Waiving the Impossible: Rethinking Appellate Waiver Enforcement When Supervening Authority Renders Convictions Void

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Federal courts are split on whether collateral-attack waivers in plea agreements bar post-conviction challenges when subsequent binding authority reveals that a defendant's charged conduct was never criminal. Most circuits enforce the waivers; only the Fourth Circuit has refused.

This Comment argues that federal courts cannot do so. Drawing on the Supreme Court's decisions in Bousley v. United States *and* Rivers v. Roadway Express, Inc.*, this Comment argues that when binding precedent clarifies that a statute never covered a defendant's conduct, the defendant's guilty plea was unknowing from its inception and therefore constitutionally invalid. A waiver contained within an invalid plea cannot insulate a void conviction from review. Contract law principles—routinely invoked by courts to justify waiver enforcement—independently support this conclusion.*

This Comment proposes a three-part test to identify when collateral-attack waivers are unenforceable: (1) The defendant's conviction rests on a sole predicate offense that has been invalidated, (2) binding precedent has authoritatively clarified the statute's meaning, and (3) the clarification renders the conviction void ab initio rather than merely creating grounds for resentencing. This framework preserves the vast majority of appellate waivers while ensuring that no one remains imprisoned for conduct that was never criminal.

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INTRODUCTION

In 2012, Derek Cook pleaded guilty to two federal charges: conspiracy to commit Hobbs Act[1] robbery and using a firearm in furtherance of a crime of violence.[2]

His plea agreement contained a collateral-attack waiver, which bars post-conviction challenges to his conviction or sentence.[3] Seven years later, the legal foundation underlying his 18 U.S.C. § 924(c) conviction shifted. Section 924(c) defines a "crime

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[1] Pub. L. No. 79-486, 60 Stat. 420 (1946) (codified as amended at 18 U.S.C. § 1951).

[2] Cook v. United States (*Cook I*), 84 F.4th 118, 120–21 (2d Cir. 2023); *see also* 18 U.S.C. § 1951(a) (criminalizing robbery or extortion, or conspiracies or attempts to commit such acts, that obstruct, delay, or affect interstate commerce); *Id.* § 924(c) (imposing criminal penalties for using a firearm in furtherance of a crime of violence).

[3] *Cook I*, 84 F.4th at 121. Cook's collateral-attack waiver excluded an appeal of a sentence that exceeds an agreed-upon term of imprisonment. *Id.*

of violence" through two clauses: (1) an elements clause, covering felonies having "as an element the use, attempted use, or threatened use of physical force," and (2) a residual clause, covering felonies inherently "involv[ing] a substantial risk that physical force . . . may be used" during the offense.[4] In *United States v. Davis*,[5] the Supreme Court held § 924(c)'s residual clause unconstitutionally vague.[6] Shortly after *Davis*, the Second Circuit held in *United States v. Barrett* (*Barrett II*)[7] that conspiracy to commit Hobbs Act robbery—the predicate offense underlying Cook's § 924(c) conviction—does not constitute a crime of violence under § 924(c)'s elements clause.[8]

The implications were stark. Under *Davis* and *Barrett II*, Cook's conduct was never covered by § 924(c). Yet when Cook and his copetitioners (all convicted under § 924(c)) pursued habeas relief, the Second Circuit enforced his collateral-attack waiver.[9] The court reasoned that Cook had knowingly and voluntarily waived his right to appeal; furthermore, the court held that plea agreements are contractual bargains, which courts may not disturb.[10] The Second Circuit denied rehearing en banc, with Judge Beth Robinson dissenting on the ground that the panel's opinion articulated broad rule statements conflicting with binding precedent.[11]

Cook and his copetitioners remain imprisoned for conduct that was never criminal under the Supreme Court's authoritative interpretation of § 924(c). Section 924(c) imposes a mandatory minimum five-year sentence that must run consecutively to other sentences, making these challenges high stakes for defendants. Many federal defendants may share Cook's situation.

Federal courts are split on whether to enforce collateral-attack waivers when subsequent binding authority renders a predicate offense no longer criminal. Most circuits enforce the waivers even after such a clarification, while the Fourth Circuit alone has declined enforcement in this context.[12] The Supreme Court has

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4 18 U.S.C. § 924(c)(3)(A)–(B).

5 139 S. Ct. 2319 (2019).

6 *Davis*, 139 S. Ct. at 2336.

7 937 F.3d 126 (2d Cir. 2019), *abrogated on other grounds by* Lora v. United States, 143 S. Ct. 1713 (2023).

8 *Id.* at 130.

9 *Cook I*, 84 F.4th at 124–25.

10 *Id.*

11 *See* Cook v. United States (*Cook II*), 111 F.4th 237, 247 (2d Cir. 2024) (Robinson, J., dissenting from denial of rehearing en banc).

12 *See infra* Part I.B.3.

recently engaged with appellate waiver doctrine. In *Hunter v. United States*,[13] the Court addressed the circuit split concerning permissible exceptions to valid appellate waivers following valid convictions, "approv[ing] the majority view" that such a waiver "is unenforceable when it would result in a miscarriage of justice."[14] *Hunter* underscores the Court's recognition that the waiver doctrine is fractured, requiring clarification. But *Hunter* assumes the validity of the underlying plea agreement when delineating the outer limits of waivers; it expressly does not address "circumstances in which an appeal waiver might be invalidly obtained."[15] This Comment, by contrast, examines broad waiver enforceability when the underlying plea becomes constitutionally defective from the outset.

This Comment argues that when subsequent binding authority clarifies that a criminal statute never covered a defendant's conduct, appellate courts cannot enforce plea agreement waivers to prevent challenges to void convictions, because the underlying plea is no longer knowing and voluntary. This has particular force when the defendant's sole predicate offense has been invalidated and no alternative valid basis for conviction exists (meaning the defendant stands convicted for conduct never criminal under any theory).

Courts enforcing collateral-attack waivers rely on the premise that contract principles govern plea agreements.[16] This Comment argues that the contract analogy, when properly applied, cuts the other way because plea agreements are best understood as "constitutional contracts" that require a more defendant-protective application of contract principles than pure commercial exchanges.[17] Contract law itself provides exceptions for agreements that lack a lawful object or rest upon a fundamental mistake about the subject matter of an agreement. Accordingly, when both parties believed the defendant was pleading guilty to a crime—and authoritative precedent later proves that it was not in fact a crime—the contract law principles invoked by courts actually support invalidating the waiver.

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[13] 146 S. Ct. 1702 (2026).

[14] *Id.* at 1713.

[15] *Id.* at 1711 n.3.

[16] *See infra* note 218 and accompanying text. For an example of scholarship developing contract-based frameworks for plea agreements, see generally Colin Miller, *Plea Agreements as Constitutional Contracts*, 97 N.C. L. REV. 31 (2018).

[17] *See* Miller, *supra* note 16, at 49.

Because modern criminal adjudication is dominated by plea bargaining, the enforcement of appellate waivers carries profound consequences for criminal defendants. This Comment proposes a three-part waiver-enforcement test that preserves judicial efficiency while ensuring that no individual remains imprisoned for lawful conduct.

This Comment proceeds in five parts. Part I provides background on the federal plea system, appellate waivers, and exceptions. Providing an example of the broader phenomenon of supervening authority, Part I also examines § 924(c) jurisprudence and the circuit divergence over waiver enforcement after § 924(c)'s clarification.

Part II uses precedent to advance this Comment's central constitutional argument: Collateral-attack waivers cannot bar post-conviction challenges when subsequent binding authority renders an original plea neither knowing nor voluntary and therefore constitutionally defective.

Next, Part III argues that the contract law principles of void agreements and mutual mistake prohibit enforcing appellate waivers when both parties operated under a fundamental misunderstanding about the plea bargain's essential subject matter.

Part IV proposes a three-part test for determining when appellate waivers are unenforceable: (1) The defendant's conviction rests on an invalidated sole predicate offense, (2) Supreme Court precedent clarifies the statute's meaning, and (3) the precedent renders the conviction void ab initio rather than creating grounds for resentencing or procedural relief.

Part V addresses counterarguments based on finality and issue preservation before addressing policy considerations, including rule of law values, equal treatment, and plea system legitimacy. The Comment concludes that constitutional protections against void convictions cannot be waived through collateral-attack waivers.

I. BACKGROUND: PLEA BARGAINING, APPELLATE WAIVERS, AND THE ENSUING CIRCUIT SPLIT

This Part provides background for understanding when collateral-attack waivers remain enforceable. Part I.A explains the federal plea system, the constitutional requirements for valid guilty pleas, the emergence of appellate waivers, and the recognized exceptions to waiver enforcement. Part I.B examines how this issue has manifested in § 924(c) cases after supervening

authority clarifies an offense's status, using Cook's case as a focal example and situating it within the circuit split.

A. The Plea System, Appellate Waivers, and Exceptions

A guilty plea is a defendant's formal admission of guilt to charged crimes. Rule 11 of the Federal Rules of Criminal Procedure provides procedural safeguards to ensure plea validity through "minimum standards for the plea colloquy—the information which must be communicated to criminal defendants to make a guilty plea valid."[18] Rule 11 requires courts to ensure that defendants understand the charges, maximum penalties, and constitutional rights being waived.[19] Courts must also determine that a factual basis exists for the plea.[20]

Constitutional due process imposes requirements beyond Rule 11's procedural mandates.[21] These constitutional requirements apply equally to state guilty pleas, as they derive from federal due process protections binding on states.[22] The Supreme Court has held that guilty pleas must be both "voluntary and knowing,"[23] reflecting the magnitude of the constitutional rights that defendants relinquish[24] and the presumption that such rights are generally waivable "as part of the laissez-faire give-and-take" in criminal pleas.[25] Guilty pleas are therefore valid only when they constitute an "intentional relinquishment or abandonment of a known right."[26]

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[18] Russell D. Covey, *Toward a More Comprehensive Plea Bargaining Regulatory Regime*, 101 OR. L. REV. 257, 265 (2023).

[19] *See* FED. R. CRIM. P. 11(b)(1).

[20] *See id.* § 11(b)(3). Most states have adopted similar procedures, requiring trial courts to engage defendants in a plea colloquy before accepting guilty pleas to confirm a "factual basis for the plea" and that it was knowing and voluntary. State v. Finney, 834 N.W.2d 46, 50 (Iowa 2013); *see also, e.g.*, State v. Bangert, 389 N.W.2d 12, 20 (Wis. 1986) (noting that Wisconsin's criminal procedure statute is, in part, modeled after Rule 11); State v. Veney, 897 N.E.2d 621, 623–24 (Ohio 2008); State v. Gibbons, 740 P.2d 1309, 1312–13 (Utah 1987); Danielle M. Lang, Note, Padilla v. Kentucky*: The Effect of Plea Colloquy Warnings on Defendants' Ability to Bring Successful* Padilla *Claims*, 121 YALE L.J. 944, 951 & n.24 (2012).

[21] *See* Miller, *supra* note 16, at 87.

[22] Boykin v. Alabama, 395 U.S. 238, 243 (1969).

[23] Santobello v. New York, 404 U.S. 257, 261 (1971).

[24] *See, e.g.*, McCarthy v. United States, 394 U.S. 459, 466 (1969); *see also* FED. R. CRIM. P. 11(b)(1)(A)–(O) (listing rights waived by guilty pleas).

[25] Stephanos Bibas, *Regulating the Plea-Bargaining Market: From Caveat Emptor to Consumer Protection*, 99 CALIF. L. REV. 1117, 1122 (2011) (citing United States v. Mezzanatto, 513 U.S. 196, 200–03 (1995)).

[26] *McCarthy*, 394 U.S. at 466 (quotation marks omitted) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)).

A plea cannot be voluntary if it is improperly or coercively induced.[27] In addition, "because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts."[28] A plea is knowing only if the defendant receives "real notice of the true nature of the charge against him."[29] If a defendant is misinformed about the essential elements of the offense, the plea cannot be knowing.[30] As the Supreme Court emphasized in *Bousley v. United States*,[31] when "neither [the defendant], nor his counsel, nor the court correctly understood the essential elements of the crime with which [the defendant] was charged," the guilty plea is "constitutionally invalid."[32]

The knowing and voluntary requirements operate in tandem. When subsequent decisions clarify that a statute never covered the defendant's conduct, both requirements are implicated: The defendant did not know the true nature of the charge because they were misinformed about what the statute criminalized, and the plea cannot be voluntary because it was premised on a fundamental misunderstanding of the law's scope.

Beyond these constitutional requirements, the federal system provides criminal defendants with several statutory avenues for review of their convictions and sentences. First, defendants may file a direct appeal from a final judgment to challenge errors that occurred during trial or sentencing.[33] Second, defendants may accept the conviction but challenge the sentence imposed as improperly calculated.[34] Third, defendants may bring a "collateral attack" on their conviction through a petition for habeas corpus, a post-conviction remedy that allows prisoners to challenge the fundamental legality of their detention.[35] Under 28 U.S.C. § 2255, federal prisoners may move the sentencing court to vacate, set aside, or correct an illegally imposed sentence, typically after direct appeals have been exhausted.[36]

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27 *See* Brady v. United States, 397 U.S. 742, 755 (1970).

28 *McCarthy*, 394 U.S. at 466.

29 Smith v. O'Grady, 312 U.S. 329, 334 (1941).

30 Bousley v. United States, 523 U.S. 614, 618–19 (1998).

31 523 U.S. 614 (1998).

32 *Id.* at 618–19.

33 28 U.S.C. § 1291.

34 18 U.S.C. § 3742.

