Plea Bargains that Waive Claims of Ineffective Assistance - Waiving *Padilla* and *Frye*

Nancy J. King[*]

In a criminal justice system where procedural rights are freely traded for sentencing and charging concessions, each heralded decision of the Supreme Court enforcing or expanding a right of the accused produces yet another bargaining chip for the defense. As rights expand, so do waivers of the opportunity to enforce those rights on review.[1] As one court stated, the government "enters into plea agreements to avoid costly litigation, not to postpone it."[2] It was, then, unsurprising when, amid the accolades for the Court's decisions in *Missouri v. Frye* and *Lafler v. Cooper,*[3] one ex-prosecutor suggested that defendants should have to waive the

* Lee S. & Charles A. Speir Professor of Law, Vanderbilt University Law School.

1. *See* Nancy J. King, *Regulating Settlement: What is Left of the Rule of Law in the Criminal Process?*, 56 DEPAUL L. REV. 389, 389-90 (2007); William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 791 (2006).

2. State v. Holloway, 980 N.E.2d 331, 335 (Ind. Ct. App. 2012).

3. *See* Missouri v. Frye, 132 S. Ct. 1399 (2012); Lafler v. Cooper, 132 S. Ct. 1376 (2012).

right to secure relief under these new cases if they want a plea deal.[4]

The fact is, courts already invoke waiver terms in plea agreements to block claims of poor representation alleged to have occurred before, during, and after the decision to plead guilty, and they are likely to continue to do so. Critics of this practice charge that that any advice to sign such a waiver is itself ineffective assistance, and that the waivers cannot be knowing and voluntary. I refute these arguments, explaining why courts will probably continue to conclude that defendants may, consistent with the Constitution, knowingly and voluntarily waive their right to later raise claims of ineffective assistance of counsel. Nevertheless, I also argue that it would be unwise to routinely enforce waivers of the right to raise claims alleging ineffective representation during bargaining, and suggest several strategies to avoid this result.

I. PLEA TERMS WAIVING CLAIMS OF INEFFECTIVE ASSISTANCE – A GROWING CONTROVERSY

A look at cases decided in the past year reveals that plea agreements already include express waivers of the right to raise ineffectiveness claims. These waiver provisions, which I will term "ineffectiveness waivers," may require the defendant to waive "any right [he] may have to collaterally attack, in any future proceeding, any order";[5] or "any claim [he] may have for ineffective assis-

4. *See* Bill Otis, *One Notable Case Showing Impact of and Import of* Lafler *and* Frye, SENT'G L. & POL'Y BLOG, (Nov. 27, 2012, 9:33:08 PM), http://sentencing.typepad.com/sentencing_law_and_policy/2012/11/one-notable-case-showing-impact-and-import-of-lafler-and-frye.html (providing a draft of possible wording for such a waiver including "[k]nowing nonetheless that he may receive poor advice from his counsel, and that such advice (or failure to advise) may result in an outcome less favorable than he would receive with a typically competent lawyer, the defendant waives any remedy that would involve vacating his conviction or lessening the sentence ultimately imposed, in exchange for the government's agreement to negotiate a disposition of this case").

5. United States v. Barrera-Cabello, No. 7:10CR00050, 2012 WL 5418291, at *1 (W.D. Va. Nov. 6, 2012); *see also* United States v. Jackson, No. 08-20150-02, 2012 WL 5869822, at *1 (D. Kan. Nov. 19, 2012) (The defendant waived "any right to appeal or collaterally attack any matter in connection with this prosecution, the defendant's conviction, or the components of the sentence to be imposed . . . ."); Robledo-Soto v. United States, No. 1:11-CR-00328, 2012 WL 5396395, at *1 (E.D. Cal. Nov. 2, 2012) (The defendant agreed "'not to contest his plea, conviction and sentence in any post-conviction proceeding . . . .'"); United States v. Jaquez-Cebayos, No. CV 12-1918, 2012 WL 5416582, at *2 (D. Ariz. Oct. 31, 2012) (The defendant waived "any right to file an appeal, any collateral attack, and any other writ or motion that challenges the conviction, . . . or any aspect of the defendant's sentence or disposition, including the manner in which the sentence or disposition is determined . . . .").

tance of counsel known and not raised by [him] with the Court at the time of sentencing";[6] or "the right to appeal or collaterally attack the conviction and sentence in any post-conviction proceeding . . . on any ground, except [if the sentence exceeds the statutory maximum] . . . ."[7] To those readers from jurisdictions where courts refuse to enforce such waivers[8] or where plea waivers exempt ineffectiveness claims,[9] such waivers may appear draconian.

6. United States v. Smith, No. 10-7564, 2012 WL 5503972, at *1 (4th Cir. Nov. 14, 2012). For similar waivers, *see* United States v. Carrillo-Castellon, No. 4:11CR3086, 2013 WL 66641, at *1 (D. Neb. Jan. 4, 2013) (The defendant waived "any and all rights to contest the defendant's conviction and sentence in any post-conviction proceedings . . . except [a later ruling that the charge fails to state a crime] or [t]he right to seek post-conviction relief based on ineffective assistance of counsel, or prosecutorial misconduct, if the grounds for such claim could not be known by the defendant at the time the Defendant enters the guilty plea contemplated by this plea agreement."); Fuller v. United States, No. 7:10-CR-21-1, 2012 WL 5183559, at *1 (E.D.N.C. Oct. 18, 2012) (The defendant waived all grounds of ineffective assistance of counsel or prosecutorial misconduct known at the time of the plea.).

7. Jackson v. United States, No. CV212-154, 2012 WL 6839219, at *3 (S.D. Ga. Nov. 5, 2012). A term may also provide that challenging the plea is a breach of the agreement. Johnson v. Williams, No. 1:12-CV-01186-TWT, 2012 WL 6700751, at *3 (N.D. Ga. Nov. 27, 2012) (The plea stated that the defendant "agrees to not directly, indirectly, or collaterally challenge his conviction and sentence underlying this guilty plea . . . [and, if he does so] be subject to prosecution in the courts of this State or the United States, for any and all offenses—indicted and unindicted—arising from the incident underlying this guilty plea, regardless of any statutes of limitation, right to speedy trial, or any other bar to prosecution.") .

8. *E.g.,* United States v. Guillen, 561 F.3d 527, 530 (D.C. Cir. 2009) (noting that waivers should not be enforced if "the defendant makes a colorable claim that he received ineffective assistance of counsel in agreeing to the waiver" (citing United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004); United States v. Teeter, 257 F.3d 14, 25 n.9 (1st Cir. 2001))). For state cases banning all ineffectiveness waivers, see Yarbrough v. State, 841 So.2d 306, 308 (Ala. Crim. App. 2002) (stating "'because ineffective assistance of counsel may, in some circumstances, render a guilty plea involuntary, . . . we believe that claims of ineffective assistance of trial counsel may also be raised in a Rule 32 petition, despite a waiver of collateral review'" (quoting Boglin v. State, 840 So. 2d 926, 931 (Ala. Crim. App. 2002) (holding that "although a waiver of the right to seek post conviction relief given as part of a plea agreement is generally enforceable, it cannot operate to preclude a defendant from filing a Rule 32 petition challenging the voluntariness of the guilty plea, the voluntariness of the waiver, *or* counsel's effectiveness") (emphasis added))); Commonwealth v. Pike, 762 N.E.2d 874, 878 (2002) (noting that claims of ineffective assistance are not waived because the defendant agreed to waive his direct appeal on advice of his trial counsel). *Compare* State v. Ward, 118 P.3d 1122, 1129 n.5 (Ariz. App. 2005) (citing State v. Ethington, 592 P.2d 768, 769-70 (Ariz. 1979) (noting that public policy bars enforcement of any waiver of review in a plea agreement), *with* State v. Ree, No. 2 CA-CR 2012-0237-PR, 2012 WL 5269416, at *1 (Ariz. App. Oct. 25, 2012) ("By entering into a plea agreement and thereby entering a guilty plea, a defendant waives all non-jurisdictional defects and defenses, including claims of ineffective assistance of counsel, except those that relate to the validity of a plea.") (citation omitted).

9. For cases involving plea agreements in which the waivers exempted ineffectiveness claims, *see, e.g.*, United States v. Apodaca, No. 11-4342, 2013 WL 264329 (6th Cir. Jan. 23, 2013) (on appeal from the Northern District of Ohio); United States v. Malone, No. 12-3110, 2013 WL 136029 (10th Cir. Jan. 11, 2013) (challenging denial of habeas petition from the District of Kansas); United States v. Pendergrass, No. 11-5134, 2013 WL 71786 (4th Cir.

Yet these broad waivers have barred ineffectiveness claims for years,[10] and today, they regularly block claims of pre- and post-plea deficiencies in representation in state and federal court.[11]

Defenders have recently singled out waivers of ineffectiveness claims for targeted attention,[12] and some judges have expressed

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Jan. 8, 2013) (on appeal from the District of South Carolina); United States v. Logan, No. 11-10352, 2012 WL 5951543 (5th Cir. Nov. 29, 2012) (on appeal from the Northern District of Texas); United States v. Roque, No. 11-4974, 2012 WL 5898024 (4th Cir. Nov. 26, 2012) (on appeal from the Western District of North Carolina); United States v. Cantrell, No. 11-51221, 2012 WL 5292869 (5th Cir. Oct. 29, 2012) (on appeal from the Western District of Texas); *see also* DOJ Memo to Prosecutors: Department Policy on Early Disposition or "Fast-Track" Programs, 2012 WL 6620439, 25 FED. SENT. R. 53, 56 (2012). (containing the DOJ policy for fast-track agreements which exempts claims of ineffective assistance of counsel from waiver).

10. *See* Nancy J. King & Michael O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209 (2005) (empirical study of the use of such waivers in federal cases, noting that 65% of a random sample of plea agreements submitted to the Sentencing Commission in 2003 included some form of waiver of review, with only 28% of these including a specific exemption for ineffective assistance claims).

