"THE FEDERAL CORNER"

Those Waiver of Appeal Provisions in Plea Agreements

BuckFiles

Congress can create laws and the federal courts can interpret these laws, but we are seldom caught off guard by them. At least we have the opportunity to be aware of, for some considerable time, what each is considering.

Not so in the case of policy changes by members of the Executive Branch. Take, for example, the recent decision of United States Attorney General Jeff Sessions to instruct his federal prosecutors that they should pursue the most serious possible charges in all criminal cases, *no matter what the circumstances.*Even for those of us who are immersed in the criminal justice system and observed Sessions' success in blocking criminal justice reform, this was surprising. We are going back to the days of Attorney General John Ashcraft and his similar admonition to his federal prosecutors.With Sessions out of the Senate, though, there is at least the possibility that bipartisan support for criminal justice reform might actually succeed in legislation that would *trump* Sessions' policy change. [A poor attempt at humor.]

My un-favorite example of a bad policy change (other than the Ashcraft memo) is in the matter of guilty pleas and plea agreements. I remember the day that an AUSA sent me a proposedRule 11(c)(1)(C) plea agreement that contained a waiver of appeal provision – one that would severely limit my client's right to a direct appeal *and,* also,his right to habeas review.

For many years, the judges of the United States District Court of the Eastern District of Texas would not, as a matter of policy, permit counsel to enter plea agreements under Fed. Crim. R. Proc. 11(c)(1)(C) because they did not want to be bound to totally accept or totally reject such plea agreements. When that policy changed, the lawyers of the District – both Government prosecutors and defense attorneys – rejoiced. Then the Government decided to create another problem for us.

I was incensed at the idea that my client should be expected to waive his appellate rights (including habeas relief) without first having an understanding of what might be at issue. When I called the AUSA to voice my concerns, I was met with the reply that I have heard on so many occasions: "This is our office's new policy."So what was I to do? I harkened back to that advice that I had gotten at a TCDLA seminar more than 40 years ago: When you have an issue to bring before the Court and it is something out of the ordinary,file a Motion for Appropriate Relief and ask for a hearing. I chose to do just that.

Ourjudge in the case was John H. Hannah, Jr. Many of you never had the opportunity to meet him or appear before him. For those of us who did, he was held in the highest esteem. He had served as the elected District Attorney of Angelina County, Texas, and as the United States Attorney for the Eastern District of Texas. While not in Government service, he had been an outstanding lawyer, both in criminal and civil cases. All who knew him would agree that he had a fine sense of what justice should be.

Judge Hannah gave me my hearing and I made an impassioned, if unsuccessful, plea against the Government's proposed waiver of appeal policy. I presented public policy arguments and raised, I thought, issues of constitutional dimension. Judge Hannah was not impressed. At the conclusion of the hearing, he announced that jury selection would begin on the following Monday morning – unless the defendant and I signed a plea agreement or agreed to proceed on a plea of guilty without a plea agreement. I left the courtroom knowing that we were going to be saddled with this waiver provision forever. If I could not convince Judge John Henry Hannah, Jr., I could not convince any judge.

[Appellate Review of the Waiver of Appeal Cases]

The United States Courts of Appeal have now reviewed thousands of cases that have waiver of appeal issues. One of the latest of these was *United States v. Griffin*, ___F.3d___, 2017 WL 1487249 [(6th Cir. (Apr. 26, 2017)]. [The Panel: Circuit Judges Gibbons, Cook and Griffin (Opinion by Griffin)] *The Court held that the defendant's valid waiver of his appellate rights in the plea agreement barred his challenge to the imposition of a sentencing increase for obstruction of justice and denial of a reduction for acceptance of responsibility.*

There is nothing special about *Griffin*, but it illustrates the common points addressed by the appellate courts in virtually every case in which a defendant has waived his right to appeal and then attempted to do so:

- There is a waiver of appeal provision in the plea agreement that has been signed by the defendant.
- During the plea colloquy, the defendant will have been called upon to acknowledge that he has executed hiswaiver of appeal and that he understands the significance of his waiver.
- After sentence is imposed, the defendant will give notice of appeal and the Government will rely on the defendant's waiver of appeal.
- The defendant will attempt to parse the wording of the plea agreement in order that he can appeal.
- The appellate court will almost always rule against the defendant.