35 28 U.S.C. § 2254 (state defendants); *Id.* § 2255 (federal defendants).

36 *Id.* § 2255; *see also* Davis v. United States, 417 U.S. 333, 343–44 (1974); Terrell J. Iandiorio, Comment, *Federal Postconviction Relief and 28 U.S.C. § 2255(4): Are State Court Decisions "Facts"?*, 71 U. CHI. L. REV. 1141, 1141 n.1, 1145 (2004).

The government and defendant exchange concessions when negotiating plea agreements. The government typically agrees not to charge additional crimes or to recommend a particular sentence range.[37] In exchange, the defendant relinquishes constitutional and statutory rights that they are otherwise entitled to.[38] This agreement can include an appellate waiver that, as a contractual term of a plea agreement, waives the defendant's right to appeal their conviction or sentence.[39]

The criminal justice system resolves the vast majority of criminal charges through plea bargaining,[40] with most criminal convictions resulting from guilty pleas.[41] In recent years, about 89–91% of federal criminal defendants pleaded guilty.[42] Among those convicted and sentenced, about 98–99% pleaded guilty.[43] A 2005 study suggested that 65% of federal plea agreements contained appellate waivers—clauses by which "defendants waive their rights to appellate and postconviction review of sentencing errors."[44] Furthermore, around three-quarters of appellate waivers included collateral-attack waivers.[45]

Appellate waivers are diverse, "[a]s with any type of contract."[46] The direct-appeal waiver, barring a defendant "from appealing the validity of the sentence he receives," is most

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37 *See* FED. R. CRIM. P. 11(c)(1)(A)–(C), advisory committee's note to 2002 amendments (recognizing "a common type of plea agreement—that the government will 'not bring' other charges").

38 *See, e.g.*, Class v. United States, 583 U.S. 174, 179 (2018).

39 *See* FED. R. CRIM. P. 11(b)(1)(N).

40 *See* Miller, *supra* note 16, at 49; *see also* Lafler v. Cooper, 566 U.S. 156, 170 (2012) (noting that "criminal justice today is for the most part a system of pleas, not a system of trials").

41 *See* United States v. Timmreck, 441 U.S. 780, 784 (1979).

42 *See Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2024*, U.S. COURTS, https://perma.cc/4UDU-GPGU [hereinafter *Table D-4 2024*]; *Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2023*, U.S. COURTS, https://perma.cc/2JVZ-C8LL [hereinafter *Table D-4 2023*]; *Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2022*, U.S. COURTS, https://perma.cc/GQY5-3D3B [hereinafter *Table D-4 2022*]; *Table D-4: U.S. District Courts—Criminal Defendants Disposed of, by Type of Disposition and Offense, During the 12-Month Period Ending September 30, 2021*, U.S. COURTS, https://perma.cc/HZ8B-XQSM [hereinafter *Table D-4 2021*].

43 *See Table D-4 2024*, *supra* note 42; *Table D-4 2023*, *supra* note 42; *Table D-4 2022*, *supra* note 42; *Table D-4 2021*, *supra* note 42.

44 Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 211, 231 (2005).

45 *Id.* at 213.

46 Garza v. Idaho, 586 U.S. 232, 238 (2019).

common.[47] Defendants may also agree to a broader collateral-attack waiver, which prevents defendants from raising post-conviction challenges unrelated to the legality of their conviction or sentence, even on constitutional grounds.[48]

While there is no authoritative Supreme Court guidance on the extent to which contract law informs plea bargaining law,[49] courts routinely apply contract principles when construing plea agreements.[50] Under this framework, plea agreements serve a risk-allocative function: Both parties assume specified risks for the benefits of the bargain. Defendants receive concessions (i.e., charge dismissals or sentencing recommendations) and avoid trial uncertainty in exchange for forgoing certain rights, including the right to benefit from favorable legal developments. For example, if the Supreme Court invalidates or narrows a sentencing enhancement (e.g., by holding a residual clause unconstitutionally vague), defendants who previously agreed to an appellate waiver typically cannot benefit from these changes, unlike similarly situated defendants without waivers.[51]

The Supreme Court has noted that no waiver "serves as an absolute bar to all appellate claims."[52] All jurisdictions "appear to treat at least some claims as unwaiveable,"[53] including claims of unknowing or involuntary waivers, ineffective assistance of counsel regarding plea entry, prosecutorial breaches of the plea bargain, and sentences exceeding the statutory maximum.[54]

One question, however, is whether waivers remain enforceable when binding authority clarifies that the criminal statute never covered the defendant's conduct. Most circuits have enforced collateral-attack waivers even when subsequent binding decisions would benefit the defendant, reasoning that defendants

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47 Lauren Gregorcyk, Note, *A Justified Obligation: Counsel's Duty to File a Requested Appeal in a Post-Waiver Situation*, 20 WASH. & LEE J. C.R. & SOC. JUST. 141, 148 (2013).

48 *Id.* at 148–49.

49 *See* Miller, *supra* note 16, at 33, 35.

50 *See* Shayna M. Sigman, Comment, *An Analysis of Rule 11 Plea Bargain Options*, 66 U. CHI. L. REV. 1317, 1321 & n.19 (1999) (collecting cases); United States v. Story, 439 F.3d 226, 231 (5th Cir. 2006) (same).

51 *Compare* United States v. Barnes, 953 F.3d 383, 388 (5th Cir. 2020) (enforcing a waiver and barring a challenge premised on the invalidation of a residual clause), *with* United States v. Booker, 240 F. Supp. 3d 164, 171–73 (D.D.C. 2017) (granting § 2255 relief in response to a challenge based on the invalidation of a residual clause).

52 *Garza*, 586 U.S. at 238.

53 *Id.* at 239.

54 *See, e.g.*, *Santobello*, 404 U.S. at 262; United States v. Marin, 961 F.2d 493, 496 (4th Cir. 1992); United States v. Jacobson, 15 F.3d 19, 22–23 (2d Cir. 1994).

knowingly accepted this risk when signing their plea agreements.[55] This Comment examines whether the majority approach comports with constitutional due process requirements and how this tension has produced a circuit split in the wake of *Davis*.

B. Section 924(c) Jurisprudence, Application to Cook, and the Ensuing Circuit Split

The question whether collateral-attack waivers remain enforceable when subsequent authority invalidates a conviction has arisen prominently in cases involving § 924(c). While this Comment's analysis extends to any situation in which binding precedent clarifies that a defendant's conduct was never criminal, § 924(c) litigation provides a particularly instructive analytical example because the Supreme Court's decision in *Davis* impacted countless convictions—including Cook's—and created the circuit split this Comment addresses.[56]

1. Background on § 924(c) jurisprudence.

Section 924(c) imposes mandatory minimum sentences on defendants who use, carry, or possess a firearm "during and in relation to any crime of violence or drug trafficking crime."[57] The minimum sentences range from five years to life imprisonment and must run consecutively to other sentences imposed for the underlying offense.[58]

The statute defines "crime of violence" through an elements clause and a residual clause.[59] If a person commits a crime that falls into either of these two categories while carrying a firearm in connection with that crime, then § 924(c) imposes a mandatory minimum sentence.

A prior successful vagueness challenge to the Armed Career Criminal Act[60] (ACCA) foreshadowed the successful challenge of § 924(c)'s residual clause. In *Johnson v. United States*,[61] the Supreme Court invalidated the ACCA's residual clause,[62] which defined "violent felony" using nearly identical language to § 924(c)'s

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55 *See infra* Part I.B.

56 *See, e.g.*, *Cook I*, 84 F.4th 118, 124–25 (2d Cir. 2023).

57 18 U.S.C. § 924(c)(1)(A).

58 *Id.* § 924(c)(1)(A)(i)–(iii).

59 *Id.* § 924(c)(3)(A)–(B).

60 Pub. L. No 98-473, 98 Stat. 2185 (1984) (codified as amended at 18 U.S.C. § 924(e)).

61 576 U.S. 591 (2015).

62 *Id.* at 606.

residual clause.[63] The Court found the clause unconstitutionally vague for requiring the "categorical approach": Judges must imagine the "ordinary case" of a crime and assess whether that version presents a sufficient risk of violence—an inherently speculative enterprise "detached from statutory elements" that invites inconsistent and unpredictable results.[64]

Johnson illustrated this difficulty: To determine whether unlawful possession of a short-barreled shotgun qualified as a violent felony, courts were required to speculate about "the ordinary case" of this offense, including whether possession might involve accidental discharge or future violent use.[65] The Court rejected a regime in which consequential sentencing decisions turned on imagination rather than consistent legal standards, finding it produced "more unpredictability and arbitrariness" than constitutionally permissible.[66] This reasoning immediately cast doubt on the similarly worded residual clause in § 924(c), sparking challenges from defendants convicted under that clause.[67]

Four years after *Johnson*, the Supreme Court confirmed what many had anticipated. In *Davis*, the Court held that § 924(c)(3)(B)'s residual clause was unconstitutionally vague for the same reasons articulated in *Johnson*.[68] While the elements clause remained intact,[69] *Davis* created widespread uncertainty: Many offenses that courts had long treated as crimes of violence under § 924(c)'s now-invalid residual clause might not satisfy the narrower elements clause.

Davis reverberated through federal courts. Before *Davis*, prosecutors had relied on the residual clause to charge conspiracy to commit Hobbs Act robbery as a crime of violence. The question then arose whether this offense alone could satisfy § 924(c)'s elements clause. Courts consistently concluded that it could not.[70] The elements clause requires that an element of the predicate felony be "the use, attempted use, or threatened use of physical

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63 18 U.S.C. § 924(e).

64 *Johnson*, 576 U.S. at 596, 597 (citing Taylor v. United States, 495 U.S. 575, 600 (1990)).

65 *Id.* at 597, 600.

66 *Id.* at 598.

67 *See, e.g.*, *Cook I*, 84 F.4th at 121; King v. United States, 41 F.4th 1363, 1366 (11th Cir. 2022); United States v. Bowen, 936 F.3d 1091, 1096 (10th Cir. 2019); Guthrie v. United States, 2017 WL 3204505, at *4 (W.D. Ky. Feb. 14, 2017).

68 *Davis*, 139 S. Ct. at 2325–26.

69 *Id.* at 2336.

70 *See, e.g.*, *Barrett II*, 937 F.3d at 130; United States v. Simms, 914 F.3d 229, 233 (4th Cir. 2019) (en banc); Brown v. United States, 942 F.3d 1069, 1075 (11th Cir. 2019); United States v. Reed, 48 F.4th 1082, 1087–88 (9th Cir. 2022).

force."[71] Conspiracy, however, is defined by an "agreement to commit an unlawful act,"[72] regardless of "whether or not the substantive crime ensues."[73] Because a defendant can join and complete a conspiracy by entirely nonviolent means, its elements do not necessarily involve force, and conspiracy cannot categorically qualify as a crime of violence.[74] In the Second Circuit, *Barrett II* applied *Davis* to reach the same conclusion, holding that *Davis* precludes the determination that Hobbs Act conspiracy "qualifies as a § 924(c) crime of violence."[75] Critically, *Barrett II*'s holding rested entirely on *Davis*'s invalidation of the residual clause; the court did not independently analyze whether Hobbs Act conspiracy satisfies the elements clause.[76]

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71 18 U.S.C. § 924(c)(3)(A).

72 United States v. Jimenez Recio, 537 U.S. 270, 274 (2003) (quotation marks omitted) (quoting Iannelli v. United States, 420 U.S. 770, 777 (1975)).

73 *Id.* (quotation marks omitted) (quoting Salinas v. United States, 522 U.S. 52, 65 (1997)); *see also Brown*, 942 F.3d at 1075 (noting that the "two offenses are meaningfully distinct," and thus the "elements of conspiracy . . . do not require the government to prove the elements of the underlying substantive crime itself").

74 *Brown*, 942 F.3d at 1075; *see also Simms*, 914 F.3d at 233–34 (explaining that conspiracy requires proof of only "an agreement").

75 *Barrett II*, 937 F.3d at 127. In *United States v. Barrett* (*Barrett I*), 903 F.3d 166 (2d Cir. 2018), the Second Circuit upheld a Hobbs Act conspiracy conviction under a hybrid approach: If the crime was categorically violent under § 924(c)(3)(A), the agreement element of the conspiracy established "substantial risk" of violence under § 924(c)(3)(B). *Id.* at 176–77.

76 *Barrett II*, 937 F.3d at 129–30. The Second Circuit explained that *Barrett I*'s holding rested on two theories (the residual clause and the hybrid approach). *Id.* After *Davis* invalidated the residual clause, both theories failed. Subsequent Second Circuit decisions have not described *Barrett II*'s reasoning consistently. Some characterize it accurately—including by quoting *Barrett II* as saying that *Davis* "precludes" the conclusion that Hobbs Act conspiracy qualifies as a § 924(c) crime of violence, without claiming that *Barrett II* analyzed the elements clause. *See, e.g.*, United States v. Dussard, 967 F.3d 149, 156 (2d Cir. 2020) (quotation marks omitted) (quoting *Barrett II*, 937 F.3d at 127); *see also Cook I*, 84 F.4th at 121; Hall v. United States, 58 F.4th 55, 59 (2d Cir. 2023); Tavarez v. United States, 81 F.4th 234, 238 (2d Cir. 2023). Some overstate *Barrett II*'s holding by attributing elements-clause reasoning to *Barrett II* that the case never articulated. *See, e.g.*, *Cook II*, 111 F.4th 237, 240 (2d Cir. 2024) (Sullivan, J., concurring in denial of rehearing en banc); Mayes v. United States, 2021 WL 3111906, at *4 (E.D.N.Y. July 22, 2021); United States v. Heyward, 3 F.4th 75, 81 (2d Cir. 2021) (discussing *Barrett II* in the context of a murder conspiracy predicate under the Racketeer Influenced and Corrupt Organizations Act, Pub. L. No. 91-452, tit. IX, 84 Stat. 922, 941 (1970) (codified as amended at 18 U.S.C. § 1961 et seq.)); United States v. Jefferys, 2019 WL 5103822, at *6 (E.D.N.Y. Oct. 11, 2019). Some describe *Barrett II* accurately but add reasoning not present in the case's holding. *See, e.g.*, McCarron v. United States, 2023 WL 1873250, at *2 (2d Cir. Feb. 10, 2023); United States v. Laurent, 33 F.4th 63, 93 (2d Cir. 2022).

