dissuade the filing of an unknowable number of meritorious appeals.

A. No-Notice-of-Appeal Provisions Violate the Sixth Amendment and *Garza v. Idaho*

Counsel is constitutionally required to file a notice of appeal upon her client's request, even if she believes the appeal is without merit. *Flores-Ortega*, 528 U.S. at 486; *Anders v. California*, 386 U.S. 738, 744 (1967). The failure to file a notice of appeal upon request constitutes presumptive ineffective assistance of counsel, *Flores-Ortega*, 528 U.S. at 483–84, regardless of whether her client waived his right to appeal, *Garza*, 139 S. Ct. at 746–47. This is because "even the broadest appeal waiver does not deprive a defendant of all appellate claims." *Id.* at 749–50. An appeal waiver is actually an appeal limitation, which simply means that the defendant has fewer claims to potentially raise on appeal. *Id.* at 744–45. Indeed, "all jurisdictions appear to treat at least some claims as unwaiveable." *Id.* at 745; *see also Campusano v. United States*, 442 F.3d 770, 774 (2d Cir. 2006) ("[I]mportant constitutional rights require some exceptions to the presumptive enforceability of a waiver.") (Sotomayor, J.).

But no unwaivable question can be reviewed if the defendant is precluded from filing a notice of appeal, which is the first step to putting the entire appellate process in motion. Thus, under *Garza*, *Flores-Ortega* and *Anders*, actions by counsel that

result in a bar to unwaivable appellate claims—such as counseling a defendant to accept a plea agreement that contains a no-notice-of-appeal provision—must be *per se* ineffective.[5] To hold otherwise would encourage prosecutors to make an end-run around *Garza* by accomplishing through a waiver agreement the very result that *Garza* disallows: denying a defendant the right to appeal substantive issues outside the scope of his waiver. *Garza*, 139 S. Ct. at 747 ("Garza had a right to a proceeding, and he was denied that proceeding altogether as a result of counsel's deficient performance.").

Worse, no-notice-of-appeal waivers actually compel counsel to be ineffective because the agreement's terms prohibit counsel from filing a notice of appeal that counsel is constitutionally mandated to file. *See id*. at 746 ("Garza's attorney rendered deficient performance by not filing the notice of appeal in light of Garza's clear requests."). Nor can the defendant himself cure the problem by filing a notice, because he too is precluded from so doing by the terms of the waiver. His appeal is thus jurisdictionally forfeited regardless of its merits and the potential unwaivability of his claims. *See* Pet.

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[5] Conversely, offering a no-notice-of-appeal waiver as part of a plea agreement falls equally afoul of this Court's rulings and raises ethical and professional-conduct risks for a prosecutor.

App. 70a (Wilson, J. dissenting) ("The cases before us today are deeply troubling because they reveal that which is not brought before us: the innumerable cases which never make it to any appellate court.").

B. No-Notice-of-Appeal Waivers Prevent Counsel From Giving Disinterested and Constitutionally Effective Advice

No-notice-of-appeal waivers also violate the Sixth Amendment because they put counsel in an impossible position. First, they pit two duties of constitutional dimension against each other—namely, the duty to advise a client on the terms of a plea agreement and the duty to file a notice of appeal upon a client's request. Second, they create a conflict of interest between counsel and client.

This Court has "long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Therefore counsel has a constitutional obligation to advise her client of the terms and consequences of a plea agreement. *Id.* at 371 (affirming duty to counsel client as to deportation consequences of pleading guilty); *Hill* v. *Lockhart*, 474 U.S. 52, 56 (1985) ("Where, as here, a defendant is represented by counsel during the plea process and enters his plea upon the advice of counsel, the voluntariness of the plea depends on whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'") (quoting *McMann* v. *Richardson*, 397 U.S. 759, 771 (1970)).

Here, counsel's obligation to give competent advice regarding a plea agreement that contains a no-notice-of-appeal waiver directly contradicts counsel's concurrent constitutional mandate to file a notice of appeal when so instructed. *See Garza*, 139 S. Ct. at 747. In practical effect, if no-notice-of-appeal waivers are upheld, counsel would have to advise her client that (on the one hand) the client has certain appellate rights that can never be waived, *id.* at 745, but (on the other hand) under the plea agreement, the client may not even file a notice of appeal to preserve appellate rights (except those—but not all—unwaivable rights which may or may not be carved out). At the same time, counsel would have to inform her client that counsel must file a notice of appeal upon the client's request, but that doing so will expose the client to uncertain consequences if the prosecution should decide that this action breaches the waiver and the plea agreement. *See*, *e.g.*, *United States v. Erwin*, 765 F.3d 219, 236 (3d Cir. 2014) ("We will continue to review conscientiously . . . whether a waiver was knowingly and voluntarily entered into and whether the issues raised fall within the scope of the waiver . . . but . . . any such defendant must accept the risk that, if he does not succeed, enforcing the waiver may not be the only consequence.").

Under these circumstances, counsel simply cannot give constitutionally competent advice as to a no-notice-of-appeal clause.[6] Facing these kinds of waivers, counsel cannot meet the performance requirement of *Strickland v. Washington,* 466 U.S. 668 (1984). *See Hill*, 474 U.S. at 58–59 (*Strickland* test applies to challenges to guilty pleas based on ineffective assistance of counsel). Moreover, as recognized in *Garza*, when counsel's ineffective assistance causes the client either to jurisdictionally default and lose his appeal, or alternatively to breach the terms of his plea agreement, prejudice must be presumed. *Garza*, 139 S. Ct. at 746–47.

United States v. Dillard, 891 F.3d 151 (4th Cir. 2018), illustrates these concerns. In *Dillard*, the Fourth Circuit enforced an appeal waiver that provided:

> I hereby waive my right of appeal as to any and all other issues in this matter and agree I will not file a notice of appeal. I am knowingly and voluntarily waiving any right to appeal. By signing this agreement, I am explicitly and irrevocably directing my attorney not to file a notice of appeal. Notwithstanding any other language to the contrary, I am not waiving my

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[6] And a defendant unrepresented by counsel would be at a complete loss as to how to proceed.

> right to appeal or to have my attorney file a notice of appeal, as to any issue which cannot be waived, by law.

891 F.3d at 154. This language highlights the contradictory nature of no-notice-of-appeal waivers, which make it impossible for counsel to give constitutionally effective advice.

These provisions infect not just direct appellate review but collateral review as well, creating another end-run around *Garza*. A no-notice-of-appeal provision identical to that in *Dillard* was at issue in *United States v. Ashby*, where the defendant in a habeas action alleged ineffective assistance of counsel because "counsel failed to advise her after sentencing that she could raise a viable appellate challenge to the six-level enhancement." No. 1:10CR00048-002, 2013 U.S. Dist. LEXIS 36620, at *10 (W.D. Va. Mar. 18, 2013). Despite the presence of unwaivable issues, the court enforced the waiver and found no Sixth Amendment violation because, by the terms of the plea agreement, the defendant had expressly directed her attorney not to file a notice of appeal. *Id.* at 10–13; *see also United States v. Manning*, No. 7:12CR00042, 2015 U.S. Dist. LEXIS 62651, at *11–12 (W.D. Va. May 13, 2015) (denying habeas petition based on ineffective assistance of counsel for failure to file a notice of appeal, where defendant's plea agreement provided: "by signing this agreement I am explicitly and irrevocably directing my attorney not to file a notice of appeal"); *United States v. Martinez-Romero*, No. 4:10-cr-00020-1, 2012 U.S. Dist. LEXIS 143536, at *13 (W.D. Va. July 12, 2012) (same); *see also United States v. Carter*, No. 2:11CR00002-001, 2014 U.S. Dist. LEXIS

67402, at *5–7 (W.D. Va. May 16, 2014) (enforcing identical appeal waiver in habeas proceeding, and finding petitioner had not asked his attorney to file a notice of appeal).

No-notice-of-appeal waivers also create an unresolvable ethical conflict for counsel: their use forces counsel to advocate for a provision that puts counsel's own interests ahead of her client's by shielding counsel's performance from review. This again constitutes ineffective assistance of counsel, *see Caplin & Drysdale*, 491 U.S. at 632 n.10 (counsel advising a client to accept a harsher sentence that preserves counsel's fee "would surely constitute ineffective assistance of counsel"), but would be unreviewable by its very nature. *See also Strickland*, 466 U.S. at 692 ("Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'"); *Cuyler v. Sullivan*, 446 U.S. 335, 349–50 (1980); *Hill*, 474 U.S. at 56–57 (1985) (quoting *McMann*, 397 U.S. at 771).

ABA standards and court rules already recognize and prohibit the ethical dilemma that no-notice-of-appeal waivers create. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 435 (1985) (noting that attorney's personal interest should not guide the decision on whether to appeal) (citing Model Rules of Professional Conduct 1.7(b), 2.1 (Am. Bar Ass'n 1985)); *Padilla*, 559 U.S. at 366 (quoting *Strickland*, 466 U.S. at 688) ("We long have recognized that '[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable . . .'").

Indeed, ABA standards and court rules discourage counsel from advising a client to accept a plea agreement that contains a no-notice-of-appeal waiver, because such an agreement necessarily waives the client's right to challenge his conviction on the basis of ineffective assistance of counsel. Standards for Criminal Justice, Defense Function, 4-6.4(a) (Am. Bar Ass'n 2017) (defense counsel should not agree to appeal waivers of non-specified ineffective assistance of counsel claims); *see also id.* at § 4-9.1(c) ("Defense counsel should take whatever steps are necessary to protect the client's rights of appeal, including filing a timely notice of appeal[.]"); 22 N.Y.C.R.R. § 606.5(b)(1) ("It shall also be the duty of . . . counsel to ascertain whether defendant . . . wishes to appeal and, if so, to serve and file the necessary notice of appeal."); Susan R. Klein, Aleza S. Remis, & Donna Lee Elm, *Waiving the Criminal Justice System: An Empirical and Constitutional Analysis*, 52 AM. CRIM. L. REV. 73, 94 (Winter, 2015) ("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 effectively shields herself from future findings of ineffective representation—which in turn often shields her from bar discipline and malpractice liability.").

C. No-Notice-of-Appeal Waivers Lead to Unconscionable Pleas and Cannot be "Knowingly, Intelligently, and Voluntarily" Made

No-notice-of-appeal waivers also lead to unconscionable pleas that cannot meet the

constitutional requirement that plea agreements and appeal waivers be made knowingly, intelligently, and voluntarily. *See Boykin v. Alabama*, 395 U.S. 238, 244–45 (1969); *see also People v. Panizzon*, 913 P.2d 1061, 1068 (Cal. 1996); *People v. Seaberg*, 541 N.E.2d 1022, 2026 (N.Y. 1989); *Commonwealth v. Grant*, 689 N.E.2d 1336, 1338 (Mass. 1998); *State v. Sweet*, 581 P.2d 579, 581–82 (Wash. 1978).

No-notice-of-appeal waivers make it practically impossible for counsel to identify and articulate the rights her client is waiving, especially in the hurly-burly of daily criminal practice in an overburdened system, where cases can be pled out in a matter of minutes.

As Judge Wilson observed in his dissenting opinion in this case, "where even a reviewing court would struggle to understand the rights surrendered by an appellate waiver, we cannot expect defendants or their attorneys to 'grasp the nature of the rights they are surrendering.'" Pet. App. 60a. Worse, he noted, "most criminal lawyers (and judges, myself included) could not produce a comprehensive list of waivable and unwaivable rights without conducting substantial research—let alone assess the value of

those rights in the context of a particular case."[7] *Id.* at 58a; *Garza*, 139 S. Ct. at 745.

The facts of Petitioner's case highlight the problem. His no-notice-of-appeal waiver was not the product of a pre-plea negotiation between parties of equal bargaining power. In fact, it was not negotiated at all. Rather, it was sprung on Petitioner, defense counsel and even the trial judge only *after* Petitioner had agreed to the plea in open court and allocuted to the facts of the crime. The judge did not explain the waiver, instead delegating this task to counsel, and nothing in the record shows that the trial judge even read the waiver. Only after Petitioner, under time pressure, signed the waiver did the judge enquire whether he had had a "full opportunity" to speak with his lawyer about "what

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[7] For example, in New York, nearly 20 issues have been found to survive valid waivers of appeal, not just the "traditional" four issues sometimes known to counsel. Brief for Defendant-Appellant, *People v. Thomas*, No. APL-2018-00094 (N.Y. July 20, 2018) ("Thomas Br.") 36–38. *See People v. Seaberg*, 541 N.E.2d 1022 (N.Y. 1989); *People v. Callahan*, 604 N.E.2d 108, 111 (N.Y. 1992). Likewise, the Washington Supreme Court has identified at least four issues that can never be waived, *In re Pers. Restraint of Schorr*, 422 P.3d 451,453 (Wash. 2018), and the Supreme Court of Kentucky has also enumerated four examples of "some issues" that survive waiver, *Grigsby v. Commonwealth*, 302 S.W.3d 52, 54 (Ky. 2010).

signing this waiver means, what rights you're giving up." Pet. App. 93a. For his part, the judge twice categorically told Petitioner that he could not challenge his plea and sentence to a higher court, but then later, at sentencing, instructed counsel—but not the Petitioner—that "even though your client waived the right to appeal, you can provide him with a notice of right to appeal for any rights that may survive that waiver." Pet. App. 84a.

Confusing and contradictory situations like this are by no means isolated. Rather, courts nationwide continue to struggle to create consistent jurisprudence governing when appeal waivers can "knowingly, intelligently, and voluntarily" be made, as the New York Court of Appeals did here. Pet. App. 36a (upholding one no-notice-of-appeal waiver despite its being "incorrect," and reversing two different absolute-ban waivers because the court's advisements on the waivers were "mischaracterized," "muddled," and "confused" with "few correctly spoken terms"); *United States v. Teeter*, 257 F.3d 14, 26–27 (1st Cir. 2001) ("Given the court's failure to make inquiry into the waiver, its unfortunate contradiction of the waiver's terms, and the lack of any correction, then or thereafter, we cannot say with the requisite assurance that the appellant's surrender of her appellate rights was sufficiently informed."); *United States v. Bushert*, 997 F.2d 1343, 1352–53 (11th Cir. 1993) (holding that it was not clear whether the waiver was entered into knowingly and voluntarily because "[t]he district court's generalization that the defendant could appeal his sentence under some circumstances was insufficient. It is not manifestly clear that [defendant] understood he was waiving his

appeal rights"); *State v. Thomas*, 391 P.3d 728, 2017 Kan. App. Unpub. LEXIS 211, at *6–7 (Kan. Ct. App. Mar. 24, 2017) (finding the waiver previously approved by the lower court was invalid and inoperable because it waived constitutionally guaranteed appeal rights).

The *practical* effect of no-notice-of-appeal waivers is to prevent recourse to the appellate courts. A countless number of defendants and counsel will take these blanket waivers at their word and refrain from filing a notice of appeal—even where the issue to be appealed cannot be waived. But without filing a notice of appeal, there will be no transcription of the record, no assignment of counsel and no review of the record for (unwaivable) appellate issues. Jurisdictional default quickly follows and the appeal of any legitimate unwaivable issues is lost forever.

D. This Court Should Void Waivers of Appeal Containing No-Notice-of-Appeal Provisions and their Equivalents

Current law provides no deterrent to prosecutors including overbroad no-notice-of-appeal waivers and their equivalents in plea agreements. And courts continue to uphold them even as they note that the waivers are constitutionally flawed. *See*, *e.g.*, *Grigsby*, 302 S.W.3d at 54–55 (upholding a broad waiver while stating, "A waiver of the right to appeal in a guilty plea does not extinguish all appealable issues"). The only way to stop the use of these clauses is to void the entire waiver whenever it includes language that strips the right to file notice or otherwise pursue an appeal. This remedy is

reasonable and proportionate to an unfair practice that aims to chill appeals—even those that cannot be waived. This type of bright-line rule is easily understood by all participants in the system and is administratively efficient. *See*, *e.g.*, *People v. Batista*, 167 A.D.3d 69, 82 (2d Dep't 2018) (conservative estimate of at least 380 appeal waivers in New York being held invalid over five years); J. Rolando Acosta, *First Department Takes Different Approach to Appeal Waivers*," N. Y. L. J. (Dec. 7, 2018) (describing First Department practice as more efficient to review the merits of "waived" claims than to endeavor to determine if appeal waivers are valid); *see also Miranda*, 384 U.S. at 447 (discussing standard for adopting prophylactic rules to curb abuse); *United States v. Goodman*, 165 F.3d 169, 174 (2d Cir. 1999) (observing that the validity of appellate waivers "has been a recurring issue in this Court" and presented "more difficulty" in cases involving broad form waivers).

Accordingly, this Court should extend *Garza* to establish a bright-line rule voiding appeal waivers that contain clauses purporting to block the filing of a notice of appeal or otherwise prevent appeal altogether. Absent a clear, prophylactic rule, prosecutors will continue to use these provisions, which bring a false, unconstitutional "finality" to cases.

This Court prescribes prophylactic rules assuring the constitutional rights of criminal defendants when it determines that (i) "[p]rocedural safeguards must be employed to protect the privilege," (ii) the relevant conduct is "sufficiently widespread to be the object of concern," and (iii) "there can be no assurance that

practices of this nature will be eradicated in the foreseeable future." *Miranda*, 384 U.S. at 447, 478–79.

The Court has tailored its rulings to the rights protected by authorizing rules sufficient to deter behaviors that violate those rights. *See*, *e.g.*, *id. at* 479 ("[U]nless and until such warnings are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him."); *Wong Sun*, 371 U.S. at 471 (excluding out-of-court statements against a declarant's co-conspirator when the conspiracy has ended); *Silverman v. United States*, 365 U.S. 505 (1961) (excluding verbal statements overheard by officers using an electronic listening device); *Mapp v. Ohio*, 367 U.S. 643 (1961) (extending the exclusionary rule to the states' prosecution of crimes); *Weeks*, 232 U.S. at 383 (excluding physical evidence seized during an illegal search). While "Congress and the States are free to develop their own safeguards," when "the issues presented are of constitutional dimensions," the rule is for this Court to determine. *See Miranda*, 384 U.S. at 490, *see also Oregon v. Elstad*, 470 U.S. 298, 307 (1985) ("Miranda's preventive medicine provides a remedy even to the defendant who has suffered no identifiable constitutional harm").

The need for a clear prophylactic rule is highlighted by the practice of prosecutors in Idaho after this Court's 2019 *Garza* decision. The Idaho Supreme Court has recently heard, and granted by unpublished summary order, a motion by the State to dismiss an appeal after the defendant agreed as part of his plea agreement to a waiver in which he "specifically waives and gives up his right to appeal

the judgment and sentence." Pet. App. 110a, 118a. Counsel had filed a notice of appeal to comply with *Garza*, Pet. App. 132a, 137a, but before the defendant could perfect the appeal—and even before the trial-court record was made available to defendant—the State moved to dismiss the appeal, Pet. App. 117a, and the Idaho Supreme Court granted that motion, Pet. App. 109a. Notably, the defendant had sought to appeal what this Court has identified in *Garza* to be unwaivable: whether the defendant's appellate right was "knowingly, intelligently, and voluntarily waived." Pet. App. 115a; *see Garza*, 139 S. Ct. at 745.

This is but one example illustrating the need for a simple, binding rule: prosecutors may not offer, defense counsel may not accept, and courts may not ratify any waiver of appeal that purports to strip a defendant of unwaivable appellate rights, including the right to file a notice of appeal. *See Garza*, 139 S. Ct. at 744 ("And, most relevant here, prejudice is presumed 'when counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken.'") (citing *Flores-Ortega*, 528 U.S. at 484).

II. The Challenged Practice Is Widespread, Takes Many Forms, and Provides an End-Run around *Garza*.

A. Nearly All Criminal Cases in the United States End in Plea Agreements With Waivers of Appeal

This Court has recognized that, increasingly, plea bargaining "*is* the criminal justice system."

Missouri v. Frye, 566 U.S. 134, 144 (2012) (quoting Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 YALE L.J. 1909, 1912 (1992)) (emphasis in original). Indeed, as many as 96% of felony convictions in New York State are obtained by plea agreement,[8] while comparative statistics in the federal system and for the 50 States have reached as high as 97% and 94%, respectively. *Frye*, 566 U.S. at 143 (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, https://www.albany.edu/sourcebook/pdf/t5222009.pdf and Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006-Statistical Tables, p. 1 (NCJ226846, rev. Nov. 2010), https://www.bjs.gov/content/pub/pdf/fssc06st.pdf).

The majority of such plea agreements contain waivers of appeal. *See* Susan R. Klein et al., *Waiving the Criminal Justice System: An Empirical and*

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[8]*People v. Parker*, 32 N.Y.3d 49, 61 n. 7 (N.Y. 2018) (in New York State "in 2017, only 1,710 of the felony indictments and SCIs [Superior Court Informations] were disposed of through trials, while 40,449 were disposed of through other means, mostly plea deals") (citing New York State Division of Criminal Justice Services, *Criminal Justice Case Processing Arrest through Disposition New York State January-December 2017*, http://www.criminaljustice.ny.gov/crimnet/ojsa/dar/DAR-4Q-2017-NewYorkState.pdf (accessed February 20, 2020)).

Constitutional Analysis, 52 AM. CRIM. L. REV. 73, 87, 122–26 (2015) (finding that 88 of 114 boilerplate plea agreements from federal districts contained appellate waivers)*; see also* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 212, 231 (2005) (reporting that over 65 percent of plea agreements across all federal circuits included appeal waivers); *United States v. Hahn*, 359 F.3d 1315, 1318 (10th Cir. 2004) ("Many such plea agreements contain a waiver of the defendant's right to appeal."); *Batista*, 167 A.D.3d 69, 80 (2d Dep't 2018) (noting appeal waivers may be the reason why only 846 records on appeal were filed in that court out of over 15,600 felony guilty pleas recorded in the same year); *Mechling v. State*, 16 N.E.3d 1015, 1017 n.4 (Ind. Ct. App. 2014) ("This court has previously noted the prevalence of plea agreements containing a waiver of the right to appeal, and we have advised trial courts to be on the lookout for those agreements.").

B. Many Waivers Completely Block the Right to "File a Notice of Appeal," to "File an Appeal" or to "Appeal"

At the same time, prosecutors' offices across the nation have deployed no-notice-of-appeal provisions, or similarly overbroad waiver clauses that achieve the same deceptive and deterrent result. *See, e.g.*, *Browne v. United States*, No. 11 C 5833, 2013 U.S. Dist. LEXIS 66642, at *8 (N.D. Ill. May 8, 2013) ("In the agreement, Browne waived 'his right to challenge his conviction and sentence, . . . and (in any case in which the term of imprisonment and fine are within the maximums provided by statute) his attorney's

alleged failure or refusal to file a notice of appeal.'"); *People v. Reid*, 24 N.E.3d 70, 71–72 (Ill. App. Ct. 2014) ("There is an agreement that the defendant will not file a notice of appeal, will not file a post-conviction petition, and will waive further appeals exclusive of his constitutional rights to apply for pardon or commutation."); *Junious v. State*, No. 14-99-01247-CR, 2001 Tex. App. LEXIS 2714, at *3 (Tex. Ct. App. Apr. 26, 2001) ("[A]ppellant voluntarily waived his right to file a motion for new trial, motion in arrest of judgment, notice of appeal, or any right to appeal in this cause of action.").

These waivers are categorical in their commands not to file or take an appeal. *See, e.g.*, *Commonwealth v. Patton,* 539 S.W.3d 651, 653 (Ky. 2018) (upholding Kentucky waiver of the right to "appeal to a higher court"); *State v. Anderson*, 781 N.W.2d 55, 57 (Neb. 2010) (upholding Nebraska plea form with waiver of the right "to appeal any final decision of the court"); *State v. Chavarria*, 208 P.3d 896, 897 (N.M. 2009) (upholding plea agreement with waiver of "the right to appeal the conviction that results from the entry of this plea agreement"); *Oliver v. State*, No. 05-14-00308-CR, 2015 Tex. App. LEXIS 4033, at *3 (Tex. Ct. App. Apr. 22, 2015) (upholding Texas plea form with waiver of "my right to any appeal if the Court follows the terms of the State's recommendation as to sentencing"); *Jones v. Commonwealth*, 795 S.E.2d 705, 713 (Va. 2017) (upholding plea agreement with waiver of "all rights of appeal with regard to any substantive or procedural issue involved in this prosecution").

