No. _____

IN THE SUPREME COURT OF THE UNITED STATES

FRANKLIN RAY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

After this Court re-interpreted the Aggravated Identity Theft statute in *Dubin v. United States*, 599 U.S. 110, 132 (2023), Petitioner was factually innocent even though he had pled guilty before *Dubin* was decided. But the Second Circuit barred Petitioner from appealing the invalid plea, relying on a waiver entered by Petitioner's *lawyer* without Petitioner's knowledge. The Second Circuit opined that waiving the right to challenge guilt under a reinterpreted statute is a strategic and tactical matter within counsel's discretion.

> The first question is whether permitting lawyers to decide for their clients whether to challenge pleas under reinterpreted law contravenes their clients' due process and Sixth Amendment rights to decide for themselves whether to plead guilty.

The Second Circuit split with the Fourth Circuit, which refuses to enforce appeal waivers if there is a colorable claim of actual innocence, applying the principle that it avoids complete miscarriages of justice.

> The second question is whether an appeal waiver is enforceable where a defendant did not make a knowing and voluntary choice to plead guilty and where enforcing it will leave someone in jail for a crime that they did not commit.

PARTIES TO THE PROCEEDING

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Franklin Ray respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Second Circuit entered on May 16, 2025. The Second Circuit denied Mr. Ray's petition for en banc and/or panel rehearing in an order dated June 25, 2025.

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit is available at 2025 WL 1416860 and appears at Pet. App. 1a. The Second Circuit declined to rehear the appeal *en banc*. Pet. App. 9a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on May 16, 2025, and rehearing was denied on June 25, 2025. Following a 90-day period for filing, this Petition would have expired on September 23, 2025. The Petition is being filed on or before that date. Rules 13.1, 13.3, 13.5, 29.2, 30.1. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case concerns how to treat convicted felons who are factually innocent after this Court changes the substantive law, as it did in *Dubin*, 599 U.S. at 132, and several other recent decisions. Following those opinions where this Court changed the meaning of criminal statutes,[1] the Second Circuit remained unwilling to vacate convictions for defendants who pled guilty, but who are no longer guilty under the redefined law.

Petitioner pled guilty to Aggravated Identity Theft, 18 U.S.C. § 1028A. But after *Dubin*, 599 U.S. at 132, he was factually innocent. At his plea hearing, he had been incorrectly advised about the offense's elements based on how the law was subsequently clarified and described in *Dubin* – meaning that the plea was neither knowing nor voluntary, nor supported by a factual basis. Yet the Second Circuit barred Petitioner from appealing his plea's validity by enforcing a purported waiver entered by Petitioner's *lawyer* without any record that Petitioner knew about the purported waiver, much less that he voluntarily agreed to it.

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[1] *E.g.*, *Dubin*, 599 U.S. at 132; *United States v. Davis*, 588 U.S. 445, 470 (2019); *Rehaif v. United States*, 588 U.S. 225, 235 (2019).

The lower appellate courts are split on whether to void an appeals waiver if the defendant makes a cognizable showing of innocence. *Compare United States v. McKinney*, 60 F.4th 188, 191-93 (4th Cir. 2023) (declining to enforce petitioner's appeal waiver where he made "a cognizable claim of actual innocence" and barring the challenge would be a "miscarriage of justice"), *and Cook v. United States*, 111 F.4th 237, 246 (2d Cir. 2024) (Nathan, J., concurring with denial of rehearing; opining that Second Circuit's approach to enforcing appeal waivers for innocent defendants is "perhaps not so clear"), *with Portis v. United States*, 33 F.4th 331, 336 (6th Cir. 2022) (declining to recognize "miscarriage of justice" exception to enforcing appeal waiver), *and United States v. Goodall*, 21 F.4th 555, 565 n.6 (9th Cir. 2021) (expressing "no view" on "miscarriage of justice" exception)

Last year, the Second Circuit declined to rehear *en banc* a similar appeal concerning whether to enforce an appeal waiver that would result in a complete miscarriage of justice by leaving an innocent person in jail – with three Circuit judges signing a forceful dissent and another three Circuit judges concurring only because they wanted a better vehicle to address the topic. *Cook*, 111 F.4th at 237 (Lohier, J., concurring in denial of rehearing while noting need to address topic in future), 245 (Nathan, J., concurring in denial of rehearing while disagreeing with dicta in panel decision), 247 (Robinson, J., dissenting).