11. *E.g.,* Bryan v. State, 674 S.E.2d 390, 392 (Ga. Ct. App. 2009) (barring appeal of trial court's denial of motion for a new trial in which defendant contended his trial counsel rendered ineffective assistance); People v. Bellamy, 925 N.Y.S.2d 701, 702 (N.Y. App. Div. 2011) (barring claim of ineffective counsel in connection with the defendant's decision not to accept a more favorable offer earlier, as the argument "does not implicate the voluntariness of his later plea and, therefore, is barred by the valid waiver"); Spoone v. State, 665 S.E.2d 605, 606 (S.C. 2008) (noting that the petitioner waived ineffectiveness claims waived when he answered "Yes" to the following question at the plea colloquy: "Do you agree that you will waive all appeals, PCR applications, federal habeas corpus petitions and any other methods of review of your guilty plea and sentence today? Is that part of your agreement?"); *see also* Allen v. Thomas, 458 S.E.2d 107, 108 (Ga. 1995) (upholding waiver of all post-conviction review).

For federal habeas claims by state prisoners, *see, e.g.*, Haynes v. New York, No. 10-CV-5867, 2012 WL 6675121, at *9 (E.D.N.Y. Dec. 21, 2012) (holding, in the alternative, that petitioner's valid waiver of his right to appeal bars his ineffective assistance of counsel claim, except to the extent the claim may have affected the voluntariness of petitioner's plea, and was an independent and adequate state ground barring federal review); Johnson v. Williams, No. 1:12-CV-01186, 2012 WL 6700751, at *12 (N.D. Ga. Nov. 27, 2012) (recommending dismissal of petition and noting that plea agreements waiving the right to seek federal habeas relief are valid and do not violate public policy and that the state court concluded petitioner knowingly and intentionally waived his rights to seek habeas corpus relief), *adopted recommendation*, 2012 WL 6700693, at *1 (N.D. Ga. Dec. 26, 2012).

12. *See* J. Vincent Aprile II, *Waiving the Integrity of the Criminal Justice System*, CRIM. JUST., Winter 2010, at 46; Steven D. Benjamin, *Be Proud And Be Loud*, CHAMPION, Nov. 2012, at 5 (discussing Formal Opinion finding that it is not ethical for a criminal defense lawyer to participate in a plea agreement that bars collateral attacks in the absence of an express exclusion for prospective claims based on ineffective assistance of counsel); Alan Ellis and Todd Bussert, *Stemming the Tide of Postconviction Waivers*, CRIM. JUST., Spring 2010, at 28-29; *see also* R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 SAN DIEGO L. REV. 93, 108 (2011) ("Insisting on so-called ineffective counsel waivers impresses me as overreaching of the worst sort and fundamentally inconsistent with a prosecutor's obligation as a minister of justice.").

concern.[13] In 2012, a *New York Times* editorial criticized the practice,[14] and several states' ethics bodies have weighed in.[15] The intensifying debate, combined with the Court's recent focus on the importance of effective assistance during plea bargaining in *Padilla v. Kentucky*, *Lafler*, and *Frye*,[16] suggest that litigation over the propriety of these waivers is likely to increase.

II. CURRENT ENFORCEMENT TRENDS

In many courts, an ineffectiveness waiver bars all claims of ineffective representation, whether counsel's alleged failings occur before or after the plea, *except* allegations that bad advice rendered involuntary or unknowing the defendant's decision to agree to the waiver itself.[17] The waiver terms found in plea agreements reflect this construction.[18]

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13. *See, e.g.,* United States v. Rush, ___ F.Supp.2d ___, 2012 WL 6690120, at *4 n.4 (D.D.C. Dec. 26, 2012) (expressing "misgivings" about the enforceability of such waivers); Guillen-Rivera v. United States, No. 6:12–cv–293–Orl–37GJK, 2012 WL 3522672, at *4 (M.D. Fla. Aug. 15, 2012) (observing that the validity of waivers in connection with negotiations is not well established).

14. Editorial, *Trial judge to appeals court: Review me*, N.Y. TIMES (July 16, 2012), http://www.nytimes.com/2012/07/17/opinion/trial-judge-to-appeals-court-review-me.html?_r=0 (terming such waivers "outrageous" and describing a trial judge who refused to accept agreement with waiver in it).

15. *See infra* note 53.

16. Missouri v. Frye, 132 S. Ct. 1399, 1407-09 (2012); Lafler v. Cooper, 132 S. Ct. 1376, 1380-81 (2012); Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1482-86 (2010).

17. *E.g.,* United States v. Nance, No. 11-2423, 2012 WL 4076117, at *7 (3d Cir. 2012) (noting that waiver unenforceable only if the waiver was the result of ineffective assistance of counsel); United States v. Viera, 674 F.3d 1214, 1219 (10th Cir. 2012) (stating that a "miscarriage of justice through enforcement of a waiver occurs only in one of four situations: '[1] where the district court relied on an impermissible factor such as race, [2] where ineffective assistance of counsel *in connection with the negotiation of the waiver renders the waiver invalid*, [3] where the sentence exceeds the statutory maximum, or [4] where the waiver is otherwise unlawful.'") (emphasis added); Washington v. Lampert, 422 F.3d 864, 871 (9th Cir.2005) (noting that the waiver was unenforceable to block an ineffectiveness claim that challenges the voluntariness of the waiver); United States v. White, 307 F.3d 336, 339-42 (5th Cir.2002) (rejecting a § 2255 claim of attorney's incompetence regarding the sentence and joining "[o]ur sister circuits [that] have addressed the instant question and all have concluded that waivers of appeal remain valid unless the ineffective assistance directly related to the knowing, voluntary nature of the waiver,"); Davila v. United States, 258 F.3d 448, 450-53 (6th Cir. 2001) (holding that "[w]hen a defendant knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bring a claim of ineffective assistance of counsel based on 28 U.S.C. § 2255" and that Davila's allegations of incompetent assistance at sentencing were barred by the waiver in his plea agreement); Lebron v. United States, CIV. 12-2925 , 2013 WL 132675 (D.N.J. Jan. 9, 2013) (rejecting an ineffectiveness claim in a § 2255 case and enforcing a waiver noting that petitioner has not claimed that he agreed to the waiver because his counsel was ineffective); Jones v. United States, 8:12-CV-914-T-30, 2013 WL 24226 (M.D. Fla. Jan. 2, 2013) (nothing that a voluntary plea waived the defendant's antecedent non-jurisdictional grounds for relief under a § 2255 including claim of ineffective assistance

Exempting from waiver provisions only those claims that allege attorney errors that affect the validity of the waiver itself means that a defendant must show some probability that but for his attorney's errors he would not have signed that waiver. Whether the defendant's burden is phrased this way, as showing that the waiver of his right to bring an ineffectiveness claim was involuntary and uninformed, or rather, as showing that his attorney's error was "prejudicial" under *Strickland*, the challenge for the defendant who signs a waiver then attacks his plea is the same. He must convince the reviewing court there is a reasonable probability that had he received competent representation, his rational, informed, and voluntary choice would have been to either take his chances at trial or plead guilty without a bargain.[19] Showing he

prior to the plea because the grounds do not implicate the validity of the plea, and, alternatively, the claim lacks merit); *see also* United States v. Rosas, 491 F. App'x 766 (7th Cir. 2012) (noting appellant's allegations that defense counsel (1) failed to explain the consequences of accepting responsibility for the amount of drugs, (2) gave him conflicting information on his potential sentence, and (3) badgered him into signing the plea agreement, were barred by the appeal waiver and "to the extent" claims fell within the waiver's exception for claims "relating directly to the waiver or its negotiation," they must be pursued under § 2255).

For examples of state cases, see People v. Stovall, 284 P.3d 151, 155 (Colo. 2012) (holding that despite an express waiver of the right to assert ineffective assistance of counsel in the plea agreement, the defendant could contest in post-conviction proceeding whether the guilty plea was knowing, voluntary, and intelligent); Contreras-Garcia v. State, 95 So. 3d 993, 995 (Fla. App. 2012) (noting that ineffective claims on post-conviction review attacking the advice received from counsel in entering into the plea and waiver could not be waived); People v. Ruffin, 101 A.D.3d 1793, 955 N.Y.S.2d 917 (N.Y. App. 2012) (nothing that the waiver barred an ineffectiveness claim when"[t]here is no showing that the plea bargaining process was infected by [the] allegedly ineffective assistance or that defendant entered the plea because of his attorney['s] allegedly poor performance"); *Ex parte* Reedy, 282 S.W.3d 492 (Tex.Crim.App. 2009) (waiver of the right to pursue post-conviction habeas corpus remedies bars "claims that [petitioner] could have anticipated at the time of his waiver" but noting "that a waiver of post-conviction habeas corpus relief will not be enforceable to prohibit an applicant from claiming that his guilty plea was the product of constitutionally ineffective assistance of counsel, i.e., that but for the incompetence of his counsel, he would not have pled guilty but would have elected to proceed to trial").

18. *E.g.,* United States v. Salas-Garcia, 698 F.3d 1242, 1254 (10th Cir. 2012) (noting that the waiver exempted attacks on counsel's assistance "in negotiating or entering this plea or this waiver"); United States v. Hidalgo-Aviles, No. 11-CR-0067-CVE, 2012 WL 5949114 (N.D. Okla. Nov. 28, 2012) (exempting claims based on ineffective assistance of counsel which challenge the validity of the guilty plea or this waiver"); Lorentz v. United States, No. 4:10CV415, 2012 WL 6607291 (E.D. Tex. Nov. 20, 2012) (exempting "a claim of ineffective assistance of counsel that affects the validity of this waiver itself"); United States v. Caston, CRIM.A. No. 09-98, 2012 WL 5463143 (E.D. La. Nov. 8, 2012) (exempting ineffectiveness that "directly affected the validity of this waiver of appeal and collateral challenge rights or the validity of the guilty plea itself"); United States v. Kawzinski, No. 2:09-CR-130, 2012 WL 5304174 (N.D. Ind. Oct. 25, 2012) (exempting ineffectiveness claims "relat[ing] directly to this waiver or its negotiation").