2. Application to Cook.

This ruling had profound implications for defendants like Cook, who had been convicted under § 924(c) for crimes that no longer fell within the statute's ambit. *Barrett II* established that conspiracy to commit Hobbs Act robbery could not satisfy § 924(c)'s narrow elements clause.[77] After *Davis*, there was no longer a residual clause to cover it. This ruling created the possibility that countless convictions were constitutionally void from the outset.

Cook was among those affected. Three years into his sentence, Cook filed a 28 U.S.C. § 2255 motion to vacate his § 924(c) conviction.[78] He argued that post-*Johnson*, his conviction under § 924(c)'s similarly worded residual clause could no longer stand as a matter of law, since vague statutes violate due process by failing to provide fair notice.[79]

The district court denied relief on two independent grounds. First, Cook had signed a collateral-attack waiver that barred relief, agreeing not to challenge his conviction or sentence under 28 U.S.C. § 2255 as long as his sentence did not exceed the term of imprisonment specified in his plea agreement.[80] Second, *Davis* and *Barrett II* had not yet been decided. At that point, conspiracy to commit Hobbs Act robbery still qualified as a § 924(c) crime of violence under then-existing circuit precedent.[81]

Davis and *Barrett II* were decided while Cook's copetitioners' motions were pending. Despite these decisions, the district court again denied relief in the remaining petitions, relying on the defendants' collateral-attack waivers.[82] Thus, Cook and his copetitioners remained convicted under § 924(c) based on a predicate that, as correctly interpreted, no longer (and never had) qualified for the charge. Recognizing the potential for injustice, the Second Circuit issued certificates of appealability to resolve two questions: the broader question whether a waiver of appeal alone could sustain the conviction, and if not, the narrower question whether these particular § 924(c) convictions should be vacated.[83]

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77 *Barrett II*, 937 F.3d at 127.
78 *See Cook I*, 84 F.4th at 121.
79 *Id.*
80 *Id.*
81 *Id.*
82 *Id.*
83 *Cook I*, 84 F.4th at 121.

In 2023, a unanimous panel found these petitioners' waivers enforceable, answering the narrow question but leaving the broader issue unresolved.[84] The panel reasoned that the pleas were knowing and voluntary and that the waivers clearly barred the challenges Cook raised.[85] The panel recognized five exceptions to the enforcement of collateral-attack waivers that were inapplicable to Cook.[86] Critically, the panel reserved the question whether collateral-attack waivers would be unenforceable in the event of a "complete miscarriage of justice," since valid alternative predicates supported Cook's conviction.[87] This distinction between cases with invalid sole predicates and cases with valid alternative predicates is central to the post-*Davis* circuit split.

The Second Circuit denied rehearing en banc, but the decision was fractured.[88] In her dissent, joined by two other judges, Judge Robinson noted that the holding did not address whether a "waiver is enforceable where the § 924(c) conviction is unsupported by *any* valid predicate act."[89] Second, the *Cook I* panel did not address whether the waiver may be unenforceable on the grounds that the plea cannot be knowing and voluntary if the defendants were "misinformed about the 'true nature' of the charge."[90] Under Second Circuit precedent in *United States v. Balde*,[91] a collateral-attack waiver does not foreclose appeal when the plea itself is rendered neither knowing nor voluntary, and therefore "deficient under Rule 11" of the Federal Rules of Criminal Procedure (which requires knowing and voluntary guilty pleas).[92] Judge Robinson argued that Cook's case presented the same constitutional defect as *Balde*.[93]

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84 *Id.* at 124–25.

85 *Id.*

86 *Id.* at 122, 125.

87 *Id.* at 125 n.4 (quotation marks omitted) (quoting *Davis*, 417 U.S. at 346) (noting that the defendants admitted to conduct "prohibited by a number of criminal statutes . . . each of which would have supported a section 924(c) conviction").

88 *See Cook II*, 111 F.4th at 247 (Robinson, J., dissenting from denial of rehearing en banc).

89 *Id.* (emphasis in original).

90 *Id.* at 248 (quoting *Bousley*, 523 U.S. at 619).

91 943 F.3d 73 (2d Cir. 2019).

92 *Id.* at 93–94.

93 *See Cook II*, 111 F.4th at 251–52 (Robinson, J., dissenting from denial of rehearing en banc).

3. Varying circuit approaches.

Cook II illustrates wider tensions that divide federal courts. Prior to *Hunter*, the circuits had long diverged over whether to recognize a miscarriage of justice exception to otherwise valid waivers, and if so, how broadly to define it. The First, Third, Fourth, Eighth, Ninth, Tenth, and D.C. Circuits had recognized some form of miscarriage of justice exception to appellate waiver enforcement, though they defined its scope differently.[94] The Fifth, Sixth, Seventh, and Eleventh Circuits had declined to adopt a general exception.[95] The Second Circuit had neither squarely adopted nor rejected a miscarriage of justice exception.[96] The Supreme Court has since resolved this split, following the majority approach in adopting a general miscarriage of justice exception.[97]

That divergence has carried into the § 924(c) context: The circuits further disagree on whether collateral-attack waivers remain enforceable when subsequent binding decisions clarify that a defendant's predicate offense for their § 924(c) conviction was never actually a statutory crime of violence. Both divergences largely rely on the assumption of a valid waiver; the question they answer is therefore whether a court should exercise its discretion

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[94] United States v. Andruchuk, 122 F.4th 17, 24–25 (1st Cir. 2024) (listing factors for applying miscarriage of justice exceptions); United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001) (endorsing the First Circuit's approach); United States v. McKinney, 60 F.4th 188, 192–93 (4th Cir. 2023); United States v. Andis, 333 F.3d 886, 890–91 (8th Cir. 2003) (en banc) (adopting a miscarriage of justice exception but cautioning that it is narrow); United States v. Wells, 29 F.4th 580, 583, 587–88 (9th Cir. 2022) (noting a miscarriage of justice limitation before applying a categorical exception for constitutional challenges to the terms of the sentence itself); United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (using a miscarriage of justice inquiry limited to a closed list of four circumstances); United States v. Adams, 780 F.3d 1182, 1184 (D.C. Cir. 2015) (noting the miscarriage of justice exception is a "very narrow" doctrine).

[95] United States v. Chaney, 120 F.4th 1300, 1303 (5th Cir. 2024), *vacated*, 2026 WL 1855041 (U.S. June 29, 2026); Portis v. United States, 33 F.4th 331, 339 (6th Cir. 2022); United States v. Nulf, 978 F.3d 504, 507 (7th Cir. 2020) (noting that the Seventh Circuit "did not adopt a general miscarriage-of-justice exception" for "setting aside an otherwise enforceable appeal waiver"); United States v. Garcia, 2016 WL 3999997, at *4 (N.D. Ind. July 25, 2016) ("The Seventh Circuit has strictly circumscribed the exceptions that can be invoked to appeal waivers, and has never recognized a generalized miscarriage-of-justice exception." (citing United States v. Smith, 759 F.3d 702, 706 (7th Cir. 2014))); *King*, 41 F.4th at 1368 & n.3.

[96] The Second Circuit has assumed without deciding that such an exception might exist. *See Cook I*, 84 F.4th at 125 n.4; Roselien v. United States, 2024 WL 4341361, at *3 (2d Cir. Sept. 30, 2024). The Supreme Court has since characterized the Second Circuit's approach as "differently framed but substantively similar." *See Hunter*, 146 S. Ct. at 1709 n.1 (citing United States v. Riggi, 649 F.3d 143, 148 (2d Cir. 2011)).

[97] *Hunter*, 146 S. Ct. at 1713.

to decline enforcement of a valid waiver in the name of justice and equity. But courts have not authoritatively answered the antecedent question this Comment addresses: whether a plea agreement entered under a fundamental misunderstanding of the charge's elements produces a valid waiver at all. Under the current framework, a defendant's legal innocence of the charged offense is treated as a basis for discretionary equitable relief, which courts apply in divergent ways.

The Fourth Circuit established itself as an outlier by applying a miscarriage of justice exception in declining to uphold collateral-attack waivers, including in the § 924(c) context.[98] In *United States v. McKinney*,[99] the defendant's conviction rested on Hobbs Act conspiracy as the sole predicate offense.[100] After *Davis*, this predicate no longer qualified as a crime of violence.[101] The Fourth Circuit declined to enforce defendant Donzell Ali McKinney's collateral-attack waiver and vacated his § 924(c) conviction, reasoning that to invoke the miscarriage of justice exception, "a defendant need only make 'a *cognizable claim* of actual innocence.'"[102] Because McKinney's sole predicate offense no longer qualified under § 924(c), the court found he had demonstrated actual innocence of the § 924(c) charge, and enforcing the waiver would constitute a miscarriage of justice.[103] Doing so would imprison McKinney for ten years for lawful conduct—an outcome fundamentally at odds with the principle that criminal punishment requires a charged crime. The Fourth Circuit's approach recognizes that actual innocence provides a gateway through procedural defaults, including contractual waivers of appellate- and collateral-review rights.[104] However, the circuit has maintained some limitations, holding that actual innocence claims must

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98 *See, e.g.*, United States v. Adams, 814 F.3d 178, 182 (4th Cir. 2016) ("We will refuse to enforce an otherwise valid waiver if to do so would result in a miscarriage of justice."); Wolfe v. Johnson, 565 F.3d 140, 160 (4th Cir. 2009) ("A proper showing of 'actual innocence' is sufficient to satisfy the 'miscarriage of justice' requirement.").

99 60 F.4th 188 (4th Cir. 2023).

100 *Id.* at 191.

101 *Id.* at 197–98.

102 *Id.* at 192–93 (emphasis in original) (quoting *Adams*, 814 F.3d at 182).

103 *Id.*

104 Outside the waiver context, the Fourth Circuit has recognized the significance of alternative valid predicates for § 924(c) convictions. *See* United States v. Crawley, 2 F.4th 257, 262–64 (4th Cir. 2021) (affirming that a § 924(c) conviction remained valid despite *Davis* invalidating one of two predicate offenses, as the alternative predicate remained sound).

relate to the offense underlying the conviction, not merely sentencing enhancements.[105]

Most circuits enforce waivers despite supervening authority that invalidates predicate offenses. The Fifth Circuit has explicitly declined to recognize (neither adopting nor rejecting) any miscarriage of justice exception, holding that waivers must be enforced regardless of subsequent legal developments.[106] Circuit precedent permits knowing waivers of the right to challenge "both illegal and unconstitutional sentences," treating constitutional clarifications of criminal statutes as risks defendants assume through their waivers.[107]

The Sixth, Seventh, Ninth, and Eleventh Circuits have enforced collateral-attack waivers in § 924(c) cases, though their reasoning varies. In *United States v. Portis*,[108] the Sixth Circuit asserted that "[t]he principle that future changes in law do not vitiate collateral-challenge waivers is mainstream."[109] The court reasoned that valid waivers remain enforceable because defendants knowingly assume the risk that future legal developments will not benefit them, and because the Sixth Circuit has deliberately chosen never to adopt miscarriage of justice exceptions that might undermine the finality that waivers are designed to provide.[110] The court further noted that even if such an exception existed, the exception likely would not apply to the case before it given the multiple charges against the defendants, illustrating the alternative-predicate reasoning that is invoked by other circuits.[111]

In *Oliver v. United States*,[112] the Seventh Circuit enforced a waiver in a § 924(c) case, rejecting the argument that doing so would result in a miscarriage of justice.[113] The court based this rejection on the existence of a valid alternative predicate, reaffirming that contract principles govern plea agreements and that

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[105] *See* United States v. Richardson, 146 F.4th 394, 399 & n.1 (4th Cir. 2025) (noting that the miscarriage of justice exception to waiver enforcement is invoked only in a narrow class of claims), *vacated*, 2026 WL 1855087 (U.S. June 29, 2026) (mem.).

[106] *See Chaney*, 120 F.4th at 1303 (citing *Barnes*, 953 F.3d at 388–89); *see also* United States v. Jones, 134 F.4th 831, 841–43 (5th Cir. 2025).

[107] *See Barnes*, 953 F.3d at 389. *Barnes* also notes that waivers must only be "'knowing,' not 'all-knowing.'" *Id.* at 388.

[108] 33 F.4th 331 (6th Cir. 2022).

[109] *Id.* at 335.

[110] *Id.* at 339 (noting that the miscarriage of justice exception has only been addressed in dicta as a "possible" exception).

[111] *Id.*

[112] 951 F.3d 841 (7th Cir. 2020).

