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The Cheney Dilemma: Should a Defendant Be Allowed to Appeal the Factual Basis of His Conviction After Entering an Unconditional Guilty Plea?

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THE *CHENEY* DILEMMA: SHOULD A DEFENDANT BE ALLOWED TO APPEAL THE FACTUAL BASIS OF HIS CONVICTION AFTER ENTERING AN UNCONDITIONAL GUILTY PLEA?

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Described as both "the single most important (and powerful) factor in the disposition of criminal cases"[1] and also "an essential component of the administration of justice,"[2] it should come as no surprise that the plea-bargaining[3] process has secured a central role in the American justice system. After all, the federal justice system annually disposes of an estimated ninety-five percent[4] of all criminal cases through guilty pleas.[5] Because of the prevalence of guilty pleas, and to encourage their continued use, procedural

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1. Milton Heumann, *Back to the Future: The Centrality of Plea Bargaining in the Criminal Justice System*, 18 CAN. J.L. & SOC'Y 133, 133 (2003) (discussing Professor George Fisher's view of plea bargaining).

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

3. A "plea bargain" is "[a] negotiated agreement between a prosecutor and a criminal defendant whereby the defendant pleads guilty to a lesser offense or to one of multiple charges in exchange for some concession by the prosecutor, [usually] a more lenient sentence or a dismissal of the other charges." BLACK'S LAW DICTIONARY 1270 (9th ed. 2009).

4. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS, COMPENDIUM OF 2004 tbl.4.2 (2006), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cfjs04.pdf (noting that approximately ninety-six percent of the defendants found guilty of criminal offenses in federal courts in 2004 entered guilty pleas); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2006 tbl.4.2 (2009), *available at* http://bjs.ojp.usdoj.gov/content/pub/html/fjsst/2006/fjs06st.pdf [hereinafter 2006 STATISTICS] (noting that 76,300 (95.49%) of 79,904 federal criminal convictions in fiscal year 2006 were attributable to guilty pleas); *see also* MARCH MOTIVANS, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, FEDERAL JUSTICE STATISTICS 2005 tbl.7 (2008), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/fjs05.pdf (noting that in 2005, only 3.9% of federal criminal convictions were returned by juries or from bench trials); The Plea Bargaining Blog, http://thepleabargainingblog.blogspot.com/ (Aug. 19, 2008, 10:18 EST) [hereinafter The Plea] (stating that plea bargains account for approximately nintey-five percent of all felony convictions).

5. A "guilty plea" is "[a]n accused person's formal admission in court of having committed the charged offense." BLACK'S LAW DICTIONARY 1268 (9th ed. 2009). Generally, a guilty plea is a product of a plea bargain and "has the same effect as a guilty verdict and conviction after a trial on the merits." *Id.*

safeguards have been developed to protect the rights of defendants who enter them.[6]

Three federal circuits, however, refuse to enforce one of the procedural safeguards included in Rule 11 of the Federal Rules of Criminal Procedure.[7] In these circuits, courts deny defendants the right to be free of conviction of a crime even though their conduct does not satisfy the statutory elements of that crime.[8] A defendant is robbed of this right when a circuit court, reviewing a defendant's conviction pursuant to a guilty plea, refuses to look beyond the constitutionality of the plea to determine whether the defendant's conduct falls within the definition of the charged crime.[9]

In *United States v. Cheney*, the Eighth Circuit noted the circuit split concerning whether defendants who enter unconditional guilty pleas[10] waive their right to appeal the adequacy of the factual bases for their convictions under Rule 11(b)(3) of the Federal Rules of Criminal Procedure.[11] The court, however, did not address this issue because the defendant preserved the adequacy determination for appeal, and the government did not argue that the defendant's guilty plea barred review.[12] The circuit split turns on the Rule 11(b)(3) inquiry: whether a circuit court must determine, in its review of a conviction, that Rule 11(b)(3) is satisfied, or conversely, whether such review

6. *See infra* Part I.B.

7. *See infra* notes 27 & 90.

8. *See infra* Part I.G.1.

9. *See infra* Part I.G.1.

10. An unconditional guilty plea is the most common type of guilty plea employed in the judicial system; the defendant admits guilt and waives all rights to appeal any adverse determinations of his pretrial motions. *See* Gerard A. Riso, Note, People v. Thomas*: The Conditional Guilty Plea*, 2 PACE L. REV. 101, 103–05 (1982). Conditional guilty pleas, on the other hand, enable defendants to appeal adverse determinations of specified pretrial motions and, if successful, to withdraw their guilty pleas and enter pleas of not guilty or nolo contendere. *See* BLACK'S LAW DICTIONARY 1268 (9th ed. 2009) (defining a "conditional plea" as a "plea of guilty or nolo contendere entered with the court's approval and the government's consent, the defendant reserving the right to appeal any adverse determinations on one or more pretrial motions"); *see also* FED. R. CRIM. P. 11(a)(2) (permitting a defendant to reserve the right to appeal adverse determinations of specificed issues while simultaneously entering into a plea agreement).

11. United States v. Cheney, 571 F.3d 764, 768 (8th Cir. 2009). Rule 11(b)(3) of the Federal Rules of Criminal Procedure requires a trial court to "determine that there is a factual basis" for a defendant's guilty plea before entering judgment on that plea. FED. R. CRIM. P. 11(b)(3).

12. *Cheney*, 571 F.3d at 768–69 (explaining that although the defendant did not enter a conditional guilty plea in compliance with Rule 11(a)(2) of the Federal Rules of Criminal Procedure, he did reserve the right, in his plea agreement, to appeal the issue of whether his possession of a firearm was "*in furtherance* of a drug trafficking crime, in violation of [18 U.S.C.] § 924(c)(1)").

is foreclosed by a circuit court's finding that a defendant's unconditional guilty plea was knowing and voluntary.[13]

The First, Fifth, and Seventh Circuits have held that a defendant can appeal the adequacy of the factual basis for conviction after entering an unconditional guilty plea.[14] The Fourth, Sixth, and Eleventh Circuits, on the other hand, have held that a defendant's entrance of a "voluntary and intelligent plea of guilty 'is an admission of all the elements of a formal criminal charge' and constitutes an admission of all 'material facts alleged in the charge.'"[15] Thus, a knowing, voluntary, and unconditional guilty plea precludes review of the adequacy issue in the Fourth, Sixth, and Eleventh Circuits.[16]

This Comment examines the circuit split concerning whether the entrance of an unconditional guilty plea waives a defendant's right to appeal the adequacy of the factual basis for conviction and explores the appropriate resolution of this issue. First, it traces the history of the modern-day guilty plea, and then examines Rule 11 of the Federal Rules of Criminal Procedure, which provides procedural safeguards to defendants by limiting the circumstances in which federal criminal courts may accept guilty pleas. Specifically, this Comment addresses the need—pursuant to Rule 11(b)(3)—for a district court to determine that an adequate factual basis for a defendant's guilty plea exists. Next, this Comment discusses *United States v. Cheney* and introduces a detailed overview of the circuit split. It further analyzes the circuit split, each circuit's compliance with the controlling law, and the policy implications of each approach. This Comment then explores the avenues available to a defendant to challenge the adequacy of the factual basis, and concludes that the Eighth Circuit should join the First, Fifth, and Seventh Circuits by permitting review. Such a decision would create a majority position to which the Supreme Court could turn in a future resolution of the issue. This Comment advises that until the Supreme Court grants certiorari concerning this issue,

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13. *Compare* United States v. Lacey, 569 F.3d 319, 323 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 431 (2009) (reviewing the adequacy of the factual basis for the defendant's conviction), United States v. Spruill, 292 F.3d 207, 215 (5th Cir. 2002) (same), *and* United States v. McKelvey, 203 F.3d 66, 70 (1st Cir. 2000) ("'While we ordinarily deem waived an issue not raised before the district court, we will determine Rule 11 compliance for the first time on appeal if the record is sufficiently developed.'" (quoting United States v. Martinez-Martinez, 69 F.3d 1215, 1219 (1st Cir. 1995))), *with* United States v. McMillon, 89 F. App'x 561, 563–64 (6th Cir. 2004) (finding that the defendant waived his right to appeal the adequacy of the factual basis by entering an intelligent and voluntary unconditional guilty plea), United States v. Johnson, 89 F.3d 778, 784 (11th Cir. 1996) (same), *and* United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993) ("A knowing, voluntary, and intelligent guilty plea to an offense conclusively establishes the elements of the offense and the material facts necessary to support the conviction.").

14. *Lacey*, 569 F.3d at 323; United States v. Hildenbrand, 527 F.3d 466, 474–75 (5th Cir. 2008); *McKelvey*, 203 F.3d at 70.

15. *Willis*, 992 F.2d at 490 (quoting McCarthy v. United States, 394 U.S. 459, 466 (1969)); United States v. Johnson, 888 F.2d 1255, 1256 (8th Cir. 1989)); *see McMillon*, 89 F. App'x at 563–64; *see also Johnson*, 89 F.3d at 784.

16. *See infra* Part II.A.

defendants would best serve their interests by following the approach used in *Cheney* and entering conditional guilty pleas.