Further, the Second Circuit appears now to be alone in permitting a defense lawyer to exercise strategic discretion to waive, on a client's behalf, challenges to guilt under a reinterpreted statute – without even discussing the matter with the client. In so doing, the Second Circuit created an unsustainable carve out to the rules that (a) only defendants can decide whether to concede guilt, *McCoy v. Louisiana*, 584 U.S. 414, 417-18 (2018), and (b) only and on-the-record allocution can establish the knowing and voluntary waiver required to accept a defendant's choice to plead guilty, *McCarthy v. United States*, 394 U.S. 459, 465 (1969).

STATEMENT OF THE CASE

Petitioner Franklin Ray admitted to facts that constituted aggravated identity theft under a reading of the statute, 18 U.S.C. § 1028A(1), rejected by this Court in *Dubin*, 599 U.S. at 131-33. The Court decided *Dubin* after Petitioner pled guilty but before he was sentenced. It is undisputed that Petitioner's allocution at his plea hearing no longer stated an aggravated identity theft offense after *Dubin*.[2]

In Petitioner's sentencing letter, his lawyer raised *Dubin* and told the judge why Petitioner was not guilty under the new precedent. But before Petitioner's sentencing, that lawyer submitted another letter to the district court stating that, after the *lawyer's* conversations with the government, "the defendant" wished to keep his plea agreement and waive any argument that he was innocent under *Dubin*. **There is no record that Petitioner was even told about his counsel's waiver, much less that he consented to it**: he was not copied on it, the district court never addressed it with Petitioner, and no one allocuted Petitioner about whether he understood the new definition of the offense and still wished to maintain his plea and waive appellate rights. After judgment entered and Petitioner

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[2] Ray's briefs below explained why he is not guilty under *Dubin*. *United States v. Ray*, No. 23-8005 (2d Cir.), Dkt. 33.1 at 26-31; Dkt. 45.1 at 3-9. The Second Circuit did not reach this question after its waiver finding.

found out what his lawyer had done, he asked to appeal and have new counsel assigned.

In his direct appeal, Petitioner, who had also pled guilty to four wire fraud counts, only challenged the consecutive 24-month sentence imposed for violating § 1028A. He argued that, based on *Dubin's* change to the law, he was not advised about the "true nature" of the offense when he pled guilty, as required for the plea to be knowing and voluntary, *see* Fed. R. Crim. P. 11(b)(1)(G); *Bousley v. United States*, 523 U.S. 614, 623 (1998), and that there was no factual basis to support the plea in the record at the plea hearing, *see* Fed R. Crim. P. 11(b)(3); *Brady v. United States*, 397 U.S. 742, 748 (1979).

The government responded primarily by arguing that Petitioner had waived any challenge to the § 1028A conviction based on the letter submitted by Petitioner's lawyer about which the district court never allocuted Ray, or even mentioned on the record or in his presence. The government never contended that Petitioner's plea agreement barred his appeal – it relied only on the post-plea, post-*Dubin* letter that his lawyer filed and which the district judge never raised with Petitioner.

The Second Circuit affirmed the conviction without reaching the merits because it found that Petitioner' counsel's letter "waived [Petitioner's] *Dubin*

arguments in the district court and, thus, he cannot raise that claim on appeal." *United States v. Ray*, 2025 WL 1416860, at *2 (2d Cir. May 16, 2025). It concluded that this waiver constituted a "strategic and tactical" decision within counsel's discretion. *Id.* at *3. Even without a record that the waiver it sought to enforce was made knowingly and voluntarily by Petitioner himself, the Court of Appeals stated that "[Petitioner] acted intentionally in declining to pursue his *Dubin* argument in the district court" and that "the intentionally relinquishment of the *Dubin* argument prior to sentencing was undoubtedly tactical." *Id.* at *2.

Petitioner moved for rehearing. He argued that the Court of Appeals overlooked two important areas of law. The first is the right for the client alone to decide whether to plead guilty after making a voluntary decision after being informed about the elements of the offense. *McCoy*, 584 U.S. at 414-18; *Bousley*, 523 U.S. at 632. The second is the need to conduct on-the-record allocutions to establish a knowing and voluntary waiver of substantive rights. *McCarthy*, 394 U.S. at 465; *see generally* Fed. R. Crim. P. 11(b). The Second Circuit declined to rehear the appeal en banc in an order dated June 25, 2025. Pet. App. 9a.

