

Hunter v. United States: Appeal Waivers, Guideline Errors, and the Realities of Bargained Justice

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Introduction

In *Hunter v. United States*, decided on June 18, 2026,¹ the Supreme Court held that a criminal defendant who has bargained away his right to appeal his sentence may sometimes appeal it anyway—when enforcing the waiver would produce a “miscarriage of justice.” Writing for eight members of the Court, Justice Elena Kagan explained that “an agreement not to appeal a sentence is unenforceable when it would result in a miscarriage of justice—meaning, when it would leave in place the kind of egregious error that would bring the judicial system into disrepute.”² The holding rejects the position, pressed by the government, that a knowing and voluntary appeal waiver is always enforceable, and it rejects the narrower rule of the Fifth Circuit, which had recognized only two exceptions—ineffective assistance of counsel and a sentence above the statutory maximum. To that extent, *Hunter* is a modest victory for the principle that courts should not lend their names to lawless sentences.

But as with many Supreme Court decisions, the agreement among the Justices in the *Hunter* majority was more apparent than real.

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¹ *Hunter v. United States*, 608 U.S. ___, 146 S. Ct. 1702 (2026). Justice Elena Kagan delivered the opinion of the Court, in which Chief Justice John Roberts and Justices Samuel Alito, Sonia Sotomayor, Neil Gorsuch, Brett Kavanaugh, Amy Coney Barrett, and Ketanji Brown Jackson joined. Justice Gorsuch filed a concurring opinion, joined by Justices Sotomayor and Jackson; Justice Kavanaugh filed a concurring opinion, joined by Justices Alito and Barrett; Justice Barrett filed a concurring opinion; and Justice Clarence Thomas filed a dissenting opinion.

² *Id.* at 1708.

The eight Justices in the majority agreed that a miscarriage-of-justice exception exists and that it sets a “high bar.” But they did not agree—and the Court’s opinion did not say—exactly where that bar lies. The two dueling concurrences, spanning six Justices, begin the next round of the debate about which sentencing errors are egregious enough to survive a waiver and which are just “tough luck.” The line dividing the appealable from the unappealable remains murky. This article describes the decision and then argues that the murkiness is not a problem the courts must solve alone. Two institutions have work to do. The first is the United States Sentencing Commission, which has both the expertise and the statutory authority to study the emerging body of miscarriage-of-justice cases and to write policy identifying the kinds of sentencing errors serious enough to clear the Court’s high bar. The second is the larger community of courts, scholars, and policymakers who continue, too often, to treat plea bargaining as an inherently reliable engine of justice. As the empirical research canvassed in the second half of this article shows, that assumption is unsupported—and it should inform how the courts draw the line *Hunter* left undrawn.

The Facts of *Hunter v. United States*

Munson P. Hunter III was charged in the Southern District of Texas with 10 counts of bank and wire fraud arising out of a years-long scheme that cost various financial institutions roughly half a million dollars. Each count carried a statutory maximum of 30 years’ imprisonment; together, as Justice Neil Gorsuch observed in his concurrence, the indictment “threatened Mr. Hunter with up to 300 years in prison and a \$10 million fine.”³ Hunter and the government struck the kind of bargain that resolves the overwhelming majority of federal criminal cases. Hunter agreed to plead guilty to a single count of aiding and abetting wire fraud; in exchange, the government agreed to dismiss the other nine counts and to refrain from prosecuting him in the future for the conduct they described.⁴

The plea agreement also contained an appeal waiver. Hunter “knowingly and voluntarily” waived the right to appeal his conviction and sentence, reserving only the right to raise a claim of

³ *Id.* at 1715 (Gorsuch, J., concurring).

⁴ *Id.* at 1708 (majority opinion).

ineffective assistance of counsel. He acknowledged that his sentence had “not yet been determined,” that the government had made no promise about it, and that the sentence to be imposed was “within the sole discretion of the sentencing judge.” The agreement provided that any modification of its terms—including of the appeal waiver—had to be in writing and signed by all parties. At the plea colloquy, the district court read the waiver aloud and summarized it in plain terms: “Basically you’re agreeing to whatever sentence I impose.”⁵

The dispute that reached the Supreme Court grew out of a condition of supervised release. The presentence report found that Hunter suffered from symptoms of anxiety and depression and had refused medication, and the probation office recommended that he be required to take all mental-health medications prescribed by his treating physician. Hunter objected in unusually direct terms: “I don’t want to take any medication. I don’t drink. I don’t use drugs. I don’t even curse. I don’t want to have to be forced to medicate.”⁶ The district court imposed the condition anyway, telling Hunter that if the treatment provider prescribed drugs, he should take them, and that he could raise any future dispute with the probation officer or the court. The court sentenced Hunter to 51 months in prison followed by three years of supervised release.⁷

Then something odd happened. After imposing this sentence, the district judge told Hunter, “You have a right to appeal”—a statement flatly at odds with the waiver the same judge had just finished enforcing at the plea colloquy. Asked whether either party wished to add anything, defense counsel said, “Nothing from the defense.” The prosecutor began to correct the record and then thought better of it: “Your Honor, I believe — well, no. I — no.” The Court would later describe this as the prosecutor’s “swallowed retort.”⁸

Hunter appealed, arguing that the medication condition infringed his fundamental liberty interest in refusing unwanted psychiatric medication. The Fifth Circuit dismissed the appeal. Under its precedent, an appeal waiver is enforceable subject to only two

⁵ *Id.* The plea agreement reserved only the right to raise a claim of ineffective assistance of counsel and provided that any modification of its terms be “in writing and signed by all parties.” *Id.*

⁶ *Id.* at 1716 (Gorsuch, J., concurring) (quoting Hunter’s statement at sentencing).

⁷ *Id.* at 1709 (majority opinion).