I. THE DEVELOPMENT OF THE CIRCUIT SPLIT

A. The Role of the Guilty Plea in Modern Society

Since their introduction in the nineteenth century, guilty pleas have come to occupy a central role in America's criminal-justice system.[17] Traditional plea bargains are an advantageous means of resolving criminal cases for both the government and defendants:[18] they are "structured to avoid trials and clear crowded court calendars without sacrificing convictions" while ensuring defendants that prosecutors will not seek the maximum sentence,[19] will drop certain charges, or both.[20] As the Court stated in *Brady v. United States*:

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17. *See* Earl G. Penrod, *The Guilty Plea Process in Indiana: A Proposal to Strengthen the Diminishing Factual Basis Requirement*, 34 IND. L. REV. 1127, 1131–32 (2001). The roots of the modern-day guilty plea can be traced back hundreds of years to the English common law. *See* Barry J. Fisher, *Judicial Suicide or Constitutional Autonomy? A Capital Defendant's Right to Plead Guilty*, 65 ALB. L. REV. 181, 183 (2001). England's most primitive form of the modern guilty plea was its eleventh- and twelfth-century acknowledgement of confessions as an appropriate ground for conviction. *Id.* (explaining that a thief who was "caught in the act could 'confess,' then be condemned and either pay a fine or forfeit his life"); *see* 2 ENCYCLOPEDIA OF CRIME AND PUNISHMENT 901–02 (David Levinson ed., 2002) (explaining that the Catholic Church's institution of an "inquisitorial system of justice" in the twelfth century led secular judges to rely on confessions as "conclusive" proof of guilt). The American court system, however, did not accept its first guilty plea until 1804. Commonwealth v. Battis, 1 Mass. 94, 95, 1 Will. 95, 95–96 (1804) (accepting a defendant's guilty plea only after determining that he was sane and providing him time to reconsider the entry of his plea); Penrod, *supra*, at 1132. Nearly a century later, the Supreme Court of the United States recognized for the first time the legitimacy of a conviction based on a guilty plea. Hallinger v. Davis, 146 U.S. 314, 324 (1892) (holding that the defendant's guilty plea did not violate the due process clause of the Fourteenth Amendment when the defendant was fully informed of his right to plead not guilty, was assigned competent counsel, and was provided sufficient time to consider the implications of his plea); Penrod, *supra*, at 1132. Still, defendants rarely entered guilty pleas prior to the 1830s. Mary E. Vogel, *The Social Origins of Plea Bargaining: Conflict and the Law in the Process of State Formation, 1830-1860*, 33 LAW & SOC'Y REV. 161, 172 (1999). After the emergence of plea bargains in the nineteenth century, the number of guilty pleas entered increased drastically. *Id.* at 175 (noting the increased percentages of guilty pleas in the Boston Police Court docket: less than 15% in 1830; 28.6% in 1840; 52% in 1850; 55.6% in 1860; and 88% in 1980). By 1860, "plea bargaining had been solidly established and institutionalized; it was spreading by diffusion to other cities." *Id.* at 174.

18. Plea bargains are advantageous to both the government and the defendant because they (1) allow a prosecutor to avoid the time and expenses inherent in a trial, and (2) provide the defendant with "a measure of certainty and control relative to his sentence," which may result in a promise of leniency. Note, *Conditional Guilty Pleas*, 93 HARV. L. REV. 564, 567 n.12 (1980).

19. *But see* STEVEN VAGO, LAW AND SOCIETY 107 (7th ed. 2003) ("Contrary to popular belief, the ones who plead guilty do not, on the average, receive a lighter sentence than those who do not.").

20. Riso, *supra* note 10, at 107.

> It is this mutuality of advantage that perhaps explains the fact that at present well over three-fourths of the criminal convictions . . . rest on pleas of guilty, a great many of them no doubt motivated at least in part by the hope or assurance of a lesser penalty than might be imposed if there were a guilty verdict after a trial to judge or jury.[21]

Because of this mutuality of advantage, both defendants and prosecutors have come to rely upon guilty pleas, further entrenching their role in modern society.

Undoubtedly, the use of guilty pleas has reached an unprecedented high. In 1980, approximately eighteen percent of federal criminal cases went to trial, but that number declined to nine percent by 1987.[22] In recent years, plea bargains have secured approximately ninety to ninety-five percent of all criminal convictions.[23] In 2006, the statistics exceeded this estimate: 76,778 (ninety-six percent) of the 79,904 criminal defendants who were convicted in federal courts entered pleas of either guilty or nolo contendere.[24]

Prosecutors fear that without guilty pleas "the system would be crippled by thousands of cases backlogged for trial."[25] Against this backdrop, one can easily understand how the American criminal-justice system has come to depend on guilty pleas to resolve the majority of criminal cases.[26]

B. Procedural Safeguards Designed to Encourage the Entrance of Guilty Pleas

Rule 11 of the Federal Rules of Criminal Procedure (Rule 11)[27] was

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21. Brady v. United States, 397 U.S. 742, 752 (1970).

22. VAGO, *supra* note 19.

23. *Id.*; *see* The Plea, *supra* note 3.

24. *See* 2006 STATISTICS, *supra* note 4.

25. Paula Reed Ward, *Plead Guilty or Go to Trial?*, PITT. POST-GAZETTE, Mar. 27, 2006, at B1.

26. VAGO, *supra* note 19.

27. Rule 11, in pertinent part, provides:

> (a) ENTERING A PLEA.
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> . . .
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> (2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.
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> . . .
>
> (b) CONSIDERING AND ACCEPTING A GUILTY OR NOLO CONTENDERE PLEA.
>
> (1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

developed to protect a criminal defendant's fundamental rights when entering a guilty plea.[28] Among the most significant protections provided to defendants is the requirement that before accepting each plea, the court must find it to be

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(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel—and if necessary have the court appoint counsel—at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

. . .

(d) WITHDRAWING A GUILTY OR NOLO CONTENDERE PLEA. A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

. . .

(g) RECORDING THE PROCEEDINGS. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) HARMLESS ERROR. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

FED. R. CRIM. P. 11.

28. *See* FED. R. CRIM. P. 11 advisory committee's note ("The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all in the federal courts.").

knowing, intelligent, and voluntary.[29] An "intelligent" plea must be based on defense counsel's "reasonably competent advice" and the court's communication informing the defendant of the rights waived by his entrance of a guilty plea.[30] To be "voluntary," a plea must not be the result of promises or coercion, but rather must be the product of a defendant's own volition.[31] These requirements exist to ensure that a guilty plea, which effectively waives a defendant's constitutional rights to trial, confrontation, and freedom from self-incrimination, is not accepted unless valid.[32]

Furthermore, Rule 11(b)(3) requires the district court to determine the existence of an adequate factual basis for the defendant's guilty plea.[33] The

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29. *See, e.g.*, Bradshaw v. Stumpf, 545 U.S. 175, 182–83 (2005) (explaining that a guilty plea is valid "only if done voluntarily, knowingly, and intelligently 'with sufficient awareness of the relevant circumstances and likely consequences'"); United States v. Ruiz, 536 U.S. 622, 628–29 (2002) (reasoning that the United States Constitution requires these procedural safeguards because of the "seriousness" of pleading guilty); Bousley v. United States, 523 U.S. 614, 618 (1998) (stating that the validity of a guilty plea depends on whether it is voluntary and intelligent); Brady v. United States, 397 U.S. 742, 748 (1970) (explaining that the effects of a guilty plea require that it be voluntary, knowing, and intelligent). For a list of the rights of which a defendant must be advised, see FED. R. CRIM. P. 11(b)(1).

30. McMann v. Richardson, 397 U.S. 759, 770–71 (1970); *see* Boykin v. Alabama, 395 U.S. 238, 242 (1969); McCarthy v. United States, 394 U.S. 459, 465–66 (1969). Notably, the advice provided by counsel need not be *correct*; it need only be "within the range of competence demanded of attorneys in criminal cases." *McMann*, 397 U.S. at 771. For example, if a defendant's attorney reasonably advised him that his confession would be admissible in court, but the court subsequently ruled the confession inadmissible, the defendant's guilty plea entered on the basis of that advice was still "intelligent," even though the attorney was incorrect. Parker v. North Carolina, 397 U.S. 790, 797–98 (1970). Alternatively, a defendant could attack the conviction collaterally, claiming ineffective assistance of counsel pursuant to 28 U.S.C. § 2255. *See* 28 U.S.C. § 2255 (2006) (authorizing a court to vacate a sentence that is unconstitutional or that violates a law of the United States). To state a cognizable claim for ineffective assistance of counsel, a petitioner must prove (1) "that counsel's performance was deficient," (2) "that the deficient performance prejudiced the defense," and (3) "that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washington, 466 U.S. 668, 687, 694 (1984). To establish the first element, the petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the [petitioner] by the Sixth Amendment." *Id.* To prove the second element, the petitioner must show that "counsel's errors were so serious as to deprive the [petitioner] of a fair trial, a trial whose result is reliable." *Id.* Petitioners seldom prevail on such claims due to the amount of deference courts afford attorneys in determining whether they acted ineffectively. *See id.* at 687, 699–700. Moreover, the government may require the petitioner to waive his right to appeal in the plea agreement under § 2255. *See* FED. R. CRIM. P. 11(b)(1)(N).

31. *See* FED. R. CRIM. P. 11(b)(2); *see also Brady*, 397 U.S. at 748–50; *Parker*, 397 U.S. at 795 (finding a defendant's guilty plea voluntary when he failed to inform his attorney that the police coerced his confession, he issued sworn statements to the court testifying that his plea was voluntary, and he accused the police of misconduct only after he served several months of his sentence).

32. FED. R. CRIM. P. 11(b)(1); *Brady*, 397 U.S. at 748.

33. FED. R. CRIM. P. 11(b)(3); *see* United States v. Wilson, 305 F. App'x 598, 599 (11th Cir. 2008); Spiridigliozzi v. United States, 117 F. App'x 385, 392 (6th Cir. 2004); *cf.* United States v. Delgado-Hernandez, 420 F.3d 16, 28 (1st Cir. 2005) ("Because the government's

factual basis requirement ensures that a defendant's past conduct satisfies the definition of the crime to which he intends to plead guilty.[34] The rule operates to "ensure that 'the court make clear exactly what a defendant admits to, and whether those admissions are factually sufficient to constitute the alleged crime.'"[35] To determine whether an adequate factual basis exists, a trial judge should consider whether the entire record contains sufficient evidence to justify a plea for the charged crime.[36] Rule 11(d) enables a defendant to withdraw a guilty plea "for any reason or no reason at all" before the court accepts the plea, or after the court has accepted it if there is "a fair and just reason for requesting the withdrawal."[37]

In the 1969 case *McCarthy v. United States*, the Supreme Court explained that Rule 11 requirements, although not "constitutionally mandated," serve a constitutional end by ensuring that a defendant's plea is knowing and voluntary.[38] Under Rule 11(b)(3), "[t]he judge must determine 'that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty.'"[39] A district court's failure to "fully adher[e] to the procedure provided for in Rule 11" entitles the defendant to "plead anew," regardless of the severity of such deviations.[40] The Court reasoned that this position not only guarantees the "procedural safeguards" of Rule 11 for all

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proffered evidence lacked a rational basis in facts for the 'in furtherance of' element of the . . . charge, the district court erred in determining that there was an adequate factual predicate for [the defendant's] guilty plea.").

