

CRIMINAL PROCEDURE — FOURTH AMENDMENT —
PROSPECTIVE BLANKET WAIVERS — SEVENTH CIRCUIT HOLDS
A PLEA AGREEMENT INCLUDING A PROSPECTIVE BLANKET
WAIVER OF FOURTH AMENDMENT RIGHTS ENFORCEABLE. —
United States v. Barnett, 415 F.3d 690 (7th Cir. 2005).

“Whatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country’s criminal justice system . . . [that] can benefit all concerned.”¹ Courts and commentators alike have recognized for decades the substantial role the plea bargain plays in the administration of justice, but its benefits are jeopardized when courts undermine its terms. Recently, in *United States v. Barnett*,² the Seventh Circuit held that an individual’s prospective blanket waiver of his Fourth Amendment rights, as part of a plea agreement, independently justified a warrantless search of his home,³ but the court failed to decide whether a conflict between the terms of a plea agreement and the probation office policy guidelines could render the agreement void for indefiniteness. Sound doctrinal analysis of the issue would likely have led the court to conclude that indefiniteness cannot be invoked in these situations. Instead of providing a clear answer, however, the *Barnett* court skipped this analysis and failed to resolve the ambiguity regarding the applicability of the indefiniteness doctrine to plea agreements in such contexts — potentially undermining the valuable policy of promoting plea agreements.

In March 2003,⁴ Curtis Barnett entered into a plea agreement to avoid jail time for his felony convictions.⁵ As part of this plea agreement, Barnett submitted to future searches and seizures by the Illinois police by accepting a year-long sentence of “Intensive Probation Supervision.”⁶ On April 15, 2003, the police conducted a warrantless

¹ *Blackledge v. Allison*, 431 U.S. 63, 71 (1977).

² 415 F.3d 690 (7th Cir. 2005).

³ *Id.* at 692. Courts have regularly upheld searches of probationers conducted with reasonable suspicion and performed pursuant to authority granted in probation order conditions. *See, e.g., United States v. Knights*, 534 U.S. 112, 118, 120 n.6 (2001); *United States v. Brown*, 346 F.3d 808, 812 (8th Cir. 2003) (holding that search authority granted to probation officers in a plea agreement also extended to police officers invited to join the search by probation officers). However, it is unclear whether such a waiver on its own can legitimize a search conducted without reasonable suspicion. *See, e.g., Knights*, 534 U.S. at 120 n.6 (declining to answer the question).

⁴ *United States v. Barnett*, No. 03-CR-30170 DRH, 2004 WL 391830, at *1 (S.D. Ill. Feb. 27, 2004).

⁵ *Barnett*, 415 F.3d at 691. Barnett was convicted of “aggravated fleeing from police officers, criminal damage to state property, and damage to property (the first two of these crimes are felonies and the third can be either a felony or a misdemeanor).” *Id.*

⁶ *Id.* The relevant provision of the conditions for the “Intensive Probation Supervision” required Barnett to agree to “[s]ubmit to searches of [his] person, residence, papers, automobile,

search of Barnett's home without reasonable suspicion or adequate contemporaneous consent from Barnett.⁷ During the course of this search, the police discovered a gun, and Barnett was subsequently charged with being a felon in possession of a firearm.⁸ Barnett moved to suppress the evidence of the gun, alleging that the search violated the Fourth Amendment's proscription of unreasonable searches and seizures.⁹ The district court denied Barnett's motion, holding that the waiver provision of the Intensive Probation Supervision agreement supplied the necessary consent for the search.¹⁰

The Seventh Circuit affirmed. Judge Posner,¹¹ writing for the panel, held that the defendant's waiver of his Fourth Amendment rights in lieu of imprisonment was a valid contract; in exchange for Barnett's protection from the "greater invasion of personal privacy" that comes with imprisonment, the government received the benefit of being able to keep a close watch over his activities.¹² Judge Posner argued that the existence of mutual consideration, in conjunction with the absence of harm to third parties, rendered the plea agreement a valid and enforceable contract.¹³ Since Judge Posner also found Barnett's waiver to have been knowing and intelligent, he deemed it a valid waiver of his constitutional right.¹⁴ Judge Posner then rejected Barnett's argument that the blanket consent invited abuse because it gave probation officers the right to "camp in [his] home and search him every five minutes" on two grounds:¹⁵ First, contract doctrine precluded such "absurd results"¹⁶ by calling for reference to the intent of the parties in the interpretation of contractual terms — and it was doubtful that either party to the plea bargain intended to approve of searches like those in Barnett's hypothetical with "no possible law enforcement objective."¹⁷ Second, even if the plea bargain did authorize

and/or effects at any time such requests are made by the Probation Officer, and consent to the use of anything seized as evidence in Court proceedings." *Barnett*, 2004 WL 391830, at *1.

