PSD
BOSTON NEW YORK
www.psdfirm.com
POLLACK SOLOMON DUFFY LLP
133 Federal Street . Suite 902 . Boston, MA 02110
617.439.9800
bpollack@psdfirm.com

June 15, 2015

The Honorable Chuck Grassley
Chairman
United States Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, D.C. 20510-6050

Re: Proposed Legislation to Ensure Accuracy, Consistency and Informed-Decision-Making in Connection with Appellate Waivers in Plea Agreements

Dear Chairman Grassley:

We write to request the attention of the United States Senate Committee on the Judiciary to concerns that arise from the use of certain inaccurate or misleading language in appellate waivers imposed by federal prosecutors in plea agreements. During my tenure as a federal prosecutor, my office rarely if ever insisted on appellate waivers in plea agreements, but now such waivers are common practice in at least certain jurisdictions. While we question the propriety of appellate waivers generally, by way of this letter, we seek consideration of new legislation, or at least a legislative inquiry, concerning whether (1) typical appellate waiver language in plea agreements creates confusion in the absence of adequate disclosures to defendants of exceptions that exist to the enforceability of the appellate waiver, and (2) District Courts should conduct an enhanced colloquy with counsel at a Rule 11 plea hearing to identify any constitutional grounds for an appeal that are being waived, which would advance the directives and reasoning in a memorandum on the subject by Attorney General Eric Holder, dated October 14, 2014, sent to all federal prosecutors. A copy of proposed legislation is attached to this letter.

The typical appellate waiver language now used in plea agreements has a tendency to mislead defendants into believing that they have given broader waivers than what the law recognizes. Typical appellate waiver language in recent plea agreements has stated in pertinent part the following:

> Defendant waives any right to challenge Defendant's conviction on direct appeal or in a future proceeding (collateral or otherwise).

> Defendant understands and acknowledges the U.S. Attorney has retained all appeal rights.
>
> Notwithstanding the previous subparagraphs, Defendant reserves the right to claim that Defendant's lawyer rendered ineffective assistance of counsel under *Strickland v. Washington.*

It is also common practice for federal prosecutors to include language that the U.S. Attorney has the power or discretion to determine whether a defendant has breached any provision of the plea agreement. As a result of this language, defendants face the threat of various remedies that federal prosecutors reserve for their office, according to language they impose in plea agreements, if a prosecutor in his or her discretion views anything that occurs as a breach by the defendant. The highly uneven bargaining leverage underlying these positions is also reflected in the practice of appellate waiver language generally being unilateral, with the government retaining its right to appeal.

Contrary to the appellate waiver language that federal prosecutors regularly employ in plea agreements, the law recognizes exceptions beyond ineffective assistance of counsel claims. Despite broad appellate waiver language, appeals based on an argument that the government has breached the plea agreement are not precluded, as a matter of law. *See United States v. Cohen*, 459 F.3d 490, 495 (4th Cir.2006) (the court "will not enforce an otherwise valid appeal waiver against a defendant if the government breached the plea agreement containing that waiver"); *see also Santobello v. New York*, 404 U.S. 257, 262 (1971) (prosecutors improperly breach a plea agreement when a promise made to induce the plea goes unfulfilled). In addition, appellate waivers do not preclude an appeal based on an asserted error in the Rule 11 plea colloquy that affects the defendant's understanding of his or her waiver or the voluntariness of his or her plea. *See United States v. Corso*, 549 F.3d 921, 929 (3d Cir. 2008) (recognizing permissible appeal despite appellate waiver when a Rule 11 error "precluded him from understanding that he had a right to appeal and that he had substantially agreed to give up that right").

Under the present regime, defendants are routinely told they have no appellate rights other than those concerning ineffective assistance of counsel, when in fact those defendants retain appellate rights concerning breaches of the plea agreement and certain flaws in the Rule 11 plea colloquy. As a result, many defendants (and their counsel) likely forego appeals believing that they are not permitted to bring them, even if the government has breached the plea agreement or flaws permeated the Rule 11 plea colloquy. Furthermore, the consequences set forth in many plea agreements for breaches by a defendant would naturally compound the error, causing defendants to fear that prosecutors have the power to deem them in breach for taking an impermissible appeal, thereby exposing them to a successive prosecution that otherwise could not be brought. There is simply no good reason for depriving a defendant of accurate and valuable information during the Rule 11 plea colloquy concerning appellate rights that he or she still holds.

With respect to the general carve out from appellate waivers for claims of ineffective assistance of counsel, a greater inquiry at the Rule 11 plea hearing is needed to make this carve out effective. In his October 14, 2014 memorandum to all federal prosecutors, Attorney General

Eric Holder directed that prosecutors no longer seek in plea agreements to require that a defendant waive claims of ineffective assistance of counsel," but otherwise prosecutors may continue to obtain waivers of appellate rights and of post-conviction remedies. The Attorney General supported this directive because the Department of Justice has "made support of indigent defense a priority" and has "worked to ensure that all jurisdictions – federal, state and local – fulfill their obligations under the Constitution to provide effective assistance of counsel, especially to those who cannot afford an attorney." By requiring a greater inquiry at the plea hearing, a record on ineffective assistance could be perfected for an appeal rather than saved for a future collateral attack.

These changes would pose a minimal burden on the District Courts and litigants, but would promote accuracy, consistency, and informed appellate waivers that facilitate the Attorney General's recent directives. While the Attorney General may have blessed appeals on ineffective assistance grounds despite appellate waivers, courts have long "discourage[d] appellants from raising claims of ineffective assistance of counsel on direct appeal because the record is often not sufficiently developed to support the ineffectiveness issue." *Fuller v. United States*, 398 F.3d 644, 649 (7th Cir. 2005) (citation omitted). While, in some cases, collateral attacks in habeas proceedings might be the most productive way to build a record of ineffective assistance of counsel, particularly after a trial, when a defendant pleads guilty, several simple questions of counsel during the Rule 11 plea colloquy would build the record on the scope constitutional grounds for appeal that are being waived by entering a plea of guilty. For instance, if a defendant had filed an unsuccessful motion to suppress the key evidence on Fourth Amendment grounds, and then entered a plea of guilty with an enforceable appellate waiver, the government's use of that evidence at sentencing to enhance a sentence could not even be challenged on appeal. Accordingly, during the Rule 11 colloquy, the Court should inquire of counsel what potential constitutional grounds exist for an appeal that the defendant is waiving. If counsel identify an issue, such as the right to renew arguments on Fourth Amendment grounds, then the waiver by the defendant would appear knowingly made. If counsel fail to identify an issue during the colloquy, then the record may be sufficiently developed for appeal on ineffective assistance of counsel grounds, at least concerning the scope of the appellate waiver. Such questions would pose a minimal burden, but could help avoid the need for future habeas proceedings, thereby conserving resources. Such a colloquy with defense counsel would also advance the concerns expressed by the Attorney General in his October 14, 2014 memorandum concerning the need for all jurisdictions to ensure effective assistance of counsel.

The debate over plea agreements is not remotely new, but the debate over appellate waivers in plea agreements has grown over the past decade. As Justice Douglas explained in a concurring opinion in the seminal case of *Santobello v. New York*, 404 U.S. 257 (1971):

> [A] prosecutor's promise may deprive a guilty plea of the 'character of a voluntary act.' *Machibroda v. United States*, *supra*, 368 U.S., at 493, 82 S.Ct., at 513. *Cf. Bram v. United States*, 168 U.S. 532, 542-543, 18 S.Ct. 183, 186-187, 42 L.Ed. 568. The decisions of this Court have not spelled out what sorts of promises by prosecutors tend to be coercive, but in order to assist appellate review in weighing promises in light of all the circumstances, all trial courts are now

> required to interrogate the defendants who enter guilty pleas so that the waiver of these fundamental rights will affirmatively appear in the record. *McCarthy v. United States*, 394 U.S. 459, 89 S.Ct. 1166, 22 L.Ed.2d 418; *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274. The lower courts, however, have uniformly held that a prisoner is entitled to some form of relief when he shows that the prosecutor reneged on his sentencing agreement made in connection with a plea bargain, most jurisdictions preferring vacation of the plea on the ground of 'involuntariness,' while a few permit only specific enforcement. Note: Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 876 (1964). As one author has stated, the basis for outright vacation is 'an outraged sense of fairness' when a prosecutor breaches his promise in connection with sentencing. D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 36 (1966).

*Santobell*o, 404 U.S. at 266 (Douglas, J., concurring).

This sensitivity toward protecting an accused through the plea bargaining process has been reinforced by two relatively new Supreme Court decisions, which recognized that the quantity of guilty pleas now shuffled through our criminal justice system justifies meaningful scrutiny of the plea bargaining process to safeguard constitutional rights. In *Missouri v. Frye*, 132 S. Ct. 1399 (2012), the Court applied constitutional rights of a defendant to the plea bargaining stage, reasoning that "[i]n today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Id.* at 1407. In *Lafler v. Cooper*, 132 S. Ct. 1376 (2012), the Court similarly explained:

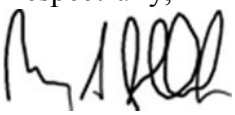
> Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. *See Frye*, ante, at 1386, 132 S.Ct. 1399. As explained in *Frye*, the right to adequate assistance of counsel cannot be defined or enforced without taking account of the central role plea bargaining plays in securing convictions and determining sentences.

Lafler, 132 S. Ct. at 1388.

The accompanying proposed legislation addresses these issues by imposing minimal burdens on courts and litigants that often would conserve judicial resources by reducing the number of collateral attacks. The proposed legislation would safeguard the rights of defendants through the modern plea bargaining process that now tends to strip defendants often of appellate rights. The proposed legislation is short and fairly self-explanatory, at least with the benefit of this letter. In the absence of legislation, prosecutors may continue to impose appellate waiver language in plea agreements that misleads defendants into foregoing appeals that controlling law allows and that involve important constitutional issues.

Thank you for your attention to these important matters. If you have any questions, please feel free to contact me. We would appreciate an opportunity to speak with you, other committee members or staff to facilitate progress on this proposed legislation and area of legislative inquiry.

Respectfully,



Barry S. Pollack

A PROPOSED ACT TO IMPROVE ACCURACY, CONSISTENCY AND INFORMED DECISION-MAKING IN CONNECTION WITH APPELLATE WAIVERS IN PLEA AGREEMENTS.

A. Before a District Court accepts a plea agreement or the tender by a defendant of a guilty plea that includes a waiver of appellate rights, the District Court shall:

1. inform the defendant that the appellate waiver does not preclude appeals based on any breach by the government of the plea agreement, based on a flaw in the entry of the plea that affects the voluntariness of it or based on any claim that defense counsel failed to provide effective assistance in the matter;
2. ask counsel whether they have identified any constitutional grounds for an appeal that are subject to the appellate waiver; and,
3. if any constitutional ground is identified, ask the defendant whether he or she understands that any such constitutional ground for an appeal is being waived.

B. Whenever a plea agreement contains an appellate waiver, any language in the plea agreement that purports to reserve for the prosecutorial authority the power or discretion to determine whether the defendant has breached the plea agreement shall be of no force and effect, and the District Court shall retain the power and discretion to determine whether the defendant has breached the plea agreement.