34. FED. R. CRIM. P. 11 advisory committee's note ("Such an inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge.").

35. United States v. Mastrapa, 509 F.3d 652, 659–60 (4th Cir. 2007) (quoting United States v. DeFusco, 949 F.2d 114, 120 (4th Cir. 1991)).

36. FED. R. CRIM. P. 11 advisory committee's note; 21 AM. JUR. 2D *Criminal Law* § 663 (2008); *see, e.g.*, United States v. Adams, 961 F.2d 505, 509 & n.3 (5th Cir. 1992) (per curiam) (explaining that in determining whether a factual basis exists, the court must examine the information and the plea hearing, and "[i]n some cases it might also be permissible for the district court to turn to the Presentence Report"); John L. Barkai, *Accuracy Inquiries for All Felony and Misdemeanor Pleas: Voluntary Pleas but Innocent Defendants?*, 126 U. PA. L. REV. 88, 118–19 (1977) (explaining that a factual basis may be determined through "inquiry of the defendant, inquiry of the prosecutor, or examination of the presentence report" or any other method a judge deems appropriate).

37. FED. R. CRIM. P. 11(d). Whether a procedural Rule 11 deficiency, such as a court's failure to inform a defendant of its "obligation to impose a special assessment," constitutes a "fair and just reason" for a defendant to withdraw his guilty plea is a question that this Comment leaves for another day. FED. R. CRIM. P. 11(b)(1)(L).

38. McCarthy v. United States, 394 U.S. 459, 465 (1969).

39. *Id.* at 467 (quoting FED. R. CRIM. P. 11 advisory committee's note).

40. *Id.* at 463–64. In *McCarthy*, the district court failed to "personally inquire whether [the defendant] understood the nature of the charge" when he pleaded guilty to intentional tax evasion but stated that his conduct resulted from "'neglectful' and 'inadvertent'" record-keeping. *Id.* at 462, 464.

defendants, but also reduces the "great waste of judicial resources" used to evaluate appeals of guilty pleas in the absence of adequate trial records.[41] In so holding, the Court did not distinguish among violations of the various Rule 11 requirements, but rather implied that *any* formal violation provided the defendant an opportunity to withdraw his guilty plea.[42]

Following this decision, courts divided over whether the rule articulated in *McCarthy*—that a technical Rule 11 deficiency enables a defendant to plead anew—applied to *all* Rule 11 violations or merely *some* of these violations.[43] To a limited extent, the Court addressed this issue in its 1978 decision, *United States v. Timmreck*.[44] In that case, the defendant pleaded guilty to conspiracy to distribute controlled substances.[45] Before accepting the defendant's guilty plea, the district court judge informed the defendant that he could be fined $25,000 and sentenced to fifteen years in prison.[46] The judge, however, failed to inform the defendant that a "mandatory special parole term of at least 3 years" also applied.[47] Two years after the district court sentenced the defendant, he moved to vacate his conviction pursuant to 28 U.S.C. § 2255,[48]

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41. *Id.* at 472.

42. *See id.* at 468–69. One year later, the Supreme Court heard a case in which the defendant pleaded guilty to second-degree murder but maintained his innocence during his plea hearing. North Carolina v. Alford, 400 U.S. 25, 28 & 29 n.2 (1970). The Court held that a defendant's express admission of guilt in the entrance of a guilty plea was "not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." *Id.* at 37. The Court upheld the conviction premised on the guilty plea despite the defendant's denial of the facts as set forth by the government. *Id.* The Court concluded that the plea was valid because it was knowing and voluntary and because the record contained "strong evidence of actual guilt." *Id.* at 37–38. In so holding, the Court found an adequate factual basis for the plea despite the defendant's contention to the contrary. *Id.* at 38.

43. FED. R. CRIM. P. 11 advisory committee's note (observing conflict among courts regarding whether to allow defendants to plead anew after Rule 11 violations when the doctrine of harmless error would otherwise preclude it). *Compare* United States v. Coronado, 554 F.2d 166, 173 (5th Cir. 1977) (finding that the district court's failure to explain the meaning of "conspiracy" to the defendant did not mandate reversal because the Rule 11 proceedings showed that the defendant understood the charges), *with* United States v. Boone, 543 F.2d 1090, 1092 (4th Cir. 1976) ("[T]he failure to advise the defendant with respect to his right against self-incrimination, to instruct him that there would be no trial of any kind, and to warn him of possible perjury peril compels reversal."), *and* United States v. Journet, 544 F.2d 633, 634, 636–37 (2d Cir. 1976) (holding that the defendant must be "specifically informed of each and every element enumerated in Rule 11 [or] the plea must be vacated").

44. United States v. Timmreck, 441 U.S. 780, 781 (1979).

45. *Id.*

46. *Id.* at 781–82.

47. *Id.* at 782.

48. 28 U.S.C. § 2255(a) provides that:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without

alleging that the judge violated Rule 11 by failing to inform him of the mandatory special parole term before accepting his guilty plea.[49] The district court denied the defendant's motion to vacate, but the Sixth Circuit reversed, finding that a technical violation of Rule 11 supported a collateral attack.[50]

Relying on its decision in *Hill v. United States*,[51] the Supreme Court held in *Timmreck* that not all "formal" Rule 11 violations mandate reversal and reversed the Sixth Circuit's decision, implying that a difference exists between "formal" violations and other, substantive violations.[52] The Court also explained that claims of "technical" violations must be raised on direct appeal rather than in a collateral action.[53] In reaching its conclusion, the Court emphasized the importance of "finality" in court decisions, discussed its role in building "'confidence in the integrity of our procedures,'" and explained that allowing collateral attacks premised on formal Rule 11 violations would "'increas[e] the volume of judicial work, inevitably delay[ing] and impair[ing] the orderly administration of justice.'"[54] Importantly, however, *Timmreck* did not overturn *McCarthy* because *Timmreck* addressed only collateral attacks—not direct appeals.[55]

C. The Emergence of the Conditional Guilty Plea

Critics questioned whether the Rule 11 protections described above sufficiently protected a defendant's basic rights; they argued that the guilty plea was a double-edged sword.[56] To further safeguard a defendant's rights

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> jurisdiction to impose such sentence, . . . or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (2006).

49. *Timmreck*, 441 U.S. at 782.

50. *Id.* at 782–83.

51. Hill v. United States, 368 U.S. 424 (1962). In *Hill*, the defendant collaterally attacked his conviction—premised on a guilty plea—pursuant to 28 U.S.C. § 2255. *Id.* at 425. He alleged that the trial court deprived him of the opportunity to speak before being sentenced, but the Court did not recognize this as ground for reversal. *Id.* at 425, 428–29.

52. *Timmreck*, 441 U.S. at 783–84.

53. *Id.* at 784.

54. *Id.* (quoting United States v. Smith, 440 F.2d 521, 528 (7th Cir. 1971) (Stevens, J., dissenting)).

55. *See id.* at 781.

56. Riso, *supra* note 10, at 107 (explaining that a defendant who pleads not guilty will likely confront "more severe charges at trial and face[] harsher punishment if convicted," but one who pleads guilty will "forfeit[] his right to appeal any nonjurisdictional defects"). Before the enactment of the United States Sentencing Guidelines, a defendant who wanted to appeal an unfavorable ruling on a pretrial motion risked little by going to trial. G. Fred Metos, *Appellate Advocacy*, THE CHAMPION, May 2001, at 33, 34. The adoption of the sentencing guidelines, however, provided defendants an incentive to plead guilty—an "offense level reduction for [the] acceptance of responsibility." *Id.* The sentencing guidelines expressly authorize a sentence

when entering a guilty plea, Congress amended Rule 11 in 1983 to provide for conditional guilty pleas.[57] Prior to the creation of Rule 11(a)(2), which provides for conditional guilty pleas,[58] a defendant was generally required to assert certain objections, motions, and defenses—specifically, those addressed in Rule 12(b)—during the pretrial stage.[59] Interlocutory appeals of adverse determinations were "seldom permitted," and a defendant's subsequent guilty plea "usually foreclose[d] later appeal with respect to denial of [any] pretrial motion[s]."[60] Thus, the 1983 amendment that created Rule 11(a)(2) enables a defendant to enter a guilty plea while simultaneously preserving his right to appeal adverse determinations of specified pretrial motions.[61] Additionally, Rule 11(a)(2) allows a defendant to withdraw his guilty plea in the event that he appeals[62] and the circuit court rules in his favor.[63] The overall purpose of this amendment is to "conserve prosecutorial and judicial resources and advance speedy trial objectives."[64] The amendment also resolved the circuit

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reduction of up to two levels if the defendant "clearly demonstrates acceptance of responsibility for his offense." U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2006).

57. FED. R. CRIM. P. 11 advisory committee's note; 6 DAVID A. SCHLUETER ET AL., WEST'S FEDERAL ADMINISTRATIVE PRACTICE § 6886 (3d ed. 1999). In fact, the Second Circuit adopted this practice prior to the amendment, and the Third Circuit followed its lead. 1A CHARLES ALAN WRIGHT & ANDREW LEIPOLD, FEDERAL PRACTICE AND PROCEDURE § 174 (3d ed. 2008). For a comparison of conditional and unconditional guilty pleas, see *supra* note 10.

58. *See* FED. R. CRIM. P. 11(a)(2).

59. *See* FED. R. CRIM. P. 11 advisory committee's note. Rule 12(b)(3) specifies that a defendant must raise the following motions at the pretrial stage: "a motion alleging a defect in instituting the prosecution," "a motion alleging a defect in the indictment or information," "a motion to suppress evidence," "a Rule 14 motion to sever charges or defendants," and "a Rule 16 motion for discovery." FED. R. CRIM. P. 12(b)(3).