⁷ *Barnett*, 2004 WL 391830, at *2–3.

⁸ *Id.* at *1–2.

⁹ *Id.* at *1.

¹⁰ *Id.* at *4–5. While it is established doctrine that Fourth Amendment rights can be waived voluntarily, the precedents generally deal with specific waivers and not blanket consent as in this case. *See, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 220 (1973).

¹¹ Judges Coffey and Kanne joined the opinion.

¹² *Barnett*, 415 F.3d at 692 (emphasis omitted).

¹³ Judge Posner pointed to the fact that individuals often sacrifice their rights in the hopes of obtaining something more valuable: "Often a big part of the value of a right is what one can get in exchange for giving it up." *Id.*

¹⁴ *Id.* at 691.

¹⁵ *Id.* at 692.

¹⁶ *Id.* (quoting *Beanstalk Group, Inc. v. AM Gen. Corp.*, 283 F.3d 856, 860 (7th Cir. 2002)) (internal quotation marks omitted).

¹⁷ *Id.*

such an intrusion, Barnett still had the alternate option of the “even greater deprivation of privacy”¹⁸ that came with imprisonment. Thus, the court found that Barnett’s fear of being subject to continuous searches was “chimerical.”¹⁹

Judge Posner concluded by briefly discussing Barnett’s final argument that the terms of his plea bargain were unenforceably indefinite. Specifically, Barnett pointed to the discrepancy between the agreement’s broad grant of power to probation officers and the probation office policy manual’s requirement that an officer “must have some reasonable suspicion to suspect a violation of probation or [that] a crime is being committed or has been committed” in order to search an individual’s home.²⁰ Judge Posner neither accepted nor rejected this argument, but shrewdly indicated that if a contract is deemed unenforceable on the basis of indefiniteness, the parties would return to the positions they would have occupied had there been no contract. In this case, Judge Posner noted, that outcome could result in Barnett receiving an extended prison sentence including both the term for this federal charge and the prison time he would have received for his prior felonies.²¹ After the court indicated this risk to the defendant, Barnett responded by abandoning the indefiniteness argument.²²

The shortcoming of the *Barnett* court’s decision is its failure to adequately analyze the defendant’s indefiniteness argument. By focusing on the effects of the indefiniteness doctrine rather than on whether it should apply at all,²³ the court did not resolve whether the language and purpose of a plea agreement shields it from being rendered void for indefiniteness due to a conflict with a written probation office policy. In failing to respond authoritatively to this doctrinal puzzle, the court created the potential for confusion on the part of prosecutors, defendants, and lower courts.

¹⁸ *Id.*

¹⁹ *Id.* at 693. Other courts have rejected this “stalking horse” theory in similar parole situations. *See, e.g.,* United States v. Reyes, 283 F.3d 446, 462–64 (2d Cir. 2002) (rejecting the theory in the context of a home visit by a probation officer).

²⁰ *Barnett*, 415 F.3d at 693.

²¹ *Id.; see, e.g.,* Cox v. Zale Del., Inc., 239 F.3d 910, 914 (7th Cir. 2001); Dow Chem. Co. v. United States, 226 F.3d 1334, 1345 (Fed. Cir. 2000). It is unclear, however, whether Barnett would, in fact, receive an extended prison sentence that also included the term for the gun possession. If the parties were put back into the positions they would have occupied without the plea agreement, the warrantless search conducted without reasonable suspicion would constitute a violation of the Fourth Amendment, and accordingly, it is possible that the evidence the search produced would be excluded.

²² *Barnett*, 415 F.3d at 693.