19. *See, e.g.,* United States v. Fugit, 703 F.3d 248, 260 (4th Cir. 2012) (In finding petitioner could not show that declining to plead guilty "would have been rational under the

circumstances," the court noted that the decision to plead guilty "may not be lightly undone by buyer's remorse on the part of one who has reaped advantage from the purchase."); United States v. Quintero, 2:08-CR-111, 2013 WL 25920 (N.D. Ind. Jan. 2, 2013) (nothing that the defendant did not allege that he did not understand his plea agreement, or that the waiver was not knowingly or voluntarily made, nor argue that his counsel was ineffective with regard to the negotiation of the waiver); United States v. Kapan, No. 11 C 3665, 2012 WL 6727342 (N.D. Ill. Dec. 27, 2012) (finding no legitimate reason to suspect that petitioner's waiver of his collateral attack rights was either involuntary or the result of ineffective assistance of counsel when the agreement "could not be more clear," and concluding that neither counsel's alleged false advice that he could not appeal because he pled guilty nor his failure to object when petitioner was sentenced under the crack cocaine guidelines related to the waiver or plea negotiations); Casares-Alvarado v. United States, No. 12-CV-1892 W, 2012 WL 6677917 (S.D. Cal. Dec. 21, 2012) (finding waived a claim that defender failed to argue a credible defense when record shows defendant knowingly and voluntarily agreed to a waiver of his right to collateral attack); United States v. Montemayor, No. CR C-10-1178, 2012 WL 6681906 (S.D. Tex. Dec. 20, 2012) (finding claim that counsel induced defendant to plead guilty by assuring him that his prior criminal history would not be used to enhance his sentence fell within scope of waiver, and waiver was valid, noting that defendant's sworn testimony that his plea was voluntary, he had not been promised a particular sentence, he had discussed the waivers with counsel, he understood them, the charges against him, the rights he was giving up, and the maximum sentence he faced).

Some cases find these claims waived even *without* an express agreement and apply the same test. Consider *Castro v. State*, 795 N.W.2d 789, 793 (Iowa 2011):

> [T]he distinction between ineffective-assistance-of-counsel claims that do not survive a guilty plea . . . and those that do survive is the existence of a showing that the pre-plea ineffective assistance of counsel rendered the plea involuntary or unintelligent. The component of the claim involving the voluntariness of the plea is largely tied to the prejudice element of all ineffective-assistance-of-counsel claims . . . This element means criminal defendants who seek postconviction relief after pleading guilty must establish the guilty plea would not have been entered but for the breach of duty by counsel. Thus, when a postconviction relief claim following a guilty plea is properly alleged, a case-by-case analysis is necessary "to determine whether counsel in a particular case breached a duty in advance of a guilty plea, and whether any such breach rendered the defendant's plea unintelligent or involuntary.

See also Ziebol v. State, ___ S.W.3d ___, 2013 WL 11897 (Mo. Ct. App. Jan. 2, 2013) (in case involving open plea without agreement, stating "A movant who pleads guilty waives any claim of ineffective assistance of counsel except to the extent that counsel's conduct bears upon the voluntariness and understanding with which the movant entered the plea"); Johnson v. Williams, No. 1:12-CV-01186, 2012 WL 6700751 (N.D. Ga. Nov. 27, 2012) (knowing and voluntary plea waived any claim regarding counsel's pre-plea performance, allegations of failure to properly investigate Petitioner's case or develop a viable defense strategy and misinformation about consequences of conviction were waived); Dennis v. Ludwick, No. 2:10-CV-11056, 2012 WL 5379461 (E.D. Mich. Oct. 31, 2012) (stating that a defendant who pleads guilty or no contest generally waives any non-jurisdictional claims that arose before the plea, that inquiry is limited to whether the plea was knowing, intelligent, and voluntary, and that petitioner's claim that counsel was ineffective for failing to properly act during the pre-trial period is foreclosed by his plea); Bigelow v. Culpepper, No. 2:09–cv–107, 2012 U.S. Dist. LEXIS 42426, at *45 (M.D. Fla. Mar. 28, 2012) ("Pre-plea ineffective assistance of counsel claims are . . . waived by entry of a knowing and voluntary plea."); State v. Bregitzer, No. 2012–P–0033, 2012 WL 5995060 (Ohio Ct. App. Dec. 3 2012) (holding that a plea of guilty or no contest waives any prejudice a defendant suffers arising out of his counsel's alleged ineffective assistance, except with respect to a claim that the particular failure alleged impaired the defendant's knowing and intelligent waiver of his right to a trial, and the failure to suppress evidence has no prejudicial impact upon a conviction based on a no contest plea, because the conviction does not result from the unsup-

would have signed a deal with no waiver would also be a possibility, but only if he also could show that such a waiver-free agreement was available.

These ineffectiveness waivers block claims regarding incompetence occurring after the plea, such as bad advice during sentencing.[20] They also bar claims based on pre-plea ineptitude, including trial error that leads to the plea,[21] inadequate or erroneous advice about sentencing consequences,[22] failing to suppress evidence,[23]

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pressed evidence); Bolith v. State, 248 P.3d 1008, 1009 (Utah 2011) (stating it was not sufficient for defendant to claim that his trial counsel was ineffective without also demonstrating that the guilty plea was not knowing and voluntary). *Frye* and *Padilla* seem to undercut this approach in cases without express waivers; both were able to raise their ineffective assistance claims despite having pleaded guilty.

20. *E.g.,* Davila v. United States, 258 F.3d 448, 450-53 (6th Cir.2001) (holding that "[w]hen a defendant knowingly, intelligently, and voluntarily waives the right to collaterally attack his or her sentence, he or she is precluded from bring a claim of ineffective assistance of counsel based on 28 U.S.C. § 2255" and that Davila's allegations of incompetent assistance at sentencing were barred by the waiver in his plea agreement); Braxton v. United States, 358 F. Supp. 2d 497, 504 (W.D. Va. 2005) (knowing and voluntary guilty plea and § 2255 waiver barred claim that counsel was "blindsided" by a weapons enhancement at sentencing).

21. Bishop v. Com., 357 S.W.3d 549, 551 (Ky. App. 2011) (appeal waiver in plea agreement entered into after conviction but before sentencing phase waived right to raise post-conviction claims regarding various counsel errors that were, in any event, meritless).

22. United States v. Pena, No. CR C-09-865, 2013 WL 100260 (S.D. Tex. Jan. 4, 2013) (holding that even if Pena's counsel had estimated his expected sentence without including the enhancement, Pena failed to show that his plea was unknowing or involuntary, waiving an ineffectiveness claim); United States v. Rosales, CR C-09-1046-5, 2012 WL 5943236 (S.D. Tex. Nov. 26, 2012) (holding that claims of ineffective assistance of counsel based upon counsel's advice to plead guilty and failure to advise him of enhancements were waived); United States v. Jackson, CRIM. A. No. 08-20150-02, 2012 WL 5869822 (D. Kan. Nov. 19, 2012) (holding that the waiver barred claims that (1) counsel failed to disclose all the evidence to the defendant, (2) failed to discuss the evidence with the defendant, and (3) neglected to warn the defendant of a possible life sentence, when defendant did not claim that the alleged ineffectiveness affected the validity of the plea agreement or waiver); Kirk v. United States, No. CIV.A. 12-0632, 2012 WL 5837588 (W.D. Pa. Nov. 16, 2012) (when defendant did not argue that his counsel was ineffective in negotiating or explaining the plea agreement and presented no evidence suggesting that his acceptance of the agreement was anything but knowing and voluntary, waiver barred claim that counsel failed to investigate legal strategies to obtain concurrent state and federal sentences, or inform defendant that the sentences would not run concurrently); Espinoza-Cuamea v. United States, No. CR 11-01185, 2012 WL 6086877 (D. Ariz. Nov. 9, 2012) (holding that the waiver in the defendants plea agreement barred claims that counsel failed to explain the agreement and the resulting adequately when the defendant did not produce any evidence indicating he did not knowingly and voluntarily enter into the agreement), *adopted recommendation*, 2012 WL 6086874 (D. Ariz. Dec 06, 2012). *But see* Jones v. United States, No. 2:11-CV-00322, 2012 WL 5833293, at *1 (D. Utah Nov. 14, 2012) (holding that the defendant did not waive an ineffectiveness claim where the defendant claimed that his counsel had him sign a plea agreement under false pretenses by leading him to believe that he would "receive a 37-month split sentence").

23. *E.g.,* Fisher v. United States, CRIM. A. No. 07-00288, 2012 WL 6680315 (S.D. Ala. Dec. 3, 2012) (holding claims that counsel failed to file a motion to suppress to be meritless and that the claims were waived because the plea was knowing and voluntary), *adopted*

and failing investigate or assert claims or defenses such as double jeopardy,[24] or competency.[25] A waiver has even been held to bar a defendant's claim that his lawyer should have advised him of the possibility of pleading guilty without the waiver.[26]

Enforcing an ineffectiveness waiver to bar claims alleging *Frye* or *Padilla* error fits comfortably within this approach. Even assuming that a waiver may never bar a claim that the waiver itself was unknowing or involuntary (what the Fifth Circuit terms impermissible "bootstrapping"[27]), it can bar a claim of ineffective assistance under the Sixth Amendment, even a claim that alleges bad advice about whether to sign the waiver itself. The next section explains why.

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recommendation, 2012 WL 6678608 (S.D. Ala. Dec 21, 2012); United States v. Cooley, CRIM. A. No. 07-352, 2012 WL 5348860 (E.D. La. Oct. 29, 2012) (noting that a knowing and voluntary guilty plea and waiver of collateral rights barred a claim alleging an attorney's failure to suppress and investigate).

24. *E.g.,* Johnson v. Williams, No. 1:12-CV-01186, 2012 WL 6700751 (N.D. Ga. Nov. 27, 2012) (noting state post-conviction court properly concluded plea was knowing and voluntary and waived any claim regarding counsel's pre-plea performance, including claims that attorney failed to research double jeopardy claim and provided bad advice), *adopted recommendation*, 2012 WL 6700693 (N.D. Ga. Dec 26, 2012).