60. FED. R. CRIM. P. 11 advisory committee's note.

61. *See id.*

62. Rule 4(b) of the Federal Rules of Appellate Procedure sets forth the proper procedure for appealing an adverse determination of a specified pretrial motion. SCHLUETER ET AL., *supra* note 57. Rule 4(b)(3)(A) states

> [i]f a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:
>
> (i) for judgment of acquittal under Rule 29;
>
> (ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or
>
> (iii) for arrest of judgment under Rule 34.

FED. R. APP. P. 4(b)(3)(A).

63. FED. R. CRIM. P. 11(a)(2).

64. FED. R. CRIM. P. 11 advisory committee's note; *see* Guilty Plea: Accepting the Plea—The Nature of Guilty Pleas, http://law.jrank.org/pages/1275/Guilty-Plea-Accepting-Plea-nature-guilty-pleas.html (last visited July 20, 2010) (explaining that the purpose of a conditional guilty plea is to avoid the waste of going forth with trial "just to preserve the defendant's right to appeal"). Conditional guilty pleas are based on the theory that, "if legal issues raise matters of

split over whether courts may accept conditional guilty pleas in the absence of specific legislation authorizing their use.[65]

D. The Default: Unconditional Guilty Pleas

The Federal Rules of Criminal Procedure lack an express provision authorizing "unconditional guilty pleas."[66] The 1983 Advisory Committee Note, however, refers to "traditional, unqualified pleas" and expresses the idea that these pleas, unlike conditional guilty pleas, "constitute a waiver of nonjurisdictional defects."[67] Therefore, unconditional guilty pleas "usually foreclose later appeal with respect to denial of [any] pretrial motion."[68] The circuits remain split, however, on whether a defendant's unconditional guilty plea forecloses his right to appeal the adequacy of the factual basis for his conviction, in part because it remains unclear whether the lack of a factual basis constitutes a jurisdictional error.[69]

E. General Reviewability of Appeals from Convictions Based on Guilty Pleas

In *United States v. Broce*, the Supreme Court described the reviewability of appeals made by defendants who were convicted after entering unconditional guilty pleas but then alleged nonjurisdictional defects on appeal.[70] According to the Court, "[a] plea of guilty and the ensuing conviction comprehend all of the factual and legal elements necessary to sustain a binding, final judgment of guilt and a lawful sentence."[71] Thus, the Court articulated the following rule: after a court has accepted a guilty plea and entered judgment upon it, a

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public importance—such as police misconduct in Fourth Amendment cases—the appellate courts should be able to hear them." *Id.*

65. *See* FED. R. CRIM. P. 11 advisory committee's note (explaining that the Second and Third Circuits accepted the use of unconditional guilty pleas, and the Eighth and District of Columbia Circuits "praised" such a practice, while the Fifth, Sixth, and Seventh Circuits held that such pleas were "improper"). Despite the drafters' acceptance of the conditional guilty plea, there exists no *right* to enter one. United States v. Fisher, 772 F.2d 371, 374 (7th Cir. 1985) (per curiam). In fact, several states expressly prohibit the use of conditional guilty pleas in the absence of specific statutory authority. *See* State v. Hodge, 882 P.2d 1, 6 (N.M. 1994) (noting the following states' refusal to accept conditional guilty pleas: Arizona, Iowa, Montana, and Rhode Island). *But see id.* (noting the following states' acceptance of conditional guilty pleas: Alaska, Arkansas, Connecticut, Florida, Idaho, Kentucky, Louisiana, Michigan, Minnesota, Nevada, New Mexico, North Carolina, North Dakota, Utah, Vermont, and Virginia). Despite vast support for conditional guilty pleas, they remain "the exception, not the rule." United States v. Bundy, 392 F.3d 641, 645 (4th Cir. 2004). Moreover, "neither the courts nor the government have any duty, either statutory or constitutional, to inform defendants" about the possibility of entering a conditional plea. *Fisher*, 772 F.2d at 375.

66. *See* FED. R. CRIM. P. 11.

67. FED. R. CRIM. P. 11 advisory committee's note.

68. *Id.*

69. *See infra* Part II.A–B.

70. United States v. Broce, 488 U.S. 563, 569 (1989).

71. *Id.*

defendant's subsequent appeal is limited to considerations of "whether the underlying plea was both counseled and voluntary."[72] If the plea is found to be "counseled and voluntary," then generally further review is foreclosed.[73] The vigor of this rule is limited to cases where an appellant asserts a nonjurisdictional defect; it does not apply to alleged *jurisdictional* defects "where on the face of the record the court had no power to enter the conviction."[74] Thus, the issue underlying the circuit split is whether an inadequate factual basis constitutes a jurisdictional or nonjurisdictional defect.[75]

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72. *Id.*

73. *Id.*

74. *Id.* Whether a claim is "'jurisdictional' and therefore appealable depends on whether the claim can be resolved by examining the face of the indictment or the record at the time of the plea without requiring further proceedings." United States v. Caperell, 938 F.2d 975, 977–78 (9th Cir. 1991). An indictment's failure to charge an offense is not waived by a defendant's unconditional guilty plea. *Id.*

75. Circuit courts have ruled both ways on this issue. For example, in *United States v. White*, the Fifth Circuit held that a defendant's unconditional guilty plea did not preclude his subsequent appeal challenging the sufficiency of his indictment. United States v. White, 258 F.3d 374, 379 (5th Cir. 2001). The Fifth Circuit expressly categorized the failure of an indictment to set forth facts which would satisfy the elements of the charged offense as a "*jurisdictional defect*[]," and the court reasoned that it was willing to "reverse on direct appeal where the factual basis for the plea as shown [in the] record fails to establish an element of the offense of conviction." *Id.* at 379–80 (emphasis added). Eight years later, the Seventh Circuit held that a defendant's guilty plea waived his right to argue that the facts alleged by the government failed to satisfy one of the elements of the crime for which he was convicted. United States v. Lacey, 569 F.3d 319, 323 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 431 (2009). In that case, the defendant was charged with violating 18 U.S.C. § 2252A(a)(5)(B) by possessing child pornography. *Id.* at 321. This statute required the government to prove that the defendant knowingly possessed material "that contain[ed] an image of child pornography," and that such material was "mailed, or shipped or transported in interstate or foreign commerce by any means." 18 U.S.C. § 2252A(a)(5)(B) (2006). On appeal, the defendant contended that the government failed to satisfy the third element of the offense—the "jurisdictional element." *Lacey*, 569 F.3d at 322–23. The court disagreed, however, and held that the satisfaction of an element is "jurisdictional 'only in the shorthand sense that without that . . . nexus, there can be no federal crime. . . . It is not jurisdictional in the sense that it affects a court's subject matter jurisdiction, *i.e.*, a court's constitutional or statutory power to adjudicate a case . . . .'" *Id.* at 323 (quoting United States v. Martin, 147 F.3d 529, 532 (7th Cir. 1998)).

Even those circuit courts willing to review the adequacy of the factual basis do not apply a uniform standard of review. *See, e.g.*, United States v. Lindsay, 238 F. App'x 582, 589 (11th Cir. 2007) ("The standard for evaluating challenges to the factual basis for a guilty plea is whether the district court was presented with evidence from which it could *reasonably* find that the defendant was guilty."); United States v. Byrd, 220 F. App'x 421, 424 (6th Cir. 2007) (applying the abuse of discretion standard); United States v. Baymon, 312 F.3d 725, 728 (5th Cir. 2002) (applying the plain error standard); Barkai, *supra* note 36, at 123 ("A federal court standard of proof for factual basis is virtually nonexistent."). The issue concerning the appropriate standard of proof for Rule 11(b)(3) review exceeds the scope of this Comment. Rather than encouraging the application of one standard over another, this Comment argues that regardless of which standard courts apply, review of adequacy of determinations is appropriate.

F. United States v. Cheney*: A Unique Approach*

In 2009, the Eighth Circuit correctly noted that the law is "unsettled" regarding "whether a defendant can appeal the adequacy of a factual basis [for his conviction] after entering an unconditional guilty plea."[76] *United States v. Cheney* involved a defendant, Holland, who pleaded guilty to conspiring to manufacture and distribute at least five hundred grams of methamphetamine and using a firearm in furtherance of a drug trafficking crime.[77] In his plea agreement, Holland waived his right to appeal his conviction.[78] Although Holland's guilty plea was technically unconditional, he included the following typed statement in the plea agreement: "The defendant retains the right to appeal the factual basis for [his] conviction and sentence in Count II, Possession of a Firearm in Furtherance of a Drug Trafficking crime."[79] Defense counsel expressly brought this provision of the plea agreement to the court's attention during the plea hearing.[80] The *Cheney* court, in turn, did not address the issue of whether a defendant who enters an unconditional guilty plea waives his right to appeal the adequacy of the factual basis for his conviction because the defendant expressly reserved this right for appeal, and the government did not challenge this reservation.[81]

Prior to *Cheney*, the Eighth Circuit struggled with this issue in *United States v. Marks* and *United States v. Beck*.[82] In *Marks*, the defendant appealed his conviction and alleged, among other claims, that the trial court failed to establish an adequate factual basis before accepting his guilty plea.[83] Despite the defendant's unconditional guilty plea, the Eighth Circuit reviewed the factual basis and affirmed the trial court's decision to accept the guilty plea because it determined that the methods the district court used to establish an adequate factual basis were sufficient.[84]

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76. United States v. Cheney, 571 F.3d 764, 768 (8th Cir. 2009).

77. *Id.* at 767–68; *see* 18 U.S.C. § 924(c)(1) (2006) (criminalizing the use of a firearm, "during and in relation to any crime of violence or drug trafficking . . . in furtherance of any such crime").

78. *Cheney*, 571 F.3d at 768.

79. *Id.*

80. *Id.*

81. *Id.* at 769.