Regardless of type, these blanket waivers routinely fail to carve out all unwaivable claims that survive any limitation of appeal, and thus should be

void under *Garza*. *See, e.g.*, *Robinson v. State*, 373 So. 2d 898, 902 (Fla. 1979) (right to appeal on the basis of lack of jurisdiction is unwaivable); *Hill v. State*, 710 S.E. 2d 667, 669 (Ga. Ct. App. 2011) (right to appeal based on double jeopardy is unwaivable); *Chavarria*, 208 P.3d at 899–900 (right to challenge the legality of sentences is unwaivable); *Kitzke v. State*, 55 P.3d 696, 699 (Wyo. 2002) (right to appeal on the basis that the plea or waiver was involuntary is unwaivable); *see also Garza*, 139 S. Ct. at 745 ("[W]hile signing an appeal waiver means giving up some, many, or even most appellate claims, some claims nevertheless remain.").

C. Courts Routinely Enforce Overbroad Waivers

Notwithstanding *Garza*, state courts routinely enforce clauses that preclude any appeal. *See, e.g.*, *Panizzon*, 913 P.2d at 1068–70 (enforcing waiver language that "I hereby waive and give up my right to appeal from the sentence I will receive in this case. I also waive and give up my right to appeal the denial of any and all motions made and denied in my case."); *Brant v. State*, 830 S.E.2d 140, 141 (Ga. 2019) (enforcing agreement that expressly provided that defendant "waives any and all rights to appeal and will not file, or cause[] to be filed, any appeal"); *People v. Alfonso*, 52 N.E.3d 456, 459–60 (Ill. App. Ct. 2015) (enforcing a waiver where the defendant agreed to "giv[e] up [his] right to appeal and . . . to attack these judgments at a later date" and in which the defendant was told, "If you appeal or file a motion to withdraw your plea or to attack the judgments, you will violate your promise not to do so

and that will violate the plea agreement."); *State v. Campbell*, 44 P.3d 349, 353 (Kan. 2002) (enforcing a waiver that stated the defendant waived "any right to appeal the verdict against him"); *Berg v. Nooth*, 359 P.3d 279, 282 (Or. Ct. App. 2015) (enforcing a waiver where the defendant agreed to "waive any right to appeal"). *But see Bazzle v. State*, 434 P.3d 1090, 1097 (Wyo. 2019) (rejecting state's attempt to bar an appeal "simply because the parties used the terms 'any' and 'appeals' in the appellate waiver," noting that "[a]t most, the use of those terms creates an ambiguity, which is interpreted against the State and in favor of the defendant").

Such over-broad and misleading waivers are also upheld in federal practice. *See, e.g.*, *Dillard*, 891 F.3d at 154 (enforcing waiver that stated the defendant "will not file a notice of appeal," "waiv[ed] any right to appeal," was "explicitly and irrevocably directing my attorney not to file a notice of appeal" but also stating "[n]otwithstanding any other language to the contrary, I am not waiving my right to appeal or to have my attorney file a notice of appeal, as to any issue which cannot be waived, by law"); *United States v. Erwin*, 765 F.3d 219, 224 (3d Cir. 2014) (enforcing an appellate waiver that stated defendant "voluntarily waives the right to *file* any appeal," and remanding for resentencing) (emphasis added); *United States v. Oladimeji*, 463 F.3d 152, 153 (2d Cir. 2006) (upholding waiver of right to appeal that provided that "defendant will not file an appeal or otherwise challenge the conviction or sentence").

Thus, appeal waivers that prohibit defendants from pursuing unwaivable appellate issues are common, widely enforced, and pernicious. Their sole purpose and practical effect are to deter defendants

from seeking, and courts from having jurisdiction over, appellate review even concerning violations of "important constitutional rights [that] require some exceptions to the presumptive enforceability of a waiver." *Campusano*, 442 F.3d at 774. Based on *Garza*, the Court should put on end to this practice.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 24, 2020

APPENDIX

APPENDIX A — OPINION OF THE STATE OF NEW YORK COURT OF APPEALS, DATED NOVEMBER 26, 2019

COURT OF APPEALS OF NEW YORK

No. 87

THE PEOPLE & C.,

Respondent,

v.

VICTOR THOMAS,

Appellant.

No. 88

THE PEOPLE & C.,

Respondent,

v.

NICOLE L. GREEN, & C.,

Appellant.

Appendix A

No. 89

THE PEOPLE & C.,

Respondent,

v.

STORM U. LANG, & C.,

Appellant.

November 26, 2019, Decided

OPINION

DiFiore, Chief Judge:

In these three consolidated appeals, the defendants' written waivers of the right to appeal contained mischaracterizations of the scope of the appellate rights waived as a condition of the plea bargains. In two of the three cases, the trial courts' colloquies, in eliciting defendants' oral waivers, similarly mischaracterized the appellate rights surrendered. Our primary task is to determine whether, under the circumstances of each case, the mischaracterizations impacted the knowing and voluntary nature of the three appeal waivers before us. Adhering to our well-established precedent in reviewing the validity of appeal waivers, we affirm in *People v Thomas*, as the appeal waiver was knowingly and voluntarily entered. We reverse in *People v Green* and

People v Lang, as the appeal waivers were involuntarily made and thus are not enforceable.

People v Thomas

By indictment, defendant Victor Thomas was charged with class B violent felonies of first-degree assault and first-degree gang assault, and related crimes. He was identified by a police officer who recognized him, based on previous arrests, as the man in surveillance video pointing a gun at people attempting to assist the victim during a gang assault. While in custody at the precinct and prior to *Miranda* warnings, a detective showed Thomas a still photo taken from the video to answer Thomas' repeated questions as to why he was being detained. Immediately upon viewing the photo, Thomas stated: "You got me." Supreme Court denied his motion to suppress this oral statement on the ground that it was spontaneously made and not the result of interrogation or its functional equivalent.

The following day, Thomas pled guilty as a second-felony offender to a reduced class C violent felony charge of first-degree attempted assault in exchange for the promise of the legal minimum sentence of five years in prison to be followed by five years of postrelease supervision (PRS). This was the same plea offer made before the suppression hearing was held. Thomas waived his right to appeal both orally and in writing as a condition of the plea bargain. During the oral plea colloquy, the trial court elicited from defendant his understanding that, "separate and apart" from the constitutional trial rights he waived, he was being

asked to give up the right to appeal, meaning "to challenge to a higher court what is taking place right now, the plea and what will take place in about two weeks when you are sentenced." The written waiver form he and his attorney signed stated that, in consideration of the plea agreement, defendant "waives any and all rights to appeal including the right to file a notice of appeal from the judgment of conviction," with the exception of any constitutional speedy trial claim, the legality of sentence, competency to stand trial and "the voluntariness of this plea and [appeal] waiver." The court elicited defendant's acknowledgement that he "had a full opportunity" to consult with counsel "about what signing this waiver means" and the rights he was "giving up."

At sentencing, the court imposed upon defendant the promised legal minimum term and advised defense counsel to provide Thomas "with a notice of right to appeal for any rights that may survive that waiver." Defendant timely filed a notice of appeal and, on direct appeal, sought review of the validity of the appeal waiver and the order denying his motion to suppress his oral statement. The Appellate Division affirmed, holding that defendant's valid waiver of the right to appeal precluded review of the suppression ruling; in the alternative, the Court agreed with the suppression court that defendant's statement was spontaneous and not the product of interrogation (158 A.D.3d 434, 70 N.Y.S.3d 190 [1st Dept 2018]). A Judge of this Court granted defendant leave to appeal (31 N.Y.3d 1088, 79 N.Y.S.3d 110, 103 N.E.3d 1257 [2018]).

Appendix A

People v Green

After waiving indictment, defendant Nicole Green was charged by superior court information (SCI) with three counts of burglary in the second degree, class C violent felonies. Defendant pled guilty to one reduced count of attempted second degree burglary, a class D violent felony, in exchange for an initial sentence promise of a six-year prison term and three years of PRS. The court left open the possibility that the sentence could run consecutive to a nine-year prison sentence Green was then serving. A waiver of the right to appeal was a condition of the plea bargain offer. In describing the waiver, the court advised Green that:

> "ordinarily, . . . after somebody is convicted and sentenced in this court, they have the right to file an appeal to the Appellate Division Fourth Department. Some people get to take an appeal to the highest Court in the state after that, the Court of Appeals. Some people exhaust their state appeals and file appeals in the federal system. Some people come back here and ask to have their conviction vacated or modified. The [P]eople have indicated that in order to give you this cap on sentence, they are requiring you to waive your right to appeal; and once you are convicted and sentenced here, there will be no review by any other court. Do you understand that?"

Green answered that she did. The court next asked:

> "Do you understand that waiver goes to almost all issues of conviction and sentence, including the terms and length of your sentence, whether your sentence is excessive, you won't be able to hire an attorney to file an appeal for you, you won't get an assigned attorney to file an appeal for you, you won't be able to file your own appeal, you won't get waived filing fees. There is just going to be no review by any other court."

Green again confirmed that she understood and the court directed her to sign a written appeal waiver form stating that she was waiving "all rights to appeal," including her rights to take an appeal, to file a brief, to have counsel appointed if she could not afford one, to argue the appeal before an appellate court and to seek postjudgment CPL article 440 relief to vacate the conviction or sentence. Beneath that language, the form listed four issues that were excepted from the appeal waiver, including the voluntariness of the waiver. The court did not allocute Green as to whether she understood the form's contents.

Green then admitted her guilt of the charged burglary. After a brief recess and alerted by the prosecutor that a mandatory five-year PRS period was required as Green was a second violent felony offender, the court corrected the sentencing promise with respect to PRS. Green reaffirmed her acceptance of the plea bargain deal with the revised five-year PRS term, confirming that she did not want to withdraw her guilty plea. Counsel made it clear that Green's only concern was that the plea offer still included the possibility of concurrent time. Green

then admitted her predicate violent felony conviction and was adjudicated a predicate felon. At sentencing, the court again asked if Green understood that the promised offer included the increased PRS term. After consulting with counsel, Green maintained her guilty plea and the court imposed the promised sentence but ordered it to run consecutively to the previously imposed sentence. The court advised defendant: "you waived your right to appeal at the time you entered the plea. If you intend to challenge that waiver, you would have to do so within 30 days or you lose your right to appeal forever." Defendant agreed that she understood. Green, proceeding pro se, sought and received permission to file a late notice of appeal. On direct appeal, appellate counsel challenged the validity of the appeal waiver and raised an excessive sentence claim based on the consecutive sentences imposed. The Appellate Division affirmed, declining to review the sentence claim as precluded by a valid appeal waiver (160 AD3d 1422, 72 N.Y.S.3d 870 [4th Dept 2018]). A Judge of this Court granted defendant leave to appeal (32 N.Y.3d 1004, 86 N.Y.S.3d 762, 111 N.E.3d 1118 [2018]).

People v Lang

Seventeen-year-old defendant Storm Lang was charged by felony and misdemeanor complaints with four felony counts of sexual abuse, and two misdemeanor counts of sexual abuse stemming from his sexual assault of three children ages five, seven and twelve years old. Held for the action of the grand jury on six counts as charged in the complaints by two separate local courts, Lang agreed to waive prosecution by indictment after the

County Court thoroughly explained his right to have the crimes presented to a grand jury and the consequences of waiving prosecution by indictment. After Lang confirmed that he had reviewed the indictment waiver form, the court directed him to sign the waiver, which he did in open court and in the presence of counsel. Accompanying the indictment waiver form was the SCI, which repeated the factual allegations of the six counts of sexual abuse charged in the felony and misdemeanor complaints, including the place and designated dates of each crime. In contrast, the waiver of indictment form identified the six counts of sexual abuse for which prosecution by indictment was waived, without mentioning any date, approximate time or place of the offenses as prescribed by CPL 195.10.

The plea bargain offer required Lang to waive his right to appeal and plead guilty to two felony counts and one misdemeanor count of sexual abuse in exchange for a promised sentence cap of four years in prison plus ten years of PRS. The same judge who took Green's plea presided over Lang's plea proceedings and used essentially the same appeal waiver description in its oral colloquy in both cases. Lang signed the identical written appeal waiver form that Green did, and the court, as with Green, did not ask Lang if he understood the contents. Lang acknowledged that his counsel advised him fully about the consequences of his plea, he had enough time to discuss the waiver with counsel and he had confidence in counsel's ability to represent him on the charges. The court accepted the plea after defendant admitted his guilt of the three relevant counts in the SCI.

During the sentencing proceeding, the court announced that it had "carefully reviewed all the documents that [had] been submitted, and . . . agree[d] with the probation department that youthful offender adjudication would be inappropriate in this case because of the importance of having sex offender registration of the defendant based upon his conduct." The court sentenced Lang to a prison term of three years, one year less than the promised cap, and ten years of PRS. Reminding Lang that he waived his right to appeal, the court advised him that if he intended to challenge the appeal waiver, he "would have to do so within 30 days." Lang indicated that he understood. Defendant timely filed a notice of appeal. On direct appeal, Lang challenged the validity of the appeal waiver and the court's denial of youthful offender status. The Appellate Division affirmed (165 AD3d 1584, 85 N.Y.S.3d 642 [4th Dept 2018]). While agreeing with defendant "that the colloquy and written waiver contain[ed] improperly overbroad language concerning the rights waived," the Court concluded that nonwaivable appellate issues were excluded from the scope of the waiver and the remainder was valid and enforceable, foreclosing review of the youthful offender determination (165 AD3d at 1584). A Judge of this Court granted defendant leave to appeal (32 N.Y.3d 1174, 97 N.Y.S.3d 583, 121 N.E.3d 210 [2019]).

I.

Observing that "[p]lea bargaining is now established as a vital part of our criminal justice system," we held in *People v Seaberg* that defendants may validly waive their right to appeal, provided the "settlement is fair, free from

oppressiveness, and sensitive to the interests of both the accused and the People" (74 NY2d 1, 7-8, 541 N.E.2d 1022, 543 N.Y.S.2d 968 [1989]). That conclusion was based on our recognition that "[t]he pleading process necessarily includes the surrender of many guaranteed rights but when there is no constitutional or statutory mandate and no public policy prohibiting [waiver], an accused may waive any right which he or she enjoys" (74 NY2d at 7; *see People v Moissett*, 76 NY2d 909, 910-911, 564 N.E.2d 653, 563 N.Y.S.2d 43 [1990]; *cf. Cowles v Brownell*, 73 NY2d 382, 538 N.E.2d 325, 540 N.Y.S.2d 973 [1989]). Appeal waivers have long been lauded as serving the same beneficial public interests achieved by the plea-bargaining process itself — providing a prompt conclusion to litigation, avoiding delay and removing "the inevitable risks and uncertainties" of criminal trials for both sides (*People v Selikoff*, 35 NY2d 227, 232, 233, 318 N.E.2d 784, 360 N.Y.S.2d 623 [1974] [quotation marks and citation omitted]; *Seaberg*, 74 NY2d at 7). Aside from "conserving judicial resources and providing finality in criminal proceedings" (*People v Tiger*, 32 NY3d 91, 101, 85 N.Y.S.3d 397, 110 N.E.3d 509 [2018]), the plea bargaining process affords the accused the opportunity to obtain a conviction on reduced charges and more lenient punishment in a truncated process that "hopefully start[s] the offender on the road to possible rehabilitation" (*Selikoff*, 35 NY2d at 233, 234, citing *Santobello v New York*, 404 US 257, 261, 92 S. Ct. 495, 30 L. Ed. 2d 427 [1971]). Thus, we have rejected challenges to appeal waivers on the ground that they are "invalid per se" because plenary appellate review is necessary to protect defendants from "misconduct and coercion in the pleading process and ensure[] fairness in sentencing" — implicating

societal interests that "transcend the individual concerns of the defendant" (*Seaberg*, 74 NY2d at 8-9). In rejecting such categorical condemnation of appeal waivers based on a purported power imbalance, we reasoned that those "arguments overlook the role of the trial court and its obligation to insure the reasonableness of the bargain struck and of the sentence imposed and the availability of collateral proceedings to review infirmities in the plea bargain which may not appear on the record" (74 NY2d at 8 [internal citations omitted]). Contrary to the argument that "defendants [are] victims of situational coercion,' compelled to execute waivers as a [plea] condition," we concluded that "[n]othing requires a defendant to seek a plea bargain and there is nothing coercive in leaving with the defendant the option to accept or reject a bargain if one is offered" (74 NY2d at 8-9).[1]

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1. In what is a rejection of *Seaberg* and its progeny — 30 years of appellate precedent — our colleague reaches the sweeping and unsubstantiated conclusion that "appeal waivers have . . . corrupted the integrity" of the plea-bargaining process (Wilson, J., concurring/dissenting op. at 2). This condemnation of appeal waivers is predicated on hypothetical constructs, rather than on the facts of the cases before us. It further evidences a mistrust of all players in the system, particularly the trial court and its ability to ensure that an appeal waiver is voluntarily entered. Moreover, it discounts the importance of defendant's consultation with competent counsel in opting for a plea bargain and comprehending the nature of the appeal waiver (*see People v Nixon*, 21 NY2d 338, 354, 234 N.E.2d 687, 287 N.Y.S.2d 659 [1967]) — advice typically provided dehors the record in communications protected by attorney-client privilege. Nonetheless, this partial concurrence concludes that while a plea bargain is eminently enforceable because the defendant is aware of "the precise terms of the offered sentence," or, in other words, is given the sentence in a numerical value, the separate appeal waiver

Manifestly, while a defendant always retains the right to challenge the voluntariness of the plea (*see People v Lopez*, 71 NY2d 662, 525 N.E.2d 5, 529 N.Y.S.2d 465 [1988]) and legality of the sentence, "the negotiating process serves little purpose if the terms of a carefully orchestrated bargain'" — particularly the sentence imposed — can subsequently be renegotiated despite a voluntary appeal waiver (74 NY2d at 10, quoting *People v Prescott*, 66 NY2d 216, 220, 486 N.E.2d 813, 495 N.Y.S.2d 955 [1985]). We see no public policy reason to depart from *Seaberg* and its progeny today, as carefully-constructed and counseled appeal waivers — with the terms memorialized on the record and executed under the supervision of the trial courts — continue to serve the same worthy objectives, as they have for the last three decades.

Turning to the language of the appeal waiver colloquies at issue, the following principles derived from our precedent are instructive. First and foremost, a

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is not enforceable because no "itemization" of the appellate rights waived is provided (Wilson, J., concurring/dissenting op. at 3). Suffice it to say, with respect to defendant's waiver of constitutional *Boykin* rights (*see Boykin v Alabama*, 395 US 238, 243, 89 S. Ct. 1709, 23 L. Ed. 2d 274 [1969]), it is firmly established that courts need "not include a specific enumeration of each of the rights being waived" for a guilty plea to be enforceable (*People v Harris*, 61 NY2d 9, 18, 459 N.E.2d 170, 471 N.Y.S.2d 61 [1983]). No rationale whatsoever is provided for holding the enforceability of waivers of the statutory right to appeal to a standard more stringent than the one that applies to the complete waiver of constitutional trial rights. And none exists, as defendant does not waive appellate review of fundamental issues, such as the voluntariness of the plea and appeal waiver.

waiver of the right to appeal is not an absolute bar to the taking of a first-tier direct appeal (*see Seaberg*, 74 NY2d at 11; *People v Callahan*, 80 NY2d 273, 280, 604 N.E.2d 108, 590 N.Y.S.2d 46 [1992]; *People v Hansen*, 95 NY2d 227, 230-231, 738 N.E.2d 773, 715 N.Y.S.2d 369 [2000]). "[S]everal categories of appellate claims" remain nonwaivable "because of a larger societal interest in their correct resolution" (*Callahan*, 80 NY2d at 280). One such claim is the voluntariness of the appeal waiver. Appellate courts have an integral role in reviewing the validity of appeal waivers, as they are vested with "the responsibility to oversee the process and to review the record to ensure that the defendant's waiver of the right to appeal reflects a knowing and voluntary choice" (80 NY2d at 280).

Although an appeal waiver entered as part of the plea-bargaining process does not serve as an absolute bar to the taking of a first-tier direct appeal, imprecision persists in trial courts' descriptions of the waiver of the right to appeal. Nonetheless, we have never required any particular litany explaining the finer distinction in appeal waiver colloquies between the "right to appeal" and the right to limited appellate review.[2] Indeed, while the phrase

2. The defendant's conviction upon a guilty plea is predicated on the plea itself and will effectuate a forfeiture by operation of law of the appellate review of most antecedent issues raised in the trial court (*see Hansen*, 95 NY2d at 231-232). As stated herein, appellate review is not waivable, despite a guilty plea, for issues involving jurisdictional matters or "rights of a constitutional dimension that go to the very heart of the process" (95 NY2d at 231). Apart from the forfeited rights and the nonwaivable rights are the waivable rights that are the typical subject of appellate waivers — including the intermediate appellate court's review in the interest of justice

"waiver of the right to appeal" is a "useful shorthand" reference to what is more precisely a narrowing of the issues for appellate review, the term "can misleadingly suggest a monolithic end to all appellate rights [when] [i]n fact . . . no appeal waiver serves as an absolute bar to all appellate claims" (*Garza v Idaho*, 586 US __, 139 S Ct 738, 744, 203 L. Ed. 2d 77 [2019]).

Appeal waivers using such shorthand pronouncements are enforceable so long as the totality of the circumstances reveals that the defendant understood the nature of the appellate rights being waived. Historically, imprecise and overbroad language in appeal waivers did not prevent their enforcement, so long as "all the relevant facts and circumstances surrounding the waiver, including the nature and terms of the agreement and the age, experience and background of the accused" revealed that the waivers were knowingly, intelligently and voluntarily entered (*Seaberg*, 74 NY2d at 11; *see also Callahan*, 80 NY2d at 280). In *People v Sanders*, we clarified that "this Court has not . . . set forth the absolute minimum that must be conveyed to a pleading defendant in the plea colloquy in order for the right to appeal to be validly waived" (25 NY3d 337, 341, 12 N.Y.S.3d 593, 34 N.E.3d 344 [2015]). Rather, in determining whether the record

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of the severity of the sentence imposed and/or the CPL 710.70 right to appellate review of an adversely decided suppression motion. Of note, that some legal issues survive a guilty plea does not mean there is an inexorable appellate review, as any appellate review demands the existence of an actual issue extant on a sufficient factual record in the defendant's individual case to review (*see People v Kinchen*, 60 NY2d 772, 457 N.E.2d 786, 469 N.Y.S.2d 680 [1983]).

demonstrates that a defendant understood an appeal waiver's consequences, proper considerations include the defendant's consultation with counsel and on-the-record acknowledgments of understanding, a written appeal waiver that supplements or clarifies the court's oral advice and the defendant's experience with the criminal justice system (*see* 25 NY3d at 341-342; *People v Bradshaw*, 18 NY3d 257, 267, 961 N.E.2d 645, 938 N.Y.S.2d 254 [2011]; *People v Ramos*, 7 NY3d 737, 738, 853 N.E.2d 222, 819 N.Y.S.2d 853 [2006]; *People v Lopez*, 6 NY3d 248, 256, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]). The role played by counsel in ensuring a defendant's knowing and voluntary waiver is an important component of that analysis that cannot be ignored (*see* 22 NYCRR 606.5 [1st Dept]; 22 NYCRR 671.3 [2d Dept]; 22 NYCRR 821.2 [3d Dept]; 22 NYCRR 1015.7 [4th Dept]; *Moissett*, 76 NY2d at 911). In the absence of any record support, we do not presume that counsel was somehow incompetent and failed to provide effective assistance during the plea negotiations as demanded by the Sixth Amendment (*see Lafler v Cooper*, 566 US 156, 132 S. Ct. 1376, 182 L. Ed. 2d 398 [2012]; *McMann v Richardson*, 397 US 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763 [1970]). And, of paramount importance is the trial court's responsibility to ensure that each defendant's "full appreciation of the consequences" and understanding of the terms and conditions of the plea and appeal waiver are "apparent on the face of the record" (*Seaberg*, 74 NY2d at 11; *Callahan*, 80 NY2d at 280).