⁸ *Id.* at 1710.

exceptions—where the waiver was tainted by ineffective assistance of counsel and where the sentence exceeded the statutory maximum—and neither applied. On that view, as Justice Gorsuch later put it, even if the district court had imposed an unconstitutional sentence, the court of appeals was “powerless to say so.”⁹

The Issue Before the Supreme Court

The circuits had long been divided over the enforceability of sentencing appeal waivers. Most courts of appeals had adopted some version of a miscarriage-of-justice exception, declining to enforce a waiver where doing so would produce a fundamentally unjust result. The Fifth Circuit and a handful of others had gone the other way, recognizing only a few narrow, enumerated exceptions. The question the Supreme Court agreed to decide was whether—and if so, when—a knowing and voluntary appeal waiver in a plea agreement may be set aside. Put in the Court’s own terms, once it is established that the government has a right to enforce the bargain, “the question then becomes whether that right to enforce has limits (beyond any stated in the agreement itself) and, if so, what they are.”¹⁰

When we wrote about the case after oral argument in April—in an essay titled “Tough Luck Sentencing”¹¹—we flagged a narrower but consequential question lurking within the larger one: how the Court would treat ordinary errors in calculating the Sentencing Guidelines. Hunter’s own counsel, Lisa Blatt of Williams & Connolly, had argued that some safety valve must remain for “repugnant and manifestly unjust sentences,” but she conceded, readily and openly, that guideline miscalculations fall outside any such exception. “A lot of defendants are unhappy with their sentences,” she acknowledged; but when that unhappiness stems from the Guidelines, “courts have

⁹ *Id.* at 1709 (describing the decision below); *id.* at 1716 (Gorsuch, J., concurring). The court of appeals’s decision is *United States v. Hunter*, No. 24-20211, 2024 WL 5003582 (5th Cir. Dec. 6, 2024).

¹⁰ *Hunter*, 146 S. Ct. at 1711.

¹¹ Jonathan J. Wroblewski, *Tough Luck Sentencing: Appeal Waivers, Guideline Errors, and What’s Reviewable*, SENT’G MATTERS (Apr. 27, 2026), <https://sentencing.substack.com/p/tough-luck-sentencing-appeal-waivers> (first published in the Plea Bargaining Institute’s Academic Working Group Newsletter).

universally said tough luck.”¹² As long as the sentence falls within the statutory maximum, she maintained, the waiver is enforceable even in the face of a manifest legal error in the guideline calculation. That concession, as we explain below, found its echo in the Court’s opinion.

Justice Kagan’s Majority Opinion

Justice Kagan wrote for eight members of the Court. Her opinion’s foundational move is to reject the premise that enforcing an appeal waiver is simply a matter of holding a defendant to his contract. Courts, she emphasized, are not bystanders to plea agreements; they are deeply implicated in them. A district court must accept a plea agreement, including any appeal waiver, before it takes effect, and that decision is committed to the court’s “sound judicial discretion.” The waiver then “falls into the lap of a court of appeals, which has exclusive control over its operation”—the real-world effect of the waiver “turns, and turns only, on whether the appeals court decides to enforce it.” If enforced, the waiver will “cement into place a district court’s sentence, whether or not lawful.” “From start to finish, then, courts are in the middle of, and partly responsible for, appeal waivers and their results.” And it follows, Kagan reasoned, that “[i]f a court always carries out those waivers—no matter the kind or degree of error tainting a sentence—the judicial system’s integrity may come into question.”¹³

That institutional concern supplied the doctrinal engine of the decision. Drawing on *Wheat v. United States*, the Court reaffirmed that federal courts have an “independent” “institutional interest” in ensuring that legal proceedings “appear fair to all who observe them.” Drawing on *United States v. Mezzanatto*, it recognized that some rules are “so fundamental” that they cannot be waived “without irreparably discrediting the federal courts,” and that automatic enforcement of a waiver may “risk[] institutional harm.” The Court even reached for the memorable image, borrowed by way of *Mezzanatto* from Seventh Circuit Judge Richard Posner, that a defendant’s conviction would be invalid “if the parties stipulated to trial by 12 orangutans,”

¹² Tr. of Oral Arg., *Hunter v. United States*, No. 24-1063 (U.S. argued Mar. 3, 2026) (argument of Lisa S. Blatt on behalf of petitioner).

¹³ *Hunter*, 146 S. Ct. at 1712.

consent notwithstanding, “because some minimum of civilized procedure is required by community feeling regardless of what the defendant wants.”¹⁴

On that foundation, the Court rejected the government’s “maximalist position” that a knowing and voluntary waiver is always enforceable. That position founders, Justice Kagan reasoned, on hypotheticals that even the Fifth Circuit would not tolerate—a misdemeanor sentenced to life imprisonment where the statute caps the term at one year, a judge who imposes a sentence based on the defendant’s race or religion, a condition of supervised release forbidding a defendant from becoming pregnant, or the judge who lets “an orangutan pick a sentence out of a hat.” In each, “the courts are too enmeshed in [the waiver’s] approval and implementation to escape responsibility for such results.”¹⁵

The Court then articulated the governing standard. The waiver “may be set aside only if the sentence is marred by the kind of egregious error that would bring the judicial system into disrepute. The error must be obvious—not one a judge could reasonably make. And it must be of the type that would undermine public confidence in the judiciary.”¹⁶

For guideline errors specifically, the majority spoke with clarity—and, from the vantage of a defendant challenging a guideline miscalculation, discouragingly. “Sentencing is a complex affair in our criminal justice system,” Justice Kagan wrote, “involving for example the detailed calculation of a Sentencing Guidelines range and the mandatory consideration of multiple sentencing factors. In that endeavor, it is unfortunate but inevitable that mistakes will occur. Such standard-fare errors in misapplying sentencing law cannot cancel an appeal waiver.” Her reasoning was frankly pragmatic rather than aspirational: if ordinary guideline errors could void a waiver, “the utility of waivers in plea negotiations could plummet,” making them less valuable to the government and reducing the concessions it would offer in return. And such routine errors, she added, are “not

¹⁴ *Wheat v. United States*, 486 U.S. 153, 160 (1988); *United States v. Mezzanatto*, 513 U.S. 196, 204–05 (1995) (quoting *United States v. Josefik*, 753 F.2d 585, 588 (7th Cir. 1985)); see *Hunter*, 146 S. Ct. at 1712.