[113] *Id.* at 847.

valid waivers remain enforceable despite future legal changes.[114] The court noted that refusing to allow defendants to benefit from these changes is "not a miscarriage of justice."[115]

The Ninth Circuit has upheld a collateral-attack waiver for a § 924(c) conviction challenged after *Davis*, reasoning that defendants knowingly and voluntarily assume the risk of favorable changes in the law when they enter plea agreements in exchange for favorable deals.[116] The Eleventh Circuit has held that waivers challenged on the basis of new retroactive constitutional rules are enforceable and do not trigger narrow exceptions to waiver enforcement.[117] The Eleventh Circuit similarly treats supervening legal developments as risks that defendants assume when they enter plea agreements.[118]

The Second Circuit's position largely aligns with the majority of circuits. As *Cook v. United States* (*Cook I*)[119] demonstrates, the Second Circuit enforces collateral-attack waivers when alternative valid predicates exist to support a § 924(c) conviction.[120] Therefore, if the defendant's conduct could satisfy § 924(c) under a different legal theory even though the charged theory has been invalidated, the waivers remain enforceable.

Other circuits have not consistently addressed the distinction between sole-predicate and multiple-predicate cases. The Sixth, Ninth, and Eleventh Circuits enforced waivers in *Portis*, *United States v. Goodall*,[121] and *King v. United States*[122] without addressing whether alternative predicates are relevant to the miscarriage of justice exception. The Seventh Circuit noted in *Oliver* that an alternative, existing predicate offense would have satisfied the elements clause and supported the defendants' convictions.[123] However, the court did not treat the existence of alternative predicates as a limiting principle essential to its holding: It

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114 *Id.* at 845–47.

115 *Id.* at 847.

116 *See* United States v. Goodall, 21 F.4th 555, 558, 563–64 (9th Cir. 2021).

117 *See King*, 41 F.4th at 1368 & n.3 (declining to adopt "a general 'miscarriage of justice' exception" to the general rule that valid appellate waivers are to be enforced by their terms).

118 *Id.* at 1367.

119 84 F.4th 118 (2d Cir. 2023).

120 *See Cook I*, 84 F.4th at 125 n.4.

121 21 F.4th 555 (9th Cir. 2021).

122 41 F.4th 1363 (11th Cir. 2022).

123 *See Oliver*, 951 F.3d at 847.

held broadly that collateral-attack waivers validly allocate the risk of future legal developments and remain enforceable.[124]

By contrast, the Second Circuit panel in *Cook v. United States* (*Cook II*)[125] explicitly reserved the question whether a waiver would be enforceable in cases involving a "complete miscarriage of justice"—specifically, cases in which no alternative valid predicate exists.[126] This reservation creates a potential exception that the Second Circuit has not yet recognized or applied, leaving defendants with sole-predicate cases in legal limbo. As Judge Robinson's dissent emphasizes, the panel's reasoning conflicts with the Second Circuit's own precedent in *Balde*: There, it held that collateral-attack waivers do not bar challenges based on the argument that the plea itself was neither knowing nor voluntary when supervening authority clarifies the elements of the offense.[127]

This unreached question is significant. The circuit split over the miscarriage of justice exception—how broadly it applies and what standard governs it—is a dispute about equitable discretion. But the voluntariness of a plea agreement is a constitutional requirement, not a matter of discretion. While some courts argue that constitutional requirements may be contractually waived, this Comment argues that for a defined subset of cases, this is the wrong question to ask; the right question is whether the waiver was constitutionally valid in the first place.

II. THE LEGAL INNOCENCE FRAMEWORK: CONSTITUTIONAL BARRIERS TO ENFORCING COLLATERAL-ATTACK WAIVERS

Cook's § 924(c) conviction rested on a predicate offense that binding precedent later clarified was never a "crime of violence."[128] His claim can be classified as a form of "*legal* innocence, which arise[s] when no valid criminal statute prohibited the defendant's conduct or supplied the basis for the defendant's sentence."[129] Professor Leah Litman has argued that legal innocence represents a recognized form of actual innocence that overcomes procedural barriers in habeas proceedings.[130] Under Litman's

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[124] *Id.* at 845.

[125] 111 F.4th 237 (2d Cir. 2024).

[126] *Id.* at 238 (Lohier, J., concurring in denial of rehearing en banc).

[127] *Id.* at 251–52 (Robinson, J., dissenting from denial of rehearing en banc).

[128] *Cook I*, 84 F.4th at 122.

[129] Leah M. Litman, *Legal Innocence and Federal Habeas*, 104 VA. L. REV. 417, 419 (2018) (emphasis in original).

[130] *Id.* at 421.

framework, even if a defendant's claim is time-barred, a showing that the defendant was convicted for conduct that is no longer criminal can allow the claim to proceed in post-conviction habeas proceedings. This Comment extends Litman's framework to contractual waiver barriers, arguing that when supervening authority clarifies that a defendant's conduct was never criminal, collateral-attack waivers cannot be enforced because they are based on constitutionally defective guilty pleas.

Supreme Court precedent provides frameworks for this argument. Part II.A uses *Rivers v. Roadway Express, Inc.*[131] as an interpretive lens to establish that when the Court authoritatively construes a statute, it declares what the statute has always meant, not what it means going forward. Part II.B argues that under *Bousley* and related criminal precedents, subsequent binding clarifications that a criminal statute never covered a defendant's conduct render the original guilty plea neither knowing nor voluntary and therefore constitutionally defective. Part II.C draws on *Balde* and *Garza v. Idaho*[132] to demonstrate that defective plea agreements cannot generate enforceable appellate waivers. Synthesizing the principles from those cases, this Comment demonstrates that constitutional defects in plea agreements cannot be waived away, especially when the underlying conviction lacks any valid legal foundation.

A. *Rivers*: The Retroactivity of Statutory Interpretation

This Comment's argument rests on a foundational principle of statutory interpretation: When a court authoritatively interprets a statute, it declares what the law *always* was, and does not change the law. The Supreme Court established this principle in *Rivers*, a civil statutory interpretation decision that was invoked in *Bousley* and relied upon by the Second Circuit in *Balde*.

In *Rivers*, the Supreme Court established that when the Court interprets a statute, it "explain[s] its understanding of what the statute has meant continuously" since the statute's enactment.[133] The Court provides the authoritative statement of the statute's meaning "*before* as well as after the decision" of the case at hand.[134] This principle distinguishes judicial interpretation

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131 511 U.S. 298 (1994).

132 586 U.S. 232 (2019).

133 *Rivers*, 511 U.S. at 313 n.12.

134 *Id.* at 313 (emphasis added).

from legislative amendment. When passing statutes, Congress "has the power to decide when the statute will become effective."[135] When clarifying statutory interpretation, the Court does not create new law prospectively but declares what the law always was. Any contrary understandings were simply mistaken.

Two recent Supreme Court decisions might appear to undercut this principle, but both are distinguishable. In *Jones v. Hendrix*,[136] the Court held that the Antiterrorism and Effective Death Penalty Act's[137] (AEDPA) restrictions on successive § 2255 motions preclude prisoners from bringing § 2241 habeas claims rooted in new statutory interpretation by way of § 2255's savings clause.[138] The Court closed by quoting *George v. McDonough*[139] for the proposition that "there is nothing incongruous about a system in which this kind of error—the application of a since-rejected statutory interpretation—cannot be remedied after final judgment."[140] But *George* involved a veteran seeking collateral relief from a Veterans Affairs benefits decision under the agency's specific "clear and unmistakable error" standard, a specialized remedial framework with an independent regulatory history distinct from the validity of criminal pleas.[141]

Both *Hendrix* and *George* presuppose a valid final judgment and address which remedial vehicles are available to seek relief.[142] *Hendrix* concerned a prisoner who had already obtained one round of § 2255 relief and sought a second collateral attack on an otherwise valid conviction; *George* concerned whether a particular administrative standard of review could incorporate *Rivers*'s

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[135] *Id.* at 313 n.12.

[136] 143 S. Ct. 1857 (2023).

[137] Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 8, 18, 22, 28, and 34 U.S.C.).

[138] *Hendrix*, 143 S. Ct. at 1864 (noting that successive § 2255 motions must satisfy the statute's narrow gateway conditions).

[139] 142 S. Ct. 1953 (2022).

[140] *Hendrix*, 143 S. Ct. at 1877 (quotation marks omitted) (quoting *George*, 142 S. Ct. at 1962).

[141] *George*, 142 S. Ct. at 1962. The plaintiff was seeking collateral relief under 38 U.S.C. §§ 5109A and 7111, which establishes a veterans benefit standard with a century-long independent regulatory history governing Board of Veterans' Appeals decisions. *Id.* at 1958–59.

[142] *See Hendrix*, 143 S. Ct. at 1863 (framing the question as whether AEDPA's restrictions on second or successive motions render § 2255 "inadequate or ineffective" such that a prisoner may obtain relief under § 2241 (quoting 28 U.S.C. § 2255(e))); *George*, 142 S. Ct. at 1957 (addressing whether a veteran may obtain collateral relief from a final benefits decision on grounds of "clear and unmistakable error").

general interpretive principles.[143] Critically, *George* acknowledged that *Rivers*'s principles remain valid "general principles" of statutory interpretation, even while they "do not dispose of the issue before us."[144]

The *George* Court's observation that a since-rejected statutory interpretation need not be remedied after final judgment was made in this narrow context,[145] addressing the scope of a remedial standard and not the constitutional validity of the underlying plea. This Comment's argument operates at a prior level: not which door a defendant may use to seek relief, but whether the original plea was constitutionally valid from inception.

While *Rivers* arose from a civil employment discrimination dispute, it is a foundational precedent that courts have applied in the criminal context. Justice John Paul Stevens cited this principle when reasoning that supervening authority could render prior guilty pleas "constitutionally invalid."[146] In *Balde*, the Second Circuit similarly relied on *Rivers* when holding that subsequent binding authority rendered Souleymane Balde's plea legally deficient from the outset.[147]

This principle has direct consequences for the constitutional validity of plea agreements. If *Davis* and *Barrett II* are authoritative declarations of what § 924(c) always meant, then any plea entered on a contrary understanding rests on a legal error that existed from the moment of entry. Under *Bousley*, such a plea is constitutionally defective.

B. The Constitutional Framework: *Bousley* and Related Criminal Precedents

The Supreme Court established in *Bousley* that a guilty plea must be "'voluntary' and 'intelligent'" to be constitutionally valid.[148] A plea is intelligent only if the defendant receives "real notice of the true nature of the charge against him, the first and most universally recognized requirement of due process."[149] When "neither [the defendant], nor his counsel, nor the court correctly

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143 *Hendrix*, 143 S. Ct. at 1864; *George*, 142 S. Ct. at 1961–62.

144 *George*, 142 S. Ct. at 1962.

145 *See id.* at 1959.

146 *Bousley*, 523 U.S. at 626 (Stevens, J., concurring).

147 *Balde*, 943 F.3d at 94.

148 *See Bousley*, 523 U.S. at 618 (quoting Brady v. United States, 397 U.S. 742, 748 (1970)).

149 *Id.* at 618 (quotation marks omitted) (quoting Smith v. O'Grady, 312 U.S. 329, 334 (1941)).

understood the essential elements of the crime with which [the defendant] was charged," the guilty plea is constitutionally invalid.[150]

Bousley involved a defendant who pleaded guilty to "using" a firearm under § 924(c)(1).[151] At the time of his plea, he, his counsel, and the court all believed that possession of a firearm during a drug trafficking offense satisfied the statute.[152] Years later, the Supreme Court held in *Bailey v. United States*[153] that "use" requires "active employment of the firearm" and that mere possession is insufficient.[154] Kenneth Bousley challenged his plea as involuntary, seeking collateral relief under 28 U.S.C. § 2255: He argued that the record revealed that neither he, his counsel, nor the court correctly understood the essential elements of the offense.[155] The Supreme Court agreed that if this contention were proved, Bousley's plea would be constitutionally invalid.[156]

The Supreme Court distinguished *Bousley* from cases like *Brady v. United States*,[157] in which defendants pleaded guilty after correctly understanding the "essential nature of the charge" against them but sought relief based on legal developments affecting sentencing (a miscalculation of consequences).[158] Robert Brady pleaded guilty to kidnapping under 18 U.S.C. § 1201(a) after learning that he faced a potential death sentence upon jury recommendation and that his codefendant could testify against him at trial.[159] After his plea but before his sentencing, the Supreme Court invalidated § 1201's death penalty provision.[160] Brady then challenged his plea, arguing it was induced by fear of a now-unconstitutional provision.[161] The Supreme Court rejected this argument, as Brady was "fully aware of the direct consequences" of his plea,[162] was "advised by competent counsel," and had sufficient mental competence to make his plea.[163] In

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150 *Id.* at 618–19.

151 *Id.* at 616.

152 *Id.* at 617.

153 516 U.S. 137 (1995).

154 *Id.* at 144.

155 *See Bousley*, 523 U.S. at 616, 618.

156 *Id.* at 619.

157 397 U.S. 742 (1970).

158 *See Bousley*, 523 U.S. at 619 (citing *Brady*, 397 U.S. at 757).

159 *See Brady*, 397 U.S. at 743–44.

160 *Id.* at 745–47 (citing United States v. Jackson, 390 U.S. 570, 581–83 (1968)).

161 *Id.* at 744.

162 *Id.* at 755 (quotation marks omitted) (quoting Shelton v. United States, 246 F.2d 571, 572 n.2 (5th Cir. 1957)).

163 *Id.* at 756.

distinguishing *Brady*, the *Bousley* Court reasoned that Brady had been correctly informed of the true nature of the charge against him (kidnapping)[164] and had merely misjudged the strength of the government's case or the penalties he faced, regardless of subsequent legal developments.[165] Therefore, his plea remained knowing after the supervening change in law.

