

# Justices' Concurrences Foretell Fault Line On Appeal Waivers

By **Gregory Rosen, Lauren Kramer Sujeeth and William Hart** (July 6, 2026)

On June 18, the U.S. Supreme Court decided *Hunter v. U.S.*, a fairly technical case about how courts should treat appeal waivers in the context of criminal plea agreements.[1] Ruling in favor of the defendant, the court adopted a rule that already prevailed in a majority of circuits: An agreement to not appeal a sentence is unenforceable if it would result in a "miscarriage of justice", a potentially expansive term of art.

While that holding is neither novel nor disruptive, the battle of concurrences between Justices Neil Gorsuch and Brett Kavanaugh reveals a lurking divide within the high court that could make this the beginning of the end for certain plea waivers — or just another minor exception to the rule.

## The Case on Appeal

Petitioner Munson Hunter III pled guilty to one count of aiding and abetting wire fraud in the U.S. District Court for the Southern District of Texas in exchange for the dismissal of nine other "counts of bank and wire fraud for a years-long scheme costing various financial institutions about half a million dollars." [2]

The plea agreement contained a waiver that barred Hunter from appealing his conviction and sentence except in very limited circumstances. The court accepted that plea agreement, but at the close of Hunter's sentencing hearing, the court made the "fairly inexplicable" remark that Hunter could appeal his conviction and sentence. Hearing no objection, the court adjourned.

Hunter immediately appealed, specifically because the court imposed a mental health condition as part of his supervised release, which ordered that if "the treatment provider prescribes drugs, you should take them." [3] That condition, per Hunter's appeal, was a step too far.

The threshold issue was whether Hunter could appeal at all. The U.S. Court of Appeals for the Fifth Circuit dismissed the appeal based on the waiver provision, holding that the district court's misstatement at the end of sentencing "did not impact the validity of the appeal waiver." [4] The Supreme Court granted certiorari "because the Courts of Appeals have differed on when appeal waivers are unenforceable in the sentencing context." [5]

## Justice Kagan's 8-1 Majority Opinion

In holding the appeal waiver unenforceable, the court framed the question as one of degree. The government contended that the waiver, as bargained for, was a contractual term that had to be honored no matter the cost; Hunter, in contrast, argued that a waiver could not be enforceable if it violated a fundamental constitutional right, and that as a procedural matter, the government acquiesced to the appeal based on a colloquy that occurred at the end of sentencing between the court and the parties.



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The Fifth Circuit, in its order, had articulated a position closer to that of the government, which allowed appeals only when the sentence imposed was actually unlawful by virtue of the statute's upper bound.

The Supreme Court adopted none of these. Rather, the majority opinion, written by Justice Elena Kagan, agreed with the "less stringent approach" of most circuits, "declining to enforce appeal waivers when doing so would produce a 'miscarriage of justice.'" [6] The court emphasized the judiciary's need to police its own integrity, disallowing enforcement of a waiver when the sentence would be "marred by the kind of egregious error that would bring the judicial system into disrepute." [7]

The majority opinion — 8-1, to boot — offers a roadmap of the errors that would support a lawful appeal even in the face of a waiver: a sentence that exceeds what the relevant statute allows; a sentence "infected with a blatant constitutional error," [8] such as a judge who bars a defendant from becoming pregnant, or who relies on race or religion; or a sentence imposed without a minimum of "civilized procedure" including, as the oral argument colorfully suggested, if a court "let an orangutan pick a sentence out of a hat." [9]

Rejecting the government's argument that the failure to adopt a brightline "never" rule would open the floodgates to new appeals, the court noted that many circuits already apply the rule and the bar remains narrow and high, reserved "only for egregious cases."

In short, the court adopted the majority view that enforcing appeal waivers is generally fine, absent an egregious error of constitutional or statutory magnitude. Even nonlawyers can appreciate this flexible but demanding standard: A contract is a contract between two parties unless what happens is so fundamentally unfair that enforcing it would be beyond the pale.

### **An Update or Upending Doctrine?**

The Hunter decision alone — notwithstanding its release from the nation's highest court — is not especially newsworthy, although it is the first time the Supreme Court has authoritatively imposed any substantive limit on appeal waiver enforcement. As Justice Gorsuch described it, after decades of silence, the court has now established a federal floor below which consent will not save a sentence. That converts a circuit practice into a constitutional-stakes nationwide baseline.

But the fight that followed the majority opinion is newsworthy, and it illustrates why this decision is more than a yawn.