¹⁵ *Hunter*, 146 S. Ct. at 1713.

¹⁶ *Id.*

likely to discredit the judiciary's commitment to law." Defense counsel's concession at argument thus became the law: "standard-fare" guideline errors do not satisfy the miscarriage-of-justice standard, and "tough luck" remains the rule for ordinary guideline miscalculations in the face of an appeal waiver.¹⁷

It is worth pausing on how unflattering the majority's description of the sentencing enterprise is. An opinion that treats guideline errors as "unfortunate but inevitable" and characterizes the sentencing process as forbiddingly "complex" is not exactly a ringing endorsement of the Guidelines as a reliable instrument of justice—a point to which we will return. We further stop to note here that we disagree with Justice Kagan and defense counsel's concession to "tough luck" in cases involving obvious and consequential errors. In our opinion, a guideline calculation error that is obvious and consequential does bring the judiciary's commitment to law into question and should be appealable regardless of the existence of an appellate waiver. If a judge sentences a defendant to an extra year in prison based on the belief that two plus two equals six, it is hard to accept that letting that sentence stand because of an appellate waiver done before the sentencing even occurred would not irreparably discredit the federal court system in the eyes of the public.

While the majority did embrace the "tough luck" approach, however, they did not slam the door. "A high bar," Justice Kagan wrote, "is not the same as an insurmountable one." The exception is a "safety valve for extreme cases—a way out of a waiver when the justice system's basic integrity is at stake." The Court offered three illustrative, nonexclusive examples of qualifying errors: a sentence "exceeding what the relevant statute allows"; a sentence "infected with a blatant constitutional error," such as reliance on race or a constitutionally infirm supervised-release condition like barring a defendant from becoming pregnant; and a sentence imposed "without some minimum of civilized procedure," the orangutan case being the vivid extreme.¹⁸ Because the Court is "a court of review, not of first view," it declined to decide whether Hunter's medication condition cleared the bar, and instead vacated the Fifth Circuit's judgment and remanded.¹⁹

¹⁷ *Id.*

¹⁸ *Id.* at 1713–14.

¹⁹ *Id.* at 1715 (quoting *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005)).

The Concurrences

The space Justice Kagan left open—between ordinary error and egregious injustice—is where the real fight broke out, and it produced two dueling concurrences.

Justice Neil Gorsuch, joined by Justices Sonia Sotomayor and Ketanji Brown Jackson, would locate the line generously in the defendant's favor. His concurrence is a sweeping account of how "the jury trial has given way to a conveyor belt of plea bargains," a development for which, he wrote, "at least some responsibility . . . lies with this Court."²⁰ Turning to guideline errors, he insisted that although standard-fare mistakes "will not often clear the 'high bar' the Court sets today," "some errors may." He pointed to *Rosales-Mireles v. United States*, in which the Court held that the failure to correct a plain and nonharmless error in calculating an advisory guideline's range ordinarily "will seriously affect the fairness, integrity, and public reputation of judicial proceedings." He quoted that decision's memorable question: "what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?"²¹ Gorsuch added that a miscarriage of justice would also arise when a sentence is so substantively unreasonable that it would fail even the deferential abuse-of-discretion standard that governs ordinary sentencing appeals. Hunter's own case illustrated his concern: although Hunter pleaded guilty to a single transaction worth \$38,648.77, the district court sentenced him on a loss amount of \$488,352.25 spread across 26 transactions, moving his advisory range from 15–21 months to 41–51 months.²²

Justice Brett Kavanaugh, joined by Justices Samuel Alito and Amy Coney Barrett, joined the majority in full but wrote separately to push back against Gorsuch. In his reading, the Gorsuch concurrence "would set a lower bar for the miscarriage-of-justice exception than

²⁰ *Id.* (Gorsuch, J., concurring).

²¹ *Rosales-Mireles v. United States*, 585 U.S. 129, 141, 145 (2018) (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333–34 (10th Cir. 2014)); see *Hunter*, 146 S. Ct. at 1721 (Gorsuch, J., concurring).

²² *Hunter*, 146 S. Ct. at 1715–16 (Gorsuch, J., concurring); see *Gall v. United States*, 552 U.S. 38, 51 (2007) (describing the "deferential abuse-of-discretion standard" governing substantive-reasonableness review).

the Court's opinion does," and so "may not be entirely consistent with the Court's opinion." The majority's language, he emphasized, confines the exception to "extreme cases" involving errors that are "egregious" and "obvious" and that "undermine public confidence in the judiciary."²³ Justice Gorsuch, for his part, answered in a footnote that Kavanaugh's "unexplained disagreement lies not with me, but with what many lower courts and this Court have said in the past about what kinds of errors represent miscarriages of justice."²⁴

Justice Barrett also wrote separately, on a different axis. Sharing some of Justice Clarence Thomas's skepticism about any inherent supervisory power of the Supreme Court over the lower federal courts, she grounded the decision instead in "longstanding waiver principles" and procedural common law, concluding that a court "should not enforce a waiver when doing so would 'irreparably discredi[t] the federal courts.'"²⁵ Her vote, though, was with the majority and its "high bar."

The upshot is that six Justices agreed on the words of the standard while openly disagreeing about their meaning. That tension—expressed in the concurrences but not resolved in the majority opinion—leaves the lower courts with real work to do.²⁶ The follow-on debate over the precise boundary between a standard-fare guideline error and one so egregious as to be a miscarriage of justice has already begun.

The Dissent

Justice Thomas dissented alone. His objection was fundamental and jurisprudential: the Court, he argued, had manufactured a "miscarriage-of-justice" exception without identifying "any source of law" for it. Stripped of a legal basis, he wrote, the decision rests on a "policy concern that holding defendants to their waivers may sometimes lead to unfair results or make federal courts look bad"—but

²³ *Hunter*, 146 S. Ct. at 1724 (Kavanaugh, J., concurring).

²⁴ *Id.* at 1721 n.1 (Gorsuch, J., concurring).