The critical distinction in *Bousley* lies in the defendant's understanding of the charge itself. In contrast to *Brady*, Bousley asserted that he was "misinformed as to the true nature of the charge against him."[166] This fact pattern exemplifies legal innocence, as the defendant committed an act that "the law, properly interpreted, does not make criminal."[167] Similarly, § 924(c) constitutes a separate criminal charge with distinct elements rather than a mere sentencing provision. Like Bousley, Cook and similarly situated defendants were misinformed about the fundamental elements of a specific federal crime. Unlike Brady, Cook did not plead guilty with a correct understanding of the charge against him, only to later discover that the law had changed in his favor. Cook pleaded guilty to conduct (using a firearm during conspiracy to commit Hobbs Act robbery) that was described to him as a crime of violence under § 924(c). Under *Davis* and *Barrett II*, this characterization was incorrect. As a result, Cook's guilty plea was not knowing and intelligent, and is therefore constitutionally invalid under *Henderson v. Morgan*.[168] There, the defendant pleaded guilty to second-degree murder without being informed that intent was an element.[169] The Court found the plea invalid, reasoning that a defendant must receive "real notice of the true nature of the charge."[170] If a plea is invalid when a defendant is not informed of an existing element, it is a fortiori invalid when the defendant is told that noncriminal conduct is a crime. Cook and similarly situated defendants were told that conspiracy to commit Hobbs Act robbery qualified as a crime of violence under § 924(c). Under *Davis* and *Barrett II*, this conduct never qualified. Under *Bousley* and *Henderson*, pleas based on fundamental misunderstandings of the charge cannot be constitutionally valid.

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164 *See Bousley*, 523 U.S. at 619.

165 *Id.* (citing *Brady*, 397 U.S. at 757).

166 *Id.*

167 Litman, *supra* note 129, at 451.

168 426 U.S. 637 (1976).

169 *Id.* at 642–44.

170 *Id.* at 645 (quotation marks omitted) (quoting *O'Grady*, 312 U.S. at 334).

Some have argued that *Teague v. Lane*[171] bars retroactive application of these decisions.[172] This argument is misplaced. In *Teague*, the prosecutor exercised all ten peremptory strikes against Black prospective jurors—a practice that was constitutionally prohibited but difficult to remedy due to then-controlling evidentiary requirements.[173] The Supreme Court declined to retroactively apply the *Batson* principle on collateral review, holding that new rules of criminal procedure do not apply retroactively to then-final decisions, subject to narrow exceptions.[174] As the Court recognized, *Teague* does not govern cases in which the Court "decides the meaning of a criminal statute enacted by Congress."[175]

Davis and *Barrett II* did not announce new procedural rules; they interpreted the substantive scope of § 924(c). Such statutory interpretation decisions are authoritative statements of what the statute always meant and are not "new rules" for *Teague* purposes.[176] Here, Cook seeks to enforce § 924(c)'s actual meaning. The precise risk identified in *Bousley*, that a "defendant stands convicted of 'an act that the law does not make criminal,'"[177] is present.

Without *Teague* barring the claim, the relevant question becomes how supervening authority should be classified. Applying the principle the *Rivers* Court would later adopt, the *Brady* Court held that the relevant supervening authority did not alter the meaning of kidnapping under federal law.[178] The elements of kidnapping remained the same; what changed was the permissible punishment.[179] Brady's conduct was always kidnapping.

This framework provides a different result when applied to Cook. First, *Rivers* requires evaluating Cook's 2012 plea using § 924(c)'s actual meaning, as declared in 2019.[180] When the

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171 489 U.S. 288 (1989).

172 *See, e.g.*, *Bousley*, 523 U.S. at 619–20 (noting that an amicus had urged the application of *Teague* to bar the petitioner's claim).

173 *See Teague*, 489 U.S. at 293–95. *See generally* Swain v. Alabama, 380 U.S. 202 (1965). *Swain* required proof of peremptory challenge system perversion to make a prima facie case of discrimination (e.g., showing systemic racial exclusion across cases by a prosecutor). *Swain*, 380 U.S. at 223–24. This requirement "imposed an insurmountable burden" on equal protection challenges. *See* Roger C. Harper, Note, *Rethinking Limitations on the Peremptory Challenge*, 85 COLUM. L. REV. 1357, 1362 & n.31 (1985).

174 *See Teague*, 489 U.S. at 310.

175 *Bousley*, 523 U.S. at 620.

176 *Id.* at 619–20.

177 *Id.* at 620 (quoting Davis v. United States, 417 U.S. 333, 346 (1974)).

178 *See Brady*, 397 U.S. at 746–49.

179 *Id.* at 756–58.

180 *See Rivers*, 511 U.S. at 313 n.12.

Supreme Court decided *Davis* and the Second Circuit decided *Barrett II*—both courts with binding authority over Cook's case—these courts did not alter § 924(c). Rather, they clarified that conspiracy to commit Hobbs Act robbery was never a crime of violence under § 924(c); courts simply misunderstood the statute before its authoritative clarification.[181]

Second, *Bousley* requires asking whether the defendant, counsel, and court understood "the essential elements" using this clarified meaning.[182] In 2012, none of them understood that Cook's conduct fell outside of § 924(c)'s scope. Under *Bousley*, this fundamental misunderstanding renders Cook's plea constitutionally invalid: It was unknowing from inception, though the defect was revealed only after *Davis* and *Barrett II*.

While *Bousley* establishes that such pleas are constitutionally invalid, the Supreme Court did not address whether waivers contained within those defective pleas remain enforceable. The circuit split demonstrates that courts have not extended *Bousley*'s logic to collateral-attack waivers. This Comment argues they should.

C. *Balde* and Rule 11

The Second Circuit's decision in *Balde* supports invalidating waivers when supervening authority renders pleas constitutionally defective because the defendant pleaded guilty without being properly informed of what conduct the statute actually criminalized. While *Balde* is a Second Circuit decision, it applies constitutional principles from *Bousley*, *Henderson*, and *Garza*, which apply with equal force in all circuits. Rule 11 of the Federal Rules of Criminal Procedure requires that guilty pleas be knowing and voluntary: Defendants must understand the nature of each charge, and a factual basis must support each plea.[183] *Garza* reinforces this conclusion, recognizing that certain claims are so critical to constitutional validity that they cannot be bargained away despite explicit contractual provisions.

In *Balde*, the defendant pleaded guilty to unlawful possession of a firearm by an illegal alien, in violation of 18 U.S.C. § 922(g)(5)(A).[184] During the plea colloquy, the government failed

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[181] *See supra* Part I.B.1–2.

[182] *See Bousley*, 523 U.S. at 618.

[183] FED. R. CRIM. P. 11(b)(1)–(3).

[184] *See Balde*, 943 F.3d at 79.

to inform Balde that his own *knowledge* of his unlawful status was a required element of the offense; instead, the colloquy treated Balde's unlawful status as an objective *fact* for the government to establish, not something Balde himself needed to know.[185] After Balde's conviction, the Supreme Court clarified in *Rehaif v. United States*[186] that § 922(g) requires the defendant's knowledge of their unlawful status.[187] Balde petitioned for rehearing, and the government argued that his explicit appellate waiver prevented him from challenging his conviction.[188]

The Second Circuit rejected the government's argument, holding that waivers do not bar challenges to constitutionally defective pleas.[189] The court noted that waiver enforcement "assumes a valid plea that was knowingly and intelligently entered in compliance with the requirements of Rule 11."[190] Appellate waivers do not bar defendants from challenging violations of the plea process itself, including asserting Rule 11 violations.[191] Balde's plea appeared proper at entry; it was revealed as deficient only after *Rehaif* clarified what § 922(g)(5)(A) had always required. Citing *Rivers*, the Second Circuit applied *Rehaif* to establish that Balde's plea was legally deficient under Rule 11 from the outset.[192]

The court identified two Rule 11 violations. First, the government's failure to inform Balde of the knowledge element of § 922(g) violated Rule 11(b)(1)(G)'s requirement that defendants understand "the nature of each charge."[193] Second, the factual record did not establish that he knew of his unlawful status, thus violating Rule 11(b)(3)'s factual basis requirement.[194] These requirements are critical to constitutional validity because they ensure the factual basis for the plea corresponds to conduct that actually violates the law.[195] The court concluded that Rule 11 and the Constitution itself allowed Balde to attack his plea despite his waiver.[196]

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185 *Id.* at 94–95.
186 139 S. Ct. 2191 (2019).
187 *See Balde*, 943 F.3d at 87 (citing *Rehaif*, 139 S. Ct. at 2200).
188 *Id.* at 80, 93.
189 *Id.* at 93–95.
190 *Id.* at 93.
191 *Id.* (citing United States v. Lloyd, 901 F.3d 111, 118 (2d Cir. 2018)).
192 *See Balde*, 943 F.3d at 94 (citing *Rivers*, 511 U.S. at 312–13).
193 *Id.* (quotation marks omitted) (quoting FED. R. CRIM. P. 11(b)(1)(G)).
194 *Id.* at 95.
195 *Id.* at 93–95.
196 *Id.* at 95.

This Comment argues that *Balde*'s reasoning applies with equal force to defendants whose sole predicate offense has been invalidated. In their concurrence in denial of rehearing en banc, a plurality of Second Circuit judges distinguished *Balde* on multiple grounds, most significantly the distinction between direct-appeal waivers (present in *Balde*) and collateral-attack waivers (present in *Cook*).[197] The *Cook II* plurality noted that Balde's waiver was not comprehensive, but rather "preserved [the defendant's] right to appeal the district court's denial of his motion [to dismiss the indictment]."[198] However, the distinction between direct-appeal waivers and collateral-attack waivers does not resolve the underlying constitutional question. The constitutional defect that *Balde* identifies exists whether the challenge arises on direct appeal or collateral attack, and whether the relevant waiver bars either, so long as the challenge targets the plea agreement's validity rather than the conviction's merits.[199] Federal courts evaluate both types of waivers under the same knowing and voluntary standard, so the label attached to the waiver does not determine its validity.[200]

In 2012, Cook, his counsel, and the court believed that conspiracy to commit Hobbs Act robbery presented a sufficient risk of violence to satisfy the statutory requirements of § 924(c). In 2019, *Davis* struck down the residual clause as unconstitutionally vague.[201] *Barrett II* then held that conspiracy to commit Hobbs Act robbery does not satisfy the elements clause.[202] Together, these decisions clarified that Cook's conduct was never covered by § 924(c).

Under *Rivers*'s analysis, *Davis* and *Barrett II* explained what § 924(c) always meant.[203] *Balde* and *Cook* both involved situations in which all parties fundamentally misunderstood what conduct the statute criminalized. *Balde* involved supervening authority clarifying that an additional element (which the government had not proved) was required for the guilty plea to be valid, while *Cook* involved supervening authority clarifying that the predicate

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197 *Cook II*, 111 F.4th at 242 (Sullivan, J., concurring in denial of rehearing en banc).

198 *Id.* (alterations in original) (quotation marks omitted) (quoting *Balde*, 943 F.3d at 79).

199 *See* Frederick v. Warden, Lewisburg Corr. Facility, 308 F.3d 192, 195–96 (2d Cir. 2002) ("[W]aiver of appellate or collateral attack rights does not foreclose an attack on validity of the process by which the waiver has been procured, here, the plea agreement.").

200 Federal courts focus on whether the waiver was knowingly and voluntarily procured when applying this standard. *See* United States v. Cockerham, 237 F.3d 1179, 1183, 1187 (10th Cir. 2001).

201 *See Davis*, 139 S. Ct. at 2336.

202 *See Barrett II*, 937 F.3d at 130.

203 *See Rivers*, 511 U.S. at 312–13.

offense underlying his § 924(c) conviction never satisfied the requisite statutory elements.[204] Both situations result in constitutionally defective pleas under *Bousley*.[205]

The Second Circuit has emphasized that courts must "look to the law as clarified by the Supreme Court" in evaluating whether a plea was knowing and voluntary.[206] Pleas must be assessed by the correct understanding of statutory elements, not the prevailing understanding at entry.[207] When that correct reading reveals that no party understood what conduct the statute actually criminalized, the plea cannot stand, regardless of appellate waivers or contractual principles. As the Second Circuit has repeatedly held, courts cannot enforce waivers when they "are not assured that a defendant's plea was voluntary and knowing."[208]

Garza reinforces this principle. In *Garza*, the defendant's counsel failed to file a notice of appeal despite the defendant's repeated instructions to do so, believing that an appeal would be problematic given the appellate waiver in Garza's plea agreement.[209] The Supreme Court held that counsel's failure to consult with the defendant, thereby preventing the filing of a timely appeal, may qualify as constitutionally deficient conduct entitling the defendant to an appeal, regardless of an appellate waiver.[210] The Court reasoned that waivers cannot prevent courts from ensuring that the waiver itself is constitutionally valid.[211] *Garza* recognized that certain claims are so fundamental to constitutional validity that they cannot be bargained away, despite explicit contractual provisions.[212]

* * *

From these constitutional principles, a three-step analysis emerges. First, courts must determine whether there is a threshold constitutional defect that goes to the validity of the waiver itself. Second, if such a defect exists, courts cannot enforce the waiver to bar examination of that defect. Third, courts must evaluate the merits of the constitutional claim to determine whether relief is

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[204] *See Balde*, 943 F.3d at 87, 94–95; *Cook I*, 84 F.4th at 121.
[205] *See supra* Part II.B.
[206] *Balde*, 943 F.3d at 94.
[207] *Id.*
[208] *Lloyd*, 901 F.3d at 118.
[209] *See Garza*, 586 U.S. at 235–36.
[210] *Id.* at 242–43.
[211] *Id.* at 239.
[212] *Id.*

warranted. Just as courts must examine whether a waiver was knowing and voluntary despite the waiver's terms under *Garza*, courts must apply *Davis* and *Barrett II* to determine whether pleas like Cook's are constitutionally defective, thereby rendering any waiver based on that plea equally invalid.