25. *E.g.,* United States v. Spencer, No. 1:10-CR-55, 2012 WL 5304158, at *4 (N.D. Ind. Oct. 25, 2012) (holding that the defendant's agreement not to assert an ineffective assistance of counsel waived his claim of failure to discover or present evidence of the defendant's incapacity to commit the crime); Syms v. Warden, No. TSRCV104003372, 2012 WL 6846383, at 1*-2 (Conn. Super. Ct. Dec. 12, 2012) (holding that the defendant's guilty plea waived allegations of substandard representation by counsel which related to pretrial investigation of the petitioner's psychiatric history and the effect of the involuntary or voluntary inhalation of PCP as a defense); People v. Grandin, 880 N.Y.S.2d 826, 827 (N.Y. App. Div. 2009) (holding that the defendant's waiver of the right to appeal barred a claim of alleged failure to request a mental competency examination); *see also* Cantillanos-Medina v. United States, No. 1:11-CR-00441, 2012 WL 5906553, at *3-4 (E.D. Cal. Nov. 26, 2012) (holding that a claim that the defendant's attorney did not study his case sufficiently was barred by waiver); United States v. Caston, CRIM. A. No. 09-98, 2012 WL 5463143, at *1 (E.D. La. Nov. 8, 2012) (holding that waiver barred claims that "he is actually innocent of the counts to which he pleaded guilty; [and that] his lawyer failed to zealously defend him").

26. Jones v. United States, No. 8:12–cv–914–T–30TGW, 2013 WL 24226, at *3 (M.D. Fla. 2013) (finding claim waived, and holding in the alternative that even if it wasn't waived, the defendant "presents no evidence establishing either that he did not want to proceed with his negotiated plea or that he misunderstood his plea options or the appeal waiver [and] fails to overcome the strong presumption of verity afforded his sworn statements").

27. United States v. White, 307 F.3d 336, 343 (5th Cir. 2002) ("[A]n impermissible bootstrapping arises where a waiver is sought to be enforced to bar a claim that the waiver itself-or the plea agreement of which it was a part-was unknowing or involuntary . . . Where the movant's claim does not involve that sort of boot-strapping, however, we see no need to except ineffective assistance of counsel claims from the general rule allowing defendants to waive their statutory rights so that they can reach a plea agreement if they wish.").

III. WHY INEFFECTIVENESS WAIVERS ARE ENFORCEABLE

The Court has never addressed whether or not the Constitution forbids the enforcement of a plea agreement expressly waiving the right to raise a claim of ineffective assistance of counsel.[28] Existing precedent, however, suggests that a defendant may waive both the right to effective representation during plea negotiations and the right to post-conviction review of a claim alleging deprivation of effective assistance, just as he may waive other rights,[29] so long as his waiver is knowing and voluntary.[30]

The argument for singling out as *un*waivable the right to claim of ineffective assistance of counsel regarding the plea seems to be based on three somewhat interrelated concerns. The first is the belief that a defendant cannot knowingly waive the right to raise a

28. Padilla's agreement did not include an ineffectiveness waiver, Padilla v. Kentucky, 130 S. Ct. 1473 (2010), nor did the plea agreements in *Hill v. Lockhart*, 474 U.S. 52 (1985), or *Premo v. Moore*, 131 S. Ct. 733 (2011). Frye pleaded "open" without an agreement. Missouri v. Frye, 132 S. Ct. 1399 (2012). In *Glover v. United States*, 531 U.S. 198, 200 (2001), the Supreme Court addressed the right to effective assistance of counsel at sentencing, and the case involved no negotiated waivers; the defendant was convicted at a jury trial.

29. United States v. Ruiz, 536 U.S. 622, 630 (2002) (a court may accept a plea "despite various forms of misapprehension under which a defendant might labor"); United States v. Mezzanatto, 513 U.S. 196, 209-10 (1995) (noting that the "plea bargaining process necessarily exerts pressure of defendants to plead guilty and to abandon a series of fundamental rights"); *see also* Samuel R. Wiseman, *Waiving Innocence*, 96 MINN. L. REV. 952, 976 (2012) ("*Hill* and *Mezzanatto* pose a formidable hurdle for a criminal defendant seeking to argue that his rights are not waivable in the absence of a clear legislative statement to that effect.").

30. Even capital defendants may waive post-conviction review entirely. *See* Whitmore v. Arkansas, 495 U.S. 149, 165-66 (1990) ("[W]e find no reason to disturb the judgment of the Supreme Court of Arkansas" that the defendant "knowing, intelligent, and voluntary" waived his right to appeal, when he "was questioned by counsel and the trial court concerning his choice to accept the death sentence, and his answers demonstrate that he appreciated the consequences of that decision," he "indicated that he understood several possible grounds for appeal, which had been explained to him by counsel, but informed the court that he was 'not seeking any technicalities' "and "there was no meaningful evidence that he was suffering from a mental disease, disorder, or defect that substantially affected his capacity to make an intelligent decision."); State v. Bordelon, 33 So. 3d 842, 849 (La. 2009) (observing that *Whitmore* did not resolve this question, but that the Court in *Rees v. Peyton*, 384 U.S. 312, 314 (1966), "recognized at least in principle that a competent defendant's decision to forego appellate review in a capital case may reflect a rational act of self-determination despite its potential consequences"); Pike v. State, 164 S.W.3d 257, 262 (Tenn. 2005) (collecting authority); John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency,* 103 MICH. L. REV. 939, 944-46 (2005); Wiseman, *supra* note 29, at 979 (noting widespread acceptance of waivers of post-conviction review); Wayne LaFave, Jerold Israel, Nancy King, & Orin Kerr, 6 CRIMINAL PROCEDURE § 27.5(c) (3d ed. 2010) (available as database CRIMPROC on Westlaw) [hereinafter CRIMPROC]; 3 *id.* § 11.6(a), at n.23; *see also* FED. R. CRIM. P. 11(b)(1)(N) (providing that the court must include in its colloquy with the defendant "the terms of any provision in a plea agreement waiving the right to appeal *or to collaterally attack* the sentence") (emphasis added).

claim if the basis of the claim is unknown to him at the time he agrees to the waiver. The second is the concern that in order to be knowing and voluntary, a plea or waiver *requires* advice from competent counsel. Coupled with this is a third concern: that any attorney who counsels a client to waive his right to claim ineffective assistance is, necessarily, constitutionally ineffective. I address each of these arguments in turn, below.

A. Waiving What Can Only Be Guessed, Not Known

As to the validity of prospective waivers, the Court's decisions leave little doubt that a defendant can indeed waive the right to attack his plea or sentence on the basis of attorney errors of which he is not aware, or that may occur after the waiver. Such prospective waivers are not necessarily "unknowing" and invalid, as some courts have suggested.[31]

In *United States v. Ruiz,* the Court upheld a waiver of the right to learn of impeachment information and stated that a judge may "accept a guilty plea, with its accompanying waiver of various constitutional rights, despite various forms of misapprehensions under which a defendant might labor."[32] It relied upon *Brady v. United States* where the Court upheld as "knowing" a plea entered to avoid a death sentence, even though the sentence was later struck down as illegal, rendering the basis for the defendant's decision erroneous.[33]

And in *Wheat v. United States*, where the Court ultimately concluded that a judge may under some circumstances *reject* a conflict waiver without violating a defendant's right to counsel of his

31. *E.g.,* People v. Orozco, 103 Cal. Rptr. 3d 646, 649 (Cal. Ct. App. 2010) ("'A broad or general waiver of appeal rights ordinarily includes error occurring before *but not after* the waiver because the defendant could not knowingly and intelligently waive the right to appeal any unforeseen or unknown future error.'" (quoting People v. Mumm, 120 Cal. Rptr. 2d. 18, 20 (Cal. Ct. App. 2002))); *Ex parte* Reedy, 282 S.W.3d 492, 498, (Tex. Crim. App. 2009) (noting that if "an applicant cannot be expected to have known about the existence of the facts that support such claims at the time of his waiver . . . the applicant's waiver of habeas relief cannot be knowing and intelligent, and cannot, therefore, be enforceable"); *see also* United States. v. Davis, 689 F.3d 349 (4th Cir. 2012) (stating that the defendant cannot waive the right to appeal his sentence on the ground that the proceedings following entry of the guilty plea were conducted in violation of his Sixth Amendment right to counsel); Campbell v. United States, 686 F.3d 353, 360 (6th Cir. 2012) (express waiver does not bar claims of ineffective assistance based upon the attorney's failure to file an appeal).

32. 536 U.S. 622, 623(2002).

33. 397 U.S. 742 (1970) (rejecting a challenge to guilty plea as unknowing and involuntary because it had been based on the faulty assumption that the defendant would be subject to the death penalty if he had been convicted after trial).

choosing,[34] it also recognized that courts have the discretion to permit conflicted counsel to continue if the defendant provides a valid waiver.[35] Even though the Court recognized that "[t]he likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict," and "the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them,"[36] it also reiterated that trial judges had broad latitude to decide whether to deny *or accept* a defendant's right to conflict-free counsel even with this uncertainty. In other words, a defendant is not limited to waiving conflicts that are well-defined, he may validly waive the right to contest his conviction based on ineffective assistance when the basis for any future ineffectiveness claim is, at the time of waiver, unpredictable.[37] Once a defendant knowingly and intelligently waives a conflict of interest, any subsequent challenge based on that conflict is barred.[38]

A defendant may also waive the right to any representation at all before he pleads guilty, with only a rudimentary understanding of what he is giving up. In *Iowa v. Tovar*,[39] the Court held that in order for a defendant's waiver of counsel in connection with a guilty plea to be voluntary and intelligent, he need not be admonished that "by waiving his right to an attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty."[40] Quoting *Ruiz*,

34. 486 U.S. 153, 162 (1988).

35. *Id.* at 162-63; *see also* Wood v. Georgia, 450 U.S. 261, 273-74 (1981) (noting "[i]f the court finds that an actual conflict of interest existed at that time, *and that there was no valid waiver* of the right to independent counsel, it must hold a new revocation hearing that is untainted by a legal representative serving conflicting interests") (emphasis added); Holloway v. Arkansas, 435 U.S. 475,482-83 & n.5 (1978) (noting that the right to conflict-free representation may be waived); Ryan v. Eighth Judicial District Court, 168 P.3d 703, 709 (Nev. 2007) (nothing that the defendants should not be "forced to embrace their right to conflict-free representation when they would prefer to waive it in order to pursue the defense strategy of their choosing," here a joint defense agreement); CRIMPROC, *supra* note 30, § 11.9(c), at nn.92 & 109.

36. *Wheat*, 486 U.S. at 162-63.