²⁵ *Id.* at 1724 (Barrett, J., concurring) (quoting *Mezzanatto*, 513 U.S. at 204).

²⁶ Jonathan J. Wroblewski & Douglas A. Berman, *The Supreme Court Draws a Murky Line; The Sentencing Commission Should Help Clarify It*, SENT'G MATTERS (June 22, 2026), <https://sentencing.substack.com/p/the-supreme-court-draws-a-murky-line>.

“policy concerns are not rules of decision in courts of law.”²⁷ A criminal defendant, Justice Thomas emphasized, may knowingly and voluntarily waive even the most fundamental constitutional protections, and the statutory right to appeal a sentence—“a mere . . . right of modern origin”—is no exception. Bargained-for waivers, he insisted, “not only are valid; they must be enforced to ensure that both sides to the agreement receive what they bargained for.”²⁸ That Hunter could not know his precise sentence when he signed the waiver was, in Thomas’s view, beside the point: “his waiver is knowing precisely because he is made aware of the uncertainty.”²⁹ Hunter, he observed pointedly, received a sentence of “less than 2% of the prison time to which the indictment exposed him,” and now “wants to keep his reduced sentence but take back the appeal waiver.”³⁰

Justice Thomas also sounded a practical alarm that echoes a familiar theme in this area. However difficult it may be to succeed on a miscarriage-of-justice claim, it will always be easy to allege one; the government’s ability to respond by seeking to void the entire plea agreement—and revive the dismissed counts—may make the new exception a trap for the very defendants it is meant to protect. The exception, in short, promised more litigation and, in his view, offered no lawful foundation for it.³¹

Why the Sentencing Commission Should Act

Where does *Hunter* leave the law? On the narrow question of guideline errors in general, the answer seems now settled: ordinary guideline miscalculations, standing alone, will not defeat an appeal waiver. “Tough luck” is the rule for standard-fare errors, and that rule has real consequences—cementing the power of the appeal waivers already in near-universal use, reducing the leverage that defense counsel can bring to plea negotiations, and leaving many defendants who plead guilty with no recourse for unlawful sentences. But the more important question *Hunter* opened is the one it declined to answer: which guideline and other sentencing errors are

²⁷ *Hunter*, 146 S. Ct. at 1725 (Thomas, J., dissenting).

²⁸ *Id.* at 1729–30.

²⁹ *Id.* at 1730.

³⁰ *Id.* at 1725.

³¹ See *id.* at 1731 n.6.

so obvious, substantial, and consequential that they do cross the line into a miscarriage of justice? Justice Kagan told us that “a high bar is not the same as an insurmountable one,” and Justice Gorsuch told us, with support from *Rosales-Mireles*, that some guideline errors will surmount it. But the Court gave the lower courts almost no guidance about how to tell the difference.

We do not think the courts should be left to work this out entirely on their own, case by case, circuit by circuit. Another institution in the federal sentencing system is built precisely for this kind of task: the United States Sentencing Commission. The Commission has the empirical capacity, the institutional expertise, and the statutory authority to bring clarity to the space *Hunter* left murky, and it should take up the issue.

The point is not novel; it is rooted in the Court’s own understanding of the Commission’s role. When the Court made the Sentencing Guidelines advisory in *United States v. Booker*, Justice Stephen Breyer’s remedial opinion took pains to preserve appellate review, stressing that Congress would have wanted appeals retained as a means to “iron out sentencing differences,” and championing the Commission’s continuing role in “collect[ing] and study[ing] appellate court decisionmaking” so that it could “modify its Guidelines in light of what it learns, thereby . . . promot[ing] uniformity in the sentencing process.”³² *Hunter* is exactly the sort of appellate development the Commission was designed to study.

As a first step, the Commission should undertake a systematic study of the cases in which the lower courts have addressed whether an appeal waiver should give way on miscarriage-of-justice grounds. Even before *Hunter* resolved the circuit split, most courts of appeals had been applying some version of the standard for years, generating a substantial body of case law. The Commission should catalog those decisions, identify the categories of guideline errors that courts have and have not treated as miscarriages of justice, and examine the factual and legal patterns that separate the egregious from the ordinary. Importantly—and here we take seriously an objection raised by thoughtful critics of an earlier version of this proposal—the study should not collect only the cases in which defendants prevailed.

³² *United States v. Booker*, 543 U.S. 220, 263–64 (2005) (opinion of Breyer, J., for the Court).

To be useful and fair, it must capture the full landscape: the cases in which courts found a miscarriage of justice, the far more numerous cases in which they found the error did not rise to that level, and, to the extent the data permit, some sense of how often appeal waivers go unchallenged altogether. A reviewing court trying to locate Justice Kagan’s “high bar” needs to see the whole picture.

Armed with that evidence, the Commission should then consider amendments to Chapter Six of the Guidelines Manual—the chapter governing sentencing procedures and, in particular, plea agreements under Federal Rule of Criminal Procedure 11.³³ Chapter Six already contains policy statements addressing the acceptance of plea agreements. The Commission should build on them and speak directly to the miscarriage-of-justice question after *Hunter*, offering guidance that identifies the categories of guideline calculation errors sufficiently obvious, substantial, and consequential to call into question the fairness, integrity, and public reputation of the sentencing process—and that should therefore remain cognizable on appeal notwithstanding a waiver. The right conceptual model already exists in the plain-error doctrine of *United States v. Olano* and *Puckett v. United States*, under which a forfeited error is cognizable when it is clear or obvious, affects substantial rights, and “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”³⁴ That framework—which the Court in *Rosales-Mireles* applied to guideline errors specifically—offers the Commission a ready vocabulary for distinguishing the egregious from the standard-fare.³⁵

A policy statement of this kind would do real work. It would give appellate courts and the litigants before them a principled framework for drawing the line *Hunter* left undrawn, reducing the inconsistency that case-by-case adjudication across 13 circuits will otherwise produce. It would give notice—to defendants, prosecutors, and district judges alike, at the moment a plea agreement is negotiated—about which sentencing errors remain reviewable, and it would thereby make appeal waivers more genuinely knowing and voluntary. That last point matters more than it may first appear,

³³ See U.S.S.G. ch. 6, pt. B (Plea Agreements); FED. R. CRIM. P. 11(c).