In our earlier cases, when the litigation was focused on whether appeal waivers were enforceable as components of the plea-bargaining process — and not on the precise

language of the courts' colloquies — we upheld appeal waivers where no court colloquy with the defendant occurred on the subject, relying on the record as a whole, particularly defense counsel's affirmative conduct in securing the desired sentence sought to be reviewed on appeal (*see e.g. Seaberg*, 74 NY2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968), or where waivers were elicited through court colloquies suggesting an absolute bar to review, even though we acknowledged that the defendant retained the right to review certain fundamental issues despite the waiver (*see e.g. Callahan*, 80 NY2d at 278, 280 [court advised defendant that, "by pleading guilty he was waiving his right to appeal"]). Relevant to the issues before us, our precedent has made clear from the outset that the scope of the appeal waiver contemplated by this process related only to a defendant's statutory "right to an initial appeal" (*Seaberg*, 74 NY2d at 7, citing CPL 450.10),[3] and that a

3. Our colleague's suggestion that courts should advise defendants that their "*appeal waivers* will impact their collateral remedies" (Garcia, J. concurring/dissenting op. at 14 [emphasis added]) is incorrect. Rather, it is a voluntary "guilty plea entered in proceedings where the record demonstrates the conviction was constitutionally obtained" that forecloses collateral attacks to the conviction, as a defendant "relinquishes any claim that would contradict the admissions necessarily made upon entry of a voluntary plea of guilty" (*People v Tiger*, 32 NY3d 91, 101, 102, 85 N.Y.S.3d 397, 110 N.E.3d 509, quoting *Class v United States*, US __, 138 S Ct 798, 805, 200 L. Ed. 2d 37 [2018] [internal quotation marks and citation omitted]). A waiver of the right to appeal is not needed to address the rights forfeited by law by the guilty plea itself, and that waiver cannot be used to foreclose appellate review of nonwaivable issues that exist on the record in any particular case (*see Callahan*, 80 NY2d at 280; *People v Lopez*, 71 NY2d 662, 525 N.E.2d 5, 529 N.Y.S.2d 465 [1988]). As we noted herein, an appeal waiver only covers the narrow class of

reasonable interpretation of broad waivers still permits the conclusion that the counseled defendant understood the distinction that some appellate review survived (*Callahan*, 80 NY2d at 280-281).

By 2006, in the companion cases of *People v Lopez*, *People v Billingslea* and *People v Nicholson* (6 N.Y.3d 248, 256-257, 844 N.E.2d 1145, 811 N.Y.S.2d 623), the litigation required our focus to shift from the enforceability of broad appeal waivers to the precise language of the colloquies used by the courts in eliciting waivers, causing us to caution that the rights surrendered by appeal waivers were too important to be handled in a "perfunctory step." In *Lopez*, we set forth as a standard procedure for the court's appeal waiver colloquy — used in all three colloquies before us — an explanation by the court that the waiver of the right to appeal is "separate and distinct" from the so-called *Boykin* constitutional rights waived by the defendant in the guilty plea allocution (6 NY3d at 256).[4] In *Nicholson*, we upheld the waiver following the

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issues which, if not waived, can be reviewed on direct appeal despite the guilty plea. In stark contrast, CPL 440.10 relief, which codified the writ of error coram nobis, cannot be used as a substitute for a direct appeal (*see People v Howard*, 12 NY2d 65, 66-67, 187 N.E.2d 113, 236 N.Y.S.2d 39 [1962]). Instead, it is designed as a remedy against injustice when no other avenue of judicial relief is available for certain nonwaivable rights impacted by fundamental errors dehors the record (*see People v Cuadrado*, 9 NY3d 362, 365, 880 N.E.2d 861, 850 N.Y.S.2d 375 [2007]). As we are addressing guilty pleas, references in Judge Garcia's partial concurrence to subdivisions in 440.10 relating to trial errors is irrelevant to our discussion.

4. Judge Wilson concludes that the required separation between the court's allocution for the waiver of *Boykin* rights and

court's additional shorthand advisement that the appeal waiver meant "to take to a higher court than this one any of the legal issues connected with this case," based on our review of the totality of the circumstances, which included the court's correct application of that "separate and distinct" language and defendant's multiple on-the-record acknowledgments of understanding (6 NY3d at 254, 256; *see also Sanders*, 25 NY3d at 341-342). A few months later in *People v Ramos* (7 NY3d 737, 853 N.E.2d 222, 819 N.Y.S.2d 853), we upheld an appeal waiver that followed the court's imprecise explanation that "by entering this plea of guilty you're giving up any and all rights to appeal this conviction and sentence; in other words, this is now final" (*Bradshaw*, 18 NY3d at 266 [quoting colloquy from *Ramos*]). We excused the "ambiguity" in that colloquy under the circumstances, which included a written waiver form evidencing that the defendant was advised of the appellate process and the waiver by defense counsel and defendant's on-the-record acknowledgement that he understood the rights he was waiving — all of which together sufficiently established a knowing and voluntary waiver (7 NY3d at 738).

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the allocution for the appeal waiver means that the appeal waiver is not one of the conditions of the plea bargain offer and, therefore, if a defendant pleads guilty in exchange for a specific sentence, the defendant has received no consideration for the appeal waiver (*see* concurring/dissenting op. at 9-10). This interpretation is not correct and eschews the mutually beneficial purpose of the plea bargain offer — to provide a favorable sentence in exchange for an end to litigation, including a review of the suppression order.

Importantly, we have drawn the line and held appeal waivers unenforceable where the court's advisement as to the rights relinquished was incorrect and irredeemable under the circumstances. Thus, we invalidated the defendant's appeal waiver in *People v Billingslea*, based upon the court's conflated advisement that " when you plead guilty you waive your right of appeal,'" where the court's inquiry was limited to one question — whether defendant understood the consequences of the plea — and the defendant's one-word answer that she did (6 NY3d at 257). Our disapproval hinged on the court's "misleading" language, confusing the discrete concepts of the forfeiture of a right by operation of law and the defendant's intentional relinquishment of a right by a voluntary waiver (6 NY3d at 257). We concluded that "[w]hen a trial court characterizes an appeal as one of the many rights automatically extinguished upon entry of a guilty plea, a reviewing court cannot be certain that the defendant comprehended the nature of the waiver of appellate rights" (6 NY3d at 256). We also invalidated the appeal waiver in *People v Bradshaw*, where the court's colloquy was "terse" — advising the defendant that an appeal waiver "means[] the conviction here is final, that there is not a higher court you can take [the case] to" — since the record did not contain any assurances that the defendant, who had a significant mental health history, understood the shorthand reference to the distinct appellate rights he was surrendering and, beyond asking whether it had been signed, the court made no inquiry of the defendant's understanding of the contents of the written appeal waiver form (18 NY3d at 261, 273).

Our requisite analysis for determining the validity of the waiver remains focused on whether all the relevant circumstances reveal a knowing and voluntary waiver (*see Seaberg*, 74 NY2d at 11; *Sanders*, 25 NY3d at 341-342). As we underscored in *Bradshaw*, the court's oral colloquy with defendant, including the elicitation of an oral acknowledgment that defendant was "forgoing his right to appeal," can cure incorrect language in the written waiver form (18 NY3d at 267).[5] Of course, "[w]e expect judges to express the consequences of a guilty plea clearly to the defendant during the plea hearing. But in cases too numerous to list dating from at least 1967, we have repeatedly steered clear of a uniform mandatory catechism . . . in favor of broad discretions controlled by flexible standards . . ." (*People v Alexander*, 19 NY3d 203, 219, 970 N.E.2d 409, 947 N.Y.S.2d 386 [2012] [internal quotation marks and citation omitted]). We have emphasized that "it should not matter that the trial judge failed to choose what we might in hindsight consider to be more felicitous words or turns of phrase when addressing [a] defendant" so long as the meaning was "plain enough" (19 NY3d at 219).

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5. That said, our appellate waiver precedent also establishes that, "[e]ven if there [is] any ambiguity in the sentencing court's colloquy, . . . a detailed written waiver, . . . stat[ing] that defendant had the right to appeal, explain[ing] the appellate process and confirm[ing] that defense counsel fully advised [defendant] of the right to take an appeal under the laws of the State of New York" can "establish[] that [a] defendant knowingly, intelligently and voluntarily waived [the] right to appeal" (*Ramos*, 7 NY3d at 738).

II.

Viewed against that backdrop, we conclude that the appeal waiver in *Thomas* was knowingly and voluntarily entered. We reach the opposite conclusion in *Green* and *Lang*.

Defendant *Thomas* argues that insertion of "no-notice-of-appeal" language in the written waiver form "voids the entire appeal waiver process." While that particular language — suggesting that the waiver may be an absolute bar to the taking of an appeal — was incorrect, it was coupled with clarifying language in the same form that appellate review remained available for certain issues, most importantly, the validity of the appeal waiver itself, and indicating, therefore, that the right to take an appeal was retained. The court's oral colloquy, specifically its inquiry of Thomas and resulting assurances that he had ample opportunity to discuss with counsel the meaning of the waiver and appellate rights he was surrendering, was sufficient to support a knowing and voluntary waiver under the totality of the circumstances.

Somewhat inconsistently, Thomas alternatively claims that the court's statement during the oral colloquy that he was waiving his right to challenge the "plea proceedings" and "sentence" was a "restricted" appeal waiver rather than a broad, "comprehensive" appeal waiver and therefore did not cover the CPL 710.70 right to review a suppression ruling. We disagree. In *People v Kemp* (94 NY2d 831, 833, 724 N.E.2d 754, 703 N.Y.S.2d 59 [1999]), we held that the defendant's waiver of the right to appeal,

entered one day after denial of his suppression motion, was "knowingly, voluntarily and intelligently made, with the advice of counsel," and was "comprehensive[]," as it "was manifestly intended to cover all aspects of the case." Similarly, Thomas, fully counseled, voluntarily pled guilty one day after denial of his suppression motion, to take advantage of a soon-to-expire pretrial reduced plea bargain offer — the same one offered before the suppression hearing was held. The court's statement that he would be waiving his right to challenge on appeal what was taking place at the plea proceedings — clearly referencing his conviction — was sufficient to indicate the waiver was intended "to cover all aspects of the case" (94 NY2d at 833).

In this regard, the waiver of appellate review of the suppression order was the quid pro quo to the reduced plea bargain, which was designed to end the litigation for all parties. Far from evidencing a coercive deal that did not involve "mutual concessions," as the partial concurrence posits (Wilson, J., concurring/dissenting op. at 9), the record instead supports the conclusion that this fully counselled predicate felon — whose crime was captured on video surveillance — received a highly beneficial bargain of the legal minimum term of five years' incarceration for the reduced crime, while avoiding the risk of the maximum of twenty-five years on the higher crimes charged, if convicted after trial. Defendant does not have the right to subsequently eviscerate the favorable plea bargain he knowingly and voluntarily accepted. Long before *Seaberg*, we held the voluntary waiver of the CPL 710.70 right to appellate review of a suppression

ruling can be a condition of the plea bargain (*see People v Williams*, 36 NY2d 829, 830, 331 N.E.2d 684, 370 N.Y.S.2d 904 [1975]). Since harmless error analysis is generally not available on an appeal following a guilty plea, the waiver of appellate review of the suppression decision serves to avoid unnecessary litigation for errors that would not have affected the outcome of a trial (*see People v Grant*, 45 NY2d 366, 378, 380 N.E.2d 257, 408 N.Y.S.2d 429 [1978]). Given the evidence here, counsel's advice to defendant in this regard in favor of the plea offer would be eminently reasonable. On this record, Thomas' appeal waiver was knowingly and voluntarily entered and sufficiently comprehensive to cover an appellate challenge to the suppression ruling — without any need for express mention of it during the waiver colloquy — squarely under our holding in *Kemp*.

III.

A similar conclusion does not follow in *Green* and *Lang*. The trial court's mischaracterization of appellate rights waived as encompassing not only an absolute bar to the taking of a direct appeal and the loss of attendant rights to counsel and poor person relief, but also all postconviction relief separate from the direct appeal,[6] is even more serious than the conflated language in *Billingslea*. We reiterate

6. Contrary to the conclusion of our colleague that no such argument about postconviction relief was ever "argued" by the parties (Garcia, J., concurring/dissenting op. at 11), in his sealed brief to this Court, defendant Lang specifically challenged the plea court's advisements in both the oral colloquy and the written waiver regarding the restriction of his rights to seek collateral relief.

that, when a trial court has utterly "mischaracterized the nature of the right a defendant was being asked to cede," an appellate "court cannot be certain that the defendant comprehended the nature of the waiver of appellate rights" (6 NY3d at 256-257). As in *Billingslea*, it is similarly impossible to tell, on these records, whether the waivers entered by defendants Green and Lang were knowing and voluntary. The waivers cannot be upheld in these cases on the theory that the offending language can be ignored and that defendants' waivers were enforceable based on the court's few correctly spoken terms. That position ignores the muddled nature of the court's advisements, making it impossible for reviewing courts to discern whether the defendants understood the import of the court's confused message about the important rights being waived, much less to expect the defendants themselves to grasp the nature of the rights they are surrendering. Nor were there "detailed written waiver[s]" in these cases that correctly explained the appellate process and were adequate to cure the "ambiguit[ies] in the . . . court's colloquy" (*Ramos*, 7 NY3d at 738); rather, the written waivers at issue repeated many of the errors in County Court's colloquies and, in any event, the court failed to confirm that Green and Lang understood the contents of the written waivers. The improper description of the scope of the appellate rights relinquished by the waiver is refuted by our precedent, whereby a defendant retains the right to appellate review of very selective fundamental issues, including the voluntariness of the plea and appeal waiver, legality of the sentence and the jurisdiction of the court (*see generally Seaberg*, 74 NY2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968; *Sanders*, 25 NY3d 337, 12 N.Y.S.3d

593, 34 N.E.3d 344). Thus, we cannot conclude that the appeal waivers on the records in *Green* and *Lang* were knowingly or voluntarily made in the face of erroneous advisements warning of absolute bars to the pursuit of all potential remedies, including those affording collateral relief on certain nonwaivable issues in both state and federal courts (*see* CPL 440.10 [1] [a], [b], [e]; 440.20; *Parisi v United States*, 529 F3d 134, 139 [2d Cir 2008], *cert denied* 555 U.S. 1197, 129 S. Ct. 1376, 173 L. Ed. 2d 632 [2009]). Accordingly, reversal is warranted in *Green* and *Lang* and, in both cases, we remit for a determination of all issues raised but not determined below.

We further take this opportunity to note that the employment of imprecise appeal waiver colloquies has been criticized as encouraging a pathway to increased appellate litigation over the validity of the waivers. That pathway was always extant, since appellate review as to the validity of the waiver has always been and remains a necessary component of the process (*see Seaberg*, 74 NY2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968; *Callahan*, 80 NY2d 273, 604 N.E.2d 108, 590 N.Y.S.2d 46). Appellate review of the voluntariness of an appeal waiver is not onerous. Greater precision in the courts' oral colloquies will provide more clarity on the record as to the issue of voluntariness. To be sure, the Model Colloquy for the waiver of right to appeal drafted by the Unified Court System's Criminal Jury Instructions and Model Colloquy Committee neatly synthesizes our precedent and the governing principles and provides a solid reference for a better practice. The Model Colloquy provides a concise statement conveying the distinction missing in most shorthand colloquies — that:

> "[b]y waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal . . . within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider *most* claims of error,[] and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final"

(NY Model Colloquies, Waiver of Right to Appeal [emphasis added]). There is no mention made of an absolute bar to the taking of an appeal or any purported waiver of collateral or federal relief in the Model Colloquy or to the complete loss of the right to counsel to prosecute the direct appeal.[7]

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7. The Model Colloquy also defines an appeal and the attending rights. "An appeal is a proceeding before a higher court, an appellate court. If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On an appeal, a defendant may, normally through his/her lawyer, argue that an error took place in this court which requires a modification or reversal of the conviction. A reversal would require either new proceedings in this court or a dismissal" and provides that the court should instruct the defendant that, "as a condition of the plea agreement, [the defendant is being] asked to waive [the] right to appeal" (NY Model Colloquies, Waiver of Right to Appeal). This explanation of the appellate process is consistent with that endorsed by this Court in *Ramos* (7 NY3d at 738; *see Bradshaw*, 18 NY3d at 270 [Read, J., dissenting] [setting forth the language of the written upheld in *Ramos*]). Our discussion here of colloquies that mischaracterize the nature of the appeal waiver should not be interpreted as calling into question this portion of the Model Colloquy or signaling a retreat from *Ramos*.

IV.

In addition to his challenge to the appeal waiver, defendant Lang also claims that his written waiver of indictment was jurisdictionally defective because, notwithstanding its substantial compliance with CPL 195.20 as to content, it did not state the date, approximate time and place of the specific offenses for which he was held for the action of the grand jury, in violation of that statute. Although he raises this issue for the first time before this Court, he claims the argument is reviewable because this statutory violation is either a mode of proceedings error or is jurisdictional in nature and not forfeited by the guilty plea. Neither argument has merit.

First, Lang has failed to identify any "mode of proceedings" error. The indictment waiver form was executed in full accord with the procedural requirements of article 1, § 6 of our State Constitution, as it was "evidenced by written instrument [and] signed by the defendant in open court in the presence of . . . counsel." The waiver also strictly complied with the procedures set forth in CPL 195.10, the statute that implements those constitutional requirements, which specifies that a defendant may waive indictment and consent to be prosecuted by SCI when a local court has held the defendant for the action of a grand jury, the defendant is not charged with a class A felony, and the district attorney consents to the waiver. Pursuant to CPL 195.10 (2) (b), the waiver of indictment was exercised prior to the filing of an indictment by the grand jury. Finally, the six counts of sexual abuse charged in the SCI were the same crimes for which defendant was

held for the action of the grand jury (*see People v Milton*, 21 NY3d 133, 135-136, 989 N.E.2d 962, 967 N.Y.S.2d 680 [2013]), and the waiver form duly noticed those specific crimes in conformity with both constitutional and CPL 195.20 mandates. Accordingly, there is no merit to his claim that any fundamental mode of proceedings error occurred.

Notwithstanding the specificity of the factual allegations of the crimes charged in all the accusatory instruments in the case, Lang attempts to equate the omission of the date, approximate time and place in the waiver form with a "[f]ailure to adhere to the statutory procedure for waiving indictment," arguing it is a "jurisdictional" defect under *People v Boston* (75 NY2d 585, 589, 554 N.E.2d 64, 555 N.Y.S.2d 27 n * [1990]). Reliance on *Boston* to elevate this technical challenge to a jurisdictional claim is misplaced. *Boston* involved a waiver of prosecution by indictment exercised *after* the indictment was obtained — a violation of the critical timing of the waiver process mandated by both the constitution and CPL 195.10 (*see* 75 NY2d at 588). No such jurisdictional infirmity existed here.

In contrast, "[a] purported error or insufficiency in the facts of an indictment or information to which a plea is taken does not constitute a nonwaivable jurisdictional defect and must be raised in the trial court" (*Milton*, 21 NY3d at 138 n *, citing *People v Iannone*, 45 NY2d 589, 600, 384 N.E.2d 656, 412 N.Y.S.2d 110 [1978]; *see also People v D'Angelo*, 98 NY2d 733, 735, 780 N.E.2d 496, 750 N.Y.S.2d 811 [2002] [absent timely motion to dismiss,

the Court has "no occasion to consider whether statutory mandates beyond the jurisdictional minimum required the indictment to recite" additional allegations]). By parity of reasoning, the omission from the indictment waiver form of non-elemental factual information that is not necessary for a jurisdictionally-sound indictment is similarly forfeited by a guilty plea. As relevant here, the legislative history accompanying enactment of CPL article 195 makes plain that the purpose of the written waiver of indictment form is to ensure the defendant had notice of the charges upon which the prosecution by SCI would proceed (*see* Bill Jacket, L 1974, ch 467, Mem of Staff Attorney of Law Rev Commn at 2; Governor's Program Bill Mem at 2; *People v Myers*, 32 NY3d 18, 23, 84 N.Y.S.3d 406, 109 N.E.3d 555 [2018]). Executed solemnly in open court, the waiver form must memorialize with sufficient specificity the charges for which a defendant waives prosecution by indictment. Here, the statutory notice was accomplished as the six counts of sexual abuse designated in the waiver form were identical to the crimes for which Lang was held for grand jury action and originally charged in the local court accusatory instruments.

Despite the factual omissions of date, approximate time and place of the specific offenses in his written waiver of indictment, Lang lodges no claim that he lacked notice of the precise crimes for which he waived prosecution by indictment. Nor could he, since the dates and places of the offenses were sufficiently detailed in each of the actual accusatory instruments — the three local court complaints and the SCI — charging this defendant. As a matter of statutory mandate, upon defendant's arraignment in each

local court, the court was required to furnish defendant with a copy of the accusatory instruments and thereafter provide defendant notice of the crimes for which he would be held for the action of the grand jury (CPL 170.10; CPL 180.10). During the indictment waiver proceeding, the People provided defendant with an advance copy of the SCI, which was contemporaneously filed with the waiver of indictment form. Determinatively, the indictment waiver form identified all six counts of sexual abuse as alleged in the local court accusatory instruments — specifically, three counts of sexual abuse in the first degree and two counts of sexual abuse in the second degree for which he was held for the action of the grand jury by Town of Alabama Justice Court and one count of sexual abuse in the first degree for which he was held for the action of the grand jury by Town of Bethany Court. The written waiver form further acknowledged that "[t]he [SCI] to be filed . . . will charge the offense(s) named in this written waiver" — clearly incorporating by reference the six counts of sexual abuse specifically alleged in the accompanying SCI.

In assessing the facial sufficiency of facts alleged as to non-elements of the crime in an accusatory instrument, the fundamental concern is whether the defendant had reasonable notice of the charges for double jeopardy purposes and to prepare a defense. In child sexual assault cases, we have upheld indictments alleging an approximate time span of a period of months as sufficiently stated time intervals to comply with due process notice requirements (*see e.g. People v Watt*, 81 NY2d 772, 774, 609 N.E.2d 135, 593 N.Y.S.2d 782 [1993]). Accepting defendant's argument that there must be strict compliance with the CPL 195.20

time requirement in written waiver of indictment form would eliminate prosecution by SCIs involving most child sexual assaults, where a time of offense often cannot be specified — an absurd result. Moreover, all defendants can seek a bill of particulars as the remedy to obtain the more specific information necessary for notice purposes (*see People v Morris*, 61 NY2d 290, 293, 461 N.E.2d 1256, 473 N.Y.S.2d 769 [1984]), although the information Lang demands belatedly on this appeal, again, was contained in the accusatory instruments he undeniably received. In sum, Lang received sufficient notice of the offenses for which he waived prosecution by indictment in the indictment waiver form, and having pled guilty without raising any legal challenge to the contents of that form in the trial court, there is no further issue to review on this appeal.

Accordingly, in *People v Thomas*, the order of the Appellate Division should be affirmed, and in *People v Green* and *People v Lang*, the orders of the Appellate Division should be reversed and the matters remitted to that Court for further proceedings in accordance with this opinion.

RIVERA, J. (concurring in result in *People v Thomas*, *People v Green*, and *People v Lang*):

I agree with Judge Wilson's thoroughly compelling discussion of appellate waivers and his conclusion that they "have proved unworkable, they have created more questions than they resolve, and when viewed from the 'cold light of logic and experience,' they do not serve the ends of justice" (Wilson, J., concurring/dissenting op at 17). A defendant who pleads guilty should be able to pursue an intermediate appeal as of right (*see* CPL 450.10; *accord People v Ventura*, 17 NY3d 675, 679, 958 N.E.2d 884, 934 N.Y.S.2d 756 [2011] ["Pursuant to CPL 450.10, which codifies a criminal defendant's common-law right to appeal to an intermediate appellate court, (a defendant has) an absolute right to seek appellate review of (the defendant's) conviction( )"]). Thus, for the reasons discussed in Judge Wilson's analysis, with which I fully concur, the appeal waivers in the three appeals before us are invalid.

Turning to the remaining matters, and proper disposition of these respective appeals, in *People v Thomas*, I concur in the result because although the waiver is ineffective, defendant's sole ground for reversal presents a mixed question of law and fact, and the decision to deny suppression has record support (*see People v Wheeler*, 2 NY3d 370, 373, 811 N.E.2d 531, 779 N.Y.S.2d 164 [2004]; *People v Mayorga*, 64 NY2d 864, 865, 476 N.E.2d 993, 487 N.Y.S.2d 548 [1985]). In *People v Green*, because the waiver is not valid, the order of the Appellate Division should be reversed and the matter remitted to that Court for further proceedings.

In *People v Lang*, I concur in the result, but not on the basis of the majority's sweeping rule that a waiver of prosecution by indictment is valid, so long as the missing information is set forth in the local court accusatory instruments, even if the waiver lacks the details required under CPL 195.20. That rule ignores the text and purpose of the CPL requirements.