37. *Compare, e.g.*, *Rethinking Unwaivable Conflicts of Interest after* United States v. Schwarz *and* Mickens v. Taylor, 59 N.Y.U. ANN. SURV. AM. L. 89, 95 n.31 (2003) (noting a valid waiver will bar reversal even if the conflict that arose at trial was not predicted by the judge and explained to the defendant during the waiver hearing), *with* United States v. Newell, 315 F.3d 510, 521 (5th Cir. 2002) ("We cannot conclude that Newell validly waived the actual conflict that surfaced at trial, since he 'could not waive what he did not know.'" (quoting Hoffman v. Leeke, 903 F.2d 280, 289 (4th Cir. 1990))).

38. CRIMPROC, *supra* note 30, § 11.9(c), at n.126 (collecting authority).

39. 541 U.S. 77 (2004).

40. *Id.* at 87-89, 91 (2004) (concluding that a defendant's waiver of counsel may be voluntary and intelligent even if he is not first admonished that "'by waiving his right to an

the Court explained that the "law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply in general in the circumstances . . . ."[41]

Finally, even capital defendants may knowingly and voluntarily waive, in advance, the right to seek all post-conviction review.[42] Given these many cases recognizing the validity of waiving something one can only guess about, it is reasonable to conclude that a defendant's "misapprehension" of the extent of his lawyer's competence or his inability to "full[y] and complete[ly] appreciate[e] of all of the consequences flowing from his waiver"[43] would not disable him from waiving, knowingly and voluntarily, his right to later raise a claim of ineffective assistance of counsel.[44]

B. Waiving on One's Own

Nor is advice from competent counsel a prerequisite to a knowing and voluntary plea or waiver, contrary to the conclusion of several courts.[45] The idea has support in some statements of the

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attorney he will lose the opportunity to obtain an independent opinion on whether, under the facts and applicable law, it is wise to plead guilty,'" and stating that although "[w]arnings of the pitfalls of proceeding to trial without counsel . . . must be 'rigorous[ly]' conveyed, . . . at earlier stages of the criminal process, a less searching or formal colloquy [with a judge] may suffice" (quoting State v. Tovar, 656 N.W.2d 112, 121 (Iowa 2003), *rev'd*, Iowa v. Tovar, 541 U.S. 77 (2004) and Patterson v. Illinois, 487 U.S. 285, 298-99 (1988))).

41. 541 U.S. 77, 78-79 (2004) (quoting *Ruiz*, 536 U.S. at 629).

42. *See supra* note 30.

43. Iowa v. Tovar, 541 U.S. 77, 92 (2004).

44. *See also* United States v. Guillen, 561 F.3d 527, 529 (D.C. Cir. 2009) (citing Brady v. United States, 397 U.S. 742, 748-49 (1970); United States v. Cunningham, 145 F.3d 1385, 1391 (D.C. Cir.1998)) ("An anticipatory waiver—that is, one made before the defendant knows what the sentence will be—is nonetheless a knowing waiver if the defendant is aware of and understands the risks involved in his decision.").

45. *E.g.*, People v. Orozco, 103 Cal. Rptr. 3d 646, 650 (Cal. Ct. App. 2010) (stating that ineffective assistance of counsel at the time a defendant was entering the plea or ineffectiveness related to advice he received regarding the waiver "would *require* a finding that the plea was not entered knowingly and voluntarily, which would in turn mean that a court could not enforce a waiver contained within that plea agreement." (emphasis added)); Nixon v. United States, CV206-071, 2006 WL 2850430, at *3 (S.D. Ga. Oct. 3, 2006) ("A criminal defendant simply cannot waive a claim of ineffective assistance of counsel regarding advice he received in entering the plea and waiver. This is so because the 'ineffective assistance of counsel at [this] critical time would *require* a finding that the plea was not entered knowingly and voluntarily, which would in turn mean that a court could not enforce a waiver contained within the plea agreement.'" (emphasis added) (citation omitted)); *see also* People v. Drammeh, 953 N.Y.S.2d 274, 275 (N.Y. App. Div. 2012) (*Padilla* claim not barred by his appeal waiver "because it affects the voluntariness of his plea."); R. Michael Cassidy, *Some Reflections on Ethics and Plea Bargaining: An Essay in Honor of Fred Zacharias*, 48 San Diego L. Rev. 93, 108 (2011) ("constitutionally defective representation strikes at the core of the defendant's ability to choose freely the options presented.").

Court.[46] But those statements appeared in cases in which there was no express waiver of ineffectiveness claim, and no exchange of that waiver for government concessions. More importantly, in multiple other cases, the Court has held that a defendant's waiver of the right to any assistance of counsel, as well as the right to of conflict-free representation, can be knowing and voluntary even without the separate advice of competent counsel. Finally, a rule making the competent advice of counsel a prerequisite for a knowing and voluntary plea would be inconsistent with permitting defendants to plead guilty without counsel, or *against* the competent advice of their attorneys.

Consider the Second Circuit's standard for determining which conflicts of interest are "unwaivable"—conflicts so severe "that no rational defendant would knowingly and intelligently desire the conflicted lawyer's representation."[47] Even if the Supreme Court adopted such a rule, a rational defendant might very well knowingly and intelligently desire to trade his right to challenge his conviction on the basis of ineffective assistance of counsel for what the prosecutor is offering in exchange. Barring such a waiver is not inevitably in the best interests of every defendant, as a panel of the Eighth Circuit Court of Appeals has explained:

> If a criminal defendant is able to negotiate substantial concessions from the prosecution, but only on the condition that the defendant waive a potential future claim of ineffective assistance of counsel, does "justice" really dictate that this court refuse to enforce such an agreement in all circumstances? If the government cannot obtain the benefit of avoiding collateral litigation . . . , then the government may not be willing to offer certain concessions, and a defendant may be unable to secure the bargain most favorable to his interests. To require

46. *See* Hill v. Lockhart, 474 U.S. 52, 56 (1985) (quoting McMann v. Richardson, 397 U.S. 759, 771 (1970)) ("[T]he voluntariness of the plea *depends on* whether counsel's advice 'was within the range of competence demanded of attorneys in criminal cases.'" (emphasis added)). *See also* Padilla v. Kentucky, 130 S. Ct. 1473, 1493 (2010) (Alito, J., concurring) ("When a defendant opts to plead guilty without definitive information concerning the likely effects of the plea, the defendant can fairly be said to assume the risk that the conviction may carry indirect consequences of which he or she is not aware. That is not the case when a defendant bases the decision to plead guilty on counsel's express misrepresentation that the defendant will not be removable. In the latter case, it seems hard to say that the plea was entered with the advice of constitutionally competent counsel—*or that it embodies a voluntary and intelligent decision to forsake constitutional rights*." (emphasis added)).

47. United States v. Ward, 85 Fed. App'x 246, 248 (2d Cir. 2004) (quoting United States v. Levy, 25 F.3d 146, 153 (2d Cir. 1994)).

> that conclusion would seem, in Justice Frankfurter's famous words, "to imprison a man in his privileges and call it the Constitution."[48]

At least one defendant whose attorney advised him *not* to sign an agreement with a waiver complained later that he should have been advised to sign the waiver so he could have received a better sentence.[49] Ultimately, it is the defendant's choice, not his lawyer's, whether to enter into a plea deal, and whether to agree to its individual terms.[50]

Courts might find there are individual cases, or categories of ineffectiveness claims, in which the probability of relief for the claim that would be waived is high enough and the advantage of waiver for any defendant low enough that "no rational defendant would knowingly and intelligently" agree to the deal.[51] Some might view any waiver of the right to raise a *Frye* claim as fitting within this description, as the claim is premised upon a showing that the deal the defendant did receive is actually worse than the deal his attorney lost. Indeed, one could argue that it makes no sense to waive any ineffective assistance claim, because *every* such claim, if valid, means the defendant was prejudiced, that is, deprived of a more favorable outcome because of his attorney's errors. But if all it took to invalidate a waiver of a claim was a showing that with-

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48. Chesney v. United States, 367 F.3d 1055, 1058-59 (8th Cir. 2004) (quoting Adams v. United States *ex rel.* McCann, 317 U.S. 269, 280 (1942)).

49. Esquivel v. United States, 3:10-CV-2417-L, 2012 WL 5906868, at *5 (N.D. Tex. Oct. 29, 2012) (noting the government stated it would not file a motion for a one-level sentence reduction because petitioner failed to waive his right to appeal, and finding meritless petitioner's claim that his counsel was ineffective for advising him not to sign the plea agreement); *see also* Donald A. Dripps, *Plea Bargaining and the Supreme Court: The End of the Beginning?* 25 Fed. Sent'g Rep. 141, 143 (2012) (noting that because "it may well be in the defendant's interest to plead guilty without effective assistance, rather than receive effective assistance and lose the offer on the table," meaningful regulation would require judges to refuse to accept pleas defendants prefer when there has been ineffective assistance).

50. Consider *Watson v. United States*, 682 F.3d 740, 742 (8th Cir. 2012) (waiver in agreement included this statement: "The defendant specifically acknowledges that the decision to waive the right to challenge any later claim of the ineffectiveness of his counsel was made by him alone notwithstanding any advice he may or may not have received from his attorney regarding that right. Regardless of any advice the defendant's attorney may have given him, in exchange for the concessions made by the United States in this Agreement, the defendant hereby knowingly and voluntarily waives the right to collaterally attack the conviction and/or sentence.").

51. An example of such an exception might be the waiver of viable claims that would bar prosecution altogether regardless of proof of guilt, such as diplomatic immunity or double jeopardy. Given courts' willingness to allow a capital defendant to voluntarily waive judicial review of a death sentence—a decision arguably even less rational than those discussed here—I doubt such exceptions would emerge.

out the waiver the defendant would have been better off, waivers of review would never be enforced. By waiving the right to challenge a conviction or sentence, the defendant gives up the right to raise good claims as well as bad; he gives up the *possibility* of a better outcome after post-conviction litigation, for the more *certain* advantages of resolving his case through plea rather than by trial. If a defendant might rationally choose to waive the right to challenge his conviction for other reasons, it seems conceivable, as the Eighth Circuit judges suggest, that a defendant may prefer waiving the right to raise a claim of ineffective assistance. A defendant uncertain about whether all offers were conveyed may prefer the plea deal in front of him to the costly process that would be required in order to obtain any more advantageous plea deal that his lawyer *may* have lost. That alternative process would involve trial, probable conviction, an even stiffer sentence, then appeal and post-conviction review that could ultimately fail for a host of reasons unrelated to the merits of the claim. In other words, *Frye* claims are not exceptional in any way that would make a defendant's decision to waive one necessarily irrational.