REASONS FOR GRANTING CERTIORARI

The Court should grant review to address the important and recurring question of how to treat defendants whose guilty pleas are no longer valid after this Court reinterprets a criminal statute.

It should also grant review to resolve the Circuit split concerning whether defendants can be held to appeal waivers when the defendant makes a colorable showing of factual innocence and where enforcing the waiver would result in a complete miscarriage of justice.

I. A lawyer is not authorized to waive their client's right to contest guilt absent a clear record that the client themselves made a knowing and voluntary choice.

The Court should grant rehearing and hold that only a defendant can decide whether to contest their guilt after this Court reinterprets the statute under which they were convicted. The Second Circuit's alternate view – allowing Petitioner's attorney to waive *Petitioner's* right to contest guilt under the reinterpreted law without a record that Petitioner knew about the waiver – contravened two clearly established constitutional rights.

The first arises under Sixth Amendment, which entitles a defendant to be *assisted* – and only assisted – by counsel in achieving those objectives that are the

client's alone to decide. Thus, while attorneys must advise clients on the wiser course of action, the decision whether to plead guilty belongs to the defendant alone. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal."); *cf. Gannett Co. v. DePasquale*, 443 U.S. 368, 382 n.10 (1979) (the Sixth Amendment "contemplat[es] a norm in which the accused, and not a lawyer, is master of his own defense."). It was thus wholly improper for the Second Circuit to allow Ray's attorney to waive his claims of innocence on his client's behalf in the wake of *Dubin*.

This point was emphasized in *McCoy*, 584 U.S. at 414-18, which disapproved of a long-standing practice by capital defense lawyers to concede their clients' guilt of murder as a strategy to persuade juries to impose life sentences. *Id.* at 417-18. *McCoy* held that lawyers are not permitted to decide for their clients to concede guilt if their client wants to contest it – even if experienced lawyers know that is the best strategy for their client's overall interests. *Id.* at 422-23. The Court distinguished between "strategic choices about how best to *achieve* a client's objectives" and "choices about what a client's objectives in fact *are*." *Id.* at 422. (emphasis in original). "The Sixth Amendment, in granting to the accused

personally the right to make his defense, speaks of the assistance of counsel, and an assistant, however expert, is still an assistant." *Id.* at 421 (cleaned up).

Thus, in Petitioner's case and in others where the law changes after a guilty plea, deciding whether to maintain a plea following this Court's changes to the law, or whether to challenge it because the admitted conduct no longer amounts to a crime, is not a matter within a defense attorney's strategic judgment: it is not a decision about *how* to pursue the case; it is rather a decision about what *objective* to pursue that be left to the defendant personally. *McCoy*, 584 U.S. at 421-24.

The second implicated constitutional right is due process: a waiver is not enforceable under the Due Process Clause absent an on-the-record allocution. *McCarthy*, 394 U.S. at 465. Through the allocution process, a court can determine if the waiver is "'an intentional relinquishment or abandonment of a known right or privilege'" by the defendant, which is required before the waiver is "valid under the Due Process Clause." *Id.* at 466 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

Here, the Second Circuit effectively authorized Petitioner's counsel to enter a replead on Petitioner's behalf without the district court ever telling Petitioner. It was impossible for Petitioner's plea to be knowing and voluntary before *Dubin* was decided: no one could have explained to him the "true nature" of the offense,

Bousley, 523 U.S. at 632, as it was subsequently stated by this Court in *Dubin*. By enforcing the post-*Dubin* waiver offered by Petitioner's *attorney*, the Panel in effect authorized the district judge to accept a replead by the defense *lawyer* in a written submission without a record of the defendant's actual knowledge, much less intelligent and voluntary consent.

The Court should grant certiorari to clarify that that is not allowed: trial courts must assess whether defendants themselves wish to maintain a plea after the law changes – because only then will defendants be properly advised of the offense's elements, and therefore for the first time in a position to make a knowing and voluntary decision about whether to plead guilty.