The curse of where we find ourselves is this: The waiver of appeal provision in the plea agreement is going to apply to the most important of issues, even those of Constitutional dimension.An important waiver of appeal case is *United States v. Keele*, 755 F.3d 752 (5th Cir. 2014). [The Panel: Chief Judge Carl E. Stewart and Circuit Judges Jolly and Smith (Opinion by Chief Judge Stewart)]. In *Keele*, the Court held that,

- The defendant's waiver of appeal was knowing and voluntary;
- *In a matter of first impression, the defendant's appeal waiver barred his challenge to a restitution order*; and,
- *The defendant's appeal waiver applied to his Eighth Amendment claim that restitution was disproportionate to his role in the offense.*

[A Brief Synopsis of the Facts]

Ricky J. Keele, after entering into a plea agreement with the Government that contained a general appeal waiver provision, pleaded guilty to "helping Matthew Simpson dispose of, transfer and conceal a $1,500,000 cashier's check from Citizens Bank of Texas in order to prevent the funds from being seized by the Government." The plea agreement provided for restitution to the victims – not only of the offense, but also arising from all relevant conduct and not limited to the conduct arising from the offense of conviction alone.

Chief Judge Stewart's opinion reads, in part, as follows:

[The Background of the Case]

> Keele was charged in a superseding bill of information with helping Matthew Simpson dispose of, transfer and conceal a $1,500,000 cashier's check from Citizens Bank of Texas in order to prevent the funds from being seized by the Government. Keele waived his right to an indictment and entered into a written agreement to plead guilty to the superseding information. The plea agreement set maximum sentencing exposure at 24 months and included restitution to the victims arising from 'all relevant conduct' and was not limited to the conduct arising from the offense of conviction alone. The plea agreement also contained an appeal waiver which stated that Keele waived the right to appeal his conviction and sentence except in the case of a sentence in excess of the statutory maximum, an involuntary plea or appeal waiver, or ineffective assistance affecting the voluntariness of the plea or appeal waiver.

[The Presentence Report]

> The presentence report ('PSR') described a long term, complex conspiracy, perpetrated by Keele, Simpson, Michael Faulkner and sixteen other co-defendants, to defraud telecommunication companies of property and services and to defraud individual victims of money, property, and services. Five victim impact statements referenced in Keele's PSR contained losses totaling $3,691,102.70. However, according to the second, third and fourth superseding information, the aggregate loss of all victims of the conspiracy was estimated to be between $15,000,000 and $20,000,000.

[Sentencing and the Notice of Appeal]

> The district court sentenced Keele to twenty-four months' imprisonment and ordered him to pay $3,691,102.70 in restitution to the victims under the Mandatory Victim Restitution Act ('MVRA').Keele filed the instant appeal.

[Keele's Argument on Appeal]

> Keele maintains that the appeal waiver in his plea agreement does not encompass restitution. Keele argues that the waiver did not specifically mention restitution and further claims that the district court, in discussing the appeal waiver at

rearraignment, did not specify that he was waiving his right to appeal any restitution order. On this basis, Keele asserts that the restitution order is reviewable despite the appeal waiver contained in his plea agreement. We disagree.

* * *

[The Issue of First Impression]

Whether a general appeal waiver bars a challenge to a restitution order is unsettled in this circuit, and other circuits have reached differing results, at least where restitution was not mentioned in the plea agreement.

* * *

[The Plea Colloquy]

In addition to restitution's being mentioned in Keele's plea agreement, the district court also informed Keele multiple times at sentencing and rearraignment that his sentence 'includes restitution' arising from all 'relevant conduct' and would not be limited to that arising from the offense of conviction. *The district court* admonished Keele that he 'will be required to make full restitution ... because *restitution is by statute mandatory in this case.'* Moreover, Keele stated at sentencing, '[t]he restitution, I know you have the right to do that. You have said that. The only thing I ask you to consider is that at 58 years old it will be a burden that I cannot accomplish, and I know that. I ask you to think about that before you sentence me.' Keele also agreed that he understood that he was waiving his right to appeal his conviction and sentence with certain limited exceptions. (emphasis added)

[The Written Plea Agreement]

The written plea agreement also stated that restitution was mandatory under the law and that the extent of restitution ordered by the court may include 'restitution arising from all relevant conduct, not limited to that arising from the offense of conviction alone[.]' Additionally, Keele's factual resume contains fourteen paragraphs of 'relevant conduct,' which Keele admitted to be true, that exceeded the scope of the 18 U.S.C. § 2232(a) offense of which he was convicted. Further, as the Government points out, Keele expressly waived his right to appeal his 'sentence' or 'seek any future reduction in his sentence' in his plea agreement. That same plea agreement defines 'sentence' to include mandatory 'restitution to victims.' (emphasis added)

[Waiver Bars Keele's Appeal]

We therefore conclude after reviewing the whole of the record—specifically, the plea agreement and the appeal waiver, the PSR, the district court's statements to Keele at sentencing and rearraignment, and Keele's statements at sentencing—

that Keele's valid appeal waiver did in fact bar his right to appeal the restitution order. Additionally, we note that, while defendant has made no such argument on appeal herein, an "in excess of the statutory maximum" challenge, if properly raised on appeal, would not be barred by an appeal waiver. *See United States v. Chem. & Metal Indus., Inc. (C & MI)*, 677 F.3d 750, 752 (5th Cir.2012). Accordingly, Keele's appeal of the restitution order is dismissed. (emphasis added)

* * *

[*The Waiver Even Goes to the Eighth Amendment Issue*]

Keele argues that the amount of restitution ordered by the district court was disproportionate to his role in the offense and, therefore, his Eighth Amendment rights were violated. For the reasons stated herein, we hold that Keele's Eighth Amendment claims are also waived. (emphasis added)

Before 2014, the Supreme Court had never written on whether the Excessive Fines Clause of the Eighth Amendment could apply to restitution orders. In *Paroline*, the Court considered whether the victim of a child pornography offense should be entitled to restitution in the amount of $3,400,000 based on the defendant's possession of two pornographic images of her. In the United States District Court for the Eastern District of Texas, restitution had been denied. On appellate review, both a panel of the United States Court of Appeals and the *EnBanc*Court decided in the Government's favor and remanded the case to the district court for entry of judgment of restitution in the amount of $3,400,000.

The Supreme Court held that:

- The proximate-cause requirement applied to all losses described in statute requiring an award of restitution for certain federal criminal offenses; and,
- *Restitution for child pornography possession should be awarded in amount comporting with defendant's relative role in causal process underlying victim's general losses.*[Opinion of the Court by Justice Kennedy, joined by Justices Ginsburg, Breyer, Alito, and Kagan; dissenting opinion by Chief Justice Roberts in which Justices Scalia and Thomas joined; and, dissenting opinion filed by Justice Sotomayor] (emphasis added)
  Paroline v. United States, 134 S.Ct. 1710 (2014)

Judge Kennedy's opinion reads, in part, as follows:

Her severe approach could also raise questions under the Excessive Fines Clause of the Eighth Amendment.

* * *

The reality is that the victim's suggested approach would amount to holding each possessor of her images liable for the conduct of thousands of other independently acting possessors and distributors, with no legal or practical avenue for seeking

> contribution. *That approach is so severe it might raise questions under the Excessive Fines Clause of the Eighth Amendment.*To be sure, this Court has said that 'the Excessive Fines Clause was intended to limit only those fines directly imposed by, and payable to, the government.' *Browning–Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).But while restitution under § 2259 is paid to a victim, it is imposed by the Government 'at the culmination of a criminal proceeding and requires conviction of an underlying' crime,*United States v. Bajakajian*, 524 U.S. 321, 328, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998). Thus, despite the differences between restitution and a traditional fine, restitution still implicates 'the prosecutorial powers of government,'*Browning–Ferris, supra*, at 275, 109 S.Ct. 2909. The primary goal of restitution is remedial or compensatory, *cf. Bajakajian, supra, at 329, 118 S.Ct. 2028,* but it also serves punitive purposes, *see Pasquantino v. United States, 544 U.S. 349, 365, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005)* ('The purpose of awarding restitution' under 18 U.S.C. § 3663A 'is ... to mete out appropriate criminal punishment')*; Kelly, 479 U.S., at 49, n. 10, 107 S.Ct. 353. That may be 'sufficient to bring [it] within the purview of the Excessive Fines Clause,' Bajakajian, supra, at 329, n. 4, 118 S.Ct. 2028. And there is a real question whether holding a single possessor liable for millions of dollars in losses collectively caused by thousands of independent actors might be excessive and disproportionate in these circumstances. These concerns offer further reason not to interpret the statute the way the victim suggests.* (Emphasis added)

Paroline was remanded to the Court of Appeals for the Fifth Circuit and then to the United States District Court for the Eastern District of Texas. Eventually, an agreed judgment was entered in the amount of $30,000 for restitution and attorney's fees. That was better than $3,400,000.

[My Thoughts]

- In federal criminal restitution cases, there is a way to avoid being shocked at the amount of restitution ordered and also cut off from appellate review – talk to a Financial Litigation Unit lawyer during the negotiation stage. Every judicial district has such a FLU.That's when you can present an argument in respect to your position and have the opportunity to work out a stipulation as to the amount owed*and* how it is to be paid.
- And, there is another benefit. Sometimes, in return for pre-payment of all *or evena portion* of the restitution owed, the Government might make a better offer as to the confinement issue in your case.
- The overall message: When your client has agreed to an appellate waiver provision in a plea agreement, his case is *probably* going to end in the trial court.