C. The Impact of Ethics Rules

Assuming the Constitution will not invalidate every defendant's knowing and voluntarily waiver of his right to raise an ineffectiveness claim, ineffectiveness waivers could be enforceable on collateral review even in jurisdictions where they are barred by state ethics rules. Some commentators and judges, however, have expressed concern that ineffectiveness waivers cannot be enforced because they are unethical.

This argument for barring waivers as unethical goes like this. First, to advise a client about any agreement by which the client would abandon a potential claim based on that attorney's deficient representation, the attorney's duty of loyalty to the client is impaired. The waiver creates an inherent conflict of interest, an intolerable risk the lawyer's advice about the waiver would be compromised by his interest in avoiding a claim of ineffective assistance. The ABA[52] and bar authorities in eight states,[53] for exam-

52. Rory K. Little, *The ABA's Project to Revise the Prosecution and Defense Function Standards*, 62 HASTINGS L.J. 1113, 1120 (2011); Rory K. Little, *The Role of Reporter for a Law Project*, 38 HASTINGS CONST. L.Q. 747, 795 (2011) (noting standards suggesting counsel should not accept plea deals that include waivers of "important defense rights" and prosecutors should not "routinely" require such plea waivers).

ple, have concluded that the rules of ethics bar defense counsel from advising a client to waive the right to bring any claim of ineffective assistance.[54]

Waiver opponents argue that this inherent conflict of interest satisfies the deficiency standard for ineffective assistance under *Strickland v. Washington.*[55] But conduct that contravenes ABA policy or that violates a rule of professional responsibility as interpreted in eight states does not necessarily meet *Strickland*'s deficiency test.[56] States are free to specify rules of professional re-

53. *See* Professional Ethics of the Florida Bar, Proposed Advisory Op. 12-1 (2012) (affirmed by the Board of Gov's December 7, 2012) (finding it "improper for the prosecutor to make such an offer and for the defense lawyer to advise the client on accepting the offer," noting that the "the majority of states that have examined this issue have concluded that such an offer is impermissible for the criminal defense lawyer, the prosecutor, or both, for varying reasons," and reviewing authority including Ala. State Bar, Ethics Op. RO 2011–02 (2011); Advisory Comm. of the S. Ct. of Mo., Formal Op. 126 (2009); Nev. Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. No. 48 (2011); N.C. State Bar, RPC 129 (1993); Ohio Bd. of Comm'rs on Grievances & Discipline, Op. 2001–6 (2001); Va. State Bar, Legal Ethics Op. 1857 (2011) (ethics opinion stated a defense attorney could not ethically advise a client to accept a collateral review waiver encompassing ineffective assistance claims but did not specifically bar an attorney from advising a client about such a provision); Vt. Bar Ass'n, Advisory Ethics Op. 95–04 (1995)).

54. A similar concern has also led some states to insist that a defendant's trial attorney cannot be appointed to represent him in a proceeding during which the defendant must raise or forfeit a claim of ineffective assistance of counsel. *See* Cal. Penal Code Ann. § 1240.1 (2012) (counsel who represented defendant at trial "shall admonish the defendant that he or she is not able to provide advice concerning his or her own competency, and that the State Public Defender or other counsel should be consulted for advice as to whether an issue regarding the competency of counsel should be raised on appeal."); Frazier v State, 303 S.W.3d 674 (Tenn. 2010) (statutory right to post-conviction counsel included right to conflict-free counsel, and because counsel "can hardly be expected to objectively evaluate his or her performance," court should have either disqualified counsel or obtained a valid waiver of the conflict); People v. Hardin, 818 N.E.2d 1246, 1251 (Ill. App. Ct. 2004) (duty to inquire when defendant presents facts suggesting a conflict that goes beyond the problem of one public defender having to attack another); *see also* CRIMPROC, *supra* note 30, § 11.3(c), at nn.66-68 (collecting authority, listing jurisdictions that use appellate defender offices for appointment of new counsel); Eve Brensike Primus, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. 679 (2007).

55. *E.g.*, Guillen-Rivera v. United States, 2012 WL 3522672, at *8 n.6 (M.D. Fla. Aug. 15, 2012) (expressing difficulty understanding how counsel could comply with their ethical obligations yet provide effective counsel to a criminal defendant while negotiating a plea containing an appeal waiver, but not reaching this issue).

56. *E.g.*, Cooper v. State, 356 S.W.3d 148, 157 (Mo. 2011) ("a violation of a professional rule of discipline does not equate to a constitutional violation."); David M. Siegel, *The Role of Trial Counsel in Ineffective Assistance of Counsel Claims: Three Questions to Keep in Mind*, CHAMPION, Feb. 2009, at 14, 16 (despite opinions of four state ethics bodies that unlimited waivers of post-conviction rights are unethical, few courts have followed this reasoning); *see also* DaSilva v. Commissioner of Correction, 34 A.3d 429, 438 (Conn. App. Ct. 2012) (rejecting petitioner's argument "to adopt rule 1.7 . . . as the standard against which to measure [an attorney's] conduct under the sixth amendment . . . although rule 1.7 can inform our analysis of an alleged sixth amendment violation, it does not govern our

sponsibility for their lawyers that are more demanding than the constitutional minimum.[57] The Court has referred to ethics rulings and ABA standards as helpful guides for determining whether conduct satisfies the minimum professional representation demanded by the Sixth Amendment, but those standards must, at least, be "prevailing,"[58] that is, widely accepted and well established, and these are not, at least not yet. Rather, what is widespread is the practice of seeking waivers of the right to bring ineffectiveness claims in the federal system, where, for more than two decades, they have been liberally enforced.[59] Nor are state ethics rulings on this point unanimous; two states have found that a defense attorney who counsels a client regarding a plea agreement involving the waiver of the right to bring a claim of ineffective assistance of counsel does *not* act unethically.[60]

More importantly, even if every lawyer who violates a state's ethics rule is deficient under *Strickland*, that lawyer's *client* may still be capable of knowingly and voluntarily accepting a plea deal

analysis"). For an analysis of the use and rejection of professional responsibility rules in defining Sixth Amendment standards and a collection of the Supreme Court's discussions of the topic, see CRIMPROC, *supra* note 30, § 11.10 at nn.41-46.16.

57. As the Connecticut Court of Appeals recently observed when enforcing a conflict waiver that barred a claim of ineffective assistance, the Supreme Court has "cautioned courts not to confuse ethical standards and constitutional standards. '[B]reach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct. . . .'" *DaSilva*, 34 A.3d at 438 (quoting Nix v. Whiteside, 475 U.S. 157, 165 (1986)).

58. *See* Missouri v. Frye, 132 S. Ct. 1399, 1408 (2012) (observing that the duty of communicating formal offers to clients is in an ABA standard "adopted by numerous state and federal courts over the last 30 years," and "is set out in state bar professional standards for attorneys"); Padilla v. Kentucky, 130 S. Ct. 1473, 1482 (2010) (noting ABA standards can be "valuable measures of the prevailing professional norms," and observing that the norm of informing client of immigration consequences is "universally require[d]" by "the American Bar Association, criminal defense and public defender organizations, authoritative treatises, and state and city bar publications"). *But cf. Frye*, 132 S. Ct. at 1412 (Scalia, J. dissenting) (noting that the deficiency prong of *Strickland* was not at issue in the case, only the prejudice prong).

59. King & O'Neill, *supra* note 10, at 210.

60. *See* Tex. S. Ct. Prof'l Ethics Comm., Op. 571 (2006) (concluding rules do not prohibit a defense attorney from advising the defendant with respect to a plea agreement containing a waiver of post-conviction ineffective assistance of counsel claims, so long as the agreement is not treated as an agreed limitation on possible future malpractice claims and so long as defense counsel has no cause for reasonable concern about his effectiveness); Ariz. State Bar, Ethics Op. 95–08 (1995) (plea agreement waiving future ineffective assistance of counsel claims does not constitute an improper attempt to prospectively limit defense counsel's malpractice liability); *see also* Watson v. United States, 682 F.3d 740, 744 (8th Cir. 2012) (noting division of opinion on ethics point); United States v. Deluca, No. 08-108, 2012 WL 5902555, at *10 (E.D. Pa. Nov. 26, 2012) (same).

that includes a waiver of effective assistance. The potential conflict of interest that arises when a defense attorney advises a client about waiving ineffectiveness claims is not categorically worse than other conflicts of interest that a defendant may knowingly and voluntarily waive before conviction. Indeed, the reasons for permitting a conflict waiver are even stronger in the pre-plea context than in the pre-trial context; as part of a plea agreement, an express waiver allows a defendant to obtain charging and sentencing concessions. Representation may not be forced upon a defendant who wishes to waive it, nor may a lawyer veto the defendant's decision to strike a plea deal. The key question, then, is not *if*, but *when*, as part of a plea agreement, a defendant can waive, voluntarily and knowingly, the right to challenge his conviction based upon a claim of ineffective assistance, including incompetent representation concerning the waiver itself.

