

WHITE-COLLAR CRIME

SCOTUS Wrestles with Appeal
Waivers in Guilty Pleas

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Appel waivers are commonplace in federal plea agreements. Federal courts of appeal have disagreed, however, about when a waiver may be set aside. In *Hunter v. United States*, 608 U.S. 713 (2026), the Supreme Court resolved the circuit split, holding that an appeal waiver is unenforceable only when enforcement “would result in a miscarriage of justice”—a “high bar” limited to sentences “marred by the kind of egregious error that would bring the judicial system into disrepute.”

Directing that its examples were “not intended to be exclusive,” the Supreme Court left the courts of appeal to determine the circumstances that would meet the threshold.

The justices’ concurrences sharpened the debate: Justice Gorsuch, joined by Justices Sotomayor and Jackson, urged a broader approach, citing the dominance of plea bargaining in criminal cases. Justice Kavanaugh, joined by Justices Alito and Barrett, on the other hand, stressed the exception’s limits.

For practitioners, the *Hunter* decision offers a window into the justices’ views on the federal criminal justice system, while underscoring that



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a client ordinarily should expect to be held to an appeal waiver. The different approaches revealed in the justices’ concurrences, however, suggest some narrow opportunity for creative advocacy on appeal as the lower courts define the miscarriage of justice standard going forward.

The Pre-Hunter Landscape

In most federal plea agreements, defendants waive the right to appeal or collaterally attack their convictions and sentences in exchange for government concessions, such as a favorable sentencing guidelines calculation, dismissal of other charges, or an agreement not to pursue additional counts. Plea agreements are contracts, and a knowing and voluntary waiver of appellate rights is generally enforceable. See *Santobello v. New York*, 404 U.S. 257, 262 (1971).

Ineffective assistance of counsel tainting the plea or waiver consistently has been held to defeat a waiver. See, e.g., *United States v. Henderson*, 72 F.3d 463, 465 (5th Cir. 1995). Using an array of terminology to describe the applicable standard, the circuits have disagreed on what other circumstances could override the waiver.

The Second Circuit applied a functionally similar framework without the “miscarriage of justice” label. The circuit set aside waivers for sentences based on unconstitutional factors, such as race, see *United States v. Gomez-Perez*, 215 F.3d 315, 319 (2d Cir. 2000), naturalized status, see *United States v. Jacobson*, 15 F.3d 19, 22-23 (2d Cir. 1994), and ability to pay restitution, see *United States v. Johnson*, 347 F.3d 412, 415, 419 (2d Cir. 2003).

The court also set aside a waiver where a sentencing court “failed to enunciate any rationale for the defendant’s sentence,” thus “abdicat[ing] [its] judicial responsibility.” *United States v. Woltmann*, 610 F.3d 37, 40 (2d Cir. 2010).

Prior to *Hunter*, seven other circuits, namely the First, Third, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits, applied some sort of flexible exception analogous to a “miscarriage-of-justice” standard. At the other end of the spectrum, the Eleventh Circuit declined to recognize any general exception to waivers. *Rudolph v. United States*, 92 F.4th 1038, 1048-49 (11th Cir. 2024).

The Fifth, Sixth, and Seventh Circuits recognized an exception for a few discrete circumstances, but they declined to adopt a general “miscarriage-of-justice” exception. See *United States v. Barnes*, 953 F.3d 383, 388-89 (5th Cir. 2020); *Portis v. United States*, 33 F.4th 331, 339 (6th Cir. 2022); *United States v. Nulf*, 978 F.3d 504, 507 (7th Cir. 2020).

The Hunter Decision: Setting a Miscarriage-of-Justice Exception

Munson Hunter pleaded guilty to one count of aiding and abetting wire fraud and waived his right to appeal his sentence in exchange for dismissal of nine bank and wire fraud counts arising from an alleged years-long bank fraud scheme.

At sentencing, the district court imposed a supervised release condition requiring Hunter to take mental-health medication, if prescribed, and, as part of its closing remarks, told him he could appeal—a commonplace remark the Supreme Court later described as “fairly inexplicable” and a “mistake.”

Hunter argued on appeal that the remark voided the waiver and that the medication condition violated a fundamental constitutional right. The Fifth Circuit dismissed the appeal, holding that the remark did not affect the waiver and that Hunter had waived his constitutional challenge. *United States v. Hunter*, 2024 WL 5003582 (5th Cir. Dec. 6, 2024).

The Supreme Court granted certiorari. Writing for the majority, Justice Kagan rejected the argument that the sentencing remark modified the plea agreement, but held that “an appeal waiver is unenforceable when it would result in a miscarriage of justice.” The court stressed that the standard is a “high bar,” and waivers “may be set aside only if the sentence is marred by the kind of egregious error that would bring the judicial system into disrepute.”

The Sentencing Court’s Advice of the Right to Appeal

The Supreme Court’s characterization of the district court’s statement advising the defendant of his right to appeal as “inexplicable” is likely surprising to practitioners. Courts regularly provide some version of this advice at the

conclusion of sentencing, apparently stemming from Fed.R.Crim.P. 32(j)(1)(B), which provides that “[a]fter sentencing—regardless of the defendant’s plea—the court must advise the defendant of any right to appeal the sentence.”

Many district judges include a caveat that such right may be sharply limited by the appeal waiver contained in the defendant’s plea agreement, but it is also common for sentencing courts to state this rule-mandated advice less than precisely.

In that context, the Supreme Court’s holding that the district court’s statement advising Hunter of his appeal rights, which evoked no response from either party, “could not change” the parties’ agreement, and that “it is the parties’ intent that matters,” is unsurprising.

The Court’s Three Illustrative Examples

Turning to the substance of the court’s ruling, the court offered three, non-exhaustive, illustrative examples of errors that meet the court’s articulated standard.

Sentences Exceeding the Relevant Statute

Justice Kagan described the first category—“a sentence exceeding what the relevant statute allows”—as “most commonly, a term of years above the maximum prescribed.” The Fourth Circuit has explained that such a sentence is “illegal,” and a sentencing court lacks statutory authority to impose an “illegal” sentence. *United States v. Marin*, 961 F.2d 493, 496 (4th Cir. 1992).

Under similar reasoning, the Seventh Circuit has held that appeal waivers do not bar challenges to restitution orders contrary to statute. See *United States v. Litos*, 847 F.3d 906, 910-11 (7th Cir. 2017) (restitution to non-victim Bank of America improper). Whether the court’s new formulation extends to restitution orders remains to be seen.

Sentences Infected with a Blatant Constitutional Error

The second category concerns sentences “infected with a blatant constitutional error,” such as a judge’s reliance on race or the imposition of a “constitutionally infirm condition of supervised release” (like barring a defendant from becoming pregnant).

The First Circuit has refused to enforce a waiver where an unexplained condition barred all contact between a child pornography defendant and his own minor children, given his due process liberty interest in raising them. *United States v. Cabrera-Rivera*, 893 F.3d 14, 28-29 (1st Cir. 2018). By contrast, the Fifth Circuit held on remand that Hunter’s medication condition was not a “blatant constitutional error” absent any suggestion of an invidious purpose, such as extreme animus or prejudice. *United States v. Hunter*, 183 F.4th 416, 422 (5th Cir. 2026).

Sentences Lacking Basic Procedure

The third category addresses “a sentence imposed without some minimum of civilized procedure.” The court gave the extreme examples of a sentence chosen by orangutans, and also the “less extravagant[]” example of a judge who “refused to hold a hearing consonant with basic principles of law.” What remains unclear is whether the Fourth Circuit’s finding of a miscarriage of justice from a 12-year sentence imposed in 13 minutes with no individualized analysis or basis meets the court’s high bar. *United States v. Smith*, 134 F.4th 248, 265 (4th Cir. 2025).

The Concurrences: Competing Views of the Exception’s Reach

Three justices wrote separate concurrences that, while seeking to define the contours of the miscarriage of justice language, also provide a window into their views of the federal criminal justice system.

Gorsuch's Concurrence: Elaborating on the Majority's Standard

Justice Gorsuch, joined by Justices Sotomayor and Jackson, calls *Hunter* a welcome “first step” in correcting the plea bargaining landscape. Justice Gorsuch observes with chagrin how a long constitutional tradition exalting the trial and skepticism towards plea bargaining has evolved such that plea bargains now dominate the system.

He criticizes Supreme Court precedents that have condoned “coercive prosecutorial tactics” designed to force plea deals. Justice Gorsuch walks through each of the majority’s three illustrative categories of errors.

For the first, Justice Gorsuch interprets the standard as including “sentences imposing penalties the law reserves for offenses different than those of which the defendant stands convicted,” citing *United States v. Phillips*, 124 F.4th 522, 527-28 (8th Cir. 2024) (ban on federal benefits); sentences that “order remedies the law does not permit,” citing *United States v. Yung*, 37 F.4th 70, 82 (3d Cir. 2022) (restitution); and “mandatory minimum sentences for which the defendant does not qualify.”

Justice Gorsuch explains that the second category includes conditions of release forcing medication or a condition that violates a recognized constitutional right, especially one “firmly established at time of sentencing,” citing *United States v. Del Valle-Cruz*, 785 F.3d 48, 56-57 (1st Cir. 2015) (constitutional right to raise one’s child). His formulation of any constitutional right appears to go beyond the majority’s “blatant error” formulation.

For the third category—sentences lacking basic procedure—Justice Gorsuch goes the furthest. He includes appellate decisions that have declined to enforce a waiver when a district court

failed “to give reasons for its chosen sentence or address a defendant’s non-frivolous arguments,” as well as cases of “plain and nonharmless error in calculating an advisory guidelines range,” citing *Rosales-Mireles v. United States*, 585 U.S. 129, 145 (2018), punishment “so substantively unreasonable that it would fail under the ‘deferential abuse-of-discretion standard’” applied in sentencing challenges, citing *Gall v. United States*, 552 U.S. 38, 51-52 (2007), and supervised release conditions “wholly unrelated to legitimate sentencing purposes” or “lacking in rationality,” citing *United States v. Velez-Luciano*, 814 F.3d 553, 564-65 (1st Cir. 2016) (“a highly invasive [medical] procedure” that “has no efficacy”).

Other Concurrences and Thomas's Dissent

Justice Kavanaugh, joined by Justices Alito and Barrett, wrote a short concurrence “respectfully disagree[ing]” with Justice Gorsuch, whose approach, he warned, “would set a lower bar for the miscarriage-of-justice exception” and “may not be entirely consistent” with the majority. Justice Barrett separately concurred, grounding the decision in longstanding waiver principles and procedural common law, rather than the court’s supervisory power. Justice Thomas dissented, finding “no basis” to excuse *Hunter*’s waiver.

Beyond Hunter's Categories: Other Findings of Waiver

The *Hunter* majority opinion intentionally declines to list every situation that would render a waiver unenforceable. Not all appellate precedent, however, is certain to meet the court’s high bar. Three categories of conviction and sentencing defects that appellate courts have treated as overriding an appeal waiver must now be measured against *Hunter*’s rationale.

Actual Innocence

The Fourth Circuit repeatedly has held that an appeal waiver does not bar a challenge to a

conviction for conduct no longer criminal under intervening precedent. See, e.g., *United States v. McKinney*, 60 F.4th 188, 192-93 (4th Cir. 2023) (finding cognizable claim of “actual innocence” met “miscarriage-of-justice” exception to set aside waiver). Because “actual innocence” calls into question whether a conviction should stand at all, this category may resonate with Hunter’s concern for errors that would “undermine public confidence in the judiciary.”

Insufficient Proof

Insufficient proof of an essential element of a crime presents a harder question. The Third Circuit, applying one of the most permissive frameworks, has held the exception applies where the government failed to prove an essential element.

In *United States v. Castro*, 704 F.3d 125, 137-38 (3d Cir. 2013), the record was “entirely devoid of evidence” of a false statement to government officials because the defendant told the literal truth. *Hunter’s* insistence on a confined exception may leave less room for challenges resembling disputes over the evidence or elements.

Sentences Reached in a Manner Not Anticipated

The Second Circuit’s past exceptions generally mirror *Hunter’s* three categories, so little should change beyond terminology. Indeed, following *Hunter*, the Second Circuit formally adopted *Hunter’s* miscarriage of justice standard in *United States v. Matos*, 187 F.4th 36, 39 (2d Cir. 2026), while also making clear that run-of-the-mill guidelines challenges do not qualify.

The Second Circuit also has previously declined to apply waiver in cases where the sentence “was reached in a manner that the plea agreement did not anticipate.” *United States v. Riggi*, 649 F.3d

143, 146 (2d Cir. 2011) (quoting *United States v. Liriano-Blanco*, 510 F.3d 168, 174 (2d Cir. 2007)).

Examples include when a sentence is based on a mistake of fact, see *Liriano-Blanco*, 510 F.3d at 174-75, and a sentence imposed without affording a defendant his right to allocute. See *United States v. Lajeunesse*, 85 F.4th 679, 695 (2d Cir. 2023). These precedents would seem to be unaffected by *Hunter*, because their rationale relies on contract principles and the scope of the waiver, rather than defining an “exception” to an otherwise enforceable waiver.

Conclusion

Hunter cautions that a defendant who received a sentence within the bargained-for range faces steep odds of overcoming a waiver. In making the miscarriage-of-justice exception the law of every circuit, *Hunter* provides a relief valve to reduce the likelihood that truly egregious errors will be immunized by standard-issue waivers.

Justice Gorsuch’s pointed question of how a justice system can sentence defendants contrary to law suggests the exception’s boundaries are not yet fully settled. Lower courts, including the Second Circuit, may draw on his reasoning to recognize errors not yet identified that may be egregious in the particular circumstances.

For now, counsel advising clients on a plea agreement should ensure they are getting something valuable: the waiver is not absolute, but its exceptions are expected to remain narrow.

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