Under our State Constitution, a defendant may waive, in writing and in open court, an indictment by grand jury and declare the defendant's consent to be prosecuted by an information filed by the district attorney (NY Const, art I, § 6). The CPL codifies this requirement and establishes the procedure to effectuate the waiver. Section 195.10 (2) (b) of the CPL provides, in relevant part, that a defendant may waive indictment "at any time prior to the filing of an indictment by the grand jury." CPL 195.20 requires that a waiver of indictment shall contain "the name of the court in which it is executed, the title of the action, and the name, date and approximate time and place of each offense to be charged." We have explained that CPL 195.20 "reiterates the constitutional requirements and specifies additional items the written waiver must include" (*People v Myers*, 32 NY3d 18, 22, 84 N.Y.S.3d 406, 109 N.E.3d 555 n 2 [2018]), and that a waiver of indictment is only effective if it is "within the express authorization of the governing constitutional and statutory exception" (*id.*, quoting *People v Trueluck*, 88 NY2d 546, 549, 670 N.E.2d 977, 647 N.Y.S.2d 476 [1996]). "Failure to adhere to the statutory procedure for waiving indictment which resulted in [defendant's] plea[] may be considered jurisdictional" (*People v Boston*, 75 NY2d 585, 589, 554 N.E.2d 64, 555 N.Y.S.2d 27 n * [1990]).

The purpose of the CPL requirement that a defendant sign, in open court, a waiver of indictment by grand jury—detailing, among other things, each offense to be charged by superior court information (SCI)—is twofold: it (1) provides a defendant with notice of the right to presentment of the charged crimes for grand jury consideration, and (2) impresses upon them the solemnity of the right and the consequences of the waiver. Substantial compliance with "the additional items the written waiver must include" furthers these dual goals and satisfies the constitutional and statutory mandates.

Unlike the majority, I interpret the CPL to require that the substance of those additional items be contained in the waiver form or, if filed along with the form, the SCI. Those are the only two documents expressly identified in our state constitution and the CPL as necessary prerequisites to a lawful waiver of indictment, and so in determining the validity of the waiver, we may consider the contents of the SCI when jointly filed. In appropriate cases, this ensures the defendant understands that by pleading guilty they would give up the right to have the grand jury "assess[] the sufficiency of the prosecutor's case" (*People v Pelchat*, 62 NY2d 97, 104, 464 N.E.2d 447, 476 N.Y.S.2d 79 [1984]), meaning they would forgo this safeguard against "potentially oppressive excesses by the agents of the government in the exercise of the prosecutorial authority vested in the State" (*People v Iannone*, 45 NY2d 589, 594, 384 N.E.2d 656, 412 N.Y.S.2d 110 [1978]) because they would consent to prosecution for the crimes charged in the SCI filed by the district attorney (CPL 195.20 [b]).

Here, the SCI—the instrument by which defendant agreed to be prosecuted for the offenses described therein—was presented to defendant in advance of the oral waiver and attached to and filed simultaneously with the waiver form. It contained all details required by CPL 195.20 otherwise missing from the form, except for the approximate time of the alleged offenses. Significantly, CPL 195.20 requires only an approximation of the time of each offense and, as the majority correctly notes, the Court has upheld indictments in child sexual assault cases spanning months (majority op at 26). Thus, in defendant's case, the dates of the alleged child sexual abuse offenses set forth in the SCI cabined the time period, and the waiver form and SCI considered together amount to substantial compliance with the statutory requirement. Moreover, on the same day the waiver and the SCI were filed, the court thoroughly reviewed with defendant the right to grand jury presentment prior to his signing the waiver form in open court. Under these circumstances, defendant has failed to establish a defect warranting rejection of his waiver of indictment.

GARCIA, J. (concurring in result in *People v Thomas* and dissenting in *People v Green* and *People v Lang*):

A waiver of the right to appeal will be upheld where the record demonstrates that it was knowingly, intelligently, and voluntarily made (*People v Seaberg*, 74 NY2d 1, 11, 541 N.E.2d 1022, 543 N.Y.S.2d 968 [1989]). That sensible standard has been settled for more than three decades, and repeatedly reaffirmed by this Court. It has been employed to evaluate countless appeal waivers, and consistently relied on by our State's lower courts—who bear the heaviest burden as the final arbiters in the overwhelming majority of waiver cases. Time and time again, we have assured trial courts that there is no mandatory litany that must be used to secure a valid appeal waiver; so long as it is knowing, intelligent, and voluntary, the waiver will be upheld (*see People v Sanders*, 25 NY3d 337, 12 N.Y.S.3d 593, 34 N.E.3d 344 [2015]; *People v Lopez*, 6 NY3d 248, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]; *People v Lococo*, 92 NY2d 825, 699 N.E.2d 416, 677 N.Y.S.2d 57 [1998]; *People v Hidalgo*, 91 NY2d 733, 698 N.E.2d 46, 675 N.Y.S.2d 327 [1998]; *People v Seaberg*, 74 NY2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 [1989]).

The majority accurately articulates that standard—then promptly abandons it. Instead, applying an alternative approach, the majority examines whether the trial court's description of the waiver was "improper" or somehow "irredeemable under the circumstances" (majority op at 16, 21). Preoccupied with punishing the trial court, the majority discards voluntariness as the touchstone of the appeal waiver inquiry. In doing so, the majority loses sight

of the determinative factor in our analysis: In all three cases, defendants knowingly, intelligently, and voluntarily waived the right to appeal in exchange for generous plea deals. Defendants should be held to their bargains.

I.

In *People v Seaberg*, this Court held for the first time that "criminal defendants may waive their rights to appeal as part of a negotiated sentence or plea bargain" (74 NY2d at 5). To be enforceable, we said, the waiver must be "voluntary" as well as "knowing and intelligent" (*id.* at 11). In other words, the reviewing court's focus should remain on whether the defendant "knew and understood the terms" of the waiver and whether, so equipped, "he willingly accepted them" (*id.* at 12). Even an imperfect waiver, then, will remain valid so long as "there is ample evidence in the record" that the defendant "agreed to the bargain and did so voluntarily with a full appreciation of the consequences" (*id.* at 11).

In the thirty years since *Seaberg*, we have consistently emphasized that trial courts need not engage in any particular litany in order to obtain a valid waiver of appellate rights (*see People v Johnson*, 14 NY3d 483, 486, 929 N.E.2d 361, 903 N.Y.S.2d 299 [2010]; *People v Lopez*, 6 NY3d 248, 256, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]; *People v Callahan*, 80 NY2d 273, 283, 604 N.E.2d 108, 590 N.Y.S.2d 46 [1992]; *People v Moissett*, 76 NY2d 909, 910-911, 564 N.E.2d 653, 563 N.Y.S.2d 43 [1990]; *People v Nixon*, 21 NY2d 338, 353-354, 234 N.E.2d 687, 287 N.Y.S.2d 659 [1967]). Despite calls for a compulsory colloquy, we

have repeatedly rejected mandatory catechisms in favor of broader trial court discretion (*People v Sanders*, 25 NY3d 337, 341, 12 N.Y.S.3d 593, 34 N.E.3d 344 [2015]). "[S]ound discretion exercised in cases on an individual basis," we have reasoned, is preferable to a "uniform procedure" that would inevitably "become a purely ritualistic device" (*id.*, quoting *People v Nixon*, 21 NY2d 338, 355, 234 N.E.2d 687, 287 N.Y.S.2d 659 [1967]). With the benefit of a face-to-face encounter, the trial court is "in the best position" to evaluate the voluntariness of each defendant's waiver (*Callahan*, 80 NY2d at 280). Applying that approach, we have upheld appeal waivers of all shapes and sizes.

We have, for instance, "upheld appeal waivers where no court colloquy with the defendant occurred" (majority op at 13, citing *People v Seaberg*, 74 N.Y.2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 [1989]). Indeed, in *People v Moissett*, we held that the defendant validly waived his right to appeal, overlooking the fact that "the record [did] not reveal an explicit waiver" (76 NY2d at 911). Decades later, in *People v Sanders*, we upheld an appeal waiver comprised only of three questions posed by the prosecutor, who conducted the entire colloquy without input from the trial court (25 NY3d at 339-340). As these cases demonstrate, there is no "absolute minimum that must be conveyed to a pleading defendant in the plea colloquy in order for the right to appeal to be validly waived" (*id.* at 341). So long as the defendant intentionally relinquished a known right (*People v Hansen*, 95 NY2d 227, 230, 738 N.E.2d 773, 715 N.Y.S.2d 369 n 1 [2000]), "it should not matter that the trial judge failed to choose what we might in hindsight consider to be more felicitous words or turns

of phrases" (*People v Alexander*, 19 NY3d 203, 219, 970 N.E.2d 409, 947 N.Y.S.2d 386 [2012]). Simply put, even on a sparse record, a voluntary waiver will be upheld.

We have also upheld appeal waivers on the opposite end of the spectrum—waivers that use "overbroad language" or that suggest "an absolute bar to review" (*see* majority op at 12, 13). For instance, in *People v Hidalgo*, the court informed the defendant that, once her guilty plea was accepted, she could not "come back to this Court or to any court to set aside [her] conviction" (*People v Maracle*, 19 NY3d 925, 930, 973 N.E.2d 1272, 950 N.Y.S.2d 498 [2012] [Graffeo, J., dissenting] [quoting the *Hidalgo* waiver colloquy]). Similarly, in *People v Nicholson*, the trial court informed the defendant that his waiver encompassed the right "to take to a higher court . . . any of the legal issues connected with this case" (brief and appendix for defendant-appellant in *People v Nicholson*, 6 NY3d 248, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]). And in *People v Thomas*, the defendant was "incorrect[ly]" required to waive his "right to appeal" as well as his right to "file a notice of appeal" (majority op at 17-18; appendix for defendant-appellant in *People v Thomas*).

By implying that all appellate avenues were forever foreclosed, each of these appeal waivers contained "imprecise" information (*see* majority op at 12). Of course, even a perfunctory statement that a defendant has "waived the right to appeal" is not entirely accurate, as there are several well-established categories of appellate claims that can never be waived (*see Callahan*, 80 NY2d at 280 [discussing the "categories of appellate claims that may

not be waived," including "the constitutionally protected right to a speedy trial, challenges to the legality of court-imposed sentences, and questions as to the defendant's competency to stand trial"] [citations omitted]). Despite their "overbroad" language, we upheld those appeal waivers based on our singular focus on whether each defendant's waiver was "knowingly, intelligently and voluntarily entered" (majority op at 12).

In the rare case where the Court invalidated an appeal waiver, we emphasized the manner in which the trial court's error infected the voluntariness of the defendant's decision. In *People v DeSimone*, for instance, "[t]here was no record discussion between the court and [the] defendant concerning the waiver," let alone "an acknowledgement from the defendant" that he understood and accepted its terms (80 NY2d 273, 283, 604 N.E.2d 108, 590 N.Y.S.2d 46 [1992]). Similarly, in *People v Bradshaw*, we invalidated the appeal waiver because the defendant—who had a "history of mental illness"—"never orally confirmed that he grasped the concept of the appeal waiver and the nature of the right he was forgoing" (18 NY3d 257, 265, 267, 961 N.E.2d 645, 938 N.Y.S.2d 254 [2011]). And in in *People v Billingslea*, the trial court inaccurately "characterize[d] an appeal as one of the many rights automatically extinguished upon entry of a guilty plea," and therefore the record was "not sufficient to guarantee that [the] defendant understood the valued right she was relinquishing" (6 NY3d 248, 256-257, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]). In all of these cases, the trial courts' errors prevented the defendants from fully appreciating the wide-ranging consequences of

their waivers, thereby creating a risk that the defendants unknowingly abandoned appellate rights they intended to retain.

II.

Applying that standard to the instant appeals, the record confirms that each defendant knowingly, intelligently, and voluntarily waived the right to appeal. Each defendant was represented by counsel and confirmed on the record that he or she had an adequate opportunity to discuss the waiver with defense counsel (*see Moissett*, 76 NY2d at 911; majority op at 12-13 ["The role played by counsel in ensuring a defendant's knowing and voluntary waiver is an important component of that analysis that cannot be ignored"]). Each defendant was informed that the waiver of the right to appeal was separate and apart from the rights ordinarily forfeited by a guilty plea (*see Billingslea*, 6 NY3d at 256-257). Each defendant was advised that his or her waiver would not bar certain appellate arguments, including claims concerning the legality of the imposed sentence, competency to stand trial, constitutional speedy trial, and the voluntariness of the waiver (*see Callahan*, 80 NY2d at 280). Each defendant orally confirmed on the record that he or she understood the import of the waiver (*see Bradshaw*, 18 NY3d at 265; *DeSimone*, 80 NY2d at 279). And each defendant executed a detailed written waiver form in open court, which expressly reaffirmed the knowing, intelligent, and voluntary nature of his or her waiver (*Ramos*, 7 NY3d at 738 [holding that a "detailed written wavier" could overcome "ambiguity" in the waiver colloquy]).

In addition, all three defendants had prior exposure to the criminal justice system (*see Sanders*, 25 NY3d at 342 [considering the "defendant's background, including his extensive experience with the criminal justice system"]). For instance, defendant Thomas, a second felony offender, confirmed his previous conviction for criminal sale of a controlled substance. And defendant Green, a second violent felony offender, admitted to a prior attempted burglary conviction; in fact, at the time of her guilty plea, defendant Green was already serving a separate nine-year term.

All three defendants also received highly favorable deals that enabled them to plead guilty to reduced charges in full satisfaction of multi-count accusatory instruments (*see Callahan*, 80 NY2d at 280 [noting that "relevant factors" in assessing an appeal waiver include "the nature of the agreement" and "the reasonableness of the bargain"]). Defendant Thomas—who was charged with gang assault and criminal possession of a weapon, among other things—was promised the legal minimum sentence of five years of incarceration in connection with his guilty plea, though he faced a minimum determinate sentence of eight years on the top count. Defendant Green, who faced up to fifteen years on each of the three charged class C felonies, was promised a cap of six years of incarceration in connection with her guilty plea. And defendant Lang, who confessed to sexually abusing a 5 year-old girl, a 7 year-old girl, and a 12 year-old girl, faced up to seven years of incarceration on each of his four charged felonies, but his plea capped his sentence at four years of incarceration. On these records, defendants cannot plausibly contend that

their appeal waivers were not knowingly, intelligently, and voluntarily entered.

III.

The majority's analysis, by contrast, invalidates two of the three waivers—taken by the same judge—based on the trial court's so-called "serious" mischaracterization of the right to appeal (majority op at 20). Employing a kitchen sink approach, the majority takes issue with a number of the trial court's statements, including its suggestion that defendants' waivers would (1) operate as "an absolute bar to the taking of a direct appeal," (2) result in a "loss of attendant rights to counsel and poor person relief," and (3) impact defendants' "postconviction relief separate from the direct appeal" (majority op at 20). Because none of these purported errors affected the voluntariness of defendants' waivers, none of them warrant reversal.

A.

With respect to the first asserted error, the majority itself acknowledges that we have "upheld appeal waivers" even though they were "elicited through court colloquies suggesting an absolute bar to review" (majority op at 13). As the majority concedes, even the term "appeal waiver" can "misleadingly suggest a monolithic end to all appellate rights" since "no appeal waiver serves as an absolute bar to all claims" (*Garza v Idaho*, 586 US __, 139 S Ct 738, 744, 203 L. Ed. 2d 77 [2019]). That broad, unqualified terminology nonetheless persists (*see* majority op at 11), appearing in practically every oral colloquy and written

waiver form. Because the phrasing does not undermine voluntariness, we have held that "[a]ppeal waivers using such shorthand pronouncements are enforceable" (majority op at 12).

This Court has also addressed—and rejected—the majority's second stated error as a basis for invalidating an appeal waiver (*see People v Ramos*, 7 NY3d 737, 853 N.E.2d 222, 819 N.Y.S.2d 853 [2006]). In *Ramos*, for instance, the written waiver form informed the defendant that, in connection with his waiver of the right to appeal, he was "giving up" a number of related appellate rights—including the right "to prosecute an appeal as a poor person," the right to "have an attorney assigned," and the right "to submit a brief and/or argue before an appellate court on any issues relating to [his] conviction and sentence" (*Bradshaw*, 18 NY3d at 270 [Read, J., dissenting] [quoting the *Ramos* written waiver]). Despite the clear implication—that an appeal waiver surrenders the "attendant rights to counsel and poor person relief" (majority op at 20)—we upheld the "detailed written waiver" (*Ramos*, 7 NY3d at 738). The reason, yet again, stems from our focus on the defendant; because defendant "knowingly, intelligently and voluntarily waived his right to appeal" (*id.*), his waiver remained valid.[1]

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1. The written waiver in *Thomas*, upheld today, similarly advised defendant that the right to appeal—which he expressly waived—is accompanied by various related rights: the right "to prosecute the appeal as a poor person, to have an attorney assigned in the event that the defendant is indigent, and to submit a brief and argue before the appellate court on any issue relating to the conviction or sentence" (*see* appendix for defendant-appellant in *People v Thomas*).

Even the Model Colloquy—blessed by the majority as a "solid reference for a better practice" (majority op at 22)—identifies the rights to counsel and poor person relief as components of the right to appeal:

> "An appeal is a proceeding before a higher court, an appellate court. *If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On appeal, a defendant may, normally through his/her lawyer argue that an error took place in this court which requires a modification or reversal of the conviction*."

(NY Model Colloquies, Waiver of Right to Appeal [emphasis added].) Promptly thereafter, the Model Colloquy reminds defendants that they are "giving up" the lion's share of their appellate rights: "As a result [of the appeal waiver], the conviction by this plea and sentence will normally be final" (*id.*). Here, by invoking the trial court's reference to the "rights to counsel and poor person relief" as a basis for reversal (majority op at 20), the majority simultaneously discredits the Model Colloquy and tacitly overrules *Ramos*.[2]

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2. Moreover, as a practical matter, a valid waiver of the right to appeal dramatically limits the scope of counsel's available arguments—and the nature of the representation that a defendant should expect—since defense counsel is never required to "make unsupportable arguments" on a defendant's behalf (*Garza*, 586 US at __, 139 S Ct at 746 n 8; *see also* Rules of Professional Conduct [22 NYCRR 1200.0] rule 3.1).

The third error identified by the majority is a new one: the trial court's purported misstatements concerning the effect of defendants' waivers on "postconviction relief separate from the direct appeal"—namely, on "collateral" challenges available in "state and federal courts" (majority op at 20-21). Though we have never said so, the majority asserts that none of these avenues of postconviction relief may be waived (*see* majority op at 13-14, 14 n 3), and based on that novel conclusion, determines that the trial court's contrary suggestion was flawed (*see* majority op at 20-22).

The breadth of that holding is troubling. CPL 440.10, our primary postconviction relief statute, contains no fewer than 10 grounds on which a defendant may move to vacate his conviction (*see* CPL 440.10 [1]; *see also People v Tiger*, 32 NY3d 91, 98-99, 85 N.Y.S.3d 397, 110 N.E.3d 509 [2018]). The federal habeas corpus scheme is similarly broad, enabling defendants to assert any "violation of the Constitution or laws or treaties of the United States" (28 USC § 2254; *Jones v Cunningham*, 371 US 236, 243, 83 S. Ct. 373, 9 L. Ed. 2d 285 [1963] [noting that the writ of habeas corpus "is not now and has never been a static, narrow, formalistic remedy"]). Given the breadth and diversity of collateral claims available in both state and federal court, the impact of an appeal waiver on a defendant's postconviction remedies is a complex and consequential decision—and one that we had not, until today, resolved.

Still more disturbing, the issue has never been argued by any of the parties in these appeals.[3] That should come as no surprise; these cases do not present the issue of whether any, let alone all, collateral claims may be validly waived. Rather, defendants seek only to restore their direct appeals and, as a result, they do not address the availability (or waivability) of any collateral claims. Apart from the obvious reviewability problems—we generally do not consider arguments not raised by the parties (*see People v Tapia*, 33 NY3d 257, 270 n 8, 100 N.Y.S.3d 660, 124 N.E.3d 210 [2019])—we are left with a complete absence of any briefing or argument that would enable the Court to reach an informed, considered, and well-reasoned decision. Undeterred, the majority decides the issue—and adopts a sweeping rule—in a handful of conclusory sentences: An appeal waiver, the majority states, relinquishes "*only*" those claims that "can be reviewed on direct appeal," and accordingly, waiver colloquies should never mention "collateral or federal relief" (majority op at 13-14, 14 n 3, 20-22 [emphasis added]).

Even a brief examination of that holding reveals deep flaws. With respect to State remedies, at least four of the collateral claims housed in CPL 440.10 are expressly

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3. In challenging the voluntariness of their waivers, defendants never relied on the trial court's discussion of collateral remedies. Even when expressly asked, defense counsel in both *Lang* and *Green* identified only those portions of the waiver colloquy discussing the right to counsel and the right to poor person relief; neither defendant adopted an argument concerning the waivability of the countless collateral claims available in state and federal court (*see* oral argument tr at 25-26, 34-35, 52-54).

reserved for those defendants convicted at trial (*see* CPL 440.10 [1] [c] [claim that "(m)aterial evidence adduced *at a trial*" was known to be "false"] [emphasis added]; *id.* 440.10 [1] [d] [claim that "(m)aterial evidence adduced by the people *at a trial*" was "procured in violation of the defendant's rights under the constitution"] [emphasis added]; *id.* 440.10 [1] [f] [claim of "(i)mproper and prejudicial conduct" that "occurred *during a trial*"] [emphasis added]; *id.* 440.10 [1] [g] [claim that "(n)ew evidence" was discovered after "a verdict of guilty *after trial*"] [emphasis added]). A fifth provision imposes a heightened standard on defendants "convicted after a guilty plea" as compared to those defendants "convicted after a trial" (CPL 440.10 [1] [g-1]). We evaluated a sixth provision in *People v Tiger* (32 NY3d 91, 85 N.Y.S.3d 397, 110 N.E.3d 509 [2018]), where we held that the defendant's guilty plea—coupled with a waiver of the "right to appeal all aspects of th[e] case" (*id.* at 104 [Garcia, J., concurring])—foreclosed her subsequent assertion of an "actual innocence" claim under CPL 440.10 (1) (h) (*id.* at 102-103). Evidently, an appeal waiver, coupled with a guilty plea, necessarily restricts a defendant's collateral remedies by foreclosing those grounds for relief predicated on a conviction at trial. In fact, in *People v Hidalgo*, the trial court expressly informed the defendant that, as a result of her appeal waiver, she could not "come back to this Court or to any court to *set aside [her] conviction*" (*Maracle*, 19 NY3d at 930 [Graffeo, J., dissenting] [quoting the *Hidalgo* waiver colloquy] [emphasis added]). Despite its apparent reference to collateral remedies, the defendant's waiver was upheld.[4]

4. The majority correctly notes that a guilty plea, by itself, operates to forfeit a number of collateral claims (majority op at 14 n

With respect to collateral attacks in federal court, it is crystal clear that a defendant may validly waive the right to seek federal habeas corpus relief: "[E]nforceable waivers can preclude not only the right to direct appeal but also the right to collaterally attack the conviction in a habeas or other petition" (*Rodriguez v Conway*, 2010 U.S. Dist. LEXIS 888, 2010 WL 92911, *4 [ED NY 2010] [holding that the petitioner, a state defendant, "knowingly waived his right to appeal" and "his right to collaterally attack the conviction in federal court"]). The majority's contrary holding is not only wrong, it is effectively meaningless; a defendant's waiver of federal habeas rights is evaluated not under state standards, but under "the recognized *federal standard* of being knowing and voluntary" (*Cross v Perez*, 823 F Supp 2d 142, 148 [ED NY 2011] [emphasis added]). Under that approach, trial courts are not only permitted to explain the impact of a defendant's waiver on his collateral remedies, they are *required* to do so (*see id.*).

Given these repercussions, it would be prudent—not "erroneous" (majority op at 21)—for trial courts to advise defendants that their appeal waivers will impact their collateral remedies. Ironically, had the trial court in these cases failed to advise defendants of the broad ramifications of their waivers, defendants might have plausibly (and perhaps successfully) asserted a voluntariness argument

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3). A valid appeal waiver might *also* operate to relinquish *additional* collateral remedies in state court; indeed, in federal court, it has that precise effect (*see* infra). We have never evaluated the effect of an appeal waiver on any collateral claim. Now, given the majority's holding, we never will.

on the basis that they failed to appreciate their waivers' full scope. The majority's holding now precludes trial courts from delivering those accurate warnings.

B.