IV. STANDARDS FOR DETERMINING WHEN WAIVERS OF THE RIGHT TO CLAIM INEFFECTIVE ASSISTANCE ARE KNOWING AND VOLUNTARY

To ensure that a defendant's ineffectiveness waiver is knowing and voluntary, something more than the usual guilty plea colloquy should be required. Several analogies are available. First, these waivers are something like waiving the assistance of counsel altogether in connection with a plea. The Court's decision in *Tovar* suggests that the requisite knowledge and freedom of choice for this type of waiver can be established by the facts and circumstances of the plea and the plea agreement, including the defendant's statements about whether he "fully underst[ood] the charge or the range of punishment for the crime prior to pleading guilty," whether there was "additional information counsel could have provided," and "the simplicity of the charge."[61]

Alternatively, the Court's special standards for conflict waivers are another potential guide for judges seeking to ensure that a defendant knows what he is doing when he signs one of these waivers.[62] The Second Circuit has adopted a helpful suggested

61. Iowa v. Tovar, 541 U.S. 77, 92-93 (2004).

62. The Court has held that whenever a trial court knows or reasonably should know of the possibility of a conflict of interest, it must initiate an inquiry about that conflict. Wood v. Georgia, 450 U.S. 261, 272, 273 n.18 (1988); Cuyler v. Sullivan, 446 U.S. 335, 347 (1980); *see also* CRIMPROC, *supra* note 30, § 11.9(c) at n.129 ("Trial courts must exercise 'considerable care' if they want to obtain waivers that satisfy the knowing-and-intelligent standard"). By suggesting such a colloquy provides a guide, I do not mean to suggest it is consti-

script for ensuring that conflict waivers are knowing and voluntary. When a defendant states that he desires to waive his right to representation by an non-conflicted attorney, trial judges in that Circuit are encouraged to hold what is known as a *Curcio*[63] hearing, and

> (1) advise the defendant of his right to conflict-free representation, (2) instruct the defendant as to the dangers arising from the particular conflict, (3) permit the defendant to confer with his chosen counsel, (4) encourage the defendant to seek advice from independent counsel, (5) allow a reasonable time for the defendant to make his decision, and (6) determine, preferably by means of questions that are likely to be answered in narrative form, whether the defendant understands the risks and freely chooses to run them.[64]

The focus here is on the facts of the particular case, including the personal experience and understanding of the defendant,[65] not "the exact words" of the judge.[66] As Judge Easterbrook has stated,

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tutionally required. *See, e.g.*, United States v. Velez, 354 F.3d 190, 198 (2d Cir. 2004) (quoting Mickens v. Taylor, 535 U.S. 162, 168–69 (2002) (rejecting claim that waiver was invalid, noting that the duty of inquiry only arises when the possibility of a conflict of interest was "sufficiently apparent" and not whenever "the trial court is aware of a vague, unspecified possibility of conflict.")).

63. United States v. Curcio, 680 F.2d 881 (2d Cir. 1994).

64. United States v. Rodriguez, 968 F.2d 130, 139 (1992) (citing *Curcio*, 680 F.2d 888-90). Note that although a second attorney's advice may be encouraged, the effective assistance of counsel is not a prerequisite to knowing and voluntary waiver of either all representation or conflict-free representation. A colloquy with the judge is sufficient. *See also* Krupp v. State, 356 S.W.3d 142, 147-48 (Mo. 2011) (rejecting the petitioner's argument that that in the absence of additional counsel without a potential conflict of interest, his waiver of post-conviction remedies could not have been voluntary and intelligent); Cooper v. State, 356 S.W.3d 148, 153-54, (Mo. 2011) (citation omitted) (same, stating that "[i]t has been settled law in this state and many other states that '[a] movant can waive his right to seek post-conviction relief in return for a reduced sentence if the record clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently. . . . The record in this case clearly demonstrates that the movant was properly informed of his rights and that the waiver was made knowingly, voluntarily, and intelligently.'"). A trial judge may prefer to have "stand by" counsel available to explain the waiver of ineffectiveness claims to make the waiver bullet-proof. *See, e.g.*, United States v. Baldwin, No. 4:07CR3001, 2010 WL 749746 (D. Neb. Mar. 1, 2010) (enforcing waiver after plea entered with stand- by counsel and extensive colloquy regarding waiver provision).

65. *See e.g.*, Gomez v. Ahitow, 29 F.3d 1128, 1134 (7th Cir.1994) (the issue is not whether the "judge told the defendant everything," since "[n]o choice of any kind is made with perfect information," but whether the defendant had "enough information about the conflict and its potential effects with which to make a rational choice 'with eyes open.'").

66. *See, e.g.*, United States v. Levy, 25 F.3d 146, 152-54 (2d Cir.1994). Consider, for example, a recent case where defendant, whose attorney had applied for a job with the U.S.

a judge is not required to "follow some pre-ordained, detailed script" or "conduct a long-winded dialogue with counsel and defendants" before accepting a defendant's waiver of his right to conflict-free counsel; rather, the judge need only "inform each defendant of the nature and importance of the right to conflict-free counsel and ensure that the defendant understands something of the consequences of a conflict."[67]

In addition, before accepting a plea agreement containing one of these waivers, a judge should ensure the defendant has accurate information about the right to review that he is waiving. The Eighth Circuit, for example, has suggested that a valid waiver of the right to bring an ineffectiveness claim would include an explanation of "the concept of ineffective assistance of counsel and the basic ramifications of waiving a claim that ineffectiveness influenced the signing of the waiver."[68] What this might entail would

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Attorney's Office, asserted that the appeal-waiver provision in his plea agreement was unenforceable because the District Court failed to secure a valid waiver of his Sixth Amendment right to be represented by "conflict-free" counsel. Rejecting the argument, the court reiterated its prior guidance concerning how trial courts should ensure that conflict waivers are knowing and voluntary, stating "we are more concerned with whether the defendant appreciated his predicament and made a properly informed choice than we are with whether the trial judge recited any particular litany of questions," and found that the defendant was fully informed of the potential conflict of interest involving one of his attorneys and his subsequent waiver of this issue was both "knowing" and "intelligent." United States v. Buissereth, 638 F.3d 114, 117 (2d Cir. 2011).

67. United States v. Turner, 594 F.3d 946, 952 n.1 (7th Cir. 2010) (citations omitted). Some courts may require that the colloquy be tailored to the specific circumstances of the case. *E.g.*, United States v. Newell, 315 F.3d 510, 522 (5th Cir. 2002) (an intelligent waiver requires an awareness of the particular character of the anticipated conflict, and waivers are valid "[only] against conflicts that emerge at trial in cases where they were sufficiently foreseeable that the judge can bring them home to the defendants in concrete terms."); Thomas v. State, 551 S.E.2d 254 (S.C. 2001) (waiver of potential conflict—that defendant and her husband may implicate each other—not effective as to actual conflict that arose when prosecutor offered to accept a plea from either spouse and to drop charges against the other).

68. *See* Chesney v. United States, 367 F.3d 1055, 1059 (8th Cir. 2004) (concluding that because the "waiver did not specifically mention the Sixth Amendment or the right to effective assistance of counsel, and the colloquy with the court at the time of sentencing was no more specific than the general written waiver," the defendant "did not waive the right to argue that his waiver of the right to file 'any and all post sentencing pleadings' was the result of ineffective assistance of counsel, and thus was not a 'knowing and voluntary' waiver"); *see also* Watson v. United States, 682 F.3d 740, 744 (8th Cir. 2012) (declining to decide whether to adopt *Chesney's* formulation because the defendant "[did] not claim his counsel labored under a conflict of interest when advising him to enter the plea agreement, and the parties did not brief this issue.").

Several decisions by trial courts in the Eighth Circuit have applied the standard suggested in *Chesney*, but have yet to find a sufficiently explicit waiver to preclude merits review. *See, e.g.*, United States v. Taylor, No. CR 02-3042-MWB, 2007 WL 3504461, at *4 (N.D. Iowa Nov. 15, 2007) (noting that there was no proof or claim that the defendant explicitly waived his Sixth Amendment rights in this case, and therefore the defendant is not

have to be developed, but a court might start with a short list of the some of the more common allegations a defendant would be waiving, such claims that the lawyer cost the defendant a better deal, may have an undisclosed conflict of interest, provided incorrect advice, or did not sufficiently investigate the law or facts.

The main point is that so long as appropriate safeguards are followed to ensure that a defendant's waiver of his right to raise claims of ineffective assistance of counsel is knowing and voluntary, the Constitution probably allows reviewing courts to enforce that waiver, even to bar a claim that the defendant was denied the effective assistance of counsel under *Frye* or *Padilla*.

V. WHY COURTS SHOULD NEVERTHELESS DECLINE TO ENFORCE INEFFECTIVENESS WAIVERS

Although the Constitution does not bar enforcement a waiver of the right to bring an ineffectiveness claim regarding advice about the plea or waiver itself, I believe that such waivers should not be routinely sought or enforced. My opposition is not based on the assumption that enforcement of these waivers would cause defendants who would otherwise receive post-conviction relief to lose their chance to avoid conviction or punishment.[69] Even when ad-

initially precluded from making his ineffective assistance of counsel); Rosson v. United States, Crim. No. 05-00080-01-CR-W-FJG, 2007 WL 2406998, at *3 (W.D. Mo. Aug. 17, 2007) (noting that an "explicit waiver of Sixth Amendment right to counsel, which explains the concept of ineffective assistance of counsel and the basic ramifications," would "suffice and defendant would be precluded from asserting any ineffective assistance of counsel claims," but "there is no such waiver in movant's plea agreement."); United States v. Feather, No. 1:03-CR-22, 2006 WL 688998, at *4 (D. N.D. Mar. 3, 2006) (stating that although "An explicit waiver of the Sixth Amendment right to counsel, which explains the concept of ineffective assistance of counsel and the basic ramifications of waiving a claim that ineffectiveness influenced the signing of the plea agreement, would suffice. . . . The waiver at issue in this case contains no specific Sixth Amendment language regarding ineffective assistance of counsel.").

Missouri state courts, however, have upheld such a waiver after noting the "extensive" questioning "about whether defense counsel fully apprised him of the consequences of his agreement, whether he understood his agreement, and whether his decision to enter into the agreement was the result of his own free will," and the "substantial benefit" he received in exchange for his waiver of post-conviction relief. Krupp v. State, 356 S.W.3d 142, 147-48 (Mo. 2011); *see also* Cooper v. State, 356 S.W.3d 148, 153-54 (Mo. 2011); Cross v. State, 359 S.W.3d 571, 575-78, (Mo. Ct. App. 2012) (defendant waived his right to seek post-conviction relief in exchange for the State's sentencing recommendation, received the benefit of the bargain, and the record shows the waiver was made knowingly, voluntarily, and intelligently after he was informed of the rights he was relinquishing, holding defendant "to his end of the bargain").