The threshold question is not whether the defendant waived their right to challenge the conviction but whether the underlying conviction and waiver were valid from inception. After *Rivers*, *Davis* clarified that Hobbs Act conspiracy was never a crime of violence.[213] Courts are required to apply this clarification.[214] Under *Bousley*, when this clarification reveals that the defendant was fundamentally misinformed about the nature of the charge, the plea is constitutionally invalid.[215] Under *Balde*, when the plea is constitutionally invalid, any waiver based on that plea is equally infirm.[216] The next Part demonstrates that the contract law principles courts routinely invoke to enforce plea agreements independently support this conclusion.

III. PLEA AGREEMENTS AS CONSTITUTIONAL CONTRACTS

This Comment next argues that contract principles, which courts routinely invoke to enforce collateral-attack waivers, instead support invalidating those waivers. Further, courts have invoked contract principles selectively, though the constitutional interests at play in criminal plea agreements support a more even application. This Comment demonstrates that two contract law doctrines—void contracts and mutual mistake—support invalidating waivers when both parties operated under a fundamental misunderstanding about whether the defendant's conduct was criminal.

The Supreme Court has repeatedly recognized that "plea bargains are essentially contracts."[217] Many circuits invoke contract principles when enforcing waivers, relying on general notions of bargained-for consideration and risk allocation.[218] This Comment

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213 *See Rivers*, 511 U.S. at 312–13; *Davis*, 139 S. Ct. at 2336; *Barrett II*, 937 F.3d at 130.

214 *See* Rodriguez de Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477, 484 (1989).

215 *See Bousley*, 523 U.S. at 618–19.

216 *See Balde*, 943 F.3d at 93–95.

217 *See* Puckett v. United States, 556 U.S. 129, 137 (2009).

218 *See, e.g.*, *Portis*, 33 F.4th at 337 ("Plea agreements are contracts."); *Oliver*, 951 F.3d at 845 ("Contract principles make [defendants'] agreements enforceable."); *Goodall*, 21 F.4th at 561 ("[P]lea agreements are contractual in nature and are measured by contract law standards." (quoting United States v. Clark, 218 F.3d 1092, 1095 (9th Cir. 2000))); *King*, 41 F.4th at 1367 ("If courts step back from the contract-based approach for

argues that courts apply these principles asymmetrically: They invoke contract doctrine to enforce finality, instead of applying the contract defenses that would be available to commercial parties when there is a fundamental mistake about the nature of a bargain. This asymmetry is significant because, unlike parties to commercial contracts, a criminal defendant's contractual relationship with the prosecution "is governed by the Constitution."[219] As Justice William Brennan has noted, "The values that underlie commercial contract law, and that govern the relations between economic actors, are not coextensive with those that underlie the Due Process Clause."[220]

Professor Colin Miller has developed a framework for understanding what this constitutional element requires.[221] Under his theory of "plea agreements as constitutional contracts," the Fifth Amendment Due Process Clause's guarantee of fundamental fairness "requires that pleading defendants be treated at least as well as parties to other contracts, and specifically government contracts."[222] Miller explains that parity is the baseline: "[E]very contract defense and rule of construction" available in the civil context "should apply to the extent that it would assist pleading criminal defendants."[223]

This parity principle should then apply when supervening authority clarifies that a defendant's underlying conduct was never criminal. In such cases, contract law principles support the conclusion that waivers founded upon these misunderstandings cannot bar challenges to convictions. Two primary doctrines are instructive: (1) the distinction between void and voidable contracts, and (2) mutual mistake. Both doctrines would be available to a commercial party in analogous circumstances. As they benefit criminal defendants, these contract defenses ought to be considered in evaluating the validity of plea agreements and collateral-attack waivers, given the heightened liberty interests at stake.

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appeal waivers, it will upset significant reliance interests."); *see also Portis*, 33 F.4th at 340 (White, J., dissenting) ("[T]he unenforceability of unconscionable contracts require that plea-agreement terms that would lead to miscarriages of justice not be enforced." (citing United States v. Caruthers, 458 F.3d 459, 471–72 (6th Cir. 2006))).

219 Miller, *supra* note 16, at 38 (quotation marks omitted) (quoting Ricketts v. Adamson, 483 U.S. 1, 20 (1987) (Brennan, J., dissenting)).

220 *Ricketts*, 483 U.S. at 16 (Brennan, J., dissenting).

221 *See generally* Miller, *supra* note 16.

222 *Id.* at 49.

223 *Id.*

A. Void Versus Voidable Contracts

Contract law distinguishes between void and voidable agreements.[224] A void contract is one that "never existed" and is "null from the beginning."[225] Such agreements are void ab initio, unenforceable by either party, and offer no legal remedies.[226] In contrast, a voidable contract is valid unless and until the aggrieved party elects to avoid it; if affirmed, the contract remains enforceable.[227]

This distinction is useful for evaluating plea agreements. Nothing is more fundamental to plea bargaining than the premise that the defendant is pleading guilty to conduct that is criminal. When a defendant pleads guilty to conduct that—under the correct interpretation of the statute as clarified by binding authority—was never criminal, the plea agreement and any waiver contained within it should be treated as void ab initio rather than merely voidable (and able to be bargained away). While courts sometimes treat defective pleas as merely voidable, the void ab initio doctrine applies when a defect concerns the agreement's foundational subject matter rather than to its terms or performance.

Treating these pleas as void ab initio is further supported by contract law's doctrine of fundamental misunderstandings. When parties attach materially different meanings to their manifestations and neither party knows (or has reason to know) the meanings attached by the other, there is no manifestation of mutual assent and therefore no contract at all.[228] Granted, the doctrine is an imperfect fit, as in *Cook*-type cases, both parties initially shared the same erroneous understanding rather than attaching different meanings to the same term. But the principle embodied in the doctrine—that some misunderstandings about the subject matter of a bargain are so fundamental that they preclude contract formation entirely—reinforces this Comment's void ab initio characterization.

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224 *See* 1 WILLISTON ON CONTRACTS § 1:20 (Richard A. Lord ed., 4th ed. 2025).

225 *Id.*

226 *Id.*; *see also* RESTATEMENT (FIRST) OF CONTS. § 475 cmt. b (AM. L. INST. 1932) ("[A] contract which is voidable may be ratified while a void transaction cannot be.").

227 RESTATEMENT (SECOND) OF CONTS. § 7 cmts. b, c, e (AM. L. INST. 1981); 1 WILLISTON ON CONTRACTS, *supra* note 224, § 1:20.

228 RESTATEMENT (SECOND) OF CONTS. § 20(1). Although § 20 mostly addresses cases of equivocation (such as the *Peerless* case, in which parties contracted for goods from different ships of the same name), its logic extends to the plea context. *See id.* cmt. d, illus. 1–2 (providing an example based on Raffles v. Wichelhaus (1864) 159 Eng. Rep. 375; 2 Hurl. & C. 906 (Ex.)).

Because Rule 11(b)(3) requires a factual basis for a plea, no court would accept a plea agreement based on noncriminal conduct. Under *Rivers*, *Davis* and other overriding interpretations of criminal statutes do not create new law but rather clarify what the statute "*always* meant."[229] This clarification reveals that, for plea agreements entered before such cases, there was no valid basis for prosecution from the outset, rendering conviction and waiver invalid from inception. This defect is not one that can be cured by affirmance or ratification.[230] It is a foundational absence of lawful subject matter that renders the conviction and waiver void ab initio.

B. Mutual Mistake

Mutual mistake doctrine provides another lens for understanding why appellate waivers should not bar challenges when predicate offenses are invalidated. Should a court decline to treat a plea agreement as void ab initio, mutual mistake provides an independent basis for rescission. Mutual mistake ordinarily renders agreements voidable rather than void, granting the disadvantaged party the right to rescind.[231] In the plea context, this distinction matters less than it might appear: If the plea agreement is voidable due to mutual mistake, the defendant is entitled to rescind, which functionally achieves the same result as treating the agreement as void.

1. Mutual mistake doctrine.

Mutual mistake of fact occurs when both parties share an erroneous belief about a fact essential to the agreement.[232] By contrast, mistakes of law occur when a party "enters into a contract not fully understanding [its] legal ramifications."[233] Mistakes of law, such as a mistake about the legal effect of a contract, rarely justify rescission

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[229] *Rivers*, 511 U.S. at 313 n.12 (emphasis in original).

[230] *See* RESTATEMENT (FIRST) OF CONTS. § 475 cmt. b.

[231] *See* RESTATEMENT (SECOND) OF CONTS. § 152 cmt. a. *But see id.* § 20(1) (recognizing that certain fundamental misunderstandings may prevent contract formation entirely). Under Miller's framework, the Due Process Clause requires that pleading defendants receive at least the protections available to parties in other contractual settings. Miller, *supra* note 16, at 49. At minimum, then, a defendant should have the right of rescission that mutual mistake affords any contracting party.

[232] *See* RESTATEMENT (SECOND) OF CONTS. § 152.

[233] 27 WILLISTON ON CONTRACTS, *supra* note 224, § 70:106.

in the absence of fraud or deceit.[234] However, "mistakes about a contracting party's antecedent rights (which form the basis of an agreement)" constitute mistakes of fact that may void an agreement.[235]

United States v. Bradley[236] confirms that courts have already applied the mutual mistake doctrine to § 924(c) plea agreements. In *Bradley*, the defendant pleaded guilty to a § 924(c) charge, and all parties shared a misunderstanding about what conduct formed the predicate for the offense.[237] Citing *Bousley* and *United States v. Barnes*,[238] the Seventh Circuit held that Bradley's plea was not knowing and voluntary, "[g]iven this fundamental misapprehension."[239] The court reasoned that following *Barnes*, "'ambiguity in an essential term or a mutual mistake about the meaning of such a term can invalidate' the plea agreement," and *Bradley* presented such a case.[240]

In *Cook*, both the government and defendant operated under a mutual mistake about the defendant's antecedent legal status: whether certain conduct constituted a crime under § 924(c). Both parties believed conspiracy to commit Hobbs Act robbery qualified as a crime of violence, and the defendant agreed to waive his appeal rights based on this shared understanding.[241] When *Davis* clarified that such conduct was never a crime of violence,[242] it revealed that both parties had been fundamentally mistaken about the defendant's criminal liability when negotiating—a mistake about antecedent legal rights that warrants rescission. By contrast, a mistake about the contract's legal effects would involve a misunderstanding about the consequences of the waiver (e.g., what claims are foreclosed). In such cases, there was no mistake about the terms of the plea agreement; the mistake was about the underlying factual basis of the defendant's criminal liability.

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234 *Id.* (noting that the rule used to be that mutual mistakes of law never justified contract rescission, but "[b]y and large, that is no longer true and it is of no critical importance whether a mutual mistake is one of fact or law" so long as the mistake is material).

235 *Id.*

236 381 F.3d 641 (7th Cir. 2004).

237 *Id.* at 643, 646. Bradley's predicate drug offense was changed from cocaine possession in the indictment to marijuana possession in the plea agreement. *Id.* at 643–44.

238 83 F.3d 934 (7th Cir. 1996).

239 *Bradley*, 381 F.3d at 647 & n.4 (emphasizing that this misunderstanding was "a due process violation," not "a mere Rule 11 violation"); *id.* at 647 (citing *Bousley*, 523 U.S. at 618–19, 622); *id.* at 648 (citing *Barnes*, 83 F.3d at 938, 941).

240 *Id.* (quoting *Barnes*, 83 F.3d at 938).

241 *See supra* Part I.B.

242 *See supra* Part I.B.

Bradley differs from cases involving subsequent supervening authority in the respect that the defect was manifest at the time of the plea colloquy, while in *Cook*-type cases the defect was latent until supervening authority clarified the relevant statutory interpretation. Although some may argue this latency suggests treating statutory clarifications as future legal developments that parties bear the risk of when bargaining, *Rivers* is the bridge that dissolves this distinction. Under *Rivers*, *Davis* clarified what the law always meant, instead of creating new law.[243] The parties were thus similarly mistaken about what the law was at the time of the plea colloquy, not about what the law would become. As in *Bradley*, the temporal gap between the plea and the clarifying decision is irrelevant to the nature of the mistake.[244]

2. Addressing the risk allocation counterargument.

As Professor Richard Lord cautioned, "contracting parties cannot count on the state of the law to remain static," and courts will not rescind agreements based on subsequent legal developments.[245] The government may argue that defendants assume the risk of this precise kind of legal development when signing collateral-attack waivers, based on the principle that a party bears the risk of a mistake when it is allocated to them by contract.[246]

For example, the Fourth Circuit invoked this principle in *United States v. Archie*,[247] reasoning that a plea agreement allocates risk and that "the possibility of a favorable change in the law occurring after a plea is one of the normal risks that accompan[ies] a guilty plea."[248] *Archie* is distinguishable, however, as its reasoning is limited to "post-sentencing change[s] in the law," which the court held do not void appellate waivers.[249] Like Brady,

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[243] *See supra* Part II.A.

