Opinion

The Gov't Tool You've Never Heard of That Conceals Police Misconduct

By Barbara Zolot

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Few in the general public, even those deeply committed to criminal justice reform, have ever heard of appeal waivers. Yet such waivers should be on the radar screen of anyone interested in true reform. Appeal waivers are neither innocuous nor technical. They are ubiquitous, insidious, and stealthy weapons used by the government to strip individuals of fundamental protections against law enforcement's overreach. Until the state Legislature takes the necessary step of abolishing all appellate waivers, it should enact a simple fix to a single statute that would put a quick end to one of the worst abuses these waivers occasion—insulating police misconduct, predominantly perpetrated against Black and brown New Yorkers, from exposure through vital appellate review.

Guilty Pleas, Forfeiture, and Right to Appeal

To understand the iniquity this article addresses, the starting point is the guilty plea that the appeal waiver accompanies. When an individual pleads guilty, even without an appeal waiver, he or she automatically forfeits the constitutional rights and protections associated with going to trial (*e.g.*, a jury's determination of guilt or innocence, confrontation, testifying in one's own behalf).

Further, because guilty pleas are meant to signal an end to litigation, most issues that were litigated before the guilty plea was entered are forfeited by the plea, and, therefore, unreviewable by an appellate court.

Some issues, however, do survive a guilty plea, and—absent an appeal waiver—can be raised on appeal notwithstanding the general forfeiture of many issues. Issues that survive include the excessiveness of the sentence imposed, and—crucially—an adverse suppression ruling. Adverse suppression rulings refer to a hearing court's decision denying the defense's pre-trial claim that the police violated the accused's constitutional rights in obtaining evidence.

The hearing court may be tasked, for example, with determining whether the police lied about the circumstances leading to a stop, seizure, or arrest; whether the police stopped an individual on the basis of racial profiling or for other illegitimate reason; or whether, in making a stop, the police exceeded the amount of legally permissible force. A guilty plea is often preceded by a suppression hearing, and, if the hearing court declines—rightly or wrongly—to find a constitutional violation requiring suppression of the evidence, an individual may choose to plead guilty, rather than face trial with the unfavorable evidence available to the prosecution.

Since 1971, Criminal Procedure Law §710.70 (2) has provided that a suppression ruling "may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty." Statutory law thus protects an individual's right to appellate review, even after a guilty plea, of an adverse suppression ruling.

The exception New York has carved out from the general forfeiture rule reflects a state policy favoring appellate review when an accused has alleged—and fully litigated to decision—a violation by law enforcement of his or her constitutional rights. Importantly, too, such violation, if found on appeal, may result in the suppression of evidence that would put an end to the case, thus sparing the State the expense of a trial.

Ubiquitous Appeal Waivers Shield Police Misconduct

Over the last 30-odd years, however, appeal waivers have effectively nullified this important policy. They have been weaponized to all but eliminate an individual's legislatively protected right to appeal an adverse suppression ruling after a guilty plea. Approved by the Court of Appeals in the seminal case of *People v. Seaberg*, 74 NY.2d 1 (1989), which held that appeal waivers serve important public policies, including the interest of a "final and prompt conclusion of litigation," appeal waivers have become a standard condition of negotiated pleas in New York State.

An appeal waiver purporting to waive a suppression claim is not only valid, but will foreclose appellate review of an adverse suppression ruling even if it does not specifically mention the suppression issue. *See People v. Kemp*, 94 N.Y.2d 831 (1999).

In practical terms, the judicial enforcement of appeal waivers purporting to waive the right to appeal from an adverse suppression ruling means that, unless the appellate court finds a defect in the appeal waiver itself, police misconduct that would come to light upon appellate review remains concealed.