³⁴ *United States v. Olano*, 507 U.S. 725, 732–36 (1993); *Puckett v. United States*, 556 U.S. 129, 135 (2009); see Wroblewski, *supra* note 11; Wroblewski & Berman, *supra* note 26.

³⁵ *Rosales-Mireles*, 585 U.S. at 138–45.

and it connects our argument to the empirical realities that the second half of this article takes up: a waiver is only as knowing as the defendant's understanding of what he is giving up, and today defendants are asked to relinquish their appeal rights without any reliable way of knowing which unlawful sentences will, and which will not, be beyond their reach. And a Chapter Six policy statement would bring the Guidelines' treatment of plea agreements into alignment with the Court's recognition, most fully developed in *Peugh v. United States*, that a correct guideline calculation is legally required and that the Guidelines, though advisory, exert a powerful and empirically documented "gravitational pull" on the sentences that judges actually impose.³⁶ When an error distorts that gravitational pull, the sentencing consequences can be severe; a doctrine that treats every such error as unreviewable "tough luck" ignores what we know about how sentencing actually works.

The Commission has done this kind of work before. When the Court's decision in *Johnson v. United States* invalidated the residual clause of the Armed Career Criminal Act as unconstitutionally vague, the Commission responded with Amendment 798, revising the guideline definition of a crime of violence.³⁷ *Hunter* calls for a comparable response. The "tough luck" rule for ordinary guideline errors is now settled law. But the line between an ordinary error and a miscarriage of justice is not settled—and the Sentencing Commission is the institution best positioned to help draw it. In *Booker*, the Court made clear that the Commission has a role in guiding the courts of appeals, and not only the district courts, toward fair and consistent sentencing. The Commission should embrace that role, and soon.

The Reliability and Knowledge Questions and the Future of Plea Bargaining

As courts and other bodies engage in the important work of deciding exactly where the *Hunter* guardrails lie and where other guardrails should be built, important realities about plea bargaining

³⁶ *Peugh v. United States*, 569 U.S. 530, 541–44 (2013). On the Guidelines' empirical "gravitational pull *see*," REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING (U.S. SENT'G COMM'N).

³⁷ *Johnson v. United States*, 576 U.S. 591 (2015); U.S. SENT'G GUIDELINES MANUAL App. C, Amend. 798 (U.S. SENT'G COMM'N 2016).

should inform their work. As discussed at length by the Plea Bargaining Institute in its amicus curiae brief in the *Hunter* case, plea bargaining is not an inherently reliable indicator of factual guilt. Further, though plea bargaining caselaw requires pleas of guilty be entered knowingly, much uncertainty exists regarding whether this standard is being achieved in the vast majority of cases. The guardrails and limitations on plea bargaining to come must be built with knowledge and consideration of these realities of bargained justice.

As has been well documented, including in the *Hunter* case, plea bargaining is a relatively modern American creation.³⁸ In both American and English common law prior to the 20th century, the use of threats of punishment or offers of leniency to induce a plea of guilty was impermissible.³⁹ Even when plea bargaining began to appear more regularly in the United States after the American Civil War, appellate courts often responded with sharp condemnation. The Wisconsin Supreme Court in 1877, for example, said plea bargaining is “hardly, if at all, distinguishable in principle from a direct sale of justice.”⁴⁰ But plea bargaining continued to grow and eventually came to dominate.⁴¹

A definitive moment for plea bargaining’s rise came in the late 1960s and early 1970s, a period during which both institutions and courts began to embrace the mechanism they had once viewed with such skepticism. The American Bar Association (ABA) in 1968, for example, said,

[A] high proportion of pleas of guilty and *nolo contendere* does benefit the system. Such pleas tend to limit the trial process to deciding real disputes and, consequently, to reduce the need

³⁸ See Lucian E. Dervan, *Bargained Justice: The History, Psychology, and Future of Plea Bargaining*, 31 FED. SENT’G REP. 239 (2019); Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51 (2012); Albert W. Alschuler, *Plea Bargaining and Its History*, 29 COLUM. L. REV. 1 (1979).

³⁹ See, e.g., *Bram v. United States*, 168 U.S. 532 (1897); *Rex v. Warickshall*, 168 Eng. Rep. 234 (1783).

⁴⁰ *Wright v. Rindskopf*, 43 Wis. 344, 354 (1877).

⁴¹ For a full discussion of the forces that lead to plea bargaining’s rise to dominance, see Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL’Y 645 (2011); Lucian E. Dervan, *Bargained Justice: Plea Bargaining’s Innocence Problem and the Brady Safety-Valve*, 2012 UTAH L. REV. 51 (2012).

for funds and personnel. If the number of judges, courtrooms, court personnel and counsel for prosecution and defense were to be increased substantially, the funds necessary for such increases might be diverted from elsewhere in the criminal justice process. Moreover, the limited use of the trial process for those cases in which the defendant has grounds for contesting the matter of guilty aids in preserving the meaningfulness of the presumption of innocence.⁴²

Then, in 1970, the Supreme Court ruled in *Brady v. United States* that plea bargaining was permissible as long as the plea of guilty was voluntary and intelligent and any offers of leniency or threats of punishment did not overbear the will of the defendant.⁴³ A year later in *Santobello v. New York* the Supreme Court described plea bargaining as “highly desirable,” something “to be encouraged,” and “an essential component of the administration of justice.”⁴⁴ Echoing the ABA’s 1968 statement, the *Santobello* decision stated, “If every criminal charge were subjected to a full-scale trial the States and the Federal Government would need to multiply by many times the number of judges and court facilities.”⁴⁵ Justice Gorsuch in *Hunter* described this era as a “dramatic turn.”⁴⁶

The decisions of the Supreme Court during this era of the “dramatic turn” created an environment in which plea bargaining could emerge from the shadows and be properly examined and regulated to ensure consistency with the Constitution and legal norms. This sentiment was expressed by the Supreme Court eight years after *Brady* when it stated in *Bordenkircher v. Hayes*, “[A] rigid constitutional rule that would prohibit a prosecutor from acting forthrightly in his dealings with the defense could only invite unhealthy subterfuge that would drive the practice of plea bargaining back into the shadows from which it has so recently emerged.”⁴⁷ Thus, by the end of the 1970s, the stage was set for the courts to begin carefully examining plea bargaining in the light and for the creation of

⁴² AMERICAN BAR ASSOCIATION STANDARDS RELATING TO PLEAS OF GUILTY 2 (1968).