Even if the trial court's colloquy was, in fact, misleading, the court's overbroad description of defendants' waivers would still not require their invalidation. As an initial matter, had defendants actually been misled by a literal interpretation of their appeal waivers, they would have never filed these appeals—and none of these cases would be here. In any event, an otherwise valid waiver is not rendered involuntary simply because the defendant was willing to waive *more* rights than required (*see People v Rudolph*, 21 NY3d 497, 502-503, 997 N.E.2d 457, 974 N.Y.S.2d 885 [2013] ["If anything, defendant pleaded guilty under the impression that the law was less favorable to him than we have held that it is—in other words, the plea offer he accepted may have been better than he thought. That is not a misapprehension that would support an application to withdraw a plea."]; *see also Garza*, 586 US at __, 139 S Ct at 749-750 [noting that "even the broadest appeal waiver does not deprive a defendant of all appellate claims"]). While any nonwaivable issues purportedly encompassed by a waiver will be excluded from its scope, the balance of the waiver remains valid and enforceable (*see People v Henion*, 110 AD3d 1349, 1350, 973 N.Y.S.2d 857 [3d Dept 2013]; *People v Neal*, 56 AD3d 1211, 1211, 867 N.Y.S.2d 612 [4th Dept 2008]; *see also Callahan*, 80 NY2d at 282 [holding that "a bargained-for waiver of the right to appeal is ineffective *to the extent* it

impairs the defendant's ability to obtain appellate review" of unwaivable claims] [emphasis added]).

Notably, these defendants do not seek to raise claims that might fall beyond the scope of a valid waiver. Rather, they seek appellate review of the trial court's suppression ruling (*Thomas*), sentencing determination (*Green*), and denial of youthful offender status (*Lang*)—claims that are entirely waivable and that, here, were validly waived. By way of example, during defendant Green's waiver allocution, the court stated: "Do you understand that [appeal] waiver goes to almost all issues of conviction and sentence, including the terms and length of your sentence, whether your sentence is excessive . . . ?" Defendant responded: "Yes, sir." She now seeks to raise an excessive sentence claim.

Nor is the majority's analysis properly anchored in *Billingslea* (majority op at 20)—a case involving an *under*inclusive waiver (6 NY3d 248, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]). There, the trial court conflated the distinct concepts of forfeiture and waiver, inaccurately informing the defendant that his appeal waiver was an automatic consequence of his guilty plea (*id.* at 254). As a result, the record failed to demonstrate that the defendant grasped the full range of claims he had relinquished through his waiver, rendering the waiver involuntary (*id.* at 257). Here, by contrast, each waiver made clear that the right to appeal is "separate and distinct," and defendants fully appreciated the breadth of claims validly encompassed by their waivers. Armed with that knowledge, defendants voluntarily agreed to waive those rights—and then some.

IV.

In lieu of voluntariness, then, the majority's holding is premised on an entirely different standard—one that focuses solely on the trial court to the exclusion of the defendant. Tellingly, the majority's analysis contains little discussion of these defendants; it makes no mention of defendants' backgrounds, plea deals, or discussions with counsel (*see* majority op, section III). The majority effectively eliminates defendants from the inquiry altogether, instead resorting to harsh criticism of the trial court's colloquy as "muddled," "confused," "conflated," "incorrect," "improper," and "erroneous" (majority op at 18, 20-21). The touchstone of that inquiry is the conduct of the trial court—not its impact on the defendant.

This shift in emphasis works a change in our law. Our standard is premised not on a review of the trial court's colloquy in a vacuum, but on the defendant's grasp of the relinquished rights. Rather than asking whether defendants acted knowingly, intelligently, and voluntarily, the majority asks whether the trial court's description of the waiver contained a "serious" mischaracterization of the right to appeal or was otherwise "incorrect and irredeemable under the circumstances" (majority op at 16, 20). That novel standard elevates the court's colloquy over the defendant's state of mind, neglecting the centerpiece of voluntariness review. Not only does the majority's approach run counter to decades of settled precedent, it leaves lower courts with an unfamiliar and undefined new framework.

The majority's punitive tone is particularly jarring in light of our clear advisement that the "better practice" is for trial courts to "define the nature of the right to appeal more fully" (*Sanders*, 25 NY3d at 342). A broader, more inclusive colloquy, we reasoned, serves to protect defendants from unwittingly abandoning vital appellate rights (*see People v Maracle*, 19 NY3d 925, 928-929, 973 N.E.2d 1272, 950 N.Y.S.2d 498 [2012]). Indeed, we have admonished trial judges to more thoroughly explain the rights surrendered by an appeal waiver in order to ensure that defendants appreciate their far-reaching implications (*see DeSimone*, 80 NY2d at 283; *Sanders*, 25 NY3d at 342).

Meanwhile, we continue to craft a maze of rules for trial courts to navigate. Our cases have generated an evolving, non-exhaustive list of appellate claims that can never be waived—a list susceptible to continued amendment (*see Seaberg*, 74 NY2d at 9). Indeed, defendant Thomas's brief purports to list 18 additional appellate claims that survive a valid waiver (*see* brief for defendant-appellant in *People v Thomas*). And despite our promise of "no mandatory litany" (*e.g. Johnson*, 14 NY3d at 486), our cases continue to suggest "standard procedure[s]" for trial courts to adopt (majority op at 14 [discussing *Lopez*, 6 NY3d 248, 844 N.E.2d 1145, 811 N.Y.S.2d 623]). The rules are constantly changing, and our cases hardly lend themselves to a clear procedure.

The result has been predictable: more expansive waiver colloquies, couched in cautionary language, designed to impress upon defendants the breadth and significance of the rights encompassed by an appeal waiver. Reinforcing

that approach, we have upheld a number of these padded waivers, opting to overlook technical inaccuracies aimed at emphasizing the broad scope of the right to appeal (*see* majority op at 11-17; *see also Nicholson*, 6 NY3d at 257; *Ramos*, 7 NY3d at 738; *Hidalgo*, 91 NY2d at 734-737). With respect to appeal waivers, our message to trial courts has been consistent and clear: say more, not less.

The majority's message today is the opposite: say less, not more. In each of these three cases, the trial court went to great lengths to impress upon the defendant that a waiver of the right to appeal is important, expansive, and should not be taken lightly. That approach has now been condemned. The result is an unfortunate one: waivers will only be less knowing, less intelligent, and less voluntary.

V.

The ramifications of today's holding will be substantial and, more importantly, detrimental to defendants. Initially, the majority's assertion that its holding is a classic application of our established standard will, by itself, generate widespread repercussions (*see* majority op at 2, 17). Any waiver resembling those in *Green* and *Lang* is now prone to attack, and any defense attorney who failed to challenge its terms is vulnerable to a claim of ineffective assistance of counsel (*see* CPL 440.10 [1] [h]). And because the majority insists that it has not announced a new rule, its holding applies even to those cases that have already become final (*see People v Baret*, 23 NY3d 777, 783-784, 992 N.Y.S.2d 738, 16 N.E.3d 1216 [2014]).

The majority's holding also unsettles plea bargains in a manner that will harm the public, the courts, and ultimately, defendants. Like guilty pleas, appeal waivers serve the laudable goals of certainty and finality, allowing for "prompt resolution of criminal proceedings with all the benefits that enure from final disposition" (*Seaberg*, 74 NY2d at 7; *Tiger*, 32 NY3d at 101). But plea agreements, like all other contracts, depend on consistency and predictability in their enforcement (*see J. Zeevi & Sons v Grindlays Bank [Uganda]*, 37 N.Y.2d 220, 227, 333 N.E.2d 168, 371 N.Y.S.2d 892 [1975]; *see also United States v Riggi*, 649 F3d 143, 147 [2d Cir 2011] [noting that plea agreements are construed "according to contract law principles"]). We therefore counsel against judicial upending of the bargain reached at the conclusion of the parties' negotiations (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 NY2d 685, 695, 660 N.E.2d 415, 636 N.Y.S.2d 734 [1995]), opting instead to enforce the terms of the parties' negotiated agreement (*Seaberg*, 74 NY2d at 10; *see also People v Avery*, 85 NY2d 503, 507, 650 N.E.2d 384, 626 N.Y.S.2d 726 ["Conditions imposed as part of a plea arrangement are valid if the parties agree to them and they do not violate any statute or contravene public policy"]). "[B]argains fairly made," we stressed, "should signal an end to litigation, not a beginning" (*Seaberg*, 74 NY2d at 10; *see also Tiger*, 32 NY3d at 100-101).

Today's holding unravels defendants' bargains and undermines the finality of their convictions. That result serves only to "disadvantage[] the public by allowing defendants to relitigate issues that they waived in exchange for substantial benefits" (*Garza*, 586 US at __,

139 S Ct at 755 [Thomas, J., dissenting]; *see also Seaberg*, 74 NY2d at 10 [recognizing the "public interest concerns" that are "served by enforcing waivers of the right to appeal"]). It also enlarges the caseload of our already burdened appellate courts, who must address the new appeals authorized by today's decision (*Garza*, 586 US at __, 139 S Ct at 755 [Thomas, J., dissenting]).[5]

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5. Judge Wilson asserts that, "in the real world," appeal waivers "fail to advance the State's interest in finality" because appellate challenges to the validity of appeal waivers consume the time and resources of appellate courts and advocates (*see* J. Wilson concurring/dissenting op, section III). But his anecdotal evidence omits the most significant statistic: the tens of thousands of cases where defendants decline to pursue an appeal as a direct result of their waivers. Accurately presented, the empirical evidence demonstrates that appeal waivers continue to serve the goals of finality and judicial economy that we recognized in *Seaberg*. In 2018, nearly 37,000 felony cases were resolved by guilty plea in Supreme Court and County Court, but only 2,870 of those cases were later addressed by the Appellate Division (*see* New York State Unified Court System 2018 Annual Report, Court Structure and Caseload Activity). Accepting the premise that appeal waivers are a "standard" component of plea deals (*People v Batista*, 167 AD3d 69, 81, 86 N.Y.S.3d 492 [2d Dept 2018] [Scheinkman, P.J., concurring]), these statistics tell us that fewer than 8% of defendants opt to pursue an appeal once they have waived their appellate rights. Put differently, in more than 92% of cases, appeal waivers operate exactly as they were intended.

There is no reason to believe that these revealing statistics are the result of pure coincidence (*see* Spriros A. Tsimbinos, *The State of Appellate Division Caseloads*, 70-JAN NY St BJ 33, 34 [1998] [attributing the "steep decline in criminal appeals" to the increasing "utilization of the waiver of appeal" as a result of "the Court of Appeals decision in *People v Seaberg*"]). Judge Wilson's contrary suggestion—that defendants would "not appeal their convictions"

Perhaps worst of all, by depriving the prosecution of the benefit of its bargain, the majority introduces considerable uncertainty into the plea bargaining process. Without the guarantee of finality that an appeal waiver once promised, a prosecutor's incentive to offer generous plea deals is dramatically diminished (*see Seaberg*, 74 NY2d at 10 ["the negotiating process serves little purpose if the terms of a carefully orchestrated bargain' can subsequently be challenged"] [citation omitted]). Here, for instance, defendants *Green* and *Lang*, who faced lengthy terms of incarceration on their respective burglary and sexual abuse charges, will retain their reduced sentences (among other benefits), even though they have been relieved of their earlier promise to restrict further litigation. Going forward, a negotiating prosecutor will understandably consider that—notwithstanding a defendant's appeal waiver—limitless appeals might still ensue. In turn, the "very real" benefit of a waiver, a valuable bargaining chip for defendants, will be discounted (*see United States v Teeter*, 257 F3d 14, 22 [1st Cir 2001] ["Allowing a criminal defendant to agree to a

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even in the absence of an appeal waiver (J. Wilson concurring/dissenting op at 13-14 n 6)—is both unsupported and counterintuitive.

Nor is there any support for the speculative argument that, because appeal waivers have become "virtually universal," no additional consideration is provided to defendants in exchange for an appeal waiver (brief for amicus curiae The Legal Aid Society in *People v Thomas*; *accord* J. Wilson concurring/dissenting op at 9-10). In fact, the opposite conclusion is at least equally plausible: universal appeal waivers are universally compensated with more favorable plea deals—such as a four year maximum prison term for sexually assaulting three children.

waiver of appeal gives her an additional bargaining chip in negotiations with the prosecution"]). In other words, appeal waivers will no longer operate as a secure means of "providing a prompt conclusion to litigation," nor will they serve the "worthy objectives" we once celebrated (majority op at 8, 10). Terms offered to defendants may well reflect that new landscape as prosecutors adjust for increased risk. Ultimately, defendants will pay the price.

WILSON, J. (dissenting in *People v Thomas*; concurring in result in *People v Green* and *People v Lang*):

The game is not worth the candle. That is not to say this is a game: for many defendants, the harsh and chilling effect of appellate waivers results in the deprivation of their constitutional and statutory rights, far from anything one could, other than with great irony, call a game. Rather, our Court's tortured jurisprudence on appellate waivers has wreaked havoc on the lower courts, district attorneys, defense counsel and defendants, and is not worth any of the hypothetical benefits purportedly bestowed by appellate waivers.

Since *People v Seaberg*, 74 NY2d 1, 541 N.E.2d 1022, 543 N.Y.S.2d 968 (1989), we have held that an appeal waiver is enforceable so long as the defendant has agreed to it knowingly, voluntarily and intelligently. There, we offered that appellate waivers provide a means "where, by mutual concessions, the parties may obtain a prompt resolution of criminal proceedings with all the benefits that enure from final disposition" (*id.* at 7). We observed that the "final and prompt conclusion of litigation is an important goal," "provided that the settlement is fair, free from oppressiveness, and sensitive to the interests of both the accused and the People" (*id.* at 8). We noted that there was no public policy precluding defendants from waiving their rights to appeal, and that the "validity of the waiver is supported by the interests supporting plea bargains generally" (*id.* at 10). At the same time, *Seaberg* recognized that some claims — not itemized in our decision — could not be waived because those claims

"embrace the reality of fairness in the process itself" (*id.* at 9).

The reality, however, is that appeal waivers have so corrupted the integrity of the process that, as our jurisprudence now stands, it is the rare appellate waiver that is fully knowing, voluntary and intelligent. The foundational justifications on which *Seaberg* relied to sanction appellate waivers are painfully absent in all three cases before us. Those waivers were not "fair," "free from oppressiveness," or "sensitive to the interests of both the accused and the People." I therefore dissent as to *People v Thomas*; I concur in result as to *People v Green* and *People v Lang*.

I.

The waivers at issue here were incapable of providing the defendants any meaningful knowledge as to the rights they were waiving. The knowing, voluntary and intelligent test works tolerably well in its original context: plea bargaining. There, a defendant must learn the precise terms of the offered sentence, and weigh that against the potential benefits and costs of going to trial. As regards the sentence received, our jurisprudence has been circumspect in ensuring that every detail of that sentence is identified clearly (*see e.g. People v Catu*, 4 NY3d 242, 244, 825 N.E.2d 1081, 792 N.Y.S.2d 887 [2005] ["the court must advise a defendant of the direct consequences of the plea"]; *People v Louree*, 8 NY3d 541, 545, 869 N.E.2d 18, 838 N.Y.S.2d 18 [2011] ["a plea cannot be knowing, voluntary and intelligent if a defendant is ignorant of

a direct consequence" of his plea]; *People v Peque*, 22 NY3d 168, 197, 980 N.Y.S.2d 280, 3 N.E.3d 617 [2013] ["a noncitizen defendant convicted of a removable crime can hardly make a 'voluntary and intelligent choice among the alternative courses of action open to the defendant' unless the court informs the defendant that the defendant may be deported if he or she pleads guilty," *citing People v Ford*, 86 NY2d 397, 657 N.E.2d 265, 633 N.Y.S.2d 270 (1995)]; *People v Estremera*, 30 N.Y.3d 268, 66 N.Y.S.3d 656, 88 N.E.3d 1185 [2017]). Transported by *Seaberg* to appellate waivers, however, the test sheds painfully little light on whether a defendant knows the rights waived, comprehends them intelligently, and makes a voluntary decision to abandon them. Two principal reasons account for that failure. First, in sharp contrast to the terms of a sentence, we have expressly held that no itemization of the appellate rights waived is required (*People v Lopez*, 6 NY3d 248, 256, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006] ["a trial court need not engage in any particular litany when apprising a defendant pleading guilty of the individual (appellate) rights abandoned"]; *People v Sanders*, 25 NY3d 337, 341, 12 N.Y.S.3d 593, 34 N.E.3d 344 [2015]; *see also* majority op at 11). In practice, no such itemization is given. Second, for the typical criminal defendant, grasping the weight of the term of a sentence is fathomable; grasping the weight of the waived and unwaived appellate rights is not. Indeed, I feel confident that most criminal lawyers (and judges, myself included) could not produce a comprehensive list of the waivable and unwaivable rights without conducting substantial research — let alone assess the value of those rights in the context of a particular case.

The prospect that appeal waivers might be knowing, voluntary and intelligent is further eroded because we are attempting to measure whether the defendant "knows" something, has an "intelligent" basis to assess it, and makes a "voluntary" choice based on factors completely external to the defendant. We review the trial transcript, the colloquy of the court, the written waiver provided by the prosecutor. The defendant's own voice is conspicuously lacking. We test middle-school students about their knowledge of American history by asking them to recite facts and dates, not by giving them the correct answers and instructing them to answer "yes." We test prospective citizens similarly. But with criminal defendants, we verify their knowledge (and intelligence and voluntariness) based on monosyllabic answers they are instructed by counsel to deliver, coupled with a signature on a form in a situationally coercive environment, where the entire plea — not just the appellate waiver — may be jeopardized should the defendant say he or she does not understand the rights forfeited or their import (*see Seaberg*, 74 NY2d at 8). Stark is the contrast between the reality of *Seaberg*, where no colloquy occurred, and the language espoused in cases following it, which have emphasized "the responsibility to oversee the process and to review the record to ensure that defendant's waiver of the right to appeal reflects a knowing and voluntary choice" (*see e.g. People v Callahan*, 80 NY2d 273, 280, 604 N.E.2d 108, 590 N.Y.S.2d 46 [1992]).

An appellate waiver is effective only when "a defendant has a full appreciation" of its consequences, and a defendant "must comprehend" that the appellate waiver

is separate and distinct from the plea (*People v Bradshaw*, 18 NY3d 257, 264, 961 N.E.2d 645, 938 N.Y.S.2d 254 [2011]).[1] When the courts themselves spout misleading and incorrect information as they did in *Thomas*, *Green*, and *Lang*, courts will be hard pressed — even if they engage in in-depth colloquies — to ensure the "full appreciation" and "comprehension" of defendants.[2] Perhaps it is the reality that a judge cannot truly determine whether the defendant knows the rights waived and their import that has resulted in the labyrinth of contradictions comprising our appellate waiver jurisprudence.

As the majority acknowledges, the language of the waivers in all of the cases before us was either "incorrect" in *Thomas* (majority op at 18) or "mischaracterized" in *Lang* and *Green* (majority op at 2). Query, from a defendant's perspective, why a "mischaracterized" statement by a court results in an invalid waiver, but an "incorrect" one does not, or what meaning the majority ascribes the

1. Moreover, because appellate waivers are "ritualistic devices" included in every plea agreement as discussed in Part II, a judge will face a herculean task in making sure a defendant fully comprehends that an appellate waiver is "separate and distinct" from the plea.

2. Presiding Justice Scheinkman of the Second Department has suggested that even describing these agreements as "appellate waivers" makes them more difficult for the average defendant to comprehend fully. "It would seem more likely to be comprehensible to one without formal legal training, and substantially less inconsistent, to identify the limitation on appeal issues as being what it is — a limitation — from the outset, rather than having to explain that an appeal may be taken notwithstanding the 'waiver' of appeal just executed moments earlier" (*People v Batista*, 167 AD3d 69, 80, 86 N.Y.S.3d 492 [2nd Dept 2018] [Scheinkman, P.J., concurring]).

difference between the two. I agree with the majority that "the muddled nature of the court's advisements" cannot be ignored in *Lang* and *Green* (majority op at 20), where the trial court told the defendants that there would be "no review by any other court." I also agree with the majority that where even a reviewing court would struggle to understand the rights surrendered by an appellate waiver, we cannot expect defendants or their attorneys to "grasp the nature of the rights they are surrendering" (majority op at 20-21). I part ways with the majority as to its conclusion in *Thomas*. The court told Mr. Thomas that he was waiving his right "to challenge to a higher court what is taking place right now, the plea and what will take place in about two weeks when you are sentenced, to challenge those proceedings to a higher court." In the context of assuring that a defendant has knowingly, voluntarily and intelligently waived certain appellate rights, I see no difference between a judge telling a defendant that there will be no review by any other court and telling a defendant that he cannot challenge any of the current or future proceedings in a higher court, especially when that colloquy is coupled with a waiver that states the defendant is waiving his right to file a notice of appeal. As in *Green* and *Lang*, a reviewing court would struggle to discern whether Mr. Thomas understood the rights he waived.[3]

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3. In the alternative, the Appellate Division held that the hearing court properly denied Mr. Thomas's suppression motion because the "detective's act of showing defendant an incriminating photograph was, under the circumstances, a permissible response under *People v Rivers* to defendant's demand to know why he was being arrested" (citations omitted). Because I conclude that Mr. Thomas's case falls squarely within our holding in *People v Ferro* (63 NY2d 316, 472 N.E.2d 13, 482 N.Y.S.2d 237 [1984]), I disagree.

By choosing to differentiate these cases, the majority further ensnares this Court in our Daedalean maze. As the majority acknowledges (majority op at 16), we have struck down waivers when a lower court advised the defendant that he could not take the case to a higher court (*see People v Billingslea*, 6 N.Y.3d 248, 844 N.E.2d 1145, 811 N.Y.S.2d 623 [2006]; *People v Bradshaw*, 18 NY3d 257, 961 N.E.2d 645, 938 N.Y.S.2d 254 [2011]) — but, the majority says, those situations were distinguishable because "under the circumstances" those defendants could not have known the distinct appellate rights they were surrendering, while here Mr. Thomas surely did. Under our current case law, the "nature and terms of the agreement and the age, experience and background of the accused" may allow a trial court to determine that a waiver remained voluntary, knowing and intelligent (*Seaberg*, 74 NY2d at 11), despite its internal contradictions and inconsistencies. Even the most experienced defendant would struggle under the facts at issue in *Thomas*. A judge told Mr. Thomas that he was waiving his right to appeal, explicitly telling him that meant he could not challenge his plea or sentence in a higher court; next, he signed a written waiver form which said at once both that he was waiving "any and all rights to appeal including the right to file a notice of appeal . . . with the exception of any constitutional speedy trial claim which may have been advanced, the legality of the sentence, my competency to stand trial, and the voluntariness of this plea and waiver" and that he had waived his right to "appeal and to file a notice of appeal." Those inconsistencies alone prevent Mr. Thomas's waiver from being knowing and intelligent.

Our totality-of-the-circumstances jurisprudence — in addition to supplying an excuse for courts to uphold inherently contradictory waivers — reflects a bizarre and unintended additional punishment for repeat offenders. Those who have been previously convicted or exposed to the system are, without any empirical evidence that this is so, determined to be more "intelligent" about the appeal waiver and more likely to have "knowingly and voluntarily" waived their right to appeal, as a consequence of their "age, experience, and background" (*id.*), while first-time offenders will have an easier time of representing their waiver as unknowing. Perhaps, instead, their experience has taught them only that our maze is inescapable.

II.

In addition to the above problems inherent in determining the state of mind of a layperson about rights we offer in a coercive setting and we fail to enumerate, appellate waivers run afoul of *Seaberg*'s foundation in a fundamental way. *Seaberg* sanctioned appellate waivers as means "where, by mutual concession, the parties may obtain a prompt resolution of criminal proceedings with all the benefits that enure from final disposition" (*Seaberg*, 74 NY2d at 7). Laudable as that objective is, both ends of the presumed bargain have failed in the real world. As I set out in Part III, appellate waivers have not resulted in *Seaberg*'s finality panacea. More importantly, appellate waivers are not — and have long since ceased to be — "mutual concessions," resulting in outcomes "sensitive to the interests of both the accused and the People" (*id.*).

The *Seaberg* Court was able to dispose of the theory that appellate waivers are *per se* invalid — and the related one, that appellate waivers chill defendants from effectuating their rights — only by relying on the premise that plea bargains are ultimately a voluntary process that a defendant is free to accept or reject (*see Bordenkircher v Hayes*, 434 US 357, 363, 98 S. Ct. 663, 54 L. Ed. 2d 604 [1978]; Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 Hastings Const L Quarterly 127, 149 [1995]). History and experience have undermined *Seaberg*'s core. Our thirty years of experience under *Seaberg* demonstrates that however voluntary the plea bargain itself is, no additional consideration is provided to defendants in exchange for an appeal waiver. For appeal waivers, there are no "mutual concessions."