82. *Compare* United States v. Beck, 250 F.3d 1163, 1166 (8th Cir. 2001) (holding that the defendant waived his right to appeal the adequacy of the factual basis for his conviction by entering a valid and unconditional guilty plea), *with* United States v. Marks, 38 F.3d 1009, 1012–13 (8th Cir. 1994) (reviewing the adequacy of the factual basis for conviction even though the defendant entered an unconditional guilty plea).

83. *Marks*, 38 F.3d at 1011. Marks was convicted after he pled guilty to "one count of conspiracy to distribute cocaine, a violation of 21 U.S.C. § 846, and one count of conspiracy to launder money, a violation of 18 U.S.C. § 371." *Id.*

84. *Id.* at 1012–13. In determining that an adequate factual basis existed for the alleged crime of conspiracy to distribute cocain, the Eighth Circuit relied on the defendant's admissions during the plea hearing that he had an "understanding with others to possess and distribute cocaine" and that he helped clients "achieve their goals." *Id.* at 1013.

Seven years later, the Eighth Circuit found that a defendant's knowing and voluntary guilty plea precluded review of the factual basis's adequacy.[85] Beck pleaded guilty to arson in district court, and after he admitted that his conduct satisfied each element of the offense, the court accepted his plea and sentenced him.[86] Beck then appealed, arguing that one of the elements was not satisfied.[87] At the time of Beck's appeal, the Supreme Court issued a new decision that "'substantially changed the law of the Eighth Circuit'" regarding the element of the crime that Beck disputed.[88] Still, the Eighth Circuit declined to review the factual basis:

> By pleading guilty, Beck waived his right to appeal the district court's finding that the interstate commerce element was satisfied. "The general rule is that . . . a valid guilty plea forecloses an attack on a conviction unless 'on the face of the record the court had no power to enter the conviction or impose the sentence.'"[89]

The Eighth Circuit's own inconsistency is representative of the lack of uniformity between federal circuit courts concerning this issue.

G. Division over the Rule 11(b)(3) Inquiry Leads to a Circuit Split

1. Jurisdictions that Treat an Unconditional Guilty Plea as a Waiver of a Defendant's Right to Appeal the Adequacy of the Factual Basis

The Fourth, Sixth, and Eleventh Circuits have held that a valid guilty plea precludes a circuit court from reviewing the adequacy of the factual basis for conviction because a voluntary and intelligent guilty plea conclusively satisfies

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85. *Beck*, 250 F.3d at 1166–67.

86. *Id.* at 1164–65. Conviction of arson requires proof of (1) malicious damage or destruction, (2) by means of fire or explosives, (3) to a building or other property used in foreign or interstate commerce or in an activity affecting foreign or interstate commerce. 18 U.S.C. § 844(i) (2006).

87. *Beck*, 250 F.3d at 1164–65.

88. *Id.* at 1165 (quoting United States v. Rea, 223 F.3d 741, 743 (8th Cir. 2000)). After Beck pleaded guilty to arson in violation of § 844(i), *id.* at 1164–65, the Supreme Court heard *Jones v. United States*, a case that also involved a violation of § 844(i). *See* Jones v. United States, 529 U.S. 848, 857 (2000). In *Jones*, the Court held that the jurisdictional interstate commerce element of § 844(i) was "narrower in scope than [the Eighth Circuit's] previous cases had suggested." *Beck*, 250 F.3d at 1165; *see Jones*, 529 U.S. at 859. Before *Jones*, the Eighth Circuit held that the building needed only a "passive connection to interstate commerce" to satisfy that element of the crime. United States v. Ryan, 227 F.3d 1058, 1062 (8th Cir. 2000). After *Jones*, however, the building had to be "actively employed in interstate commerce." *Id.* at 1061–62. This change led Beck to appeal his conviction and argue that the interstate commerce element was not satisfied in his case. *Beck*, 250 F.3d at 1165.

89. *Beck*, 250 F.3d at 1166 (quoting Walker v. United States, 115 F.3d 603, 604 (8th Cir. 1997)).

all elements of the charged offense and thereby establishes an adequate factual basis.[90]

Because the entrance of an unconditional guilty plea waives a defendant's right to appeal "all nonjurisdictional defects,"[91] review on appeal is limited to whether the plea was made knowingly and voluntarily.[92] Thus, when a court in the Fourth, Sixth, or Eleventh Circuit finds that a guilty plea was constitutional, it is precluded from inquiring into the adequacy of the factual basis.[93] This approach is based on the rationale that the Rule 11 requirements are intended to "insure . . . that the defendant validly waived his constitutional rights by his guilty plea."[94] Therefore, as long as a defendant knowingly and voluntarily enters an unconditional guilty plea, his right to appeal the factual basis for his conviction is waived.[95]

Despite the Fourth, Sixth, and Eleventh Circuits' general adherence to this rule of law, a substantial number of decisions by these courts have quietly

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90. *See, e.g.*, United States v. Studabaker, 578 F.3d 423, 429 (6th Cir. 2009); United States v. Bonilla, 579 F.3d 1233, 1240 (11th Cir. 2009); United States v. Holland, 101 F. App'x 600, 603 (6th Cir. 2004) (holding that a defendant's unconditional guilty plea to the possession with intent to distribute cocaine barred an assertion upon appeal that the substance was not cocaine); United States v. Johnson, 89 F.3d 778, 784 (11th Cir. 1996); United States v. Willis, 992 F.2d 489, 490 (4th Cir. 1993) (discussing the "basic and longstanding principle" that a constitutional guilty plea "*conclusively* establishes the elements of the offense" (emphasis added)); Stano v. Dugger, 921 F.2d 1125, 1141 (11th Cir. 1991); *see also* United States v. Freed, 688 F.2d 24, 25–26 (6th Cir. 1982) (explaining that a plea of nolo contendere, like a guilty plea, "'admit[s] every essential element of the offense'" (quoting United States v. Heller, 579 F.2d 990, 998 (6th Cir. 1978))).

91. *See, e.g.*, *Willis*, 992 F.2d at 490. For an explanation of how to determine if a claim is "jurisdictional," see *supra* note 74.

92. *See* United States v. Lindsay, 238 F. App'x 582, 588 n.2 (11th Cir. 2007) ("[Although] an unconditional guilty plea constitutes a waiver of all nonjurisdictional arguments, it is well-settled that for a plea to effect such a waiver, the plea itself must be *knowing* and *voluntary*."); *see also* United States v. McMillon, 89 F. App'x 561, 564 (6th Cir. 2004); *Willis*, 992 F.2d at 490.

93. *See* cases cited *supra* note 90. Such a finding, however, does not bar a defendant from seeking post-conviction relief. A defendant convicted pursuant to an unconditional guilty plea may attack the conviction collaterally under 28 U.S.C. § 2255. Section 2255 provides:

> (a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255(a) (2006). For example, a claim alleging ineffective assistance of counsel is not barred by a defendant's unconditional guilty plea because it forms the basis of a collateral attack pursuant to § 2255. *See* discussion *supra* note 30.

94. United States v. Deal, 678 F.2d 1062, 1064 n.4 (11th Cir. 1982).

95. *Id.*; *see* cases cited *supra* note 90.

disregarded circuit precedent by reviewing the adequacy of factual bases after defendants have entered unconditional guilty pleas.[96]

2. Jurisdictions that Do Not Treat an Unconditional Guilty Plea as a Waiver of a Defendant's Right to Appeal the Factual Basis for Determination

The First, Fifth, and Seventh Circuits review the adequacy of the factual basis regardless of a defendant's unconditional guilty plea.[97] In these circuits, the courts "determine Rule 11 compliance for the first time on appeal if the record is sufficiently developed."[98] A court retains "the power to review if the factual basis for the plea fails to establish an element of the offense" to which the defendant pleaded guilty, even if the defendant expressly waived his right to appeal.[99]

The position of the First, Fifth, and Seventh Circuits is largely based on the plain language of Rule 11(b)(3), which prohibits a court from "entering

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96. *See, e.g.*, United States v. Ketchum, 550 F.3d 363, 366–68 (4th Cir. 2008); United States v. Major, 297 F. App'x 246, 249–50 (4th Cir. 2008) (per curiam); United States v. Alan, 258 F. App'x 617, 618–19 (4th Cir. 2007) (per curiam); United States v. Mastrapa, 509 F.3d 652, 660 (4th Cir. 2007); United States v. Byrd, 220 F. App'x 421, 424 (6th Cir. 2007); United States v. McCreary-Redd, 475 F.3d 718, 721 (6th Cir. 2007); United States v. Green, 182 F. App'x 247, 247–48 (4th Cir. 2006) (per curiam); United States v. DePace, 120 F.3d 233, 238–39 (11th Cir. 1997).

97. *See, e.g.*, United States v. Lacey, 569 F.3d 319, 323 (7th Cir. 2009), *cert. denied*, 130 S. Ct. 431 (2009); United States v. Hildenbrand, 527 F.3d 466, 474–75 (5th Cir. 2008); United States v. Baymon, 312 F.3d 725, 727 (5th Cir. 2002); United States v. Spruill, 292 F.3d 207, 214–15 (5th Cir. 2002); United States v. White, 258 F.3d 374, 380 (5th Cir. 2001); United States v. McKelvey, 203 F.3d 66, 69–70 (1st Cir. 2000); United States v. Martinez-Martinez, 69 F.3d 1215, 1219 (1st Cir. 1995); United States v. Japa, 994 F.2d 899, 903–04 (1st Cir. 1993).