Allowing the Second Circuit's decision to stand could lead to havoc. Many defense lawyers would stop a client from proceeding to a trial with predictably catastrophic consequences. But the attorney is not permitted to make that choice on their client's behalf.

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This Court repeatedly and emphatically holds that only defendants can choose for themselves whether to plead guilty. *McCoy*, 584 U.S. at 414-18 (collecting cases). It should grant certiorari to ensure that this rule is extended to

the increasingly common cases where a defendant who pled guilty is no longer guilty after this Court reinterprets a statute.

II. An appellate waiver is unenforceable where the defendant never entered a knowing and voluntary plea and enforcing it would lead to a complete miscarriage of justice.

The Court should also grant review to resolve the Circuit split concerning whether an appeal waiver can ever be enforced where, as here, there is a colorable showing of actual innocence and enforcing it will result in a complete miscarriage of justice by leaving someone in prison for a crime that they did not commit.[3]

A miscarriage-of-justice exception to the presumptive enforceability of appellate and collateral-attack waivers has been adopted by several courts of appeals. *See United States v. Teeter,* 257 F.3d 14, 21-27 (1st Cir. 2001) ("Our basic premise, therefore, is that if denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver"); *United States v. Khattak*, 273 F.3d 557, 559-63 (3d Cir. 2001)

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[3] The Second Circuit left open that Ray could challenge his counsel's "strategic" choice to waive challenges to guilt in a 2255 motion. Pet. App. 6a-7a. But that is misguided because counsel did not have the strategic or tactical discretion to waive *Ray's* right to a knowing and voluntary plea or to challenge his guilt under the redefined statute.

(recognizing limited "miscarriage of justice" exception to enforcing plea agreements); *United States v. Guzman*, 707 F.3d 938, 941 (8th Cir. 2013) (same); *United States v. Shockey*, 538 F.3d 1355, 1357 & n.2 (10th Cir. 2008) (same); *United States v. Guillen*, 561 F.3d 527, 531 (D.C. Cir. 2009) (same). This exception has been justified by several rationales. *See United States v. Caruthers*, 458 F.3d 459 (6th Cir. 2005) (noting miscarriage-of-justice exception encompasses unconscionability doctrine of contract law and the supervisory powers of the courts of appeals), *abrogation on other grounds recognized by Cartwright v. United States*, 12 F.4th 572 (6th Cir. 2021).

The Fourth Circuit applies this exception to permit defendants to raise "a cognizable claim of actual innocence." *McKinney*, 60 F.4th at 191-93. The Sixth, Ninth, and Eleventh Circuits have declined to apply the exception in such cases. *King*, 41 F.4th at 1368; *Portis*, 33 F.4th at 336; *Goodall*, 21 F.4th at 562. The rule in the Second Circuit is ambiguous. *Cook*, 111 F.4th at 246 (Nathan, J., concurring in denial of rehearing en banc while opining that Second Circuit rule is "perhaps not so clear").

The Court should grant certiorari to resolve this split and hold that no appeal waiver is enforceable if the defendant did not enter a knowing and voluntary plea and enforcing the waiver will result in a complete miscarriage of justice. When the

defendant was misadvised of the elements of an offense, as the statute is later reinterpreted by this Court, then that defendant never had an opportunity to make a knowing and informed decision to plead guilty. *Bousley*, 523 U.S. at 632; *McCarthy*, 394 U.S. at 465. Thus, no waiver in that invalid plea is enforceable because the waiver is attendant to a decision that was not knowing and voluntary. Further, enforcing such a waiver would be unconscionable and constitute travesty of justice by requiring an innocent person to sit in jail.

CONCLUSION

In recent years this Court has reinterpreted several criminal statutes, including 18 U.S.C. §§ 922(g),[4] 924(c),[5] and 1028A.[6] It should grant certiorari to enforce uniformity among the lower federal courts about how to treat defendants who are no longer guilty after the law changes – including defendants who pled guilty after district judges misinformed them about the offense's elements but before this Court clarified those elements in a subsequent opinion.

The Court should draw a firm line at factual innocence – it should instruct the lower federal courts not to take it lightly and to consider wrongful convictions – even ones procured by guilty pleas – as the complete miscarriages of justice that they are.

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[4] *Rehaif*, 588 U.S. at 235.

[5] *Davis*, 588 U.S. at 470.