²³ Judge Posner noted briefly that Barnett “was being subjected to restrictions that went beyond what the policy manual provides for ordinary probation,” but he did not use this fact to show that indefiniteness did not apply. *Id.*

Thorough consideration of Barnett's argument would likely have led the court to reject it entirely both with respect to his particular plea agreement and, even more broadly, as applied to any plea agreement. The doctrine of indefiniteness applies when the terms of a contract are not reasonably certain to include a basis for determining the existence of a breach and selecting an appropriate remedy.²⁴ Barnett argued that the inconsistency between the plain language of his plea agreement and the probation office manual's rules for ordinary probation rendered the agreement void for indefiniteness. While Barnett's plea agreement may have been considered indefinite if it explicitly contained both the written terms from the parole agreement and the conflicting implied terms from the probation office policy manual, his contract should not, in fact, be interpreted to include the policy manual terms. As Judge Posner mentioned briefly, Barnett's contract was for "Intensive Probation Supervision,"²⁵ not ordinary probation; accordingly, it is reasonable that different terms would apply. This conclusion is particularly true given that Barnett's contract included a section clearly marked as "specific rules and regulations of intensive probation supervision."²⁶ It is a well-established canon of contract interpretation that specific terms are always given preference over general provisions that cause potential conflicts.²⁷ Moreover, the agreement at no point references the probation office manual as a basis for interpretation.²⁸ As a result, the court would further neither the clear textual meaning of the agreement nor the intent of the contracting parties by imputing terms from an ordinary probation, as reflected in the policy manual, into the interpretation of this intensive probation agreement.²⁹

²⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

²⁵ *Barnett*, 415 F.3d at 693.

²⁶ Conditions of Intensive Prob. Supervision, *People v. Barnett*, No. 98-CF-1048 PTRP, 01-CF-936, 00-CF-823 (Ill. Cir. Ct. filed Mar. 24, 2003) (emphasis added).

²⁷ See, e.g., 5 MARGARET N. KNIFFIN, CORBIN ON CONTRACTS § 24.23, at 248 (Joseph M. Perillo ed., rev. ed. 1998).

²⁸ See Conditions of Intensive Prob. Supervision, *supra* note 26.

²⁹ Barnett's argument that the terms from the probation office policy manual should be consulted when interpreting his own agreement is in some ways similar to the concept of trade usage, in the sense that he is advocating for the court to base the interpretation of his contract on the standard treatment of parolees as described in the probation office manual. According to the *Restatement (Second) of Contracts*, "[a]n agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage." RESTATEMENT (SECOND) OF CONTRACTS, *supra* note 24, § 221; see also 5 KNIFFIN, *supra* note 27, § 24.14, at 124. The policy behind this requirement, that courts should not unnecessarily interfere with parties' freedom to contract, shows that Barnett could not rely on this doctrine. Both parties should have recognized that the plea agreement would supersede the normal policies, as its unambiguous title and unique terms illustrate. Accordingly, the court should not attempt to interpret the parties' intent. "Indeed, it is possible that

Beyond the fact that indefiniteness is precluded in Barnett's case due to the specific designation of his agreement as uniquely *intensive*, no plea agreement should fail for indefiniteness because its terms conflict with the language of a probation office policy. While contracts can be rendered void as indefinite for a variety of reasons, the one common thread is that they all leave the meaning of the contract problematically ambiguous. The justification for voiding a contract for indefiniteness is that a "court cannot enforce a contract unless it can determine what it is."³⁰ For example, in the classic indefiniteness case of *Raffles v. Wichelhaus*,³¹ a contract that was deemed complete on its face was held to be ambiguous because the parties contracted for the sale of goods arriving on a ship by the name of "Peerless." Unbeknownst to both parties, however, two ships by that name were to arrive at the same port on different days.³² The court found that because the seemingly complete contract did not actually provide enough information to identify which ship it referred to, it was void for indefiniteness.³³

The confusion arising in *Raffles* can be distinguished from the potential confusion arising from the conflict between the language of a plea agreement and an external policy manual; the potential ambiguity in the latter stems from an inconsistency with an external source, whereas in *Raffles*, the ambiguity stemmed from a term having more than one meaning. Given that the terms of the plea agreement are clear when considered alone, courts would have no difficulty ascertaining the intent of the parties by simply interpreting the language of the agreement. As one court stated:

[I]t is only where no sensible ground exists for choosing between conflicting understandings of the contractual language, and where the parties agree to terms that reasonably appear on their face to each of them to be unequivocal but in fact are not — as in cases like that of the ship "Peerless" in which the ambiguity is buried — that a voiding of the contract is necessary.³⁴

But when a plea agreement contains all the terms agreed to by the parties and when none of those terms is ambiguous, the terms of an

the written words of the contract may be such as to show that the parties were contracting wholly independently of the usage or custom." *Id.* § 24.13, at 120.