98. *McKelvey*, 203 F.3d at 70, 72 (quoting *Martinez-Martinez*, 69 F.3d at 1219). In *McKelvey*, the First Circuit determined that when the defendant was charged with possessing at least three "matters constituting child pornography," he actually possessed only one such matter, and thus, no factual basis existed for the district court's acceptance of his guilty plea. *Id.* at 68, 71–72. In *United States v. Japa*, the defendant was charged with conspiracy "to possess cocaine with intent to distribute" and "with intent to distribute within 1,000 feet of a public or private school." *Japa*, 994 F.2d at 900. The district court failed to inquire into the defendant's intent, and the prosecution failed to allege the proximity of any school. *Id.* at 904. Nonetheless, the court affirmed the conviction because the requisite information pertaining to the proximity of a school was presented in a presentencing report, and the defendant admitted to the court that he possessed and intended to distribute the cocaine. *Id.*

99. *Baymon*, 312 F.3d at 727–29 (reviewing whether the "public official" element of the crime was satisfied and thus, whether a factual basis for the defendant's plea existed despite his admission in open court that the "public official" element was satisfied); *see White*, 258 F.3d at 380 ("The government cites no authority, and we are aware of none, that holds that a defendant can waive his substantive right 'to be free of prosecution under an indictment that fails to charge an offense . . . .'" (quoting United States v. Meacham, 626 F.2d 503, 509 (5th Cir. 1980))). In *White*, the Fifth Circuit reviewed the adequacy of the factual basis even though the defendant waived the right to appeal "*any* error" pursuant to the conditions of his plea agreement. *Id.* (emphasis added).

judgment on a guilty plea" before "determin[ing] that there is a factual basis for the plea."[100] A court's failure to find a factual basis *before* convicting the defendant "would nullify the plea itself" and therefore defeat any argument that the defendant's guilty plea waived his right to appeal.[101] The Rule 11(b)(3) requirement operates "'to protect a defendant who may plead with an understanding of the nature of the charge, but without realizing that his conduct does not actually fall within the definition of the crime charged.'"[102] Requiring a circuit court to review the adequacy of the factual basis enforces Rule 11(b)(3) and ensures the constitutionality of a defendant's guilty plea.[103] These circuits reject arguments concerning waiver of appeal because such a waiver could "depriv[e] a person of his liberty" for engaging in non-criminal conduct.[104]

II. *CHENEY* AS A "SAFE BET": CIRCUMVENTING THE SHORTCOMINGS OF LIMITED REVIEW

A. A Limited Review: The Position of the Fourth, Sixth, and Eleventh Circuits

The Fourth, Sixth, and Eleventh Circuits consider a defendant's unconditional guilty plea a waiver of his right to appeal the factual basis for conviction, holding that a defendant's guilty plea conclusively establishes all elements of the charged crime.[105] Thus, these circuits limit their review to the knowing and voluntary nature of a defendant's guilty plea.[106]

In the seminal case of *McCarthy v. United States*, the Supreme Court explained that although Rule 11(b)(3) and the other Rule 11 requirements are not "constitutionally mandated," they aid a "district judge in making the constitutionally required determination that a defendant's guilty plea is truly voluntary."[107] In this way, the existence of an adequate factual basis is "inextricably" connected to the constitutionality of a defendant's guilty plea and serves a purpose beyond mere formality.[108]

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100. FED. R. CRIM. P. 11(b)(3).

101. *See* United States v. Behrman, 235 F.3d 1049, 1052 (7th Cir. 2000).

102. United States v. Denson, 183 F. App'x 411, 413 (5th Cir. 2006) (quoting *Spruill*, 292 F.3d at 215).

103. *See* United States v. McCarthy, 394 U.S. 459, 465 (1969).

104. *White*, 258 F.3d at 380 (explaining that where a defendant's unconditional guilty plea waives the right to appeal the factual basis of conviction, the defendant may be convicted of a crime even if the conduct does not satisfy the statutory definition of the crime).

105. *See supra* note 90 and accompanying text.

106. *See supra* notes 91–92 and accompanying text.

107. *McCarthy*, 394 U.S. at 465. *But see* Barkai, *supra* note 36, at 91 ("Regardless of the vigor with which the intelligence and voluntariness inquiries are pursued, that effort is largely wasted if a defendant is allowed to plead unknowingly to a charge within which his conduct does not fall.").

108. *See* Barkai, *supra* note 36, at 112 (explaining that the *McCarthy* Court indicated that the constitutional requirements of a defendant's guilty plea and the Rule 11(b)(3) requirement were

The theory advanced by the Fourth, Sixth, and Eleventh Circuits undermines the factors articulated by *McCarthy*, which are used to determine a plea's constitutionality. These circuits err by insisting that a constitutional guilty plea precludes Rule 11(b)(3) review, when in fact *McCarthy* mandates that consideration of the relevant factors, including Rule 11(b)(3) compliance, is a prerequisite to determining constitutionality.[109]

Moreover, the interpretation by the Fourth, Sixth, and Eleventh Circuits effectively nullifies Rule 11(b)(3).[110] By denying review of Rule 11(b)(3) determinations, circuit courts refuse to enforce this rule. Such refusal enables a district court to disregard Rule 11(b)(3) without fearing review, let alone reversal. Thus, where defendants' unconditional guilty pleas are constitutional, these circuits review the district court proceedings in essentially the same manner as if Rule 11(b)(3) did not exist. It is bizarre to claim that, should a judge err in finding an adequate factual basis where none exists—a determination which goes to the heart of a conviction—a defendant has no recourse.[111]

Furthermore, this interpretation is contrary to the purposes of the criminal code, which federal courts seek to enforce through criminal proceedings.[112] Among the purposes of the code is the need "to provide for the just determination of every criminal proceeding . . . and fairness in administration."[113] It can hardly be argued that a circuit court that denies review of a district court's erroneous findings operates to ensure justice and fairness. Certainly, courts err. It should be no surprise, then, that defendants lacking the legal expertise of judges—even with the assistance of competent

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"inextricably linked" because a guilty plea "cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts" (quoting *McCarthy*, 394 U.S. at 466)). Based on this reasoning, some academics have argued that the factual basis requirement "is an element of due process and therefore is a federal constitutional requirement for a valid plea." *Id.* at 112 n.156.

109. *See supra* text accompanying notes 107–08.

110. *See* FED. R. CRIM. P. 11(b)(3) (requiring courts to find a factual basis for a guilty plea before accepting it). Compliance with the constitutionality requirement does not render the other provisions of Rule 11(b) meaningless. In any other context, such a proposal would be absurd. After all, Rule 11(b)(2), which requires that a guilty plea be voluntary, and Rule 11(b)(3), which requires the court to determine that a factual basis exists, are separately mandated—not alternative—provisions. *See* FED. R. CRIM. P. 11(b)(2), 11(b)(3).

111. *See* United States v. Byrd, 220 F. App'x 421, 424 n.3 (6th Cir. 2007) (implying that a Rule 11(b)(3) determination goes "to the very validity of a guilty plea"); *see also* United States v. White, 258 F.3d 374, 380 (5th Cir. 2001) (explaining that such a position could effectively "depriv[e] a person of his liberty" for engaging in non-criminal conduct).

112. *See* 18 U.S.C. § 3001 (referring to Rule 2 of the Federal Rules of Criminal Procedure in addressing the purpose of the United States Code); FED. R. CRIM. P. 2 (describing the manner in which the Federal Rules of Criminal Procedure should be construed).

113. FED. R. CRIM. P. 2.

counsel—may miscalculate their own guilt.[114] Nonetheless, such miscalculations still constitute "intelligent" and "voluntary" pleas, thereby precluding review of the factual basis determination.[115] It is fundamentally unfair to preclude review under Rule 11(b)(3) because defendants were too ignorant[116] to know that their beliefs that they committed crimes were erroneous.[117] By precluding review, a court forces a defendant either to enter a conditional guilty plea or to go to trial to preserve the right to appeal the sufficiency of the evidence. In jurisdictions where conditional guilty pleas are not recognized,[118] or in cases where the government refuses a defendant's conditional guilty plea,[119] a defendant is forced to go to trial, contrary to the interests of judicial economy.[120]

Perhaps district and appellate courts in the Fourth, Sixth, and Eleventh Circuits have recognized this irrationality to some extent as each has deviated from its own circuit's precedent.[121]

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114. *See* Estes v. State, 294 So. 2d 122, 123 (Fla. Dist. Ct. App. 1974) ("It is not difficult to imagine an accused standing before the bar of justice accused of a crime he thinks he committed but really did not."); Barkai, *supra* note 36, at 134–35 ("Ignorance of the nuances of the law is hardly rare. . . . [A] defendant often lacks the legal expertise to determine whether his actions constitute the crime in question.").

115. For an explication of the requirements of an "intelligent" and "voluntary" plea, see *supra* text accompanying notes 30–31.

116. Approximately eighty to ninety percent of criminal defendants "qualify for indigent defense." National Center for State Courts, Indigent Defense FAQs, http://www.ncsconline.org/WC/CourTopics/FAQs.asp?topic=IndDef#FAQ534 (last visited July 20, 2010). Most of these indigent defendants likely lack the education and skill necessary to comprehend the complexities of modern law. *See* Kowalski v. Tesmer, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting) (explaining that many indigent defendants lack fundamental literacy skills and most likely did not finish high school).

117. *See* JOHN RAWLS, A THEORY OF JUSTICE 85 (1971) (explaining that the "desired outcome" of a criminal trial is that the court declare a defendant guilty "if and only if he has committed the offense with which he is charged"). This Comment advocates the review of district court Rule 11(b)(3) determinations but does not necessarily suggest the adoption of an "accuracy requirement." *See* Barkai, *supra* note 36, at 90 (arguing that the federal standard for Rule 11(b)(3) review should be one of "accuracy"; that is, whether the conduct *actually* constitutes the charged crime).

118. *See supra* note 65.

119. *See* FED. R. CRIM. P. 11(a)(2); *supra* note 65.

120. *See* Ward, *supra* note 25 and accompanying text (discussing the importance of guilty pleas); Note, *Conditional Guilty Pleas*, *supra* note 18, at 565, 573 (explaining that "judicial economy favor[s] the conditional plea" because forcing defendants to go to trial may "add to the burden of already crowded trial dockets" and usually creates "multiple points of appeal"). Evidence suggests "that the most important goal of a prosecutor is avoiding trial." *Id.* at 567 n.12.

121. *See supra* note 96 and accompanying text.