Instead, something quite distasteful and unseemly happens. The government, in the form of prosecutors and the courts, receives immunity for harmful errors[4] it has made, while defendants are expected, almost without exception, to waive their right to appeal upon pleading guilty. Appeal waivers have become a "purely ritualistic device" — they are "standard" and "part and parcel of plea bargaining" (*People v Batista*, 167 AD3d 69, 81, 86 N.Y.S.3d 492 [2018] [Scheinkman, P.J., concurring]). Due to their constituent nature, defendants do not receive a lesser sentence because of them. If they did, we would not have situations like those before us — frequently occurring in my review of cases — in which the appellate waiver was

4. If the errors were harmless, the harmless error doctrine would dispose of them, without resort to an appeal waiver.

sprung upon a defendant after the plea bargaining had been completed (*see e.g. Green*). The underlying rationale for both the majority here and in *Seaberg* can survive only if there is true voluntariness for the bargain between the People and the defendant who is waiving his or her right to appeal and only if the plea and waiver are bargained separately. A contract in which one party gives nothing is void for want of consideration. Because defendants receive no benefit in exchange for the appeal waiver, defendants are often rendered victims of "situational coercion" by these automatic, non-bargained-for waivers.

This is particularly true where defendants are giving up a fundamental right, specifically that of error correction, while the government benefits from that lack of review. In a prototypical example, a defendant seeks to suppress evidence that was unlawfully obtained. Erroneously, the court denies suppression. The defendant is now offered a much higher plea deal with a mandatory appellate waiver but sees no other feasible way to proceed: she must either agree to that plea or proceed to trial without the inculpatory evidence suppressed. The prosecutor and the court have thus effectively inoculated their error in denying suppression from appellate review. As the First Department stated in *People v Ventura*, although the "powers of a prosecutor may indeed be broad," they are "not so broad and limitless as to include the power to exact waivers of as fundamental a right as the right to appeal" (139 AD2d 196, 205, 531 N.Y.S.2d 526 [1988]). The history since *Seaberg* illustrates what the Court in *Seaberg* did not see then: appellate waivers insulate courts from error review. As such, appellate waivers should be *per se* invalid,

even on *Seaberg*'s own reasoning, because they result not from fair bargaining but from an unjust process that leads defendants compulsorily to accept waivers, foreclosing the system's obligation to review for prejudicial errors.

Our jurisprudence on appellate waivers affects more than just the rights of defendants: it impinges on the right of the public to a system that includes appellate review. The right to appeal is a fundamental right (*see e.g. Ventura*, 139 AD2d at 205; *Melancon*, 972 F2d at 577, *citing Griffin v Illinois*, 351 US 12, 18-18, 76 S. Ct. 585, 100 L. Ed. 891 [1956]). Moreover, in New York, the duty of appellate courts to entertain "all appeals from final judgments in criminal cases' is of constitutional dimension" (*Callahan*, 80 NY2d 273, 284, 604 N.E.2d 108, 590 N.Y.S.2d 46 [1992]). The United States Supreme Court has recognized that defendants have "a right to a[n appellate] proceeding" regardless of whether they signed an overbroad waiver (*see Garza v Idaho*, 139 S Ct 738, 747, 203 L. Ed. 2d 77 [2019]). We must then view our decisions in these cases as having utmost significance: it is a right of every New Yorker to have an honest process by which criminal defendants are convicted and their cases reviewed by a higher court. That right is diminished where this Court prevents the full review of errors that occur at trial, errors for which the government is responsible.[5]

5. Everyone agrees that our court systems are over-burdened. We should all agree then that "a decision of three people with time for reflection over the decision of one person with little or no time to think" should be preferred (Judith Resnik, *Precluding Appeals*, 70 Cornell L Rev 603, 620 [1985]; *see also* Calhoun, *Waiver of the Right to Appeal*, at 165). Five, had they time, would be still better. We should all want such error review.

Why should the public trust a system in which the process is not open to examination by a court capable of further consideration? "It is essential that the system not only be fair but that it be perceived as fair" (Calhoun, *Waiver of the Right to Appeal*, at 178). Because the right to appeal assures defendants and the public that there is an available corrective process — one outside the hands of a single judge — it is that right which ultimately allows the system to be perceived as fair.

Yet despite its fundamental importance, our Court has repeatedly approved of overbroad appellate waivers — waivers in which it is not clear that the defendants, the prosecutors or the courts knew the full extent of the rights waived. That result is incongruous with a fair criminal justice system. The cases before us today are deeply troubling because they reveal that which is not brought before us: the innumerable cases which never make it to any appellate court. When a defendant is told, as Ms. Green and Mr. Lang were, that they cannot appeal to "any other court," or when a defendant signs a form that forbids the filing of a notice of appeal, as Mr. Thomas did, mere fortuity brings that case to our notice. In innumerable other cases, after being explicitly told by a judge or advised by an attorney that she cannot file an appeal or that there will be no further review of her case, a defendant will simply not file an appeal and not seek review. This prevents defendants from effectuating their rights, even when those rights are legally unwaivable. Although "an agreement to waive appeal does not foreclose appellate review in all situations" (*Callahan*, 80 NY2d at 284), the broad and impenetrable language in appellate

waivers "discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself" (*People v Santiago*, 119 AD3d 484, 486, 990 N.Y.S.2d 494 [1st Dept 2014]). Because such language deprives a court of the "very jurisdictional predicate it needs as a vehicle for reviewing the issues that survive the waiver," (*Callahan*, 80 NY2d at 284), and chills defendants from enforcing their rights, appellate waivers should never be valid.

III.

As if that was not enough to make appellate waivers worthy of abandonment, the *raison d'etre* of appeal waivers — finality — does not justify their existence. In *Seaberg*, *Callahan*, and again in *People v Lopez*, 6 NY3d 248, 844 N.E.2d 1145, 811 N.Y.S.2d 623 (2006), we stressed the importance of "holding [a] defendant to the plea and sentence bargain he or she made . . . in order to accomplish the goals of fairness and finality" (*id.* at 262). We even held that "waivers *advance* that interest, for the State's legitimate interest in finality extends to the sentence itself and to holding defendants to bargains they have made" (*Seaberg*, 74 NY2d at 10) (emphasis added). Those are nice theories. What happens in the real world? Appellate waivers not only fail to advance the State's interest in finality, they have become a "pathway to future litigation" (*Batista*, 167 AD3d at 78), largely due to the failure inherent in a test designed to determine knowledge, intelligence and voluntariness in a coercive

situation with amorphous and inconsistent guidelines susceptible to various interpretations.[6]

To be clear, when we have said "finality," what we really mean is cost. For the centuries before *Seaberg* authorized appeal waivers, every criminal prosecution in New York came to a final conclusion. "Finality" is just the cost savings associated with avoiding one level of appellate

6. Judge Garcia in his partial dissent concludes that appellate waivers "operate exactly as they were intended" because just 8% of defendants appeal after waiving their appellate rights (Garcia, J., concurring/dissenting op at 20 n 5). My colleague's analysis lacks essential information: the fraction of defendants who pled guilty and did not appeal their convictions pre-*Seaberg*. Moreover, Judge Garcia's suggestion that *Seaberg* resulted in a "steep decline in criminal appeals" is not supported by the data in the article he cites. Putting aside that the article reflects the first four years post-*Seaberg*, not the quarter century since then, the proposition that *Seaberg* — a ruling with statewide effect — was the primary driver of the decline in the number of appeals between 1992-1996 is incompatible with the same article's data showing "significant" increases in the number of criminal appeals in the Third and Fourth Departments, including an increase of over 50% in the Third Department (*id.*; *see* Spriros A. Tsimbinos, *The State of Appellate Division Caseloads*, 70-JAN NY St BJ 33, 35 [1998]). Indeed, that article notes that the "number of felony indictments in New York City have [sic] dropped some 21% since 1990 [and] [s]imilar decreases in counties outside of New York City have also occurred." It goes on to say that the drop in criminal appeals from 1992 to 1996 was 18% — less than the drop in felony indictments beginning in 1990. That is, the reduction in indictments alone would account for the drop in appeals, which appears quite likely because of the increase in the Third and Fourth Departments post-*Seaberg*.

review.[7] Surely, cost to taxpayers must be taken into account, but we should recognize it for what it is, instead of calling it "finality" to raise the specter of endless litigation. We also must recognize that we are balancing that cost against the actual and perceived fairness of the criminal justice system.[8]

Post-*Seaberg*, that balance becomes quite easy to calculate, because on one side there is fairness and public confidence, and on the other side there is less than nothing. Appellate waivers create more litigation than they avoid. As the Second Department noted, it is "far too often" that a "perfunctory appeal waiver colloquy serves only" to create further litigation because an appellate court is forced in its review of the case "to hold invalid a bargained-for waiver" (*id.*). In what Justice Scheinkman calls a "conservative estimate," in just the last few years, the Appellate Division has found at least 380 appeal waivers to be invalid (*id.* at 82 [Scheinkman, P.J., concurring]).

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7. Appeals to this court are largely discretionary; we grant approximately 1.5% of the criminal leave applications before us — and that includes cases in which the validity of an appeal waiver is at issue (*see* 2018 Court of Appeals Annual Report, Appendix 8).

8. Were appeal waivers abolished, either legislatively or judicially, we should expect cost savings in all the cases now appealed in which an appeal waiver exists. Among the cases in which no appeal is now taken, there are four possible outcomes if appeal waivers are eliminated: (1) some will still not be appealed; (2) some will now be appealed and have merit; (3) some will now be appealed, the defendant will lose, but the law will be clarified; and (4) some meritless appeals will be taken. Only (4) is an undesirable outcome, but the cost of disposing of a truly meritless appeal is quite small.

Rather than conserving judicial resources, appellate waivers consume the time of prosecutors, defense counsel and the court in attempting to create a record that might satisfy our appellate waiver jurisprudence. All that time and effort would be saved were appellate waivers banned. On appeal, appellate waivers force intermediate appellate courts, not to mention advocates, to spend countless hours parsing through appellate waiver jurisprudence, trying to navigate the complexities of waivable and nonwaivable issues, and guessing at whether the defendants "fully comprehend[ed]" their waivers. And then, after all that time spent in such morass, the appeal waivers will often be found invalid and the merits of the case reached — the opposite of what *Seaberg* contemplated.

At argument, counsel for the People in *Green* and *Lang* confirmed that her office always briefs the merits even when there is an appeal waiver ("[W]e have no way of knowing for sure what's valid as a waiver of appeal, you also have to argue . . . the other issue"). In my experience, that is true statewide. Perhaps part of the People's motivation is to give appellate courts an easier way to decide appeals, because in many cases the appeal's lack of substantive merit is clearer than the validity of the appeal waiver. That conclusion is evidenced in the many Appellate Division decisions ducking the question of a waiver's validity and addressing the merits of the appeal.

Thus, if you are an appellate judge in one of the Departments that does not spend hours attempting to assess the validity of each appellate waiver, you may be in one which ignores the waivers altogether and reaches

the merits anyway. Presiding Justice Acosta notes that in the First Department, appellate waivers in excessive sentence cases "consume very little of our precious time," because the court decides the merits "without reaching the validity of any appeal waiver" (*First Department Takes Different Approach to Appeal Waivers*, NYLJ, Dec 7, 2018 at 1). Even there, then, appellate waivers waste attorney time and save no judicial time. Nor do they encourage finality as formulated by *Seaberg*; they are instead largely ignored. It is clear that appellate waivers generally fail to serve the cost-saving purpose that formed the basis for their justification. As mentioned, for the vast majority of our history as a state, we have not had appellate waivers. The parties, lawyers and courts managed just fine without them.

IV.

The majority observes that my dissent is based on "hypothetical constructs" drawn from outside the record (majority op at 9). So too was *Seaberg*. *Seaberg*'s justifications for appellate waivers relied on sweeping public policy assumptions not contained anywhere in its record. No record evidence in *Seaberg* demonstrated that appellate waivers would conserve resources, avoid litigation, improve outcomes for the parties or would be knowingly, voluntarily and intelligently entered into in a noncoercive, freely bargained exchange. Instead, those assumptions were based on good-faith judgments about extra-record facts. It is odd to suggest that this Court can make — and entrench — law based on such assumptions but cannot now overturn it if those assumptions have proven wrong.

Appendix A

In one case before us today, the Court approves of a waiver that provided "incorrect" information (majority op at 18). In two others, it disapproves of waivers that were "mischaracterized" (majority op at 2). Praise to the lower courts that can follow a string out of that maze, for it has only one exit: abandon *Seaberg*. The rule of *Seaberg*, while admirable in its notion of assuring fairness and saving costs, in practice attains neither of those goals. "Precedents remain precedents, however, not because they are established but because they serve the underlying 'nature and object of the law itself,' reason and the power to advance justice" (*People v Bing*, 76 NY2d 331, 338, 558 N.E.2d 1011, 559 N.Y.S.2d 474 [1990] [citations omitted]). *Stare decisis* is a matter of policy choice, "not a mechanical formula of adherence to the latest decision" (*id.*). Here, appellate waivers have proved unworkable, they have created more questions than they resolve, and when viewed from the "cold light of logic and experience," they do not serve the ends of justice (*see People v Peque*, 22 NY3d 168, 194, 980 N.Y.S.2d 280, 3 N.E.3d 617 [2013]). *Seaberg*'s knowing, voluntary and intelligent test has resulted in many defendants' unknowing, unintelligent and involuntary waivers. It has produced — not avoided — vast amounts of additional effort in trial courts and litigation in appellate courts as they struggle to establish and determine, respectively, the validity of such waivers. And, ultimately, defendants are chilled from pursuing their fundamental rights to appeal, while the public's confidence in the system's fairness wastes away.

All I will say with regard to Judge Garcia's partial dissent is that I thank him for proving my case.

I do not, as the majority claims, "mistrust [] all players in the system" (majority op at 9). I trust that overworked prosecutors, overworked defense attorneys, overworked trial judges and overworked appellate judges are doing their level best to follow our tortured appellate waiver jurisprudence, which has unintentionally foisted on all of them additional work and cost, with no benefit, and with a further cost to some defendants who believe they have waived even unwaivable rights and therefore fail to pursue them. Is an excellent judicial system one that insulates errors from judicial review, or one that considers the merits of every claim of error? What if doing so would cost less, or even the same? I respectfully dissent in *Thomas* and concur in result in *Green* and *Lang*.

* * * *

For Case No. 87: Order affirmed. Opinion by Chief Judge DiFiore. Judges Stein, Fahey and Feinman concur. Judge Rivera concurs in result in an opinion. Judge Garcia concurs in result in a separate concurring opinion. Judge Wilson dissents in an opinion.

For Cases No. 88 and 89: Order reversed and case remitted to the Appellate Division, Fourth Department, for further proceedings in accordance with the opinion herein. Opinion by Chief Judge DiFiore. Judges Stein, Fahey and Feinman concur. Judge Wilson concurs in result in an opinion, in which Judge Rivera concurs in a separate concurring opinion. Judge Garcia dissents in an opinion.

Decided November 26, 2019

APPENDIX B — DECISION AND ORDER OF THE SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT, DATED FEBRUARY 1, 2018

SUPREME COURT OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

Ind. 2760/15

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

VICTOR THOMAS,

Defendant-Appellant.

February 1, 2018, Decided;
February 1, 2018, Entered

Sweeny, J.P., Manzanet-Daniels, Webber, Kahn, Moulton, JJ.

Judgment, Supreme Court, Bronx County (April A. Newbauer, J. at hearing; Michael A. Gross, J. at plea and sentencing), rendered August 24, 2016, as amended October 20, 2016, convicting defendant, upon his plea of guilty, of attempted assault in the first degree, and sentencing him, as a second felony offender, to a term of five years, unanimously affirmed.

Appendix B

Defendant made a valid general waiver of his right to appeal, which encompassed his suppression claims (*see People v Kemp*, 94 NY2d 831, 724 NE2d 754, 703 NYS2d 59 [1999]). The court's on-the-record explanation of the appeal waiver "was sufficient because the right to appeal was adequately described without lumping it into the panoply of rights normally forfeited upon a guilty plea" (*People v Sanders*, 25 NY3d 337, 341, 12 NYS3d 593, 34 NE3d 344 [2015]; *see also People v Bryant*, 28 NY3d 1094, 45 NYS3d 335, 68 NE3d 60 [2016]). The written waiver properly supplemented the court's oral explanation, and did not contain any language this Court has previously found to be unenforceable, or that would otherwise require the invalidation of the waiver. There was no language that "discourages defendants from filing notices of appeal even when they have claims that cannot be waived, such as one concerning the lawfulness of the waiver or the plea agreement itself" (*People v Santiago*, 119 AD3d 484, 485-486, 990 NYS2d 494 [1st Dept 2014], *lv denied* 24 NY3d 964, 996 NYS2d 223, 20 NE3d 1003 [2014]). On the contrary, unlike the form used in *People v Powell* (140 AD3d 401, 30 NYS3d 873 [1st Dept 2016], *lv denied* 28 NY3d 1074, 47 NYS3d 233, 69 NE3d 1029 [2016]), the form did not limit the unwaived issues to constitutional speedy trial and legality of sentencing, but expressly stated that defendant could raise on appeal "the voluntariness of this appeal and waiver." Furthermore, the form here did not contain anything to suggest that the filing of a notice of appeal could be deemed a motion to vacate, or that it would have any other unwanted consequences (*see Santiago*, 119 AD3d at 485).

Appendix B

Regardless of whether defendant made a valid waiver of his right to appeal, we find that the hearing court properly denied defendant's suppression motion. The record supports the court's finding that defendant's statement was spontaneous and was not the product of interrogation requiring *Miranda* warnings. A detective's act of showing defendant an incriminating photograph was, under the circumstances, a permissible response under *People v Rivers* (56 NY2d 476, 480, 438 NE2d 862, 453 NYS2d 156 [1982]) to defendant's demand to know why he was being arrested (*see People v Wilson*, 279 AD2d 381, 719 NYS2d 555 [1st Dept 2001] , *lv denied* 96 NY2d 869, 754 NE2d 1127, 730 NYS2d 44 [2001]).

THIS CONSTITUTES THE DECISION AND ORDER OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

ENTERED: FEBRUARY 1, 2018

/s/_____
Clerk

APPENDIX C — SENTENCING TRANSCRIPT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF BRONX, CRIMINAL TERM, FILED MARCH 27, 2017

[A-100]SUPREME COURT OF THE STATE
OF NEW YORK COUNTY OF BRONX:
CRIMINAL TERM: PART:

INDICTMENT NO. 2760/15

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

VICTOR THOMAS,

Defendant.

SENTENCE

Supreme Courthouse
265 East 161 Street
Bronx, New York 10451
August 24, 2016

BEFORE:

THE HONORABLE MICHAEL A. GROSS, JUSTICE

[A-101]COURT CLERK: Calling case on the record, the People of the State of New York versus Victor Thomas. Appearances, counsel.

MS. MEIS: For Mr. Thomas, the Bronx Defenders by Marika Meis.

THE COURT: Good morning, Ms. Meis.

MS. MEIS: Good morning.

MS. FULLER: Julian Fuller. Good morning, counsel.

THE COURT: Ms. Fuller, good morning.

COURT CLERK: The defendant is present.

THE COURT: Mr. Thomas is now before the Court, pled guilty in this courtroom on the 10th of August of this year. He was permitted to plead guilty to the C violent felony of an attempt to commit the crime assault in the first degree, a lesser of the first count of the indictment, in satisfaction of higher felony charges, B violent felony charges. He was promised a five year determinate term to be followed by a period of five years post release supervision.

Mr. Thomas was, in fact, adjudicated a prior felony offender at the time of the plea.

MS. MEIS: Yes, correct.

THE COURT: Have both counsel had an opportunity to review the presentence report?

[A-102]MS. MEIS: Yes.

MS. FULLER: Yes.

THE COURT: The Department of Probation points out, as already indicated today, that Mr. Thomas is a prior felony offender. There appears to be no legal impediment to the Court imposing the negotiated sentence.

Ms. Meis, are you and your client ready to proceed to arraignment for sentence at this time?

MS. MEIS: Yes.

THE COURT: Please arraign Mr. Thomas for sentence.

COURT CLERK: Victor Thomas, you' re being arraigned for sentence on your plea of guilty to attempted assault in the first degree. Before the Court pronounces judgement, the Court will accord the district attorney an opportunity to make a statement with respect to any matter relevant to the question of sentence. The Court will then accord your attorney an opportunity to speak in your behalf and you also have a right to make a statement personally in your behalf.

Does the district attorney wish to make a statement?

MS. FULLER: Just that the promised sentence be imposed. Your Honor didn't mention it now but also incorporated in the sentence was a final Order of [A-103] Protection which -- along with the waiver of right to appeal, which we executed on the last date. I do have the final Order of Protection today.

THE COURT: That was my oversight, yes. An order of Protection was part of the promised sentence.

Ms. Meis, do you wish to be heard on behalf of Mr. Thomas?

MS. MEIS: Nothing further than the agreement upon disposition, I just ask that the premise be honored.

THE COURT: Mr. Thomas, do you wish to make any statement to the Court before you are sentenced?

THE DEFENDANT: No.

THE COURT: The sentence is the negotiated and agreed upon sentence of a five-year determinate term of incarceration to be followed by a period of five years post release supervision. There will be a final Order of Protection directing Mr. Thomas to avoid contact with the complainant, Brianna Rosa, for the statutory period of time.

The surcharge and crime victim fees mandated by law are imposed. Was the DNA fee previously imposed?

COURT CLERK: It has to be imposed.

THE COURT: Surcharge, crime victim and DNA fees all mandated by law are imposed. At this time, Ms. Meis, even though your client waived the right to appeal, you can [A-104]provide him with a notice of right to appeal for any rights that may survive that waiver.

Appendix C

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CERTIFIED TO BE A TRUE AND ACCURATE TRANSCRIPT OF THE ORIGINAL STENOGRAPHIC MINUTES TAKEN OF THIS PROCEEDING.

/s/_____
Laura Diercks
Senior Court Reporter

APPENDIX D — PLEA TRANSCRIPT OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF BRONX, CRIMINAL TERM, PART 71, FILED MARCH 27, 2017

[1]SUPREME COURT OF THE
STATE OF NEW YORK
COUNTY OF BRONX : CRIMINAL TERM : PART 71

Indictment:
2760-15

THE PEOPLE OF THE STATE OF NEW YORK,

-against-

VICTOR THOMAS,

Defendant(s).

265 East 161st Street
Bronx, New York 10451
August 10, 2016

BEFORE:
HONORABLE MICHAEL GROSS,
Justice

[2]THE CLERK: People V. Victor Thomas, jail matter.

MS. PULLIN: Trecia Pullin for the People. Good morning.

MS. MEIS: For Mr. Thomas, Bronx Defenders by Marika Meis.

Appendix D

THE COURT: Ms. Pullin, good morning. Ms. Meis, good morning. Mr. Thomas has now been produced in court somewhat later than the 9:45 I had requested the parties to return tomorrow. I understand Mr. Thomas was not produced correctly by Department of Corrections.

MS. MEIS: Yes.

THE COURT: The matter was adjourned for further discussion between the parties about further disposition.

Ms. Pullin.

MS. PULLIN: Yes, Judge. I do want to actually before I get to the recommendation, clarify the offer. I think yesterday I indicated that the separately apprehended defendant who took a plea to six years was not a predicate. That had been a discussion that Ms. Meis and I --

THE COURT: I don't think that was placed on the record at all. At least I have no recollection of it.

MS. PULLIN: If it was, I wanted to clarify that I did speak to my chief and made her fully aware of the circumstances, and the People are not prepared to change our recommendation from five years.

[3]THE COURT: If I'm, correct that is not a recommendation, that is an offer, correct?

MS. PULLIN: I'm sorry, correct. The offer, because we are offering that on a C, which is the attempted assault,

Judge. Thank you for that. And the offer is going to -- is being made today. And so the defendant can avail himself if he wishes, to that offer today. If he does not, the offer is no longer on the table.

THE COURT: And Ms. Meis, have you had an adequate opportunity to consult further with Mr. Thomas about a proposed disposition?

MS. MEIS: Yes. Part of what I attempted to do was speak to him downstairs. They had difficulty finding him in the correct register, so thank you for allowing me some time in the back. Yes, I did make him aware of the situation, and there would be no lower offer than the five that he would have been offered.

THE COURT: The time is 11:55 a.m.

MS. MEIS: Your Honor, yes, Mr. Thomas does wish to enter a plea on this case based on the People's offer.

THE COURT: Mr. Thomas, do you swear the answers you're about to give to the questions placed to you by the Court will be the truth, the whole truth and nothing but the truth so help you God?

THE DEFENDANT: Yeah, yes.

[4]THE COURT: Your attorney, Ms. Meis, indicated you would like now to withdraw your previous plea of not guilty and enter a plea of guilty under the first count of the indictment to the lesser charge of an attempt to

commit the crime assault in the first degree, that plea in violation of Penal Law sections 110 and 120.10, subdivision 1. Again, that is a lesser charge of the first count. That is a class C violent felony offense. That plea would be in full satisfaction of all of the charges now pending against you under this indictment. Is that, in fact, what you want to do, Nr. Thomas, plead guilty to that C violent felony offense?