[6] *Dubin*, 599 U.S. at 132.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

23-8005-cr
United States v. Ray

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 16th day of May, two thousand twenty-five.

PRESENT:

GERARD E. LYNCH,
JOSEPH F. BIANCO,
STEVEN J. MENASHI,
Circuit Judges.

UNITED STATES OF AMERICA,

Appellee,

v. 23-8005-cr

FRANKLIN RAY,

Defendant-Appellant,

JOSEPH WINGET,

Defendant.*

FOR APPELLEE: MATTHEW WEINBERG, Assistant United States Attorney (Andrew Rohrbach, Assistant United States Attorney, *on the brief*), *for* Danielle R.

* The Clerk of Court is respectfully directed to amend the official caption in this case to conform with the caption above.

Sassoon, United States Attorney for the Southern District of New York, New York, New York.

FOR DEFENDANT-APPELLANT: BENJAMIN SILVERMAN, Law Offices of Benjamin Silverman PLLC, New York, New York.

Appeal from a judgment of the United States District Court for the Southern District of New York (Analisa Torres, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court, entered on November 28, 2023, is **AFFIRMED**.

Defendant-Appellant Franklin Ray appeals from the district court's judgment of conviction following his guilty plea, pursuant to a plea agreement, to five charges in a superseding information. Ray was charged with one count of wire fraud and committing an offense while on release in a pending criminal case, in violation of 18 U.S.C. §§ 1343, 3147 ("Count One"); three counts of wire fraud, in violation of 18 U.S.C. § 1343 ("Counts Two, Three, and Four"); and one count of aggravated identity theft, in violation of 18 U.S.C. §§ 1028A(a)(1), (b) ("Count Five"). We assume the parties' familiarity with the underlying facts, procedural history, and issues on appeal, to which we refer only as necessary to explain our decision to affirm.

The convictions arise from Ray's participation in fraud schemes, between 2020 and 2022, in connection with his control of two purported trucking companies, CSA Business Solutions LLC ("CSA") and REM Enterprizes Inc. ("REM"). Although Ray exercised actual operational control over these companies, he was not the legal owner. Ray's co-defendant, Joseph Winget, was the legal owner of CSA and an unnamed, uncharged individual ("Individual-1") was the legal owner of REM. As relevant to this appeal, Ray used REM to fraudulently obtain funds from the Small

Business Administration. This conduct formed the basis for Counts Four and Five. As to Count Four, Ray engaged in wire fraud by procuring over $800,000 in loans from the Economic Injury Disaster Loan program and the Paycheck Protection Program through applications that contained, *inter alia*, forged bank account statements and false IRS filings. As to Count Five, aggravated identity theft, Ray—acting alone—used Individual-1's name, driver's license, and social security number on the loan applications that were used to commit the above-referenced wire fraud.

On appeal, Ray challenges his conviction only on Count Five. He argues that, in light of *Dubin v. United States*, 599 U.S. 110 (2023), which was decided after he pled guilty but before he was sentenced, his plea was not knowing and voluntary and lacked a factual basis, in violation of Federal Rule of Criminal Procedure 11 and the Due Process Clause. In particular, Ray argues that "[u]nder *Dubin*, to convict someone under 18 U.S.C. § 1028A, it is not enough to prove that they used another person's 'means of identification' merely to facilitate a fraudulent scheme," but rather the statute "requires that using the other person's identity be at 'the crux' of what makes the fraud illegal, and itself deceptive." Appellant's Br. at 2–3 (quoting *Dubin*, 599 U.S. at 131–32). According to Ray, because his use of Individual-1's identification was not at the crux of what made his conduct with respect to the loan applications fraudulent, his allocution at the guilty plea proceeding and the evidence in the record did not provide a sufficient factual basis for an aggravated identity theft conviction, and the district court could not accept his guilty plea and enter judgment on Count Five without ensuring that Ray knew the elements of the charge as articulated in *Dubin*.

Ray acknowledges that he failed to preserve any Rule 11 error in the district court but urges us to conclude that the district court committed plain error. The government, however, argues that

plain error review is unavailable to Ray because he waived his *Dubin* argument in the district court and, thus, he cannot raise that claim on appeal. We agree with the government.