B. Lifting the Rule 11(b)(3) Veil: The Position of the First, Fifth, and Seventh Circuits

The First, Fifth, and Seventh Circuits do not limit their review on appeal to the constitutionality of a defendant's guilty plea.[122] Instead, they lift the mysterious veil placed over Rule 11(b)(3) proceedings by the Fourth, Sixth, and Eleventh Circuits and independently inquire into the adequacy of the factual basis.[123] Using this approach, the First, Fifth, and Seventh Circuits ascertain the adequacy of the factual basis by actually reviewing it rather than by reviewing the constitutionality of the plea.[124]

In instances where "the record is sufficiently developed," these circuits will determine a trial court's compliance with Rule 11.[125] In so limiting review, the First, Fifth, and Seventh Circuits fail to enforce Rule 11(g), which requires a district court to record the proceedings in which a defendant enters his guilty plea; this recording includes the judge's finding of a factual basis pursuant to Rule 11(b)(3).[126] A district court has little incentive to record a judge's factual basis determination when failure to do so renders unreviewable not only noncompliance with Rule 11(b)(3), but also other alleged Rule 11 deficiencies for which a record is needed to review. If a court fails to comply with Rule 11(g)—one of the Rule 11 requirements that collectively aid a judge in making a "constitutionally required determination" [127]—then the circuit court has a duty to remand the case to the district court to record its Rule 11 findings instead of merely glossing over such errors.

The First, Fifth, and Seventh Circuits reason that if a district court failed to satisfy Rule 11(b)(3) before entering judgment upon a defendant's unconditional guilty plea, the purported factual basis is invalid, and the conviction entered pursuant to it is void.[128] If a conviction is void under these circumstances, a defendant should be permitted to withdraw his unconditional guilty plea pursuant to Rule 11(d), which allows a defendant to withdraw an unconditional guilty plea either "before the court accepts the plea, for any reason or no reason" or "after the court accepts the plea, but before it imposes sentence if . . . the defendant can show a fair and just reason for requesting the withdrawal."[129]

This position comports with the purposes of the Federal Rules of Criminal Procedure.[130] Rather than locking themselves into district courts' errors, these

122. *See supra* Part I.G.2.
123. *See supra* Part I.G.2.
124. *See supra* Part II.B.
125. United States v. Martinez-Martinez, 69 F.3d 1215, 1219 (1st Cir. 1995).
126. *See* FED. R. CRIM. P. 11(g).
127. United States v. McCarthy, 394 U.S. 459, 465 (1969).
128. *See supra* Part I.G.2.
129. FED. R. CRIM. P. 11(d).
130. *See supra* note 112 and accompanying text.

circuit courts "provide for the just determination of every criminal proceeding . . . and fairness in administration."[131] In refusing to blindly adhere to district courts' findings of factual bases, these circuits remain faithful to Rules 11(b)(3), 11(g), and 11(h).[132]

Finally, these circuits hold that even when a defendant expressly waives his right to appeal, the court retains an automatic right of review because a defendant's waiver agreement does not waive his substantive right "to be free of prosecution" for a crime he did not commit.[133] The Fifth Circuit implicitly equates a plea agreement that contains a mandatory waiver of a defendant's right to appeal substantive determinations with an unconscionable, and therefore unenforceable, contract.[134]

C. Cheney*'s Novel Approach*

As discussed above, the *Cheney* court did not address the issue of whether a defendant's entrance of an unconditional guilty plea waives his right to appeal the adequacy of the factual basis for conviction because the defendant, Holland, explicitly reserved the right to appeal the adequacy of the factual basis.[135] *Cheney* is novel in that Holland effectively employed a conditional guilty plea to reserve his right to appeal the adequacy of the factual basis—an issue not normally considered to be of a pretrial nature—without entering a conditional guilty plea in accordance with the federal rules.[136]

In *Cheney*, Holland technically entered an unconditional guilty plea; the plea did not conform to the Rule 11(a)(2) requirements for entering conditional guilty pleas. Still, he reserved his right to appeal by including a typed statement in the plea agreement and by stating his reservation on the record during the plea proceedings.[137] Though Holland entered an unconditional guilty plea, courts often forgive a defendant's failure to comply with the

131. FED. R. CRIM. P. 2.

132. It seems that the Advisory Committee intended for Rule 11(h), the harmless error provision, to apply to the entirety of Rule 11. *See* FED. R. CRIM. P. 11 advisory committee's note. Although this Comment does not endorse the application of one standard of review over another with respect to Rule 11(b)(3), it is interesting to note that Rule 11(b)(3) is not excepted from review under Rule 11(h). *See* FED. R. CRIM. P. 11(h); FED. R. CRIM. P. advisory committee's note. It is difficult to imagine why the Advisory Committee would make *any* standard of review applicable to Rule 11(b)(3) if Rule 11(b)(3) determinations were unreviewable.

133. United States v. White, 258 F.3d 374, 380 (5th Cir. 2001) (quoting United States v. Meacham, 626 F.2d 503, 510 (5th Cir. 1980)); *see* United States v. McKelvey, 203 F.3d 66, 70 (1st Cir. 2000) (expressing that, when a defendant pleads guilty to conduct that does not satisfy the statutory elements of the charged offense, his conviction will be reversed).

134. *See White*, 258 F.3d at 380 (questioning whether the lack of a factual basis is a defect that "is ever waivable in a civilized system of justice"). The unconscionability of a guilty plea is an issue better pursued under Rule 11(c)(5), which authorizes a court to reject a plea agreement. FED. R. CRIM. P. 11(c)(5).

135. United States v. Cheney, 571 F.3d 764, 768–69 (8th Cir. 2009).

136. *See* FED. R. CRIM. P. 11(a)(2); *Cheney*, 571 F.3d at 768; discussion *supra* note 59.

137. *Cheney*, 571 F.3d at 768.

procedural requirements for entering a conditional guilty plea when "the spirit of Rule 11(a)(2) has been fulfilled [such] that the defendant expressed an intention to preserve a particular pretrial issue for appeal and that neither the government nor the district court opposed such a plea."[138] Thus, this Comment will treat Holland's plea as a conditional guilty plea for the purposes of the ensuing discussion.

Holland's reservation of his right to appeal the court's Rule 11(b)(3) determination is significant. Entering a conditional guilty plea reserves in the defendant the right to appeal "an adverse determination of a specified pretrial motion."[139] Arguably, however, a Rule 11(b)(3) determination is not a traditional "pretrial motion."[140] Nonetheless, Holland's unique use of the conditional guilty plea effectively avoided confrontation with the circuit split.[141]

III. A PROPOSED SOLUTION: USE OF THE *CHENEY* APPROACH IN THE FOURTH, SIXTH, AND ELEVENTH CIRCUITS

Three mechanisms exist through which a defendant who entered an unconditional plea may seek to overturn the conviction on direct appeal by alleging an inadequate factual basis. First, a defendant can attack the "intelligent" and "voluntary" nature of the guilty plea.[142] Second, in those circuits which permit it, a defendant may appeal the adequacy of the factual basis for conviction despite the entrance of an unconditional guilty plea.[143] Third, a defendant could follow the path paved by *Cheney* by entering a conditional guilty plea and reserving the right to appeal the adequacy issue.[144]

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138. United States v. Bell, 966 F.2d 914, 916 (5th Cir. 1992).

139. FED. R. CRIM. P. 11(a)(2); *see* BLACK'S LAW DICTIONARY 1268 (9th ed. 2009). Such determinations include a district court's refusal to suppress evidence allegedly seized in violation of a defendant's constitutional rights. FED. R. CRIM. P. 11 advisory committee's note.

140. *See* discussion *supra* note 59. Rule 11(a)(2) allows the equivalent of an interlocutory appeal of a pretrial motion which is adverse to a defendant. The Advisory Committee explained that Rule 11(a)(2) is intended to apply to the "many defenses, objections and requests which a defendant must ordinarily raise by pretrial motion." FED. R. CRIM. P. 11 advisory committee's note.

141. *See supra* Part I.F.

142. *See supra* notes 29–32 and accompanying text. This method is, in fact, the only recourse a defendant has in the Fourth, Sixth, and Eleventh Circuits. *See supra* Part II.A. Pursuant to this theory, defendants could argue that when they entered their pleas, they believed they were guilty, but subsequently learned that their conduct did not constitute the alleged crimes. This argument will likely fail, however, due to the standard for determining if a plea was constitutional. *See supra* notes 29–32 and accompanying text.

143. *See supra* Part II.B.

144. *See supra* Part II.C.

A. The General Approach

Because defendants have no constitutional right to enter a conditional guilty plea but may do so only "[w]ith the consent of the court and the government"[145] on a case-by-case basis, a rule of law that consistently allows a defendant to appeal the adequacy issue would maximize the protection afforded to defendants. In their review of Rule 11(b)(3) determinations, circuit courts should require district courts to adhere "more meticulously" to Rule 11(b)(3), thereby effectuating a rule with which district courts otherwise have little incentive to comply.[146] Such meticulous adherence to Rule 11 requirements—in particular, compliance with Rule 11(b)(3)—would actually "discourage, or at least . . . enable more expeditious disposition of . . . post-conviction attacks."[147] Therefore, circuit courts could resolve appeals in a timely manner because they would have access to fully developed district court records.

Currently, the circuit split is without a majority position.[148] Upon the Eighth Circuit's next confrontation with this issue, though, it should review the district court's Rule 11(b)(3) determination in accordance with the positions of the First, Fifth, and Seventh Circuits. In so doing, the Eighth Circuit would create a majority position to which the Supreme Court could turn, should it ever address this issue.

Until the Supreme Court grants certiorari, defendants in the Fourth, Sixth, and Eleventh Circuits, as well as those in circuits that have not yet articulated their positions, may have little recourse. A defendant in one of these circuits could follow Holland's approach in *Cheney* by attempting to enter a conditional guilty plea in accordance with Rule 11(a)(2) to reserve the right to appeal the adequacy of the factual basis.[149] As noted above, however, neither the district court nor the government is obligated to accept a conditional plea.[150] Moreover, conditional guilty pleas have traditionally encompassed only pretrial motions, and it is questionable whether courts outside of the *Cheney* court would recognize a Rule 11(b)(3) determination as a "determination of a specified pretrial motion."[151] Even if all courts were to follow *Cheney* in this regard, not all jurisdictions recognize the validity of unconditional guilty pleas,[152] and "neither the courts nor the government have any duty, either statutory or constitutional, to inform defendants about conditional pleading."[153] Because of this, the government has the discretion to

145. FED. R. CRIM. P. 11(a)(2); *see supra* note 65.

146. McCarthy v. United States, 394 U.S. 459, 465 (1969).

147. *Id.*

148. *See supra* Part II.

