

Another Case on Criminal Defendants Waiving Ineffective Assistance Claims



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Should a criminal defendant be permitted to waive the right to claim ineffective assistance of counsel in a plea agreement?

Both the Missouri Supreme Court Advisory Committee (in Formal Opinion 128) and I have both answered, "No," at least when the criminal defendant does not receive counsel other than the lawyer whose potential ineffective assistance is being waived. Nevertheless, courts continue to enforce such waivers.

The most recent case, **Cross v. State of Missouri**, Case No. ED96045 (Mo. App. E.D. Feb. 28, 2012), is a bit of an easier case: the now-convicted criminal defendant -- probably proceeding pro se, of course -- apparently hoped the appellate court would invalidate his entire guilty plea on the basis that it contained a waiver of ineffective assistance claims. Considering the Missouri Supreme Court's opinion in **Cooper v. State**, Case No. SC 91695 (Mo. Dec. 6, 2011), the Missouri Court of Appeals swiftly rejected this argument.

Yet I remain troubled by this practice, as well as by the apparent comfort the Cross opinion takes from the plea hearing. The appellate court emphasizes that Cross was repeatedly told of his rights, said he had read the plea agreement, knew he was waiving his right to claim ineffective assistance, and had no questions.

With my very limited experience on criminal matters, I know that criminal defendants are often told to say they have read, understood, agree to everything, and have no questions, or it may mess up their plea -- with potentially horrible results. If the lawyer giving this advice is in fact incompetent, and the criminal defendant is among the most vulnerable in society (which is often the case), it seems quite possible that the defendant may agree to everything despite . . . or in fact because . . . the defendant received ineffective assistance of counsel. Thus, these waivers protect bad defense lawyering, and risk wrongful convictions or unfair sentences. This seems like efficiency at the sake of justice.

What could be done? The courts seem too concerned with efficiency. Defense counsel are in a poor position to fight such waivers: protesting the waiver could compromise a client's plea, and their conduct is the conduct hidden by the waivers. Thus, I think the point of attack is the prosecutors. If someone would gather up plea agreements that have clauses that waive ineffective assistance claims, and file them all with the ODC, perhaps then we could get meaningful pressure to end this practice of including such unethical provisions in plea agreements.

Cross v. State is at <http://www.courts.mo.gov/file.jsp?id=52736>

Cooper v. State is at <http://www.courts.mo.gov/file.jsp?id=51115>

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