"While we have discretion to consider forfeited arguments, a waived argument may not be revived." *Doe v. Trump Corp.*, 6 F.4th 400, 410 n.6 (2d Cir. 2021); *see United States v. Yu-Leung*, 51 F.3d 1116, 1121 (2d Cir. 1995) ("[F]orfeiture does not preclude appellate consideration of a claim in the presence of plain error, whereas waiver necessarily extinguishes the claim altogether." (internal quotation marks and citation omitted)). "Forfeiture occurs when a defendant, in most instances due to mistake or oversight, fails to assert an objection in the district court." *United States v. Spruill*, 808 F.3d 585, 596 (2d Cir. 2015). Waiver, on the other hand, occurs when there has been an "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (internal quotation marks and citations omitted); *see Berghuis v. Thompkins*, 560 U.S. 370, 382 (2010) (describing waiver as a "voluntary" and "aware[]" decision). "We will infer a waiver only where the parties were aware of their rights and made the conscious choice, for whatever reason, to waive them." *U.S. D.I.D. Corp. v. Windstream Commc'ns, Inc.*, 775 F.3d 128, 136 (2d Cir. 2014) (internal quotation marks and citation omitted). "We have identified waiver where a party asserts, but subsequently withdraws, an objection in the district court." *Spruill*, 808 F.3d at 597. "We have also recognized waiver where a party makes a tactical decision not to raise an objection." *Id.* (internal quotation marks and citation omitted).

The circumstances here demonstrate that Ray acted intentionally in declining to pursue his *Dubin* argument in the district court, which is the sole basis for his Rule 11 challenges on appeal. In his initial sentencing submission, Ray asked the district court to "consider vacating Mr. Ray's conviction on Count 5 in this matter in light of the Supreme Court's recent decision in *Dubin v. United States*." Joint App'x at 116 (italics added). In that submission, as on appeal, Ray argued

that his use of Individual-1's personal identifying information in the fraudulent loan applications was not at the crux of what made those applications fraudulent, and therefore, that information was not used in relation to his wire fraud scheme. However, Ray unequivocally withdrew this argument six days later. In his supplemental sentencing submission, Ray acknowledged his prior request that the district court vacate his conviction on Count 5 in light of *Dubin* and then abandoned it, stating, "[a]fter discussions with the Government, the Defendant wishes to clarify that we are NOT moving to withdraw or vacate Mr. Ray's plea with respect to Count 5, and Mr. Ray maintains his position that he is guilty of Count 5 as agreed to in the plea agreement." *Id.* at 144. Ray's "assert[ion], but subsequent[] withdraw[al]" of the *Dubin* argument before the district court is sufficient for us to conclude that Ray waived the argument. *Spruill*, 808 F.3d at 597.

Moreover, the intentional relinquishment of the *Dubin* argument prior to sentencing was undoubtedly tactical. As the government notes and Ray does not dispute, "[h]ad Ray obtained vacatur of the conviction on Count Five, . . . he would have been in breach of his plea agreement, and the Government could have reinstated the original indictment." Appellee's Br. at 16. That indictment contained another aggravated identity theft charge. If Ray's *Dubin* challenge were unsuccessful and he were convicted of both counts, the district court, in its discretion, could impose consecutive 24-month sentences on each count. 18 U.S.C. § 1028A(b)(4). Ray thus opted to end his effort to seek vacatur of Count Five in light of *Dubin*, which would have resulted in his need to negotiate a new plea or proceed to trial on the remaining counts in the indictment, even if his challenge to Count Five (and the second aggravated identity theft count) was ultimately successful. He instead decided to proceed to sentencing, which resulted in him receiving a sentence at the bottom of the Guidelines range calculated by the plea agreement.