³⁰ 1 ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 4.1, at 525 (Joseph M. Perillo ed., rev. ed. 1993). "Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract." *Id.*

³¹ (1864) 2 Hurl. & C. 906, 159 Eng. Rep. 375 (Exch.).

³² *Id.* at 375-76.

³³ See *id.* at 376.

³⁴ *Can. Life Assurance Co. v. Guardian Life Ins. Co. of Am.*, 242 F. Supp. 2d 344, 356 (S.D.N.Y. 2003).

external policy — which the parties never suggested should bind them — should not be sufficient on their own to support a finding of indefiniteness.³⁵

The problem with the *Barnett* court's failure to directly reject the indefiniteness argument is not simply academic: it may have adverse effects on the plea agreement system by leaving the enforceability of such agreements uncertain. Because the court did not hold that the policy manual was irrelevant to the interpretation of the plea agreement, criminal prosecutors and defense attorneys who deal with plea agreements will now incur increased costs by having to research which policy manuals may be applicable, how those manuals could affect the interpretation of agreements, and how to draft the agreements to prevent any confusion. These increased costs in conjunction with concerns about the enforceability of the terms may discourage parties from entering into such agreements. As the Supreme Court recognized in its "seminal decision"³⁶ about plea agreements, "[t]he disposition of criminal charges by agreement between the prosecutor and the accused . . . is an essential component of the administration of justice. Properly administered, it is to be encouraged."³⁷ Thus, this result could cause substantial difficulties in the administration of justice.

While judicial resolution of this question will have to wait until the next appropriate case is presented, in the meantime, prosecutors may want to preemptively address this potential problem when drafting plea agreements. One possible solution would be the inclusion of a zipper clause.³⁸ This clause should explicitly state that the contract is complete within its four corners and that the parties agree to the terms stated therein, regardless of the possible existence of conflicting terms in other sources. When interpreting a contract, courts often consult such zipper clauses to decide whether the agreement is limited to the

³⁵ It is also possible to attack such plea agreements as void in violation of public policy; holding government officials to their own written standards is arguably in the public interest. But since the Court has already determined that Fourth Amendment rights are waivable, *see, e.g.*, *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973), it seems likely that a public policy argument would not succeed.

³⁶ *United States v. Fields*, 766 F.2d 1161, 1166 (7th Cir. 1985).

³⁷ *Santobello v. New York*, 404 U.S. 257, 260 (1971).

³⁸ "The term 'zipper clause' comes from labor law, where it refers to a provision in a collective bargaining agreement that prohibits further collective bargaining during the term of the agreement or, more generally, that limits the agreement of the parties to the four corners of the contract." Gerald L. Neuman, *Jurisdiction and the Rule of Law After the 1996 Immigration Act*, 113 HARV. L. REV. 1963, 1984–85 (2000) (footnotes omitted) (citing *Local 1309, Nat'l Fed'n of Fed. Employees v. Dep't of the Interior*, 526 U.S. 86, 89 (1999); *Gannett Rochester Newspapers v. NLRB*, 988 F.2d 198, 199 (D.C. Cir. 1993)).

written terms explicitly included in the document.³⁹ As a result, the inclusion of such a clause in a plea agreement would further bolster the argument that terms from an external source, such as a policy manual, should not be imported to form part of the agreement.

By failing to flatly reject the indefiniteness argument as it applies to plea agreements, the *Barnett* court missed an opportunity to clarify whether these agreements can be rendered void due to conflicts with the terms of external sources. Unfortunately, this continued ambiguity might result in reduced confidence in the enforceability of plea agreements, which are “essential component[s]” of our justice system.⁴⁰

³⁹ See, e.g., *United States v. de Leon*, 1 F. Supp. 2d 108, 108 (D.P.R. 1998) (relying on a zipper clause to interpret a plea agreement and to deny the defendant’s request for downward departure from sentencing guidelines).

⁴⁰ *Santobello*, 404 U.S. at 260.