149. *See supra* Part II.C.

150. FED. R. CRIM. P. 11(a)(2); *see supra* text accompanying note 145.

151. FED. R. CRIM. P. 11(a)(2); *see supra* note 59.

152. *See supra* note 65.

153. United States v. Fisher, 772 F.2d 371, 375 (7th Cir. 1985) (per curiam).

withhold a plea bargain from a defendant unless the defendant agrees to waive all rights to appeal.[154] This predicament creates a catch-22 for defendants similar to that which existed before the creation of the conditional guilty plea in 1983.[155]

B. Opponents' Arguments Are Without Merit

Adversaries may argue that allowing defendants to appeal Rule 11(b)(3) determinations, regardless of whether they entered a conditional or unconditional guilty plea, will unnecessarily prolong litigation and create an abundance of appeals and extra expenses for the judicial system.[156] To some extent, appeals are likely to increase if courts permit Rule 11(b)(3) review.[157] One would anticipate this burden, however, to be minimal.[158] Conversely, if the circuit split is resolved in favor of the Fourth, Sixth, and Eleventh Circuits, a defendant will be forced to enter a conditional guilty plea to reserve the right to appeal the district court's adequacy determination.[159] Moreover, if circuit courts prohibit conditional guilty pleas, defendants will be forced to choose

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154. *See* FED. R. CRIM. P. 11.

155. *See supra* Part I.C.

156. United States v. Wiggins, 905 F.2d 51, 54 (4th Cir. 1990) (explaining that the court is unwilling to permit a defendant who has entered an unconditional guilty plea to appeal his conviction because doing so would "'eliminate the chief virtues of the plea system—speed, economy, and finality'" (quoting Blackledge v. Allison, 431 U.S. 63, 71 (1977))); Barkai, *supra* note 36, at 144 ("Reversal on appeal will create an additional cost resulting from re-pleading or conducting a trial."); *see* Flanagan v. United States, 465 U.S. 259, 264–65 (1984) (noting the importance of the timely adjudication of criminal cases); United States v. Bundy, 392 F.3d 641, 646 (4th Cir. 2004) (explaining that even a defendant who reserves the right to appeal by entering a conditional guilty plea should be permitted only to file appeals relating to a limited number of issues because of concerns for "judicial economy" and the potential for "'a flood of appellate litigation'" (quoting United States v. Burns, 684 F.2d 1066, 1072 (2d Cir. 1982))). Similar concerns arose in the aftermath of *Miranda v. Arizona*. *See* Miranda v. Arizona, 384 U.S. 436, 544–45 (1966) (White, J., dissenting) (asserting that the "application of the new [*Miranda*] rule" will conserve neither "judicial time [nor] effort"). Even in *Miranda*, a case which developed a rule with far broader applicability and implications than *Cheney*, Justice Byron White expressed skepticism about whether judicial economy was a relevant consideration. *Id.*

157. *See* Barkai, *supra* note 36, at 127–28 (discussing courts' reluctance "to expand the factual basis procedure, fearing that it might become a time-consuming, full-blown evidentiary hearing").

158. *Id.* at 117 (explaining that the average inquiry concerning the intelligence and voluntariness of a plea, as well as a Rule 11(b)(3) determination "requires about ten minutes"). Thus, the Rule 11(b)(3) determination "should require only one to two minutes at most." *Id.* Surely, two minutes is a meager price to pay for increased confidence and legitimacy in the judicial system. Before the conditional guilty plea was incorporated into the Federal Rules of Criminal Procedure, states were hesitant to adopt conditional guilty pleas for fear that they would "flood[] appellate courts." Note, *Conditional Guilty Pleas*, *supra* note 18, at 572. A review of the use of conditional guilty pleas in New York and California revealed that even then "a relatively small number of additional appeals [were] generated; no 'flooding' of appellate courts [] resulted." *Id.*

159. *See supra* Part II.A.

between entering unconditional pleas and pleading not guilty.[160] Given the significance of a Rule 11(b)(3) determination, a defendant who doubts the existence of an adequate factual basis quite conceivably may plead not guilty and hold the government to its burden of proof.[161] By leaving defendants little choice but to go to trial to reserve the right to appeal Rule 11(b)(3) determinations, this approach essentially robs defendants, prosecutors, and the judicial system of the substantial benefits the conditional guilty plea was created to ensure.[162]

Adversaries might also argue that review should not be granted because of the importance of "finality" of district courts' decisions.[163] Admittedly, finality is an important initiative of the criminal-justice system: "[T]he community [must be able to] repose in its knowledge that justice has been done, and . . . the offender [must] know that he is unable to avoid his punishment."[164] Nonetheless, the general prevalence of appellate review demonstrates the judicial system's collective belief that the importance of finality does not trump that of justice.[165] Regardless, appellate courts tend to affirm the overwhelming majority of criminal appeals from federal district courts.[166]

Allowing a defendant to appeal the adequacy of the factual basis for conviction will not necessarily result in fewer convictions; it will merely allow the defendant to withdraw the guilty plea if the circuit court determines that no factual basis exists, thereby holding the government to its burden of proof.[167] Assuming a prosecutor would not offer a defendant a plea bargain if the defendant's conduct did not satisfy the definition of the charged crime, the government should not be burdened by having to prove its case. Further, a district court's adherence to the plea-proceeding recording requirements of

160. *See supra* Part I.C–D.

161. *See supra* Part II.A.

162. *See supra* note 64 and accompanying text.

163. *See* Note, *Conditional Guilty Pleas*, *supra* note 18, at 573–74 (explaining that for criminal law to be effective, its punishments must be "final").

164. *Id.*

165. *See id.* at 574 (stating that the Supreme Court consistently protects constitutional rights, "even at the expense of finality"); *see* 2006 STATISTICS, *supra* note 4, at tbl.6.3 (explaining that in fiscal year 2006, federal appellate courts adjudicated approximately 11,764 criminal appeals on their merits).

166. *Id.* (showing that 70.7% of criminal cases terminated on their merits were subsequently affirmed).

167. *See* FED. R. CRIM. P. 11; Barkai, *supra* note 36, at 117 (explaining that reversal on appeal "does not mean . . . that legally guilty people will be allowed to escape the criminal sanction. The defendant's case will not be dismissed at the appellate level. The prosecution will have the opportunity to try the defendant or obtain a new plea"). Upon withdrawing a guilty plea, a defendant must enter a plea of not guilty or nolo contendere. *See* FED. R. CRIM. P. 11. If the defendant fails to enter a plea, the court will enter a default plea of "not guilty." *Id.* at 11(a)(4).

Rule 11(g),[168] which will be enforced by appellate review of the factual basis requirement, will facilitate an expedited review.[169]

IV. CONCLUSION

Until the Supreme Court resolves the circuit split concerning whether a defendant's entrance of an unconditional guilty plea waives his right to appeal the adequacy of the factual basis for conviction, defendants may position themselves most advantageously by entering conditional guilty pleas. In the meantime, the Eighth Circuit should join the First, Fifth, and Seventh Circuits to create a majority position to which the Supreme Court might turn, should it address this issue.

Due to the high volume of guilty pleas entered annually,[170] the judicial system has a significant and justifiable interest in disposing of its cases efficiently. Nevertheless, the judicial system must not sacrifice the quality of its processes for the speed of its administration.[171] Allowing a defendant to be convicted of a crime when his conduct does not satisfy the statutory definition of that crime cripples our criminal-justice system and our citizens' faith in it. Not only does it prioritize case disposition over fair administration, but it also deprives defendants of the fundamental protections they deserve when entering guilty pleas.[172] Guilty pleas' central societal role mandates that they maintain their legitimacy. That legitimacy, however, is undermined when their use precludes review of whether a defendant's conduct satisfies the statutory elements of a charged offense.[173] Thus, circuit courts have a duty to review trial courts' adequacy determinations in the same manner that they review all other judicial decisions; if a violation is merely formalistic, the applicable standard of review will likely bar reversal.[174] If, on the other hand, the error is substantive, the maintenance of public "'confidence in the integrity of our procedures'" and the legitimacy of guilty pleas demand that the justice system

168. FED. R. CRIM. P. 11(g).

169. *See* McCarthy v. United States, 394 U.S. 459, 465 (1969) ("[T]he more meticulously [Rule 11] is adhered to, the more it tends to . . . enable more expeditious disposition . . . .").

170. *See supra* Part I.A.

171. *See* Douglas L. Colbert, *Connecting Theory and Reality: Teaching* Gideon *and Indigent Defendants' Non-Right to Counsel at Bail*, 4 OHIO ST. J. CRIM. L. 167, 168 & n.7 (2006) (explaining the judicial system's interest in reducing "'assembly-line justice,'" a process in which the criminal-justice system sacrifices the quality of legal services in exchange for efficiency, and thereby disadvantages criminal misdemeanor defendants (quoting Argersinger v. Hamlin, 407 U.S. 25, 36 (1972))).

172. *See supra* Part I.B.

173. Such a notion certainly does not contribute to society's "'confidence in the integrity of our procedures.'" Timmreck v. United States, 441 U.S. 780, 784 (1979) (quoting United States v. Smith, 440 F.2d 521, 528 (7th Cir. 1971) (Stevens, J., dissenting)).

174. *See supra* note 75. Even though the federal courts do not apply a uniform standard to their review of Rule 11(b)(3) determinations, a district court's mere formalistic error is unlikely to result in reversal under any of the applicable standards. *See* FED. R. CRIM. P. 11(h).

allow a defendant to plead anew and hold the government to its burden of proof.[175]

175. *Timmreck*, 441 U.S. at 784 (quoting *Smith*, 440 F.2d at 528 (Stevens, J., dissenting)).