Right to Appeal Waived [1]

Next, a defendant ordinarily retains the right to appeal even after pleading guilty. Thus, a waiver of the right to appeal is separate and distinct from the waiver of a trial and other rights by a plea of guilty. In this case, however, as a condition of the plea agreement, you are asked to waive your right to appeal.[2]

First, what is an appeal? An appeal is a proceeding before a higher court, an appellate court. If a defendant cannot afford the costs of an appeal or of a lawyer, the state will bear those costs. On an appeal, a defendant may, normally through his/her lawyer, argue that an error took place in this court which requires a modification or reversal of the conviction. A reversal would require either new proceedings in this court or a dismissal. Do you understand?

By waiving your right to appeal, you do not give up your right to take an appeal by filing a notice of appeal with this court and the District Attorney within 30 days of the sentence. But, if you take an appeal, you are by this waiver giving up the right to have the appellate court consider most claims of error, [including a claimed error in the denial of your (*specify*, e.g., motion to suppress),] [3] and to consider whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?

Among the limited number of claims that will survive the waiver of the right to appeal are: the voluntariness of this plea, the validity and voluntariness of this waiver, the legality of the sentence, [and] the jurisdiction of this Court
Add if an issue in the case:
[and] a defendant's competency to stand trial,
[and] a defendant's constitutional right to a speedy trial[4]].

Do you understand?]

Have you spoken to your lawyer about waiving your right to appeal?

Are you willing to do so in return for the plea and sentence agreement?

Do you waive your right to appeal voluntarily, of your own free will and choice?

1. In *People v. Thomas*, 25 NY3d 337 (2019), the Court of Appeals reviewed three separate cases that contested the validity of a waiver of the right to appeal; a majority of the Court found one waiver valid and two invalid; three judges wrote separate opinions either concurring or dissenting with respect to each of the three cases. The majority opinion approved parts of the Model Colloquy (MC).

The Appellate Divisions had previously approved similar formulations of the MC waiver. *E.g. People v Ball*, 129 AD3d 739 (2d Dept 2015); *People v Contreras*, 123 AD3d 1139 (2d Dept 2014); *People v Cannon*, 123 AD3d 1138 (2d Dept 2014); *People v Vaiana*, 119 AD3d 879 (2d Dept 2014); *People v Persaud*, 118 AD3d 820 (2d Dept 2014). The references in the MC to whether the defendant has conferred with counsel and understands that the conviction will normally be final were added after *People v Brown*, 122 AD3d 133 (2d Dept 2014) recommended inclusion of those references.

A review of all four opinions in *Thomas* suggests additions to the MC.

First, while the opening paragraph of the MC has met the requirement of telling a defendant that a guilty plea and appeal waiver are “separate and distinct,” the repeated use of that quoted term in the *Thomas* opinions suggest that a “belt and suspenders” approach would be to include the quoted phrase in the opening paragraph. Thus the second sentence of the first paragraph has been added.

Second, the collective opinions suggest that even though the record shows that the waiver is intended "to cover all aspects of the case," the better practice would be for a court to expressly set forth any major aspect of the case for which appellate review is waived, as well as those items not waived.

With respect to the waiver of a major aspect of the case, the MC had included in footnote three a suggestion that the defendant be told, for example, that he/she was waiving appellate review of a denied suppression motion. In light of *Thomas*, the language of the footnote has been moved into paragraph three. Also, as explained in the revised footnote three, other denied motions may be waived and may warrant being noted.

2. The waiver must be made "knowingly, intelligently and voluntarily" (*People v Lopez*, 6 NY3d 248, 256 (2006); *see People v Muniz*, 91 NY2d 570, 573 (1998), and the defendant must understand that the waiver is independent of the waiver of rights that flow from a plea of guilty (*see People v Lopez*, *supra).*

A written waiver of the right to appeal may be utilized. However, that writing, even with the purported signature of the defendant, is normally by itself insufficient to prove that there was a knowing, intelligent and voluntary waiver of the right to appeal.

It remains necessary for the court to "adequately assure[ ] that defendant understood the nature of the appeal waiver (*People v. Elmer,* 19 NY3d 501, 510 (2012) ("There was no 'attempt by the court to ascertain on the record an acknowledgment from defendant that he had, in fact, signed the waiver or that, if he had, he was aware of its contents'" [citation omitted]). *See People v Bradshaw*, 18 NY3d 257 (2011). *People v Calvi*, 89 NY2d 868 (1996); *People v Callahan* [*DeSimone*], 80 NY2d 273 (1992). *Cf. People v Ramos*, 7 NY3d 737 (2006) (the defendant adequately orally acknowledged that he understood by the writing that he was waiving his right to appeal).

3. Prior to decisional law approving a waiver of the right to appeal, a defendant could separately waive the right to appeal a determination of a suppression hearing. *See People v Williams*, 36 NY2d 829 (1975). Once the waiver of the right to appeal was approved and included a waiver of review of a suppression decision, a separate waiver of the right to appeal a suppression decision became unnecessary. Thus, if applicable, the court should add the words in brackets.

As of January 1, 2020, a plea of guilty will not waive appellate review of a CPL 30.30 lack of speedy trial claim. The statute, however, does not preclude a waiver of the right of appeal including a waiver of appellate review of a CPL 30.30 claim. Thus, if the court decided a CPL 30.30 motion, it may wish to include that among the claims waived.

4. The Court of Appeals has determined that there are some "categories of claims which affect the fundamental fairness of the process and society's interest in maintaining the integrity of criminal proceedings, and therefore cannot be waived." *People v Campbell*, 97 NY2d 532, 535 (2002). *See People v Thomas*, 25 NY3d at 559 (cannot waive a claim that "the voluntariness of the appeal waiver"]; *People v Campbell*, 97 NY2d 532, 535 (2002) (cannot waive a claim of a denied "speedy trial, challenges to the legality of court-imposed sentences and questions as to a defendant's competency to stand trial"; *People v Seaberg,* 74 NY2d 1 (1989). If a defendant is eligible for adjudication as a youthful offender and the sentencing court fails to exercise its discretion to consider whether to impose same, that failure will be reviewable on appeal even though the defendant waived the right to appeal. *People v Pacherille,* 25 N.Y.3d 1021 (2015).

With respect to issues for which appellate review is not waived, the fourth paragraph of the MC that listed those aspects as "optional" are now recommended to be told to a defendant in every case. *But see People v Stevens,* 203 A.D.3d 958, 959-960 (2022) ["it was not necessary for the County Court to specifically delineate the various issues that survive a valid appeal waiver . . . . <u>in some circumstances, a court might feel that it is appropriate to advise</u> the defendant of a particular issue, or issues, that survives an appeal waiver. <u>But here, most of these issues were of no</u>

relevance and, therefore, the County Court could reasonably have concluded there was no point in discussing them" [emphasis added].