The individual and societal cost is profound, as shown by just a few examples of what appellate review has exposed and condemned when not foreclosed: police pursuit of a Black man, who was exiting public housing, based on a report of shots fired blocks away and a description of a "black [man in] a black jacket," *People v. Bilal*, 170 A.D.3d 83 (1st Dept. 2019); the "incredible and patently tailored" testimony of an officer who claimed at the suppression hearing to have seen, through his rearview mirror, the accused in the front seat of his car, 1½ car lengths away, pass a woman a two-inch long object that the officer further claimed was identifiable as drugs, *People v. Maiwandi*, 170 A.D.3d 750 (2d Dept. 2019); the frisk of a Black man, who was standing with a group of people outside a bar where a shooting had occurred at some undetermined prior time, where the suspect was described as Hispanic, not Black, *People v. Roberts*, 158 A.D.3d 1141 (4th Dept. 2018); and the stop and pointed questioning of a Black man walking his dog in a "high-crime area," *People v. Wallace*, 181 A.D.3d 1214 (4th Dept. 2020).

In short, appeal waivers directly result in concealing the circumstances of scores of fully litigated suppression hearings—circumstances which, if exposed to the searching light of appellate review, might reveal disturbing violations of our most cherished constitutional precepts. Unexamined hearings also deprive the public of the deterrent effect that a critical appellate ruling might have on future conduct by the officers involved.

By the same token, because, in many cases, appellate courts will find that the police acted properly and lawfully, the public is deprived of that information as well. The consequences of appeal waivers barring review of suppression rulings strike at the core of our principles of justice: police conduct is not only insulated from review, but kept out of the public eye.

Judge Wilson: Appeal Waivers Must Be Abolished

Last year, Chief Judge Janet DiFiore, writing for a majority of the court, reiterated *Seaberg's* policies in *People v. Thomas*, where the court considered a set of challenges to purported appeal waivers. 34 N.Y.3d 545, 564-65 (2019). One challenge, rejected by the majority, was to an appeal waiver that, without specific mention, purported to cover an appeal from a suppression ruling. Judge Rowan Wilson dissented in part, engaging in a comprehensive examination of the realities of extracting waivers and concluding that they have "corrupted the integrity of the process." *Id.* at 588.

His dissent should be read in full by any stakeholder interested in criminal justice reform and underscores the need for at least the modest legislative action proposed below. In particular, Judge Wilson derided the

fictions that *Seaberg* espoused to justify its holding and dismantled all of *Seaberg's* rationales, from finality to fairness. Judge Wilson singled out waivers forcing an individual to give up his or her challenge to a suppression ruling as "a prototypical example" of the perniciousness and unfairness of appeal waivers. *Id.* Wilson called for an end to all appellate waivers—they "should be per se invalid, even on *Seaberg's* own reasoning," he wrote. *Id.*

Simple Solution

The "fix," as noted in the opening to this article, is so simple. It requires only the stroke of a pen. If the word "may" in CPL §710.70(2) were changed to "must," then appeals from adverse suppression rulings could never be waived. *See, e.g.*, *People v. Rudolph*, 21 N.Y.3d 497 (2013) (finding that legislature's use of "must" in CPL §720.20(1) "to reflect a policy choice that there be a youthful offender determination in every case where the defendant is eligible," a determination the defendant cannot waive as part of the plea bargain). All adverse suppression rulings would survive both a guilty plea and a valid appeal waiver. New York would be much the better for it.

The elevation of finality—questionable in itself and equally accomplished by successful appeal of a case-dispositive suppression ruling—over the fundamental right of appellate review, is no longer acceptable public policy. If appellate courts were free to do their job, the public and communities of color might not have to rely on cell phone video to expose police misconduct to the light of day.

The killings of Eric Garner, George Floyd, Breonna Taylor, and countless others have proven to everyone the horrific consequences of unchecked police misconduct. With the change proposed here, a change that will expand the ability of appellate courts to expose police misconduct, perhaps one less name will need to be added to that terrible list. It is time for the Legislature to act.

Barbara Zolot is senior supervising attorney at the Center for Appellate Litigation, a non-profit legal organization in New York City, which represents individuals convicted of crimes in post-conviction proceedings.