

Right to Appeal Waived ¹

Next, a defendant ordinarily retains the right to appeal even after pleading guilty.² In this case, however, as a condition of the plea agreement, you are asked to waive your right to appeal.

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,³ and whether the sentence I impose, whatever it may be, is excessive and should be modified. As a result, the conviction by this plea and sentence will normally be final. Do you understand?

[*Optional:* Among the limited number of claims that will survive the waiver of the right to appeal are: [a defendant's competency to stand trial, a defendant's constitutional right to a speedy trial⁴], the voluntariness of this plea, the validity of this waiver, and the legality of the sentence.⁵ 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. The language of this waiver in similar formulations has been held to constitute a valid waiver (see *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 to whether the defendant has conferred with counsel and understands that the conviction will normally be final were added after *Ball* and, in particular, after *People v Brown*, 122 AD3d 133 (2d Dept 2014), which recommended inclusion of those references.

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[] itself 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]).

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*).

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 waiver of review of a suppression decision, a separate waiver of right to appeal a suppression decision became unnecessary. Thus, while not required, a court may at this point insert “including your right to appeal the decision denying your (specify,

e.g., motion to suppress).”

4. If the 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.

5. See *People v Campbell*, 97 NY2d 532 (2002); *People v Callahan*, 80 NY2d 273 (1992); *People v Seaberg*, 74 NY2d 1 (1989).