⁴³ See *Brady v. United States*, 397 U.S. 742, 752–58 (1970).

⁴⁴ *Santobello v. New York*, 404 U. S. 257, 260–61 (1971).

⁴⁵ *Id.*

⁴⁶ *Hunter*, 146 S. Ct. at 1717 (Gorsuch, J., concurring).

⁴⁷ *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978).

appropriate limitations on its use. But the potential for the courts to properly lay the guardrails for a modern plea bargaining system was impeded by the unsupported assumption that pleas of guilty are reliable and that defendants fully understand the legal process into which they have been thrown.

The unsupported assumption of reliability dates back to the *Brady* decision itself, where the Court said, “[W]e would have serious doubts about this case if the encouragements of guilty pleas by offers of leniency substantially increased the likelihood that defendants, advised by competent counsel, would falsely condemn themselves. But our view is to the contrary. . . .”⁴⁸ It appeared again in the 1975 case of *Menna v. New York*, which stated, “[A] counseled plea of guilty is an admission of factual guilt so reliable that, where voluntary and intelligent, it quite validly removes the issue of factual guilt from the case.”⁴⁹ Again, in the 1985 case of *Hill v. Lockhart*, the Court, quoting language from the United States Court of Appeals for the Seventh Circuit, similarly said, “[T]he concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea.”⁵⁰ More recently, this concept of the reliability of pleas of guilty was echoed in a 2017 dissent in the case of *Lee v. United States*.⁵¹ Importantly, no research was offered to support any of the statements of reliability advanced in the above cases from 1970 through 2017. These statements, rather, were little more than ipse dixit.

It is of little surprise, of course, that one would assume pleas of guilty are reliable indicators of actual guilt. We would all like to believe we would fight any accusation against us rather than accept a favorable compromise that included a false admission of guilt. Psychological research, however, demonstrates that is not how people respond in these situations, and pleas of guilty are far from reliable indicators of actual guilt. People plead guilty for many reasons in the criminal system, some of which have little or nothing to do with whether they committed the alleged offense. Further, while courts

⁴⁸ *Brady*, 397 U.S. at 758.

⁴⁹ *Menna v. New York*, 423 U.S. 61, 62 n.2 (1975).

⁵⁰ *Hill v. Lockhart*, 474 U.S. 52, 58 (1985).

⁵¹ See *Lee v. United States*, 582 U.S. 357, 378 (2017) (Thomas, J., dissenting) (citing *Hill*, 474 U.S. at 58; *Menna*, 423 U.S. at 62 n.2).

have attempted to create mechanisms, such as Rule 11, to ensure compliance with the requirement of *Boykin v. Alabama* that defendants knowingly plead guilty and waive their right to trial, psychological research casts much doubt on whether this is actually being achieved.⁵² As courts and others embark on the process of creating the guardrails for plea bargaining first promised in the 1970s, the work must reflect the reality of modern plea bargaining, the phenomenon of false pleas of guilty, and the significant questions regarding defendants' knowledge of the system and the deals into which they are entering.

I. Unreliable Plea Bargaining and the Innocent Defendant's Dilemma

As a fundamental starting point, we know plea bargaining is not inherently reliable because of the countless number of cases of innocent defendants falsely pleading guilty. Consider, for example, a 2015 report from the National Registry of Exonerations.⁵³ Of the first 1,700 exonerees in the database, 15 percent had pleaded guilty to an offense they had not committed. In the case of drug crime exonerations, 66 percent involved a false plea of guilty. And in Harris County, Texas, the report noted there had been 71 drug exonerations since 2014, and the defendant in every case had pleaded guilty. By the end of 2022, the Registry included 3,284 exonerations, and 25 percent of those involved a false plea of guilty. Overall, more than 40 percent of the entire dataset were "no-crime exonerations," meaning exonerations of people who were convicted of a crime that never occurred. In this category, a startling 48 percent of the cases involved false pleas of guilty by the innocent.⁵⁴

Various laboratory studies now support the conclusion that these statistics are not anomalies. Rather, they reflect the realities of defendant decisionmaking and the risks associated with a plea system without guardrails. In the late 2000s, for example, a study paradigm was developed to test how likely it might be that an innocent

⁵² See *Boykin v. Alabama*, 395 U.S. 238, 244 (1969).

⁵³ Nat'l Registry of Exonerations, *Innocents Who Plead Guilty* (Nov. 24, 2015), <http://www.law.umich.edu/special/exoneration/Documents/NRE.Guilty.Plea.Article1.pdf>.

⁵⁴ See Nat'l Registry of Exonerations, *2022 Annual Report*, at 11 (May 8, 2023); see also Thea Johnson, *Fictional Pleas*, 94 INDIANA L. J. 855 (2019).

individual would falsely plead guilty in return for the benefits of a bargain.⁵⁵ The deception study accused students of misconduct on LSAT-style questions. While only half of the students had engaged in academic misconduct, everyone was accused. Then, regardless of factual guilt or innocence and without yet knowing which of the participants had cheated, all participants were offered a bargain in return for confessing to the alleged offense. In the study, 89 percent of the guilty participants took the plea offer. Of the innocent participants, 56 percent were willing to falsely confess to misconduct in return for the benefits of the bargain.⁵⁶ These research findings have been validated several times in subsequent studies by other labs.⁵⁷ In one of those studies, 66 percent of the innocent participants falsely admitted to cheating. When those participants were asked whether they would testify consistent with their plea at a formal proceeding, 88 percent agreed. Of course, no cheating had occurred, so their testimony regarding any such misconduct would have been false, just like the plea itself.