THE DEFENDANT: Yes.

THE COURT: Have you had enough time to speak with Ms. Meis about this proposed plea?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the advice and counsel you've received from Ms. Meis while she has been representing you?

THE DEFENDANT: Yes.

THE COURT: Are you now taking medication or drugs of any kind that might effect your ability to think and concentrate at this time in this courtroom?

THE DEFENDANT: No.

THE COURT: Under the first count of the [5] indictment in this case, Mr. Thomas, the grand jury has alleged that on the 6th day of September of last year, 2015, here in Bronx County, you acting in concert with others with the intent to cause serious physical injury to another

person, did in fact cause serious physical injury to Brian Rosa using a deadly weapon or dangerous instrument. Is that claim about you true, Mr. Thomas?

THE DEFENDANT: Yes.

THE COURT: What did -- first, what was the dangerous instrument that was used in connection with the attack against Mr. Rosa?

THE DEFENDANT: A blade.

THE COURT: And what did you do on September 6th to assist in the causing of serious physical injury to Mr. Rosa.

THE DEFENDANT: I stopped other people from coming to his aid.

THE COURT: And the others that you were acting in concert with, what did one or more of them do with the blade involving Mr. Rosa?

THE DEFENDANT: Slashed Mr. Rosa.

THE COURT: What part of his body?

THE DEFENDANT: Face and shoulder.

THE COURT: Is the allocution acceptable to the People?

[6]MS. PULLIN: Yes, Judge.

THE COURT: Mr. Thomas, do you understand by pleading guilty to a crime as you are now doing, you give up a number of rights. Among the rights you give up is the right to a jury trial. At that trial, the prosecutor would have the burden of proving your guilt beyond a reasonable doubt. Your attorney would be by your side throughout the trial to confront every witness. That is, to cross-examine, to question closely every witness the prosecutor would bring in to testify against you. Your attorney would also be there to help you put in any available defense. By pleading guilty, you give up each of those rights, do you understand that Mr. Thomas?

THE DEFENDANT: Yes.

THE COURT: You have a right to remain silent at trial. Here in court right now, by pleading guilty you give up that right to silence as well. Do you understand that, Mr. Thomas?

THE DEFENDANT: Yes.

THE COURT: Mr. Thomas, other than the promise that you will receive a sentence of a five year determinate term of incarceration 1n prison to be followed by a period of five years post-release supervision, what is frequently or usually what is referred to as parole supervision, other than that a five year determinate term followed by a five [7]years post-release supervision, besides that, have any other promises of any kind been made to you by anyone in connection with your plea in this courtroom today?

THE: DEFENDANT: No.

THE COURT: People, have you prepared a predicate felony statement?

MS. PULLIN: I have, Judge. And also there is a waiver of right to appeal attached to the plea.

THE COURT: I was unaware of that before then, up to this point.

Mr. Thomas, separate and apart from each of those rights which I have just gone through in some detail, you understand as part of the negotiations with the district attorney's office in this case, you are being asked to give up your right to appeal. That means to challenge to a higher court what is taking place right new, the plea and what will take place in about two weeks when you are sentenced, to challenge those proceedings to a higher court. Do you understand that as well?

(Whereupon, there was a pause in the proceedings.)

THE COURT: Mr. Thomas, do you understand, again, as part of the negotiations with the district attorney's office, you are being asked to give up your right to appeal, challenge this plea and to challenge the sentence that will be imposed in about two weeks. Do you understand [8] that as well?

THE DEFENDANT: Yes.

THE COURT: Ms. Meis, when you and Mr. Thomas have had an adequate opportunity to review the terms of the written waiver, please let me know. I will then ask you to have Mr. Thomas sign that waiver in open court.

MS. MEIS: We're prepared.

THE COURT: Have Mr. Thomas sign.

MS. MEIS: Yes.

THE COURT: Mr. Thomas, is that your signature on the line about halfway, which I'm pointing?

THE DEFENDANT: Yes, sir.

THE COURT: You had a full opportunity to speak with Ms. Meis about what signing this waiver means, what rights you're giving up?

THE DEFENDANT: Yes.

THE COURT: The record will reflect Mr. Thomas signed the written waiver of right to appeal in open court following consultation with Counsel.

Ms. Pullin, I don't believe there was any reference to an order of protection or is that part of the proposed sentence as well?

MS. PULLIN: Yes, Judge. There has been an order of protection on the case up until --

THE COURT: All this should be put on the record [9]so I can properly allocute.

Mr. Thomas, other than the promise that I am making to you that the sentence in this case in about two weeks will be a determinate term of five years jail term, you get credit for every day you've been in since you've been arrested here. That determinate term to be followed by five years post-release supervision, what used to be referred to as parole. And that there will be a final order of protection directing you to avoid contact with Mr. Rosa for an extended period of time in the future. Other than that, have any other promises of any kind been made to you by anyone in connection with your plea in this courtroom today?

THE DEFENDANT: No.

THE COURT: People, you prepared the predicate felony statement?

MS. PULLIN: Yes.

THE COURT: Ms. Meis, when you and Mr. Thomas are ready to proceed with arraignment on that information, please let me know.

MS. MEIS: We're prepared.

THE CLERK: Victor Thomas, the District Attorney of Bronx County filed with the Court a second felony information which reads as follows. On the 10th day of July

2013 in Supreme Court, Bronx County, State of New York [10]before the honorable justice, said defendant was in due form of law convicted of an offense for which a sentence to a term of imprisonment in excess of one year or sentence of death was authorized. To wit, Penal Law section 220.31 and thereupon on the 10th day of July 2013, said defendant was duly sentenced to one year. Please take further notice that the tolling provisions contained in 1B of section 70.06 of the Penal Law do not apply.

Victor Thomas, have you received a copy of the statement?

THE DEFENDANT: Yes.

THE CLERK: Have you discussed the statement with your attorney?

THE DEFENDANT: Yes.

THE CLERK: Under the law, you may challenge any allegation in the statement on the grounds that the conviction was unconstitutionally obtained. Failure to challenge the previous conviction in the statement at this time is a waiver on your part of any claim of unconstitutionality.

Victor Thomas, do you understand the statement?

THE DEFENDANT: Yes.

THE CLERK: Do you admitted you are the person named in the second felony information

THE DEFENDANT: Yes.

[11]THE CLERK: You wish to challenge any information in the second felony information?

THE DEFENDANT: No.

THE COURT: Based on Mr. Thomas' acknowledgement that he is the person named in the predicate felony statement he's been arraigned on, further in light of his decision not to challenge in any way the conviction cited in that statement, I do adjudicate Mr. Thomas a predicate felony offender.

Please arraign him on the guilty plea.

THE CLERK: Victor Thomas, you now wish to withdraw your previously entered plea of not guilty and plead guilty to attempted assault in the first degree, 110/120.10, subsection 1, that plea to cover indictment 2760 of 2015. Is that what you wish to do?

THE DEFENDANT: Yes.

THE COURT: Mr. Thomas will be remanded for sentencing with a required report from the Department of Probation.

Ms. Meis, the earliest date available is August 24th. If that is a good date for both Counsel, that will be a good date for sentencing.

MS. MEIS; That's fine for us.

THE COURT: Good date for you as well, Ms. Pullin?

HS. PULLIN: Yes, Judge. August 24th.

[12]THE COURT: Mr. Thomas is remanded until the 24th of August for sentencing at that time with a report from probation.

MS. PULLIN: Before we conclude, I would ask that you extend the order of protection until that date.

THE COURT: Order of protection will be extended through the date of sentence, August 24th.

(Whereupon, proceedings were adjourned to August 24, 2016.)

* * *

This is to certify that the foregoing is a true and accurate transcript of the stenographic minutes taken within.

/s/_____
SARAH DEBOURG
Senior Court Reporter

APPENDIX E — DECISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF BRONX, FILED AUGUST 16, 2016

SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF BRONX PART 33

IND. NO. 2760-2015

THE PEOPLE OF THE STATE OF NEW YORK,

Against

VICTOR THOMAS,

Defendant.

DECISION

April A. Newbauer, J.

Defendant by indictment is charged with Assault in the First Degree and related charges. Defendant filed an omnibus motions to suppress any statements made by the defendant on the grounds that the statements were not voluntary and were the subject of an illegal search and seizure. A *Huntley/Dunaady* hearing was granted.

On August 4, 2016 a hearing was conducted to determine the admissibility of the statements attributed to the defendant.

Appendix E

FINDINGS OF FACT

The People called one witness, Police Officer Ramon Rodriguez of the 48th precinct, Bronx County. Officer Rodriguez, in his fourth year with the NYPD, was assigned to a crime reduction team on September 6, 2015. While on duty detectives in the 48th precinct squad played for him a video of an incident that had occurred earlier in the day. The officer believed the video footage was obtained from a nearby restaurant. The detectives did not tell Officer Rodriguez anything about what was on the video, but just to "watch this incident." The officer viewed the entire video from two camera angles; he saw a large group of people beating a man. Some individuals were attempting to assist the victim and stop the fight. Officer Rodriguez recognized Victor Thomas, who pointed what appeared to be a silver firearm at the people who were trying to break up the fight. Officer Rodriguez knew it was the defendant because he saw him nearly every day in the vicinity of East 1983rd Street and Washington Avenue and had arrested him twice before. The officer knew his name because he obtained his pedigree information when he first arrested him. Officer Rodriguez also described another specific encounter he had with the defendant, when Mr. Thomas was playing dominoes in a group and the officer stopped his police car and checked whether there was any illegal activity connected to the game, such as drinking. There was not.

After seeing the video, Officer Rodriguez informed the detectives that he recognized Victor Thomas, and a detective advised him that if he could "get him now" he could "take the arrest," So Officer Rodriguez and a

sergeant went out in the field to look for the defendant. At about 8 p.m. they arrived at the intersection of Bassford Avenue and East 183rd Street and arrested the defendant. The defendant was wearing a white shirt, green basketball shorts and green Jordan sneakers, the same items as were worn by the individual in the video.

Officer Rodriguez approached the defendant, and as he did so, the defendant threw a medium sized ziplock bag to the ground. The officer applied handcuffs, and although the defendant stiffened his arms he complied with the officer's directions. Officer Rodriguez told the defendant that the detectives wanted to ask him questions. The defendant asked repeatedly, "for what?", and the officer kept saying, "You'll find out when you speak to the detectives." During the ride back to the 48th precinct, this same dialogue continued, and according to the officer at times the defendant was "loud" and "very hostile." When they reached the precinct, the defendant kept shouting and asking what he was doing there and what does he (the detective) want to talk about. In front of the desk sergeant, Detective Gross showed defendant Thomas a still photo from the video and said, "you're here to speak to me about this," and the defendant replied "you got me." The defendant was not told or read *Miranda* warnings before this interaction.

CONCLUSIONS OF LAW

The People have the initial burden of production at a suppression hearing of providing evidence that the police conduct was legal. *People v. Malinsky*, 15 N.Y.2d 86 (1965). Probable cause exists when the facts and circumstances

known to the arresting officer warrant a prudent person in believing that the offense has been committed (*People v. Oden*, 36 N.Y.2d 382, 384) and that the person arrested is the perpetrator (see *People v. Carrasquillo*, 54 N.Y.2d 248, 254), The establishment of probable cause requires a fact-based determination that considers the "totality of the circumstances;" *Illinois v. Gates*, 462 U.S. 273, 236, 103 S. Ct. 2317 (1983); *Spinelli v. United States*, 393 U.S. 410, 419, 89 S. Ct. 584 (1969).

Given the facts developed at this suppression hearing, this Court credits the testimony of Officer Rodriguez and finds that he had probable cause to arrest the defendant on September 6, 2015 based on video surveillance footage of an assault that took place earlier that morning which captured the defendant removing a silver gun from his shorts and pointing it at one or more individuals. Officer Rodriguez testified that he knew the defendant very well from prior arrests as well as from numerous interactions the officer had with the defendant during his shifts. Officer Rodriguez went to a location where he had seen the defendant numerous times and arrested him. The Court finds that the People established probable cause to arrest the Defendant.

The People have met their burden of establishing that the defendant's statement was voluntary and not the result of custodial interrogation. The statement was not the result of any conduct by the officers intending to elicit an incriminating admission. *See, People v. Rivers*, 56 N.Y.2d 476, 480 (1982); *People v. Mercado*, 92 A.D.3d 458 (1st Dept. 2012). The defendant was in custody at the time of his statement, "You got me."

Appendix E

The issue before the Court is whether law enforcement actions rose to the level of the functional equivalent of interrogation violative of the defendant's rights to *Miranda* warnings prior to being questioned by law enforcement. See *Miranda v. Arizona*, 86 S.Ct. 1602 (1966). This case is similar to *People v. Acosta*, 132 AD3d 466 (1st Dept. 2015) inn which the court found that a detective's brief response to an inquiry by defendant concerning the reason for his arrest constituted an innocuous reply to defendant's question, not reasonably likely to elicit an incriminating response, and part of an effort to discourage the defendant's agitated outbursts. While *en route* to and at the 48th precinct desk, the defendant continually asked why he was being arrested and why he was at the police precinct. The defendant was in custody and had not received *Miranda* warnings. The detective placed a still photograph from a video surveillance camera purportedly depicting the defendant with a silver handgun. It was at this point the defendant made his statement. As described by Officer Rodriguez, Detective Gross's presentation of the still photo was designed to address the defendant's repeated concerns. It was not the functional equivalent of interrogation. The Court finds that the actions of the detective did not amount to conduct which was intended to evoke an incriminating response. *People v. Rivers*, 56 NY2d 476 (1982); *People v. Lynes*, 49 NY2d 286.

The defendant's statement was spontaneous and not the product of custodial interrogation. There was no interrogation or its functional equivalent. See *People v. Acosta*, 132 AD3d 466 (1st Dept 2015). *See also, People v. Richardson*, 134 AD3d 440 (1st Dept. 2015)

(although defendant was in custody and had not received *Miranda* warnings, his inquiry about why he was being charged with a felony was "immediately met by a brief and relatively innocuous answer by the officer" did not constitute interrogation or its functional equivalent); *People v. Frost*, 16 AD3d 351 (1st Dept. 2005)(detective's brief statement to defendant in response to defendant's inquiry as to how he had been identified did not constitute the functional equivalent of interrogation and thus did not require *Miranda* warnings); *People v. Thomas*, 174 AD2d 447 (1st Dept. 1991) (officer merely advised defendant of accusations made against him which does not constitute either formal questioning or its functional equivalent); *People v. Smith*, 160 AD2d 472 (1st Dept. 1990) (defendant's statement while in a holding cell that "you got me" when the officer extracted cash from a hiding place in the cell was admissible as a spontaneous declaration and not the product of custodial interrogation).

The defendant's reliance on *People v. Ferro*, 63 NY2d 316 (1984) in this case is misplaced. In *Ferro*, the defendant had already invoked his right to remain silent following his arrest for murder and then abandoned it later in an attempt to speak to the district attorney. Knowing that the defendant wished to speak to the district attorney, the officer told the defendant that he first had to reveal to the officer what he wanted to speak about with the district attorney. Then, the officer left and returned a short time later with furs that had been stolen from the decedent's apartment and placed them directly in front of the defendant's cell and Ferro made an incriminating statement. The Court of Appeals held that Ferro's right

to remain silent was not scrupulously honored warranting suppression of the statements. 63 NY2d at 322-323.[1]

Defendant Thomas was not read *Miranda* warnings and did not invoke his right to remain silent. The defendant questioned why he was being arrested and in response, the detective showed him a still photograph from a video surveillance recording. As this does not constitute either formal questioning or its functional equivalent, the defendant's motion to suppress his statement is denied.

The Court finds that the People have met their burden of proving the voluntariness of the statements made by defendant beyond a reasonable doubt. See, *People v. Holland*, 48 N.Y.2d 861 (1979).

Accordingly, for the foregoing reasons, the Defendant's motion to suppress the statement attributed to him is denied.

ENTERED,

Dated: Bronx, New York
August 9, 2016

/s/_____
Honorable April A. Newbauer

1. Implicit in the decision here is that this case does not involve Sixth Amendment elicitation principles as in *People v. Ferro.*

APPENDIX F — DENIAL OF REHEARING OF THE APPELLATE DIVISION OF THE SUPREME COURT, FIRST JUDICIAL DEPARTMENT, NEW YORK COUNTY, DATED MAY 1, 2018

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on May 1, 2018.

M-809
Ind. No.
2760/15

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

VICTOR THOMAS,

Defendant-Appellant.

PRESENT: Hon. John W. Sweeny, Jr., Justice Presiding,
Sallie Manzanet-Daniels
Troy K. Webber
Marcy L. Kahn
Peter H. Moulton, Justices.

Defendant-appellant having moved for reargument of the decision and order of this Court, entered on February 1, 2018 (Appeal No. 5607),

Appendix F

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

/s/_____
CLERK

APPENDIX G — WAIVER OF THE RIGHT TO APPEAL

WAIVER OF THE RIGHT TO APPEAL

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 71

Indictment or SCI #:
2760/15

THE PEOPLE OF THE STATE OF NEW YORK,

v.

VICTOR THOMAS,

Defendant.

The defendant, in consideration of and as part of the plea agreement being entered into hereby waives any and all rights to appeal including the right to file a notice of appeal from the judgment of conviction herein, with the exception of any constitutional speedy trial claim which may have been advanced, the legality of the sentence, my competency to stand trial, and the voluntariness of this plea and waiver.

The undersigned defendant executed this waiver after being advised by the Court of the nature of the rights being waived. The defendant has been advised of the right to appeal (CPL 4S0.10), to prosecute the appeal as a poor person, to have an attorney assigned in the event that the defendant is indigent, and to submit a brief and

argue before the appellate court on any issue relating to the conviction or sentence.

I waive my right to appeal and to file a notice of appeal voluntarily and knowingly after being fully apprised of my appellate rights by the Court and my attorney Ms. Meis standing beside me. I have had a full and fair opportunity to discuss these matters with my attorney and any questions which I may have had have been answered to my satisfaction.

Dated: 8/10/16

/s/_____
Defendant

/s/_____
Attorney for Defendant

The above defendant appeared before this court on this date and in open Court, in the presence of this Court and with the approval of this Court, and with the advice and consent of defendant's attorney, signed the foregoing waiver of said defendant's right to appeal and to file a notice of appeal.

Dated: 8/10/16

Hon. M. Gross

/s/_____
J. S. C.

APPENDIX H — *STATE OF IDAHO V. NEVAREZ*, NO. 47342-2019 (SUPREME COURT OF THE STATE OF IDAHO), ORDER OF THE SUPREME COURT OF THE STATE OF IDAHO, FILED DECEMBER 5, 2019

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court Docket
No. 47342-2019

Canyon County District Court No.
CR14-18-03316

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JOE ANGEL NEVAREZ,

Defendant-Appellant

ORDER GRANTING MOTION TO DISMISS APPEAL

A MOTION TO DISMISS APPEAL AND STATEMENT IN SUPPORT THEREOF was filed by Respondent on September 20, 2019. Thereafter, a MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL was filed by Appellant on October 4, 2019, followed by a RESPONSE TO "MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL"

filed by Respondent on October 9, 2019. Therefore, after due consideration,

IT IS HEREBY ORDERED that Respondent's MOTION TO DISMISS APPEAL be, and is hereby GRANTED and the above-entitled Appeal is DISMISSED.

Dated 12/05/2019.

By Order of the Supreme Court

/s/ Karel A. Lehrman
Karel A. Lehrman
Clerk of the Courts

APPENDIX I — *STATE OF IDAHO V. NEVAREZ*, NO. 47342-2019 (SUPREME COURT OF THE STATE OF IDAHO), PLAINTIFF-RESPONDENT'S RESPONSE TO OPPOSITION TO MOTION TO DISMISS APPEAL, FILED OCTOBER 9, 2019

IN THE SUPREME COURT
OF THE STATE OF IDAHO

No. 47342-2019

Canyon Co. Case No.
CR14-18-3316

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JOE ANGEL NEVAREZ,

Defendant-Appellant.

RESPONSE TO "MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL"

COMES NOW, the State of Idaho, plaintiff-respondent, by and through its authorized representative, the Attorney General of the State of Idaho, and responds to Nevarez's "MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL," filed on October 4, 2019 (hereinafter "Memorandum"). The appeal must be dismissed because Nevarez waived his right to appeal as part of his plea agreement.

The applicable procedure to dismiss an appeal was set out in *McKinney v. State*, 162 Idaho 286, 296, 396 P.3d 1168, 1178 (2017). In that case the Court stated that when

the appeal waiver is brought to the Court's attention it would "give the defendant an opportunity to show good cause why the appeal should not be dismissed. If the defendant cannot do so, we will dismiss the appeal." *Id.* at 286, 396 P.3d at 1178. In this case Nevarez entered a plea agreement whereby he waived the right to appeal. The state has brought the waiver to the Court's attention by a motion to dismiss. Nevarez' response is to point out that the waiver does not prevent him from challenging the validity of the waiver itself. (Memorandum, p. 1.) The state does not dispute that a waiver does not prevent a party from challenging the waiver itself, on the logic that an invalid waiver is no bar. However, Nevarez does not claim that he challenged the validity of the waiver in the district court, despite ample opportunity to do so.

More importantly, Nevarez does not claim that he actually intends to raise a claim that his waiver is invalid. Nor does he support his response with any evidence that his waiver is invalid. Rather, he contends that an appellate record must be prepared for him to decide whether he wants to raise this issue. (Memorandum, p. 2.) Such is not good cause to allow the appeal to proceed in the face of a facially valid waiver.

To show "good cause" a party must demonstrate facts that "rise[] to the level of a legal excuse." *State v. Young*, 136 Idaho 113, 116, 29 P.3d 949,952 (2001). *See also Martin v. Hoblit*, 133 Idaho 372, 375, 987 P.2d 284, 287 (1999). Here Nevarez asserts that the appeal should proceed *merely so he can search an appellate record for unwaived issues.* He does not claim that he will ultimately find any such issues. The claim of a mere possibility that Nevarez will assert an unwaived issue does not establish good cause

any more than a claim that the mere possibility the Court has jurisdiction establishes a Court's jurisdiction.

In addition, filing an appeal to merely ascertain whether Nevarez can pursue the appeal (or is barred by his own waiver) deprives the state of its bargain in the plea agreement. A plea waiver achieves the twin goals of finality and reduction of expenses. Allowing an appeal to proceed for months and incurring the costs to the state of preparing a record, preparing a transcript, paying an attorney to review said record and transcript on the mere chance that the appellate attorney will come to a different conclusion than trial counsel (who did not elect to file a motion to withdraw the guilty plea with complete access to the record), and, finally, paying for its own attorney, would render the appeal waiver in this case less than useless.

The only record before this Court is that Nevarez "enter[ed] into this stipulated, binding plea agreement knowingly, voluntarily and intelligently, and that his decision is not the result of threats or coercion by any individual." (Exhibit A, ¶ 11) Nevarez wishes this court to find "good cause" based on speculation of what the record might show. Because Nevarez waived his right to appeal and stipulated that the waiver was knowing, voluntary and intelligent, his mere desire to prepare a record to see if there is evidence contrary to his stipulation is not good cause and the appeal should be dismissed.

DATED this 9th day of October, 2019.

/s/ Kenneth Jorgensen
KENNETH JORGENSEN
Deputy Attorney General

APPENDIX J — *STATE OF IDAHO V. NEVAREZ*, NO. 47342-2019 (SUPREME COURT OF THE STATE OF IDAHO), DEFENDANT-APPELLANT'S MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL, FILED OCTOBER 4, 2019

IN THE SUPREME COURT
OF THE STATE OF IDAHO

NO. 47342-2019

CANYON COUNTY NO.
CR14-18-3316

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JOE ANGEL NEVAREZ,

Defendant-Appellant.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL

Joe Nevarez objects to the State's motion to dismiss his appeal, and he offers this memorandum explaining why dismissal would be inappropriate at this juncture.

In its motion to dismiss, the State correctly points out that Mr. Nevarez entered into a plea agreement with the State, pursuant to which he purported to waive certain rights, including his right to appeal the judgment and the

sentence. Such appellate waiver provisions are generally enforceable, so long as they are knowing, intelligent, and voluntary. *State v. Murphy*, 125 Idaho 456-57 (1994). "[H]owever, no appeal waiver serves as an absolute bar to all appellate claims." *Garza v. Idaho*, __ U.S. __, __, 139 S. Ct. 738, 744 (2019). Certain appellate claims are "unwaiveable." *Id.* at 745. For example, "defendants retain the right to challenge whether the waiver itself is valid and enforceable—for example, on the grounds that it was unknowing or involuntary." *Id.*; *accord id.* at 747, 748.

Whether the defendant's appellate rights were knowingly, intelligently, and voluntarily waived is a question that may be litigated in the appeal itself. *See Garza*, 139 S. Ct. at 745, 747, 748. *See, e.g., State v. Cope*, 142 Idaho 492, 496-97 (2006) (evaluating on appeal whether the appellate waiver in the plea agreement was knowing, intelligent, and voluntary); *Murphy*, 125 Idaho at 457 (same). In determining whether the defendant validly waived his appellate rights as part of a plea agreement, this Court "employ[s] the same analysis as [it] would in determining the validity of any plea of guilty," and it asks whether "*the entire record* shows the waiver was made voluntarily, knowingly, and intelligently." *Murphy*, 125 Idaho at 456-57 (emphasis added).

Given the standard for determining whether Mr. Nevarez's waiver of his appellate rights was validly made and, therefore, is currently enforceable, the State's motion to dismiss is premature. This inquiry necessarily requires examination of the appellate record—at a bare minimum, the transcript of the change of plea hearing, but perhaps other materials, such as the competency

evaluation that was undertaken in this case—which are currently unavailable to this Court or the parties' counsel, pending preparation and lodging of the Clerk's Record and Reporter's Transcript. Accordingly, Mr. Nevarez asks that this Court deny (without prejudice) the State's motion to dismiss this appeal until it can determine from the "entire record" whether Mr. Nevarez's appellate waiver was made voluntarily, knowingly, and intelligently.

DATED this 4th day of October, 2019.

/s/ Erik R. Lehtinen
ERIK R. LEHTINEN
Chief, Appellate Unit

APPENDIX K — *STATE OF IDAHO V. NEVAREZ*, NO. 47342-2019 (SUPREME COURT OF THE STATE OF IDAHO), PLAINTIFF-RESPONDENT'S MOTION TO DISMISS APPEAL, FILED SEPTEMBER 20, 2019

IN THE SUPREME COURT
OF THE STATE OF IDAHO

Supreme Court No. 47342-2019

Canyon Co. Case No. CR14-18-3316

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JOE ANGEL NEVAREZ,

Defendant-Appellant.

MOTION TO DISMISS APPEAL AND STATEMENT IN SUPPORT THEREOF

COMES NOW, the State of Idaho, Plaintiff-Respondent, by and through its authorized representative, the Attorney General of the State of Idaho, and pursuant to Rule 32, I.A.R., hereby moves this Court for an order dismissing, with prejudice, the appeal in this case. The basis for the state's motion is that Nevarez waived his appeal rights as part of his plea agreement.

Appendix K

Attached to this motion as Exhibit A is the plea agreement entered by the parties in this case and other pending cases against Nevarez. Under that agreement Nevarez agreed to plead guilty in this case to eluding a police officer and possession of a controlled substance. (Exhibit A, ¶¶ 1, 5.) The parties stipulated to binding concurrent sentences of five years with three and one-half years determinate for eluding and five years indeterminate for possession. (Exhibit A, ¶ 7.) The district court followed the binding plea agreement and imposed the agreed-upon sentences. (Exhibit B ("Judgment and Commitment").) As another condition of the plea agreement Nevarez "specifically waives and gives up his right to appeal the judgment and sentence" imposed by the district court. (Exhibit A,¶ 9.)

Nevarez has filed an appeal from the court's judgment wherein the court imposed the agreed-upon sentences. He has, however, waived his right to this appeal as part of his plea agreement. (Exhibit A, ¶ 9.) The state therefore seeks dismissal of this waived appeal.

Opposing counsel has not been contacted regarding this Motion.

DATED this 20th day of September, 2019.

/s/_____
KENNETH K. JORGENSEN
Deputy Attorney General

Appendix K

EXHIBIT A

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF CANYON

CASE NO. CR14-l8-03316
CR 14-18-10034
CR 14-19-02181

THE STATE OF IDAHO

Plaintiff,

vs.

JOE ANGEL NEVAREZ
D.O.B. 02/22/1971

Defendant.

RULE 11

COMES NOW, Plaintiff, State of Idaho ("State"), by and through its attorney, Chris J. Berglund, Deputy Canyon County Prosecuting Attorney, and Joe Angel Nevarez ("Defendant"), individually and through his attorney of record Paul Taber, and do hereby state as follows:

1. The Defendant is charged by Information in case CR14-18-03316 with the following criminal acts:

a. Eluding a Peace Officer, a violation of Idaho Code §49M-1404(2).

b. Felony Possession of a Controlled Substance, a violation of Idaho Code § 37-2732(c)(1).

2. The Defendant is charged by Information in case number 14-18-10034 with the following criminal acts:

a. Aggravated Driving Under the Influence, a violation of Idaho Code §18-8006.

b. Vehicular Manslaughter, a violation of Idaho Code §18-4006-3(a)

3. The Defendant is charged by Indictment in case number 14-19-02181 with the following criminal act:

a. Involuntary Manslaughter, a violation of Idaho Code §18-4006(2).

4. Pursuant to this agreement the State is to file an Amended Information in case Crl4-18-10334 which alleges the following criminal acts:

a. Aggravated Driving Under the Influence, a violation of Idaho Code §18-8006.

b. Misdemeanor Vehicular Manslaughter in violation of Idaho Code §18-4006(3)(c) and 18-4007(3)(c).

5. The Defendant agrees to plead guilty to Counts I and II of the Information in case CR14-18-03316 and to Count II of an Amended Information in case number 14-18-10334 which alleges Misdemeanor Vehicular Manslaughter as appears in the Information in case CR14-18-03316 and the Amended Information in Case 14-18-10334:

    a. Eluding a Peace Officer. That the Defendant, Joe Angel Nevarez, on or about the 13th day of February, 2018, in the County of Canyon, State of Idaho, did operate a motor vehicle, a 1997 Dodge Caravan at or about 2nd St S and/or 18th Ave and/or Roosevelt and/or Maple St and/or Sherman and/or 12th Ave and willfully fled a pursuing police vehicle after being given a visual signal and/or audible signal to stop, and in so doing traveled in excess of thirty (30) miles per hour above the posted speed limit and/or caused damage to the property of another or bodily injury to another and/or drove the vehicle in a manner as to endanger or be likely to endanger the property of another or the person of another.

    b. Possession of a Controlled Substance Felony. That the Defendant, Joe Angel Nevarez, on or about the 13th day of February, 2018, in the County of Canyon, State of Idaho, did unlawfully possess a controlled substance, to-wit: Methamphetamine, a Schedule II controlled substance.

c. Misdemeanor Vehicular Manslaughter. That the Defendant, Joe Angel Nevarez, on or about the 13 day of February, in the County of Canyon, State of Idaho, did, while operating a green 1997 Dodge Caravan, commit the unlawful act of driving recklessly without gross negligence, and the defendant's operation of the motor vehicle in such an unlawful manner was a significant cause contributing to the death of Georgia Cabrerra.

6. If the defendant agrees return all photographs in his possession which depict Georgia Cabrerra.

7. Pursuant to Idaho Criminal Rule 11(f)(I)(C), the parties stipulate and agree to the following sentence recommendations:

   a. The court shall impose no more and no less than 3.5 years fixed with credit for time served on the Eluding a Peace Officer charge.

   b. The court shall impose no more and no less than 1.5 year indeterminate on the Eluding a Peace Officer charge.

   c. The court shall impose a sentence of no more and no less than 0.0 years fixed with credit for time served on the Possession of a Controlled Substance charge which shall run consecutive to the Eluding a Peace

Officer charge from the same case and same Information

d. The court shall impose a sentence of no more and no less than 5 years indeterminate on the Possession of a Controlled Substance Charge which shall run Consecutive to the Eluding a Peace Officer charge from the same case and same Information.

e. The court shall impose a sentence of no more and no less than 365 days with credit for time served on the Misdemeanor Vehicular Manslaughter charge and any remaining days to be served on that count shall be concurrent with the sentence on Count I of the Information in case 14-18-03316.

8. The parties agree that, pursuant to Idaho Criminal Rule 11(f)(I)(C), this Court shall be bound by the parties' joint stipulation as outlined above.

9. Pursuant to Idaho Criminal Rule 11(f)(1) and *State v. Murphy*, 125 Idaho 456, 872 P.2d 719 (1994), the Defendant specifically waives and gives up his right to appeal the judgment and sentence imposed by this Court.

10. The Defendant specifically relieves this Court from its obligation to notify him of his appellate rights at sentencing under Idaho Criminal Rule 33(a)(3).

11. The Defendant acknowledges that he is entering into this stipulated, binding plea agreement knowingly, voluntarily and intelligently, and that his decision is not the result of threats or coercion by any individual, including his attorneys, any representative of the State, or this Court.

12. The Defendant acknowledges that he is aware of the maximum penalty for the crime of Eluding a Peace Officer and Possession of a Controlled Substance as alleged in the Information in case CR14-18-03316 and the crime of Misdemeanor Vehicular Manslaughter in case 14-18-10334 as alleged in the Amended Information.

13. The Defendant acknowledges that he is aware of his right to plead not guilty, the right to have a trial by a jury of his peers, the right to require the State to prove the charges against him beyond a reasonable doubt, the right to confront and cross-examine witnesses and to present witnesses and evidence on his own behalf, and the right to remain silent and not be compelled to be a witness at the trial or to incriminate himself in any way.

14. The Defendant understands that, by pleading guilty, he is waiving the right to have a trial by jury, that he gives up the right to require the State to prove the charges against him beyond a reasonable doubt, that he gives up the right to confront and cross-examine witnesses and to present witnesses and evidence on his own behalf

in defense of the charges, and that he gives up his right to remain silent.

15. The Defendant understands that Rules 4 and 11(c) of the Idaho Appellate Rules provide him the right to file an appeal from any sentence this Court may impose following this plea of guilty to the crimes of Eluding a Peace Officer and Possession of a Controlled Substance as alleged in the Information in case 14-18-03316 and the crime of Misdemeanor Vehicular Manslaughter as alleged in the Amended Information in case CR14-18-10334 and also understands and acknowledges that he is knowingly, voluntarily and intelligently waiving his rights to appeal.

16. The Defendant understands that Idaho Criminal Rule 35 provides him the right to file a motion to reduce any sentence this Court may impose following his plea of guilty to the crimes of Eluding a Peace Officer and Possession of a Controlled Substance as alleged in the Information in case 14-18-03316 and the crime of Misdemeanor Vehicular Manslaughter as alleged in the Amended Information in case CR14-18-10334, and also understands and acknowledges that he is knowingly, voluntarily and intelligently waiving his right to file a motion pursuant to Idaho Criminal Rule 35 requesting a reduction of his suspended sentence, or otherwise request leniency that could result in a reduction of his sentence.

17. The parties acknowledge that nothing in this agreement limits the victims' rights to provide victim impact statements or otherwise abridges their rights under Idaho Code § 19-5306 or the Idaho Constitution or for the State to seek a Civil Penalty under the victims' rights statute.

18. The Defendant and the State have entered into this stipulated plea agreement with the intent that the Defendant cannot appeal his sentence or file a motion for leniency pursuant to Rule 35, regardless of the sentence entered by this Court, unless this Court enters an illegal sentence.

19. With the exception of those terms expressly addressed in this agreement, all other terms and conditions of sentencing are left to the sound discretion of the Court. The Defendant retains all legal rights except those expressly waived in this agreement.

20. The parties agree that this agreement constitutes the entire agreement between the Defendant and the State of Idaho, and that no other promises or inducements have been made, either directly or indirectly by the State of Idaho or any of its agents regarding the disposition of this case. Additionally, the Defendant states that no person has threatened or coerced him, directly or indirectly, to enter into this agreement.

21. Counsel for the Defendant specifically state that they have read this agreement, have read and explained said agreement to the Defendant, and also state that, to the best of their knowledge and belief, the Defendant understands this agreement.

22. The Defendant specifically states that he has read this agreement, that he has had this agreement read and explained to him by his attorney, and that he is entering into this agreement knowingly, intelligently and voluntarily, and with a full understanding of its contents.

23. Defendant understands that the Court is not bound to accept this Plea Bargain Agreement and that if the Court should reject said Agreement, Defendant shall be allowed an opportunity by the Court to withdraw his plea of guilty to the charge and proceed to a trial on the original charges pursuant to Rule 11(f)(4), Idaho Criminal Rules. The Defendant is aware if the defendant persists to a jury trial and a guilty verdict is rendered, the disposition of this case may be less favorable to the defendant than that contemplated by the plea agreement.

24. If this Court does not accept this Rule 11 agreement and the Defendant withdraws his guilty plea, the State agrees the statements during the change of plea and on the change of plea form shall not be used in any future court

hearings except as contemplated under IRE 410(b)(3).

DATE: 6/12/19 /s/_____
CHRIS J. BERGLUND
Deputy Prosecuting Attorney

DATE: 6/12/19 /s/_____
PAUL TABER
Attorney for Defendant

DATE: 6/12/19 /s/_____
JOE ANGEL NEVAREZ
Defendant

Appendix K

EXHIBIT B

IN THE DISTRICT COURT OF THE THIRD
JUDICIAL DISTRICT OF THE STATE OF IDAHO
IN AND FOR THE COUNTY OF CANYON

CASE # CR14-18-03316

THE STATE OF IDAHO,

Plaintiff,

vs.

JOE ANGEL NEVAREZ,
SSN: XXX-XX-9085
D.O.B: 02/22/1971

Defendant.

JUDGMENT AND COMMITMENT

On this 5th day of August 2019, personally appeared Chris Berglund, Deputy Prosecuting Attorney for the County of Canyon, State of Idaho, the defendant Joe Angel Nevarez, and the defendant's attorney Paul Taber, this being the time heretofore fixed for pronouncing judgment.

IT IS ADJUDGED that the defendant has been convicted upon a plea of guilty to the offense of **Eluding a Peace Officer,** a felony, as charged in Count I of the Information, in violation of I.C. §49-1404(2), being

committed on or about the 13th day of February 2018; and **Possession of a Controlled Substance,** a felony, as charged in Count II of the Information, in violation of I. C. § 37-2732(c)(1), being committed on or about the 13th day of February 2018; and the Court having asked the defendant whether there was any legal cause to show why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant be sentenced, in Count I, to the custody of the Idaho State Board of Correction for a minimum period of confinement of three and one half (3.5) years, followed by a subsequent indeterminate period of confinement not to exceed one and one half (1.5) years, for a total unified term of five (5) years; and that the defendant be sentenced, in Count II, to the custody of the Idaho State Board of Correction for a minimum period of confinement of zero (0) years followed by a subsequent indeterminate period of confinement not to exceed five (5) years, for a total unified term of five (5) years. The sentence in Count II shall run consecutively with the sentence in Count I.

IT IS ORDERED that the defendant be given credit for two hundred ninety five (295) days of incarceration prior to the entry of judgment for this offense (or included offense) pursuant to I.C. § 18-309.

IT IS FURTHER ORDERED that the defendant pay court costs and fees in the total amount of $245.50, reimburse Canyon County for the cost of legal representation in the sum of $350.00 and pay restitution

pursuant to the Order of Restitution. The defendant's driving privileges shall be suspended for an absolute period of three (3) years, commencing 2/13/2018.

IT IS FURTHER ORDERED that the defendant shall submit a DNA sample and right thumbprint impression to the Idaho State Police or its agent, pursuant to I.C. §19-5506. Such sample must be provided within 10 calendar days of this order; failure to provide said sample within the 10 day period is a felony offense.

IT IS ADJUDGED that the defendant be committed to the custody of the Sheriff of Canyon County, Idaho, for delivery forthwith to the Director of the Idaho State Board of Correction at the Idaho State Penitentiary or other facility within the State designated by the State Board of Correction.

IT IS FINALLY ORDERED that the clerk deliver a certified copy of this Judgment and Commitment to the Director of the Idaho State Board of Correction or other qualified officer and that the copy serve as the commitment of the defendant.

DATED this 8 day of August 2019.

/s/_____
Thomas W. Whitney
District Judge

APPENDIX L — *STATE OF IDAHO V. NEVAREZ*, NO. CR14-18-3316 (DISTRICT COURT, THIRD JUDICIAL DISTRICT OF IDAHO, CANYON COUNTY), DEFENDANT-APPELLANT'S AMENDED NOTICE OF APPEAL, FILED SEPTEMBER 20, 2019

IN THE DISTRICT COURT OF THE THIRD JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR CANYON COUNTY

CASE NO. CR14-18-3316
S.C. DOCKET NO. 47342—2019

STATE OF IDAHO,

Plaintiff-Respondent,

v.

JOE ANGEL NEVAREZ,

Defendant-Appellant.

AMENDED NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT, STATE OF IDAHO, AND THE PARTY'S ATTORNEYS, BRYAN TAYLOR, CANYON COUNTY PROSECUTOR, 1115 ALBANY STREET, CALDWELL, ID 83605, AND THE CLERK OF THE ABOVE-ENTITLED COURT:

Appendix L

NOTICE IS HEREBY GIVEN THAT:

1. The above-named appellant appeals against the ~~State of Idaho~~ above-named respondent to the Idaho Supreme Court from the ~~final Decision and Order~~ Judgment and Commitment entered in the above-entitled action on the 8th day of August, 2019, the Honorable Thomas W. Whitney, ~~District Judge~~ presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the judgments or orders described in paragraph 1 above ~~is~~ are appealable orders under and pursuant to Idaho Appellate Rule (I.A.R.) 11(c)(1-9)

3. ~~That the defendant anticipates raising issues including, but not limited to:~~ A preliminary statement of the issues on appeal, which the appellant then intends to assert in the appeal, provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal, is/are:

> (a) Did the district court err in sentencing the defendant to a unified sentence of five (5) years with the first three and one-half (3.5) years determinate and the subsequent one and one-half (1.5) years indeterminate on Count I of the Information and five (5) years with zero (0) years determinate and five (5) years indeterminate on Count II of the Information, Count II running consecutive Count I?

4. There is a portion of the record that is sealed. That portion of the record that is sealed is the Pre-Sentence Investigation Report (PSI), and the Psychiatric Evaluation.

5. **Reporter's Transcript.** The appellant requests the preparation of the **entire reporter's standard transcript** as defined in I.A.R. 25~~(c)~~(d). The appellant also requests the preparation of the additional portions of the reporter's transcript:

(a) Change of Plea Hearing held on June 12, 219 (Court Reporter: Patricia Terry, no estimation of pages is listed on the Register of Actions); and

(b) Sentencing Hearing held on August 5, 2019 (Court Reporter: Kim Kofkins, no estimation of pages is listed on the Register of Actions).

6. **Clerk's Record.** The appellant requests the standard clerk's record pursuant to I.A.R. 28(b)(2). The appellant requests the following documents to be included in the clerk's record, in addition to those automatically included under I.A.R. 28(b)(2): ~~The defendant requests that the clerk's record contain only those documents automatically included as set out in I.A.R. 28(b)(2), including the Grand Jury Transcript if Indicted, and Jury Instructions requested and give, and Pre-Sentence Investigation.~~

Appendix L

(a) Affidavit of Probably Cause filed February 13, 2018;

(b) Notice of PTR Agreement filed February 14, 2018;

(c) Notice of Conflict Counsel & Assignment of Conflict Counsel filed July 17, 2018;

(d) Notice of Appearance filed July 17, 2018;

(e) Letter from Defendant filed December 4, 2018;

(f) Memorandum in Support of Defendant's Motion to Suppress filed February 18, 2019;

(g) Guilty Plea Advisory filed June 12, 2019;

(h) Rule 11 Plea Agreement filed June 12, 2019;

(i) Credit for Time Served (295 days) as of August 5, 2019;

(j) Letter from Defendant filed August 21, 2019;

(k) Letter from Defendant filed August 22, 2019; and

(l) Any exhibits, including but not limited to the PSI, the Psychiatric Evaluation, letters or victim impact statements, addendums to the PSI or other items offered at the sentencing hearing. Except that any pictures or depictions of child pornography necessary to the appeal need not be sent, but may be sought later by Motion to the Idaho Supreme Court.

7. I Certify:

(a) That a copy of this Amended Notice of Appeal has been served on the Court Reporter(s), Patricia Terry, and Kim Hofkins;

(b) That the appellant is exempt from paying the estimated fee for the preparation of the record because of the appellant is ~~an~~ indigent ~~person and is unable to pay said fee~~. (I.C. §§ 31-3220, 31-3220A, I.A.R. 27(f));

(c) ~~That the defendant is exempt from paying the appellate filing fee because he is indigent and is unable to pay said fee.~~ That there is no appellate filing fee since this is an appeal in a criminal case (I.C. §§ 31-3220, 31-3220A, I.A.R. 23(a)(8));

(d) ~~That the Defendant is exempt from paying the estimated transcript fee because he is an indigent person and is unable to pay said fee.~~ That arrangements have been made with Canyon County who will be responsible for paying for the reporter's transcript, as the client is indigent, (I.C. §§ 31-3220, 31-3220A, I.A.R. 24(h)); and

(e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

DATED this 20th day of September, 2019.

/s/ Erik R. Lehtinen
ERIK R. LEHTINEN
Chief, Appellate Unit

APPENDIX M — *STATE OF IDAHO V. NEVAREZ*, NO. CR14-18-3316 (DISTRICT COURT, THIRD JUDICIAL DISTRICT OF IDAHO, CANYON COUNTY), DEFENDANT-APPELLANT'S NOTICE OF APPEAL, FILED SEPTEMBER 4, 2019

IN THE DISTRICT COURT
OF THE THIRD JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND
FOR THE COUNTY OF CANYON

Case No. CR14-18-03316

Supreme Court No. 47342-2019

THE STATE OF IDAHO,

Plaintiff,

v.

JOE ANGEL NEVAREZ,

Defendant.

NOTICE OF APPEAL

TO: THE ABOVE-NAMED RESPONDENT, BRYAN TAYLOR, CANYON COUNTY PROSECUTOR, AND THE CLERK OF THE ABOVE ENTITLED COURT.

Appendix M

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Defendant appeals against the State of Idaho to the Idaho Supreme Court from the final Decision and Order entered against him in the above-entitled action on the 8th day of August 2019, the Honorable Thomas Whitney, District Judge, presiding.

2. That the party has a right to appeal to the Idaho Supreme Court, and the Judgment described in paragraph one (1) above is appealable pursuant to I.A.R. 11(c)(1).

3. That the Defendant requests the entire reporter's standard transcript as defined in Rule 25(a), I.A.R.

4. The Defendant requests that the clerk's record contain only those documents automatically included as set out in I.A.R. 28(b)(2), including the Grand Jury Transcript if Indicted, any Jury Instructions requested and given, and Pre-Sentence Investigation Report.

5. I certify:

    a) That a copy of this Notice of Appeal has been served on the reporter.

b) That the Defendant is exempt from paying the estimated transcript fee because he is an indigent person and is unable to pay said fee.

c) That the Defendant is exempt from paying the estimated fee for preparation of the record because he is an indigent person and is unable to pay said fee.

d) That the Defendant is exempt from paying the appellate filing fee because he is indigent and is unable to pay said fee.

e) That service has been made upon all parties required to be served pursuant to I.A.R. 20.

6. That the Defendant anticipates raising issues including, but not limited to:

a) Did the District Court err in sentencing the Defendant to a unified sentence of five (5) years with the first three and one-half (3.5) years determinate and the subsequent one and one-half (1.5) years indeterminate on Count I of the Information and five (5) years with zero (0) years determinate

and five (5) years indeterminate on Count II of the Information, Count II running consecutive to Count I?[1]

DATED this 28th day of August 2018.

PAUL R. TABER III

By /s/Paul Taber
Paul R. Taber III
Conflict Counsel for Defendant

1. Counsel for the Defendant is well aware that the Record reflects that Mr. Nevarez waived his right to appeal the sentence in his plea agreement pursuant to (I.C.R.) Rule 11. However, the United States Supreme Court recently held in *Garza v. Idaho*, 139 S.Ct. 738, 203 L.Ed.2d 77 that counsel is ineffective if no appeal is filed after a request by the Defendant. In that case the Defendant asked his counsel to file an appeal of his sentence and *only* an appeal of his sentence. While the Court seems to acknowledge that such a waiver was binding it nonetheless held that counsel was ineffective for not filing the requested appeal. Counsel for the Defendant is filing this appeal as he is the same counsel who was found by no less an authority than the United States Supreme Court to be ineffective for not filing an appeal in the *Garza* case.