Under these circumstances, Ray made a "tactical decision" and "acted intentionally in pursuing, [and then] not pursuing" a vacatur of Count Five under *Dubin*. *Spruill*, 808 F.3d at 597. Ray's intentional choice not to pursue a *Dubin* argument at sentencing constitutes waiver, and this "waiver applies with even more force when, as in this case, [Ray] not only failed to object to what [he] now describe[s] as error, but [he] actively solicited it, in order to procure a perceived sentencing benefit." *United States v. Quinones*, 511 F.3d 289, 321 (2d Cir. 2007); *see also United States v. Wells*, 519 U.S. 482, 488 (1997) ("[A] party may not complain on appeal of errors that he himself invited or provoked the district court to commit." (alterations adopted) (internal quotation marks and citation omitted)); *United States v. Madrid*, No. 23-6770, 2025 WL 547665, at *2 (2d Cir. Feb. 19, 2025) (summary order) (finding waiver of ineffective assistance claim on appeal because "[b]y persisting in their guilty pleas despite having raised ineffective assistance claims against their prior counsel, [the defendants] made a deliberate choice to abandon those claims"); *United States v. Martin*, No. 23-6091, 2024 WL 5001844, at *2 (2d Cir. Dec. 6, 2024) (finding waiver of an appellate argument that the defendant's plea was involuntary where the defendant had "affirmatively informed the [district c]ourt, through [a letter from] new counsel, that he did not wish to withdraw his plea"), *cert. denied*, No. 24-6753, 2025 WL 1020425 (Apr. 7, 2025). In sum, as to the Rule 11 challenges raised by Ray, which are the only grounds for appeal and are all based on *Dubin*, we conclude that review is unavailable.

Ray's arguments to the contrary are unavailing. For instance, to the extent Ray argues that "any waiver of the rights raised in this appeal [is] unenforceable as a policy matter" because waiver would result in Ray's "convict[ion] of a crime that he did not commit," we disagree. Appellant's Br. at 36–37. As set forth above, prior to sentencing, Ray understood, and indeed initially pressed, his right to challenge his guilty plea to Count Five under *Dubin*. And yet he nevertheless explicitly

withdrew that challenge for his own strategic benefit and reasserted "his position that he is guilty of Count 5 as agreed to in the plea agreement." App'x at 144. Thus, even assuming that there may be a limited class of cases where enforcing a waiver may be a miscarriage of justice or could "irreparably discredit the federal courts," *United States v. Mezzanatto*, 513 U.S. 196, 204 (1995) (internal quotation marks, citation, and alteration omitted), this is not one of them. *See Cook v. United States*, 84 F.4th 118, 125 n.4 (2d Cir. 2023) ("This case does not require us to decide whether a collateral-attack waiver would be unenforceable in the event of a complete miscarriage of justice." (internal quotation marks and citation omitted)).

We are similarly unpersuaded by Ray's contention that his counsel's waiver of his *Dubin* argument is invalid because this type of action required a personal waiver from Ray, rather than a waiver through counsel, and because his counsel effectuated the waiver without his knowledge or consent. To be sure, "[f]or certain fundamental rights, the defendant must personally make an informed waiver," but for others, "waiver may be effected by action of counsel." *New York v. Hill*, 528 U.S. 110, 114 (2000). Here, the decision as to whether or not to pursue a legal challenge to a guilty plea prior to sentencing based upon intervening case authority falls comfortably within the "strategic and tactical matters" that can be waived through counsel. *United States v. Plitman*, 194 F.3d 59, 63 (2d Cir. 1999); *see Spruill*, 808 F.3d at 597 n.8 ("[M]ost waivers are effected through counsel."). In fact, we have previously found waiver based on a filing made by a defendant's counsel before sentencing purporting to withdraw the defendants' challenge to his guilty plea. *See Martin*, 2024 WL 5001844, at *2.

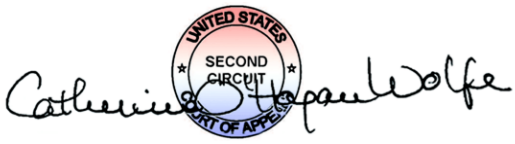
Finally, to the extent Ray argues his counsel withdrew the *Dubin* argument without his consent, Ray "may have a Sixth Amendment claim for ineffective representation," which he can pursue in a petition under 28 U.S.C. § 2255. *Spruill*, 808 F.3d at 597 n.8. But his counsel's actions

are "no less a 'true waiver,' merely because [Ray] may subsequently claim ineffective assistance of counsel." *Id*. at 600.

* * *

We have considered Ray's remaining arguments and conclude that they are without merit. Accordingly, the judgment of the district court is **AFFIRMED**.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 25th day of June, two thousand twenty-five.

United States of America,

Appellee,

v.

Franklin Ray,

Defendant - Appellant,

Joseph Winget,

Defendant.

ORDER

Docket No: 23-8005

Appellant, Franklin Ray, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk