



High Court To Judges: Appeal Waivers Aren't Sacrosanct

Jody Godoy

February 27, 2019

The U.S. Supreme Court made clear Wednesday that criminal defendants have the right to initiate an appeal even after pleading guilty and waiving most of their appeal rights, a ruling that some hope will prompt scrutiny of the commonplace practice of requiring such waivers in plea deals.

In *Garza v. Idaho*, the court considered whether or not a lawyer should be considered ineffective for failing to file a notice of appeal in cases where the defendant has already signed away the right to appeal as part of a plea agreement. The waivers are common in criminal cases and often prevent defendants from challenging their sentences.

The high court has said before that judges should automatically assume a defendant was harmed when a defense lawyer skips out at a critical juncture, such as appeal-filing time. *Garza* extended that concept to defendants who have already waived most of their appeal rights as part of a guilty plea.

Observers in the legal arena who spoke to Law360 on Wednesday lauded the ruling as an important protection of defendants' rights that has implications for judges and attorneys across the country.

In a 5-3 opinion, Justice Sonia Sotomayor wrote for the majority that while "the term 'appeal waivers' ... can misleadingly suggest a monolithic end to all appellate rights ... no appeal waiver serves as an absolute bar to all appellate claims."

Rory Little, a professor at the University of California, Hastings College of the Law, said the ruling was the first time the court discussed appeal waivers and their limits. Little said the ruling may

prompt more appeals and lead courts to scrutinize the terms of plea deals more closely. "This opinion is likely going to start a serious examination of exactly what the details are on appeal waivers," Little said.

The ruling also put criminal defense attorneys on notice that they should be filing a notice of appeal unless it's absolutely clear their client doesn't want to. After the *Garza* ruling, a failure to do so could lead to the lawyer being deemed ineffective.

"What conscientious lawyers should do is raise the question early and often," said Harry Sandick, a criminal defense attorney at Patterson Belknap Webb & Tyler LLP.

Both Sandick and Little said it may also be a good idea to put the answer in writing, whether in a memo in the attorney's file or a letter to or from the client.

When in doubt, attorneys should file a notice of appeal, according to Little. He reads Garza to mean that there's no such thing as a frivolous notice of appeal in a criminal case, especially since filing such a notice doesn't prevent dropping the appeal later.

In cases where defendants want to appeal, the ruling "creates a bright line rule" for lawyers, said "If a criminal defendant instructs his lawyer to file a notice of appeal, a lawyer must do so to protect his client's rights," Jaroslaw said. "It is immaterial whether the lawyer thinks an appeal would be meritless."

When a lawyer disagrees with a client on the wisdom of an appeal, a mechanism called an Anders brief allows the lawyer to explain that to appeals courts and let a different lawyer step in if warranted. Defendants do sometimes prevail on post-plea appeals, even in cases where it might seem at first glance that an appeal waiver cut off the possibility. U.S. v. Burden was one such case, where Sandick represented a defendant who had pled guilty under a deal that involved an appeal waiver. The Second Circuit allowed a challenge to the terms of the defendant's supervised release, since the waiver hadn't explicitly prohibited an appeal on that part of the sentence.

Since the majority of criminal cases end in plea deals, the Garza ruling has broad implications.

The court highlighted the fact that even an appeal waiver can't erase a defendant's right to challenge a plea as involuntary, said Jay Schweikert, a policy analyst at the Cato Institute.

Cato had weighed in with the Supreme Court in an amicus brief, urging the court to uphold defendants' rights to call the shots in their cases. On that front, Schweikert said the case is like one from last term, where the high court split along the same 5-3 line in holding that a defendant has the right to prevent counsel from admitting the client's guilt in court, even when the lawyer believes an admission of guilt will help the client avoid the death penalty.

Schweikert said the cases both involved defendants' rights to weigh potential consequences and make value judgments on such aspects as the importance of maintaining their innocence or challenging an involuntary guilty plea.

Garza touched on the possibility that a defendant who agreed to an appeal waiver would violate the plea deal by turning around and filing an appeal. But, according to the high court, that risk is up to the defendant to take.

"If we are going to allow them to risk the death penalty, it seems *a fortiori* that we should allow them to risk losing the benefits of a plea agreement," Schweikert said.