The concurrences reveal a live fight over the rule's trajectory, and that fight is worth watching. Justice Gorsuch's concurrence, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, reads the majority's examples as an invitation, folding in additional errors that might clear the miscarriage-of-justice bar. Certain guideline miscalculations? Possibly. Substantively unreasonable sentences? Check. Conditions of supervised release "wholly unrelated to legitimate sentencing purposes"? Those too.

Along the way, Gorsuch offers a history of plea bargaining, stressing that it is a modern development that cajoles "defendants into pleading guilty ... [s]o much so that perhaps 95 percent of convictions now come by way of plea bargains." [10] The concurrence's disdain for the practice is evident, and it builds to a striking thesis: Prospective appeal waivers may be flatly invalid under the same logic that voids waivers in other legal contexts.

That would be a sea change. With thousands of cases percolating through the federal system, pleas are a vital tool for administering justice efficiently; strip the appeal waiver out of them, and the system's churn would only intensify, perhaps to the point of exhaustion.

Justice Kavanaugh's short concurrence, joined by Justices Samuel Alito and Amy Coney Barrett, exists almost entirely to reinforce the height of the bar that the majority set. Acknowledging Gorsuch's concerns, Kavanaugh nonetheless reads his colleague's opinion to set a "lower bar" than the court's own. "In any event," he concludes, "the Court's opinion of course speaks for itself.[11]" That Kavanaugh felt the need to write at all signals two blocs already pulling in opposite directions. Justice Barrett wrote separately on the federal courts' supervisory powers generally, and in response to the dissent.

Justice Clarence Thomas' solo dissent is also important. He frames the entire spectrum of unenforceability as lawless: an unacknowledged use of a "supervisory power" that he doubts the court even possesses, dressed up as concern for the judiciary's reputation.[12] Whether or not one buys it, the dissent correctly notes that the majority's rule is not firmly grounded in text, statute or any traditional doctrine, which leaves its foundations contestable in future cases.

### **What's Next?**

Both defense attorneys and prosecutors should treat Hunter as a consolidating clarification: The court finally answered a question it had been dodging, and answered it the way most circuits had already guessed, on a narrow rationale designed to change little, day to day.

But the concurrences expose a fault line — an unsettled fight over whether the miscarriage-of-justice exception remains a rare safety valve or becomes a gateway to policing ordinary but troubling errors in the plea context. If Justice Gorsuch has his way, appeal waivers are just another coercive feature of plea bargaining, and the court should not let that machinery override constitutional rights.

The next frontier is likely collateral review waivers. Since habeas petition waivers, under Title 28 of the U.S. Code, Section 2255,[13] are often bundled into plea deals, one would expect litigants to test whether the same integrity logic migrates to these waivers too.

All in all, the defense bar has some concrete new arguments to play with. Justice Gorsuch's parade of horrors is a menu: sentencings reaching restitution improperly; questionable federal benefit bans; disqualifying mandatory minimums; guidelines miscalculations; substantively unreasonable sentences; untethered supervised release conditions.

All of these arguments, though, are subject to the concurrence bar-height fight. It might all depend on whether a particular circuit drifts toward the Gorsuch or Kavanaugh gloss.

The next shoe to drop, beyond collateral waivers, is the cert petition to forecast: whether the court will muster four votes to take on the notion that prospective appellate waivers are per se invalid. That's a teed-up question, and the cross-ideological trio of Gorsuch, Sotomayor and Jackson signals where at least three of those votes could come from.

In the meantime, watch the rulemakers at the Advisory Committee on Criminal Rules, which is part of the Judicial Conference of the United States. Given Justice Thomas' name-check and Justice Barrett recasting the holding as "procedural common law", an amended Rule 11

colloquy or a note from the committee on when appeal waivers bind may be the next word on the subject.

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[1] *Hunter v. U.S.*, No. 24-1063, 2026 WL 1751815 (U.S. June 18, 2026).

[2] *Id.* at \*1.

[3] *Id.* at\*4-5.

[4] *U.S. v. Hunter*, No. 24-20211, 2024 WL 5003582, at \*1 (5th Cir. Dec. 6, 2024).

[5] *Hunter*, 2026 WL 1751815, at \*5.

[6] *Id.* at\*2.

[7] *Id.* at\*8.

[8] *Id.*

[9] *Id.*

[10] *Id.* at\*12.

[11] *Id.* at\*16.

[12] *Id.* at\*17.

[13] 28 U.S.C. § 2255