[244] Even if the temporal distinction between existing-law and future-law mistakes was less clear cut than this Comment suggests it is, the analysis would not necessarily change. Both preexisting mistakes and unanticipated postagreement developments are subject to the same question whether the adversely affected party bears the risk of the mistake. *Compare* RESTATEMENT (SECOND) OF CONTS., *supra* note 227, § 152 (governing mutual mistake), *with id.* § 261 (governing discharge due to supervening impracticability). Under both doctrines, a party is excused unless the risk was allocated to that party by agreement, by awareness of limited knowledge, or by the court. *See id.* § 154.

[245] 27 WILLISTON ON CONTRACTS, *supra* note 224, § 70:106.

[246] RESTATEMENT (SECOND) OF CONTS. § 154.

[247] 771 F.3d 217 (4th Cir. 2014).

[248] *Id.* at 222 (alteration in original) (quotation marks omitted) (quoting United States v. Sahlin, 399 F.3d 27, 31 (1st Cir. 2005)).

[249] *Id.*

who understood the nature of his charge but misjudged the penalties he faced due to legal developments affecting sentencing, Sherwin Archie could not "claim the benefit of subsequently issued case law even if it suggests his sentence now would be different."[250] By contrast, the parties in *Cook*-type cases were mistaken about existing law at the time of contracting—a situation that more closely reflects mutual mistake than risk allocation.[251] *Archie* is also distinguishable because the nature of the underlying defect there was procedural. Archie's § 924(c) conviction was valid on the merits. His predicate offense (completed Hobbs Act robbery) remains a crime of violence after *Davis*. For Cook, however, the predicate offense was never a crime of violence under any valid interpretation of § 924(c). Risk allocation does not rationally extend to situations in which both parties are mistaken about whether criminal liability can exist.

3. Mutual mistake as a shield, not a sword.

The asymmetry regarding who may invoke mutual mistake doctrine supports allowing challenges despite appellate waivers. Courts have consistently rejected attempts by prosecutors to use mutual mistake *offensively* to escape their obligations under plea agreements.[252] But this Comment argues that this prohibition on offensive use of mutual mistake should not prevent defendants from invoking mutual mistake *defensively* to challenge convictions for conduct that was never criminal.

Take *United States v. Barron*.[253] In *Barron*, the defendant pleaded guilty to a § 924(c) charge before the Supreme Court clarified the statute's requirements.[254] The Ninth Circuit rejected the government's argument that mutual mistake of law required rescinding the entire plea agreement (which would have allowed reprosecution on more serious charges that the government had

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[250] *Id.*; *see supra* text accompanying notes 157–65.

[251] A district court in the Fourth Circuit has drawn this exact distinction, holding that *Archie*'s risk allocation reasoning does not apply when "the change in law affects the defendant's understanding of the elements of an offense to which he or she is pleading guilty." United States v. Edmundson, 2016 WL 3597574, at *6 (D. Md. July 5, 2016).

[252] *See, e.g.*, United States v. Frownfelter, 626 F.3d 549, 551 (10th Cir. 2010) (stating that "[w]e decline the invitation to rescue the government from its own blunder" when the government argued mutual mistake should void the plea agreement in its entirety); United States v. Bos, 917 F.2d 1178, 1182 (9th Cir. 1990); Currie *ex rel.* Estate of Williams v. State, 254 A.3d 25, 45–46 (Md. Ct. Spec. App. 2021); *Edmundson*, 2016 WL 3597574, at *5–8.

[253] 172 F.3d 1153 (9th Cir. 1999).

[254] *Id.* at 1155–56.

agreed to dismiss).[255] The court emphasized that plea bargains are not commercial exchanges, as the "interests at stake . . . require that something more than contract law be applied."[256]

But *Barron* supports the defensive use of mutual mistake. The Ninth Circuit's concern was preventing the government from using mutual mistake offensively to undo concessions it had made. Under Miller's parity framework, when constitutional liberty interests are at stake, courts should not permit the government to invoke contract principles to a defendant's detriment.[257] Instead, mutual mistake should protect defendants from imprisonment for noncriminal conduct.

While defendants are not expected to foresee all legal developments, mutual mistake doctrine recognizes that fundamental errors about the subject matter of an agreement (such as defendants' antecedent legal status) can render it unenforceable.[258] This distinction reflects the criminal context of these bargains, in which defendants' liberty interests are at stake, thereby warranting an asymmetric application of contract principles. In this context, courts have recognized that "the analogy between contract law and plea-bargain law may not hold in all respects" by declining to apply some contract principles to "protect the constitutional rights of defendants."[259]

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These contract principles converge with the constitutional analysis developed in Part II. When intervening authority clarifies the elements of a criminal statute, it does not create a favorable change in the law that contracting parties should have anticipated. Instead, it reveals that the original prosecution was based on a fundamental legal error that undermines the constitutional validity of the plea itself. This dynamic reflects Litman's observation that legal innocence claims necessarily implicate constitutional concerns because the underlying conduct was never within the government's authority to criminalize.[260]

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[255] *Id.* at 1158–59.

[256] *Id.* at 1158.

[257] *See* Miller, *supra* note 16, at 41–42.

[258] While the Fifth Circuit recognized that waivers need only be "'knowing,' not 'all-knowing,'" United States v. Barnes, 953 F.3d 383, 388 (5th Cir. 2020), mutual mistake doctrine does not require omniscience. It recognizes that errors about a basic assumption underlying the agreement can render it unenforceable.

[259] Miller, *supra* note 16, at 41–42.

[260] Litman, *supra* note 129, at 492.

Contract law thus provides further support for the framework proposed in Part IV. While some contract principles might support enforcing agreements despite supervening legal developments, the doctrines of void contracts and mutual mistake recognize that some fundamental errors about the subject matter of an agreement can render it void or subject to rescission. The doctrines of void contracts and mutual mistake apply with greater force in the criminal context, which "require[s] that something more than contract law be applied" because the defendant's liberty is at stake.[261]

IV. A THREE-PART FRAMEWORK TO IDENTIFY VOID CONVICTIONS

The constitutional and contract law analyses arrive at the same conclusion that appellate waivers cannot foreclose challenges when the underlying conviction is void ab initio. However, courts need an administrable test to clearly identify such exceptions to the general rule that appellate waivers are enforceable despite changes in the law. Such a test distinguishes between ordinary changes in the law and fundamental clarifications that render convictions void, addressing finality concerns while preserving constitutional protections. The test proposed by this Comment responds to the circuit split by providing clear, objective criteria that balance competing interests: the efficiency and finality benefits of plea bargaining against the constitutional imperative that no person remain imprisoned for conduct that was never criminal. Unlike approaches that either categorically enforce or reject waivers in the face of supervening authority, this test identifies the narrow circumstances in which constitutional and contractual principles converge to override rote waiver enforcement.

A. Three Criteria for Void Ab Initio Convictions

Under the proposed framework, a waiver is unenforceable when (1) the defendant's conviction rests on a sole predicate offense that has been invalidated, (2) binding Supreme Court precedent clarifies the statute's meaning, and (3) the clarifying precedent renders the conviction void ab initio rather than merely creating grounds for resentencing or procedural relief.

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[261] *Barron*, 172 F.3d at 1158.

This test provides objective, predictable standards that courts can apply consistently, avoiding the ad hoc determinations that have characterized some circuits' approaches.

1. Sole predicate: No alternative valid theories.

The first element requires that the invalidated conduct constitute the defendant's sole basis for conviction. This requirement prevents defendants from escaping valid convictions when only one of several supporting theories is undermined.

Where alternative valid predicates exist, the constitutional argument becomes more complicated. In § 924(c) cases like Cook's, the typical plea colloquy likely focuses on the general statutory offense (using or carrying a firearm in relation to a crime of violence) rather than examining whether specific crimes qualify as predicates.[262] If a defendant committed multiple offenses and at least one satisfies § 924(c)'s requirements (e.g., armed bank robbery), courts may reasonably find that the defendant had fair notice that their conduct was criminal, even if they misunderstood one pathway to liability.

The sole-predicate requirement serves several functions. First, it ensures that the exception applies only when the conviction truly lacks any legal foundation. A conviction supported by alternative valid predicates remains legally sound, even if one supporting theory has been eliminated. Second, it provides a clear, administrable standard that avoids complex, fact-specific inquiries into whether invalidated predicates were essential to the prosecution's case. Third, it addresses potential gamesmanship concerns. Without this limitation, defendants might argue that any invalidation of supporting conduct, however marginal to their actual conviction, should trigger the exception. This requirement applies broadly: Any conviction may qualify as void ab initio so long as it lacks alternative valid legal theories after statutory reinterpretation, whether the statute involves predicate offenses (e.g., § 924(c)) or not.

2. Authoritative guidance: Supreme Court decisions.

The second element requires that the clarifying decision come from a binding Supreme Court interpretation of the relevant criminal statute. This requirement enables uniform national

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[262] *See Cook I*, 84 F.4th at 120–21.

guidance and avoids geographic disparities in waiver enforcement. Under *Rivers*, a court's authoritative construction of a statute explains "what the statute has meant continuously" since enactment.[263] Without this authoritative declaration, there is no basis for concluding that a plea was unknowing from its inception.

Rodriguez de Quijas v. Shearson/American Express, Inc.[264] supports this element. There, the Court held that when Supreme Court precedent directly controls a case, lower courts must follow that precedent even if it "appears to rest on reasons rejected in some other line of decisions."[265] Lower courts must apply binding precedent and leave "the prerogative of overruling its own decisions" to the Supreme Court itself, instead of attempting to correct doctrinal inconsistency themselves.[266] Therefore, a court's obligation to apply *Davis* and *Barrett II* under *Rodriguez de Quijas* is independent of (and superior to) any contractual arrangement between the defendant and the government. Plea agreements cannot bind a court's constitutional duty to apply Supreme Court precedent correctly. All federal courts must apply the correct interpretation, ensuring consistent treatment of similarly situated defendants nationwide.

3. Substantive clarification, not change.

The framework's third requirement is that the intervening decision must render the defendant's conviction void ab initio rather than merely creating grounds for a more favorable sentence or procedural remedy. This element distinguishes fundamental challenges to the prosecution's authority from ordinary claims for relief. It requires that the decision constitute a substantive clarification of existing law rather than a genuine change in legal standards.

Drawing from *Rivers*, this element distinguishes between decisions that clarify what statutes always meant and those that create new legal obligations. Only binding decisions that clarify existing law can operate retroactively and render previous convictions void ab initio.[267] Decisions that create genuinely new legal standards operate prospectively and cannot void previously valid convictions.

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[263] *Rivers*, 511 U.S. at 312–13, 313 n.12.
[264] 490 U.S. 477 (1989).
[265] *Id.* at 484.
[266] *Id.*
[267] *See Rivers*, 511 U.S. at 312–13.

The substantive clarification requirement separates *Davis*-type decisions from ordinary legal developments. In *Davis*, the Court did not announce a new interpretation of § 924(c)'s "crime of violence"[268] definition: It clarified that the residual clause had always been unconstitutionally vague.[269] The Court's analysis emphasized that its holding was controlled by *Johnson*, suggesting that the invalidity of § 924(c)'s residual clause was already apparent.[270] Thus, under this standard, a defendant must demonstrate that supervening authority eliminates any valid basis for the charge, revealing that the conviction was void from the outset. This clarification principle excludes decisions creating new procedural requirements—such as revised jury instruction standards or discovery obligations—which represent genuine changes in law that sophisticated parties might anticipate and contract around.

In applying this test, courts should examine whether the decision is sufficiently fundamental to constitute a clarification (e.g., decisions that reject then-prevailing interpretations) rather than a choice between reasonable alternatives.[271] The former establishes that the basis for the conviction was always legally invalid, while the latter only reflects the discarding of one disfavored theory when other reasonable bases for the charge remain. When the Court merely selects among plausible competing interpretations, it means that the prosecution's original theory was reasonable when adopted. Thus, allowing collateral relief would permit defendants to second-guess reasonable charging decisions. Relief is therefore reserved for defendants whose convictions were based on constitutionally infirm interpretations.

Courts should examine not only the higher court's explicit characterization of its holding but also the reasoning and precedential foundation. Decisions that rely heavily on prior precedent and emphasize continuity with established doctrine are more likely to constitute clarifications. Decisions that acknowledge departures from prior approaches constitute changes in the law that fall outside this exception.

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268 18 U.S.C. § 924(c).

269 *Davis*, 139 S. Ct. at 2336 (holding that the residual clause was void for vagueness for allowing more unpredictability and arbitrariness than the Constitution tolerates).

270 *See Johnson*, 576 U.S. at 597–98.

271 The Court frames statutory interpretation as a choice between reasonable alternatives when there are multiple plausible readings of statutory text and no single construction is compelled by the text, structure, or constitutional constraints. *See, e.g.*, Clark v. Martinez, 543 U.S. 371, 381 (2005) (describing "competing plausible interpretations of a statutory text").

Davis exemplifies clarification. That case applied existing vagueness doctrine from *Johnson* to determine that § 924(c)'s residual clause was always unconstitutionally vague.[272] *Barrett II* applied the established categorical approach to determine that Hobbs Act conspiracy never qualified as a § 924(c) crime of violence.[273] Both relied on established doctrine and reflected continuity with rather than departure from prior approaches.

In *Cook*-type cases, this standard is satisfied because *Davis* clarified that conspiracy to commit Hobbs Act robbery was never a crime of violence, removing the sole legal foundation for the § 924(c) charge.[274] The conviction is therefore not merely wrong or unjustified—it is void ab initio because it criminalizes conduct that was never actually criminal.

B. Built-in Safeguards and Limiting Features Ensure Administrability

Beyond its three core elements, the framework's application ensures that this exception remains narrow and administrable.