69. *Cf.* Justin F. Marceau, *Remedying Pretrial Ineffective Assistance*, 45 TEX. TECH. L. REV. 277, 287 (2012) (noting that when attorney error leaves a defendant no better option

dressed on the merits, ineffectiveness claims are dispatched quickly based on the record.[70] Proving prejudice is nearly impossible—only the rare defendant could show that but for his lawyer's advice there was a reasonable probability that he would have gone to trial or secured a better deal.[71]

Instead, judicial enforcement of boilerplate waivers of ineffectiveness claims carries a different cost. The regulation of representation during negotiations is still in its infancy. The Court has just begun to address specific steps that fall below expected constitutional standards (e.g., providing accurate advice about immigration consequences as in *Padilla*, or conveying formal offers as in

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than a guilty plea, the plea "insulates these attorney errors from the light of judicial review and denies many such defendants *an opportunity to even seek a remedy*" (emphasis added)).

70. *E.g.*, United States v. Kaiser, 216 Fed. App'x 590, 592 (7th Cir. 2007) (unpublished opinion) (claim that ineffective assistance of counsel resulted in his entry of guilty plea did not serve to overcome appeal waiver, as it "contradict[ed defendant's] statement in the plea agreement that he was fully satisfied with the representation he received from his trial counsel."); Gomez v. United States, No. 12 CIV. 4799 DLC, 2012 WL 6097783, at *4 (S.D.N.Y. Dec. 7, 2012) ("Each of the assertions he makes against his attorney for either failing to give him certain advice, or misleading him about his sentencing exposure, is directly and fully contradicted by the record"); Cary v. United States, Crim. No. 4:08CR00903-001, 2012 WL 5337154, at *3 (E.D. Tex. Oct. 22, 2012) (rejecting claim alleging counsel misinformed him about the exposure he faced and the waiver of his appellate rights, stating, "the evidence shows that he was satisfied with his attorney and that his attorney was effective," and that conclusory allegations and bald assertions are insufficient); People v. Soria, 952 N.Y.S.2d 300, 301 (N.Y. App. Div. 2012) ("To the extent that the defendant contends that ineffective assistance of counsel affected the voluntariness of his plea, the record demonstrates that the defendant received an advantageous plea, and nothing in the record casts doubt on the apparent effectiveness of counsel. . . . Moreover, the defendant's claim of ineffective assistance of counsel is refuted by the record of the plea proceeding, in which he acknowledged that he had enough time to discuss the matter with his attorney and was satisfied with his attorney's advice and legal services."). *Cf.* Danielle M. Lang, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 975 (2012) (noting cases that considered the plea colloquy to be significant, if not controlling, evidence weighing against a finding of prejudice).

71. Nor is a defendant likely to be able to establish that a more effective lawyer could have procured a deal without the waiver of collateral review, particularly where waivers are routine. *E.g.*, United States v. Murin, No. 09-279, 2013 WL 23797, at *4 (W.D. Pa. Jan. 2, 2013) (noting that "the closest Petitioner comes to claiming that his waiver was the result of ineffective assistance of counsel is in claiming that waivers of the nature of his typically contain language indicating that the waiver does not apply to claims of ineffective assistance of counsel or prosecutorial misconduct and that his counsel was ineffective in failing to ensure that this 'typical' language applied in his case. However, Petitioner in no way explains why or how he believes that waivers 'typically' contain the exceptions to which he cites, and he cites to no authority or evidence in support of his claim. The language contained in Petitioner's waiver of his right to collaterally attack his conviction or sentence is certainly typical of the language in such waivers in this district. Moreover, Petitioner does not suggest that the Government would have been amenable to any different waiver language, and, therefore, he cannot establish that he was prejudiced by his counsel's failure to seek for the inclusion of such language.").

Frye). There is great uncertainty about how these initial cases will play out in the lower courts,[72] and what additional guidance to expect from the Court.[73] Dissenting in *Frye,* Justice Scalia, joined by Justices Thomas and Alito, agreed that "[t]he plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained."[74] Regardless of whether one agrees with the majority's view that the appropriate source of that regulation is the Sixth Amendment, or Justice Scalia's view that it is not, any informed regulation of plea bargaining and the assistance of counsel during bargaining depends upon accurate information about what lawyers do during this important phase of the criminal process. Waivers hide it all from view.

Other constitutional violations that could affect the validity of a plea-based conviction—such as the bias of the judge, lack of notice of the charge, double jeopardy, selective prosecution, unconstitutional charging delay, etc.—do not have this problem. These other claims could at least, in some cases, be raised and litigated before a trial, or even prior to a plea, allowing for some development of the law. But because *Strickland* claims may not be raised by a defendant before conviction, and are only ripe after conviction, routine waivers would effectively eliminate judicial review of representation in all criminal cases resolved by plea agreement. Even without ineffectiveness waivers only the most serious cases reach the initial collateral review stage, and only a small percentage of defendants dare to dislodge their negotiated resolutions.[75]

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72. *See, e.g.*, Jane Moriarty & Marisa Main, *"Waiving" Goodbye To Rights: Plea Bargaining And The Defense Dilemma of Competent Representation*, 38 HASTINGS CONST. L.Q. 1029, 1044 (2011) (noting uncertainty surrounding scope of *Padilla*).

73. For example, the Court recently agreed to consider whether "any degree of judicial participation in plea negotiations, in violation of Federal Rule of Criminal Procedure 11(c)(1), automatically requires vacatur of a defendant's guilty plea, irrespective of whether the error prejudiced the defendant." Petition for Writ of Certiorari, United States v. Davila, 133 S. Ct. 831 (2013) (No. 12-167).

74. Missouri v. Frye, 132 S. Ct. 1399, 1413-14 (2012) (Scalia, J., dissenting).

75. Because plea agreements generally produce a better outcome for defendants than trial, even without a waiver, few defendants challenge their pleas. *See, e.g.*, Padilla v. Kentucky, 130 S. Ct. 1473, 1485-86 (2010) (stating that the "nature of relief secured by a successful collateral challenge to a guilty plea—an opportunity to withdraw the plea and proceed to trial—imposes its own significant limiting principle: Those who collaterally attack their guilty pleas lose the benefit of the bargain obtained as a result of the plea. . . . ultimately, the challenge may result in a *less favorable* outcome for the defendant, whereas a collateral challenge to a conviction obtained after a jury trial has no similar downside potential.") (emphasis original); *see also* Nancy J. King, *Enforcing Effective Assistance After* Martinez, YALE L.J. (forthcoming) (presenting statistics on state post-conviction challenges). *Cf.* Jeffrey M. Brandt, *Addressing Errors in Entering Appeal Waivers: Why Appeal Waivers Entered in Violation of the Due Process Clause or Rule 11 Should Be Severed from*

Yet permitting review of at least this narrow and skewed sample of claims is essential if lawmakers and courts are to learn about what aspects of the bargaining process might require regulating.

There are several ways that a jurisdiction might choose to prop open the judicial review door for claims about effective representation in bargaining, without invoking the Constitution to invalidate waivers. State constitutional or common law or a court's supervisory power may support a ruling that either bars enforcement of ineffectiveness waivers, or creates a presumption of invalidity, subject to rebuttal by a specified showing (such as clear benefit to the defendant or extraordinary circumstances). Legislation could ban the enforcement of ineffectiveness waivers, or court rules could limit judges from accepting such terms in agreements. With or without ineffectiveness waivers, a state could also, by court rule or statute, specify certain negotiation responsibilities of counsel, about which the judge must ask before accepting a plea.[76]

Short of codifying efforts to regulate waivers by statute or court rule, more states may attempt to limit the use of ineffectiveness waivers through ethics rules. As explained above, declaring these waivers to be unethical does not make them unenforceable. But if discipline awaited those prosecutors or defense attorneys who negotiate or sign such terms, an ethics rule could deter the use of waivers in that state.[77] Even this approach has its pitfalls. A state may find that no state ethics rule can replace or modify criminal procedure law, particularly if the process for adopting ethics standards is less rigorous than the process for adopting other court rules that bind lawyers in the criminal process.[78] Even more uncertain is whether the Citizen's Protection Act (commonly

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Otherwise Valid Plea Agreements, FED. LAW., June 2010, at 42 (arguing that invalid waiver terms should be severed from an agreement, without requiring a defendant to challenge the entire deal).

76. *E.g.*, FLA. R. CRIM. P. 3.171 (requiring defense counsel to advise defendant of all plea offers); FLA. R. CRIM. P. 3.172 (judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant; and inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant).

77. *See* O'Dell v. United States, 5:11-CV-8003-RDP-RRA, 2012 WL 6186192, at *1 (N.D. Ala. Dec. 7, 2012) (noting that because a recent ethics opinion suggested a prosecutor may act unethically in attempting to enter into a plea agreement which contains such a waiver, prosecutor no longer sought to invoke waiver).

78. CRIMPROC, *supra* note 30, § 1.7(j) at nn.241-52 (collecting authority); *see also id*. § 1.7(f) (discussing the process for rulemaking in the states).

known as the McDade Amendment"),[79] would require federal prosecutors to follow a state ethics rule limiting the use of ineffectiveness waivers. Rule 11(b)(1)(N) of the *Federal Rules of Criminal Procedure* appears to recognize that plea agreements may contain waivers of the "right to . . . collaterally attack the sentence," and a state ethics rule barring parties from seeking or accepting ineffectiveness waivers would be inconsistent with the law of several federal courts of appeals.[80]

Each of these approaches has its own challenges, but as nonconstitutional options they offer at least the potential to ensure that some information about bargaining representation continues to surface, even as ineffectiveness waivers drive that information further underground.

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The issue addressed in this essay is yet another illustration of the hazards of regulating our plea-based criminal justice process through the expansion and contraction of individual procedural rights. As those rights are traded away for charging and sentencing concessions, lawmakers are left in the dark, unable to know if and how procedural law is enforced or violated. Focused regulation of defense representation during plea bargaining has only recently emerged; it would be unfortunate to allow boilerplate waivers of review to abort its development.

79. 28 U.S.C. §530B (2012); 28 C.F.R. §§ 77.1-77.5 (2012).

80. For a detailed discussion and analysis of the issues raised by the Citizens Protection Act, Department of Justice regulations interpreting the Act, and federal court decisions on this topic, see CRIMPROC, *supra* note 30, § 1.7(j) at nn.253- 265.148 (See especially authority discussed in note 265.31).