Commonly understood factors that lead to false pleas of guilty are sentencing differentials and the trial penalty.⁵⁸ Less well-known factors that contribute to the phenomenon of false pleas of guilty are the role of counsel and pretrial detention. Regarding the role of counsel, for example, a 2018 study tested for the influence of an attorney or advocate during the defendant decisionmaking process. As noted by the *Brady* Court in 1970, perhaps the presence of “competent counsel”

⁵⁵ See Lucian E. Dervan & Vanessa A. Edkins, *The Innocent Defendant’s Dilemma: An Innovative Empirical Study of Plea Bargaining’s Innocence Problem*, 103 J. CRIM. L. & CRIMINOLOGY 1 (2013).

⁵⁶ See *id.* at 34–38; see also Lucian E. Dervan, *Class v. United States: Bargained Justice and a System of Efficiencies*, in 2017–2018 CATO SUP. CT. REV. 113, 131 (2018).

⁵⁷ See, e.g., Kelsey S. Henderson & Lora M. Levett, *Investigating Predictors of True and False Guilty Pleas*, 42 L. & HUMAN BEHAVIOR 427 (2018); Miko M. Wilford & Gary L. Wells, *Bluffed by the Dealer: Distinguishing False Pleas from False Confessions*, 24 PSYCH., PUB. POL’Y, & L. 158 (2018); Lucian E. Dervan, Vanessa Edkins, and Thea Johnson, *Victims of Coercive Plea Bargaining*, 72 AMERICAN UNIVERSITY L. REV. 1919, 1949–57 (2023).

⁵⁸ See, e.g., Tina M. Zottoli et al., *Plea Discounts, Time Pressures, and False-Guilty Pleas in Youth and Adults Who Pleaded Guilty to Felonies in New York City*, 22 PSYCH., PUB. POL’Y & L. 250, 254 (2016) (researchers discovered that adult defendants received an 80 percent average reduction of the anticipated sentence that would result from trial); see also Brian D. Johnson, *Plea-Trial Differences in Federal Punishment: Research and Policy Implications*, 31 FED. SENT’G REP. 256, 257, 261 (2019) (holding that studies consistently show large sentencing differentials that disadvantage trial defendants).

would make plea bargaining more reliable. The research found the opposite. Where no advocate participated, the study participants falsely pleaded guilty 35 percent of the time. Where an advocate participated and recommended proceeding to trial, the false plea rate dropped to 4 percent. Importantly, however, where an advocate participated and provided only educational information regarding the available options, 47 percent of the study participants went on to falsely plead guilty. Where an advocate participated and recommended pleading guilty, 58 percent of the study participants went on to falsely plead guilty. This represents a number significantly higher than where a defendant stands alone deciding whether to falsely plead guilty without any counsel at all. This research indicates that not only was the *Brady* Court's assumption that defendants do not falsely plead guilty incorrect, the Court's assumption about the role of counsel in creating a reliable plea bargaining system was incorrect as well. Counsel, it turns out, may actually exacerbate the false plea phenomenon.⁵⁹

Not only are defendants more willing to falsely plead guilty when advised to do so by counsel, counsel have reported that making such recommendations is not uncommon. In a study from 2018 regarding attorney perceptions of guilty pleas, the authors interviewed counsel in nine U.S. states (Arizona, Idaho, Iowa, New York, Rhode Island, Tennessee, Vermont, Wisconsin, and Wyoming).⁶⁰ Roughly 78 percent of those interviewed indicated there were definitely cases in the current system where an innocent individual should plead guilty. "When asked whether they had ever been involved in a case where a client chose to plead guilty despite maintaining their innocence," almost 90 percent said yes.⁶¹ Not only were the attorneys aware of this occurring, almost 45 percent admitted to having advised clients they believed were innocent to accept a favorable plea agreement. In fact, even in cases where the defense attorney felt there was less than a 50 percent chance of conviction, a significant proportion stated they would encourage an innocent client to plead guilty.⁶²

⁵⁹ See Henderson & Levett, *supra* note 57, at 437.

⁶⁰ See Rebecca K. Helm et al., *Limitations on the Ability to Negotiate Justice: Attorney Perspectives on Guilt, Innocence, and Legal Advice in the Current Plea System*, 24 PSYCH., CRIME & L. 915, 922 (2018).

⁶¹ *Id.* at 921.

⁶² *Id.* at 926.

Regarding pretrial detention, a 2018 study explored the role of pretrial detention in plea decisions. The results confirmed the validity of the legal community's concerns regarding the reliability of plea bargaining. Along with observing the innocence problem discussed above, the study found that pretrial detention significantly influenced plea decisions. In particular, the rate of innocent participants who pleaded guilty in the study more than tripled in the pretrial detention scenarios.⁶³

Empirical, anecdotal, and laboratory evidence demonstrates that plea bargaining is not the hoped-for inherently reliable solution to crowded dockets and overwhelmed courthouses. Rather, plea bargaining is an unreliable predictor of actual guilt, even when competent counsel are present to assist defendants in their decisionmaking.

II. Defendants' Knowledge and Understanding of Plea Bargaining

Research has not only demonstrated plea bargaining's innocence problem but has also raised significant concerns regarding whether defendants, both guilty and innocent, understand the plea bargaining process or the agreements into which they are entering.⁶⁴ In one study, researchers found that 70 percent of adult inmates read at or below the 6th grade level.⁶⁵ This finding is particularly significant in jurisdictions where defendants read and sign tender-of-plea forms because another study concluded that a reading level of 11th–12th grade was required to fully understand such forms.⁶⁶ Even when read to defendants, many are unable to understand the questions

⁶³ Dervan, *Class v. United States*, *supra* note 56, at 134; *see also* Ram Subramanian et al., *In the Shadows: A Review of the Research on Plea Bargaining*, VERA INSTITUTE (2020) (discussing a study of 76,000 arrests in Delaware and finding pretrial detention increased the likelihood of pleading guilty by 46 percent); Emily Leslie & Nolan G. Pope, *The Unintended Impact of Pretrial Detention on Case Outcomes: Evidence from New York City Arraignments*, 60 J.L. & Econ. 529, 530, 536 (2017) (examining almost one million arraignments for felonies and misdemeanors in New York City from 2009 to 2013 and finding a link between pretrial detention and increased plea rates).