Defendants seeking collateral relief bear the burden of demonstrating that their specific conduct falls within the invalidated category.[275] Defendants must prove that post-conviction supervening authority invalidates their conviction, rather than asserting it as a "mere possibility."[276] Courts should require defendants to identify the specific theory underlying their conviction and explain how binding authority eliminates any legal foundation for that theory. Courts must examine the specific legal theory underlying the conviction, not merely the conduct alleged in the indictment. When an indictment alleged multiple potential predicates, but the plea or jury instructions rested on a single theory, that theory constitutes the sole predicate. Conversely, when alternative instructions permitted conviction on any of

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[272] *See supra* Part I.B.1.

[273] *See supra* Part I.B.1.

[274] *See Davis*, 139 S. Ct. at 2336.

[275] *See* Parke v. Raley, 506 U.S. 20, 31 (1992) ("[E]ven when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant."); *see also* Beeman v. United States, 871 F.3d 1215, 1221–25 (11th Cir. 2017) (collecting cases and concluding that *Johnson* claimants, like all § 2255 movants, bear the burden of proving that they are entitled to relief).

[276] *See* Langford v. United States, 993 F.3d 633, 637 (8th Cir. 2021); *cf.* United States v. Frady, 456 U.S. 152, 170 (1982) (noting that a prisoner bringing a collateral attack has the "burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage" (emphasis in original)).

several grounds, defendants must show that all viable theories have been invalidated. This framework prevents manipulation by defendants who failed to raise available arguments at the time of their plea.

Unlike categorical rules that either permit or prohibit all waiver challenges based on supervening authority, this framework distinguishes between binding decisions that reveal a conviction was void ab initio and those that merely create new grounds for prospective relief (i.e., legal developments that may be bargained away). Unlike discretionary approaches that invite inconsistent application, this framework provides guidance based on doctrinal categories. And unlike approaches that focus solely on defendant prejudice or prosecutorial fault, this framework emphasizes the fundamental question whether a valid conviction exists at all.

The convergence of these requirements will limit successful challenges to a small subset of cases involving the most fundamental legal errors. Most appellate waivers will remain fully enforceable, preserving plea bargaining's efficiency while ensuring that the criminal justice system does not punish individuals for conduct that was never actually criminal.

These advantages reflect a deeper constitutional principle: When all three elements are satisfied, the defendant is punished for conduct that was never within the government's authority to criminalize. These defects arguably fall within the class of structural errors that scholars and courts have treated as unwaivable because they implicate not merely the manner of prosecution, but the government's fundamental power to impose criminal sanctions in the first place. As Professor Nancy Jean King has observed, defective subject matter jurisdiction claims have traditionally "include[d] claims that the government lacked the power to create the criminal sanction under which a defendant is being prosecuted."[277] In such cases, neither contract principles nor finality interests can justify enforcing waivers that would insulate void convictions from constitutional review.

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[277] Nancy Jean King, *Priceless Process: Nonnegotiable Features of Criminal Litigation*, 47 UCLA L. REV. 113, 145 (1999). King added an important caveat: The jurisdictional label is indeterminate and not dispositive in waiver analysis, given the variety of errors that have been included under this label. *See id.* at 147. Instead, courts should "examine the interests protected by each procedural rule." *Id.*

V. COUNTERARGUMENTS AND POLICY CONSIDERATIONS: ADDRESSING FINALITY, WAIVER, AND EFFICIENCY CONCERNS

The proposed framework for challenging appellate waivers implicates fundamental questions about the criminal justice system's structure and values. This Part considers two primary counterarguments that challenge this test: finality interests (including judicial and governmental resources) and the availability of conditional pleas. While these are legitimate concerns, they must be weighed against defendants' equally compelling constitutional liberty interests. This Part then addresses the policy considerations that support the framework.

A. Finality Interests Cannot Protect Convictions Lacking Legal Foundation

The strongest counterargument involves finality. *Bousley* acknowledges that finality is particularly important in the context of plea bargains because such agreements conserve prosecutorial and judicial resources.[278] Critics might argue that allowing defendants to challenge appellate waivers based on supervening authority would flood courts with litigation and undermine the efficiency of plea bargaining. This concern should not be dismissed lightly; it encompasses not only judicial economy but the prosecutorial and governmental resources spent litigating challenges. Crime victims, the government, and society obtain meaningful closure from final judgments, and reopening cases years after conviction imposes real costs on these interests.[279]

However, finality interests do not, and cannot, protect judgments that never should have existed in the first place. Allowing collateral attacks is a justified cost to finality interests, as there is less meaningful finality in a conviction based on conduct that was never criminal. Legal innocence claims can serve finality interests by ensuring that legal clarifications apply consistently and that invalid claims are not continuously prosecuted.[280]

When binding statutory interpretation clarifies the elements of a crime (and thus the legal basis for a conviction), courts must apply that decision regardless of when the conviction occurred.[281] *Rivers* supports finality interests by establishing clear temporal

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[278] *See Bousley*, 523 U.S. at 621; Blackledge v. Allison, 431 U.S. 63, 71 (1977).

[279] *See* Calderon v. Thompson, 523 U.S. 538, 556–57 (1998).

[280] *See* Litman, *supra* note 129, at 456–60.

[281] *See Rivers*, 511 U.S. at 312–13.

rules: Courts apply such clarifications as announced by the Supreme Court, avoiding case-specific inquiries into historical understandings.

Critics may raise a related concern about the practical burden of additional litigation. The plea bargaining system (which resolves over 90% of federal criminal cases) has been regarded as efficient; exceptions to appellate waivers could weaken and destabilize this system.[282] But several features limit this practical impact.

First, the proposed framework provides clear analytical standards that should reduce rather than increase litigation uncertainty. The three-part test provides both prosecutors and defense counsel with guidance on when challenges might succeed, reducing frivolous claims. Courts currently struggle with inconsistent approaches across circuits, creating uncertainty that naturally generates more litigation than clear national standards would produce.[283]

Second, the legal innocence claims that satisfy the framework are "less burdensome than litigating factual innocence claims" because they often involve challenges to the statute's validity or interpretation, not redetermining prior facts.[284] Additionally, successful legal innocence claims typically do not result in subsequent retrials due to ex post facto constraints.[285]

If adopted, this framework would concentrate legal challenges on the most fundamental questions of prosecutorial authority rather than diffusing them across various procedural and substantive claims. Courts would spend less time parsing the boundaries of different waiver exceptions and more time addressing core questions about the scope of federal criminal law. This focus could improve decisional quality while reducing overall judicial workload. The framework would ensure that the vast majority of appellate waivers remain fully enforceable, preserving core benefits such as efficient plea negotiations, reduced appellate congestion, and greater finality in cases with valid convictions.

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[282] *See, e.g.*, Winthrop-Redin v. United States, 767 F.3d 1210, 1216 (11th Cir. 2014) ("[P]lea bargaining retains its benefits of certainty and efficiency 'only if dispositions by guilty plea are accorded a great measure of finality.'" (quoting *Blackledge*, 431 U.S. at 71)); *see also Blackledge*, 431 U.S. at 72 ("[A]rrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees." (citing Harris v. Nelson, 394 U.S. 286, 290–91 (1969))).

[283] *See supra* Part I.B.3.

[284] *See* Litman, *supra* note 129, at 422, 460.

[285] *Id.* at 458.

B. Conditional Pleas Are Practically Unavailable

The second counterargument suggests that defendants could have preserved these issues through conditional pleas under Federal Rule of Criminal Procedure 11(a)(2).[286] Because this procedural mechanism exists, defendants who failed to use it should be bound by their waivers.

But this argument ignores reality. Rule 11 requires government consent and court approval for conditional pleas, and the government routinely refuses to enter into such arrangements.[287] Defendants have no recourse when consent is denied, making the preservation of such issues effectively dependent on prosecutorial grace. Moreover, defense counsel cannot preserve issues that do not yet exist. When Cook entered his plea, *Davis* had not been decided, and no one would have anticipated that conspiracy to commit Hobbs Act robbery would be excluded from § 924(c)'s reach.

If accepted, the conditional plea argument would effectively bar relief in cases like *Bousley*, since defendants in that context could likewise have sought conditional pleas. Every post-conviction challenge could be defeated by noting that the defendant could have pursued a conditional plea, effectively collapsing all exceptions to guilty plea waivers. The Supreme Court has not suggested that the availability of conditional pleas forecloses constitutional challenges to fundamentally flawed convictions.

C. Rule of Law, Equal Treatment, and Legitimacy

The proposed framework upholds rule of law values, ensuring that legal clarifications apply consistently regardless of procedural posture. Strict waiver enforcement leads to unequal treatment of similarly situated defendants based solely on waiver decisions. A defendant who loses at trial may benefit from legal clarifications, as in *Davis*, while an identical defendant who pleads guilty with a waiver cannot challenge their conviction. This inconsistency undermines equal treatment under law and discourages plea bargaining in uncertain cases.

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[286] Rule 11(a)(2) allows a defendant who loses a pretrial motion to enter a guilty or nolo contendere plea while preserving the right to appeal the adverse ruling (without having to go through an entire trial to preserve that issue for appellate review). *See* FED. R. CRIM. P. 11(a)(2) & advisory committee's notes.

[287] *See* 1A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 175 (5th ed. 2025).

The framework also strengthens plea bargaining's legitimacy by ensuring that agreements rest on valid legal foundations. Public trust depends on the perception that defendants receive fair consideration in exchange for their waived rights. When defendants face punishment for conduct that was never criminal, the system's moral authority (which is integral to effective law enforcement) is undermined, regardless of whether waivers preclude challenges.[288] A criminal justice system derives its power to gain compliance not merely from coercion, but from its reputation for "procedural fairness and substantive justice."[289] A waiver framework that allows conviction of defendants for noncrimes risks eroding both dimensions of public trust. The framework proposed in Part IV ensures that appellate waivers serve their essential function while preventing the enforcement of such waivers when the underlying conviction was void ab initio.

CONCLUSION

Derek Cook's case illustrates a fundamental tension in criminal justice: the efficiency of plea bargaining versus the constitutional requirement that criminal convictions rest on valid legal foundations. When Cook pleaded guilty to using a firearm during a crime of violence, all parties believed that conspiracy to commit Hobbs Act robbery qualified as such a crime. Years later, *Davis* revealed that this shared understanding was legally incorrect: Cook's charged conduct was never actually criminal under § 924(c). Thus, Cook is legally innocent of his § 924(c) charge because he was convicted under a law he did not legally violate. This form of innocence should overcome contractual waiver barriers just as it overcomes procedural barriers in habeas proceedings.

The question presented by Cook's case extends beyond his individual circumstances. Because plea bargains resolve the vast majority of criminal cases and typically include appellate waivers, waiver enforceability in the face of fundamental legal errors may affect thousands of federal defendants. The circuit split demonstrates that courts have struggled to develop a principled approach that balances competing constitutional and policy concerns.

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[288] *See* Josh Bowers & Paul H. Robinson, *Perceptions of Fairness and Justice: The Shared Aims and Occasional Conflicts of Legitimacy and Moral Credibility*, 47 WAKE FOREST L. REV. 211, 217–18, 236–37, 237 n.114, 240–41, 256–58 (2012).

[289] *Id.* at 213.

This Comment argues that appellate waivers cannot categorically bar challenges when supervening authority renders convictions void. Multiple lines of analysis support this conclusion. First, the constitutional frameworks established in *Bousley* and *Rivers* require courts to apply clarifying Supreme Court decisions regardless of when convictions occurred because such decisions reveal what criminal statutes always meant. When that clarification eliminates any legal foundation for a conviction, constitutional due process principles override contractual waiver provisions.

Second, contract principles independently reach the same result, despite being routinely invoked to enforce waivers. Traditional doctrines governing void contracts and mutual mistake hold that agreements premised on fundamental misunderstandings about their essential subject matter cannot be enforced. When parties to a plea agreement operate under a fundamental misunderstanding about what conduct constitutes a crime, subsequent clarification revealing this error should render the plea agreement void ab initio or at least unenforceable under ordinary contract principles. The constitutional and contract law arguments are mutually reinforcing: A plea that was not knowing and voluntary fails as a constitutional matter and as a contractual one.

Third, convictions that criminalize noncriminal conduct necessarily implicate due process interests. When due process is at stake, courts should apply contract defenses to protect defendants' liberty interests rather than invoking them to protect finality.

The constitutional and contract law arguments, however, cannot operate without limits. Legitimate concerns about finality and efficiency require a narrow, administrable framework that distinguishes between fundamental clarifications, which reveal void convictions, and ordinary legal developments. The three-part test proposed here provides such a framework while preserving the vast majority of appellate waivers.

This approach serves multiple values. It maintains plea bargaining's essential efficiency while ensuring that the system's moral authority rests on valid grounds. It provides equal treatment for similarly situated defendants regardless of their methods of conviction. It incentivizes prosecutorial care in charging decisions without imposing unreasonable litigation burdens. And it ensures that legal clarifications apply consistently across the federal system rather than creating arbitrary disparities based on waiver status.

Ultimately, the question is not whether appellate waivers should be generally enforceable: They should be, and the proposed

framework preserves waiver enforceability in most cases. As Chief Justice Warren Burger recognized, plea bargaining "is an essential component of the administration of justice. Properly administered, it is to be encouraged."[290] The question is whether waivers can insulate void ab initio convictions from review when binding authority reveals that prosecutions were always beyond governmental authority. The constitutional answer to that question is clear: They cannot.

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[290] *See* Santobello v. New York, 404 U.S. 257, 260 (1971).