⁶⁴ *See* Allison Redlich, *The Validity of Pleading Guilty*, in *ADVANCES IN PSYCH. & L.*, 1–27 (M. K. Miller & B. Bornstein eds. 2016).

⁶⁵ *See id.*

⁶⁶ *See* Allison Redlich & Catherine Bonventre, *Content and Comprehensibility of Juvenile and Adult Tender-of-Plea Forms: Implications for Knowing, Intelligent, and Voluntary Guilty Pleas*, 39 L. & HUMAN BEHAVIOR 162 (2015).

being presented and the words being used by the court as part of the process of pleading guilty. The sample plea colloquy questions from the *Benchbook for U.S. District Court Judges* (2013), for example, require a reading grade level of 13.3, college level.⁶⁷ Researchers concluded that many defendants would not understand the questions even when the questions were read to them. "Although there is limited research on defendants' oral comprehension, one study found that the average listening comprehension ability of recently arrested jail detainees was 9th grade."⁶⁸ Further, researchers in one study measured the vocabulary comprehension of participants ages 13–24, using words from a tender-of-plea form and judicial plea colloquy. The study concluded that "adults lacked adequate comprehension."⁶⁹ As an example, more than 90 percent of the adults could not accurately define the word "concession." However, when asked if they understood the plea form and had no questions, the participants responded "yes."⁷⁰

Finally, concerns regarding the complexity of the materials presented to defendants at plea hearings, both in written and oral form, were raised in a 2016 research study that included interviews with people who had just plead guilty. When asked questions about the plea process in ways similar to how they had just been asked by the court, "89% said they understood the plea process, 96% said they understood the possible penalties associated with the plea, and 87% said they understood the legal proceedings."⁷¹ However, when a comprehension test was administered, two-thirds of the participants answered 60 percent or more of the questions about the process wrong.⁷²

In *Boykin v. Alabama*, the Supreme Court said that pleas of guilty must be entered knowingly.⁷³ The research discussed in this article, however, raises important questions about whether this requirement

⁶⁷ See Redlich, *supra* note 64, at 11.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ See Allison Redlich & Reveka Shteynberg, *To Plead or Not to Plead: A Comparison of Juvenile and Adult True and False Plea Decisions*, 40 L. & HUMAN BEHAVIOR 611 (2016).

⁷¹ Redlich, *supra* note 64, at 11.

⁷² See Allison Redlich & Alicia Summers, *Voluntary, Knowing, and Intelligent Pleas: Understanding the Plea Inquiry*, 18 PSYCHOLOGY, PUB. POL'Y, & L. 626 (2012).

⁷³ See *Boykin*, 395 U.S. at 244.

is actually being satisfied in the vast majority of criminal cases. As the Plea Bargaining Institute put it in their amicus curiae brief in *Hunter*:

In a system in which 95–98 percent of convictions come from pleas of guilty, uncertainty regarding whether defendants understand the plea bargaining process, the agreements into which they are entering, and the rights that they are waiving raises significant issues around fairness, justice, and accuracy. . . . Plea bargaining jurisprudence must be undertaken with these realities in mind, particularly when considering when and how to impose limitations and guardrails on the system.⁷⁴

The courts and other institutions must now take up *Hunter*'s call to decide on the precise nature of the appellate waiver guardrail and begin to address what other limitations are next for plea bargaining. As they do so, those decisions should not be based on unsupported assumptions and unfulfilled aspirations, but on what we know about the true nature of modern plea bargaining practices and decisionmaking.

Conclusion

Hunter v. United States is, on its surface, a defendant's victory: eight Justices agreed that a court need not enforce an appeal waiver that would leave in place an egregious and lawless sentence. But the decision's most important feature is the line it did not draw. By holding that "standard-fare" guideline errors cannot defeat a waiver while insisting that "a high bar is not the same as an insurmountable one," the Court guaranteed years of follow-on litigation over which sentencing errors are serious enough to bring the judicial system into disrepute. The dueling Gorsuch and Kavanaugh concurrences are the opening salvos in that debate. The case also suggests new avenues for the courts to examine plea bargaining more generally.

We think the courts should not have to draw the line defining the high bar unaided. The Sentencing Commission—the body Congress created to study appellate sentencing decisions and translate what it learns into guidance—should catalog the miscarriage-of-justice

⁷⁴ Brief of the Plea Bargaining Institute as Amicus Curiae Supporting Petitioner at 21, *Hunter v. United States*, 146 S. Ct. 1702 (2026) (No. 24-1063).

cases, in full and without a thumb on the scale, and then amend Chapter Six to identify the guideline errors that remain reviewable despite a waiver. Doing so would promote consistency across the circuits, give defendants the knowledge they need to waive their rights intelligently, and honor the Court's own recognition that a correct guideline calculation is legally required.

But clarity about the line is only part of the task. The case for guardrails around appeal waivers rests ultimately on a realistic account of what plea bargaining is and is not. If, as the research described above demonstrates, guilty pleas are not the reliable proxies for guilt that the courts have long assumed—if innocent people plead guilty in troubling numbers, and if many defendants do not truly understand the agreements they sign—then the stakes of an unreviewable, unlawful sentence are higher than the doctrine has acknowledged. And the case for meaningful limits on appeal waivers—and plea bargaining more generally—is stronger still. Justice Kagan reminded us that the courts are “in the middle of, and partly responsible for, appeal waivers and their results.”⁷⁵ So too, in their own ways, are the Sentencing Commission, the bar, and the scholarly community. *Hunter* drew a murky line. The rest of us should help make it clear—and make sure it falls in the right place.

⁷⁵ *Hunter*, 146 S. Ct. at 1712.