MISCARRIAGE OF JUSTICE: POST-*BOOKER* COLLATERAL REVIEW OF ERRONEOUS CAREER OFFENDER SENTENCE ENHANCEMENTS

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INTRODUCTION

Under the U.S. Sentencing Guidelines, a defendant is designated a career offender if: (1) the defendant is at least eighteen at the time of the instant offense; (2) the offense is a "felony that is either a crime of violence or a controlled substance offense"; and (3) "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."[1] In recent years, the Supreme Court has issued a number of decisions calling into question the imposition of career offender sentence enhancements for individuals previously thought to fall within this statutorily defined category of offenders.[2] As a result, several federal courts of appeals have been

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[1] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2014).

[2] *See* Chambers v. United States, 555 U.S. 122 (2009) (holding that walkaway escapes are not violent felonies under the Armed Career Criminal Act of 1984 ("ACCA")); Begay v. United States, 553 U.S. 137 (2008) (clarifying the definition of "violent felony" under the ACCA).

called upon to address whether individuals who received career offender sentences for crimes that no longer qualify them for this status now have cognizable claims to resentencing under 28 U.S.C. § 2255.[3] Such resentencing could potentially lead to a sentence reduction for individuals affected by the Court's recent decisions.

The Supreme Court has stated that the inquiry for § 2255 motions that are neither jurisdictional nor constitutional is "whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.'"[4] In the context of erroneous career offender sentences, many federal courts have found, both before and after the Supreme Court made the Sentencing Guidelines advisory rather than mandatory in *United States v. Booker*,[5] that such errors are not cognizable under this "miscarriage of justice" standard where the sentence falls within the statutory maximum for the crime.[6] Such decisions, however, are far from unanimous.[7]

Circuit courts are currently split as to whether pre-*Booker* § 2255 claims are cognizable. In 2011, the Eighth Circuit and the Seventh Circuit reached different conclusions when applying the miscarriage of justice standard to determine whether an error in the application of the then-mandatory Sentencing Guidelines where the sentence fell within the statutory maximum for the crime could be cognizable under § 2255. In *Sun Bear v. United States*,

[3] 28 U.S.C. § 2255 (2012) (stating that a prisoner in federal custody who believes his sentence is invalid may move the court to alter or set aside his sentence); *see* Whiteside v. United States (*Whiteside I*), 748 F.3d 541, 555 (4th Cir. 2014) (holding that erroneous career offender enhancements can amount to fundamental miscarriage of justice), *rev'd en banc on other grounds*, Whiteside v. United States (*Whiteside II*), 775 F.3d 180 (4th Cir. 2014); Spencer v. United States (*Spencer I*), 727 F.3d 1076, 1088 (11th Cir. 2013) (holding that an erroneous career offender designation under advisory Sentencing Guidelines can rise to level of complete miscarriage of justice), *vacated en banc*, Spencer v. United States (*Spencer II*), 773 F.3d 1132 (11th Cir. 2014); Hawkins v. United States (*Hawkins I*), 706 F.3d 820, 824 (7th Cir. 2013) ("An error in the interpretation of a merely advisory guideline is less serious [than mandatory guidelines]. Given the interest in finality, it is not a proper basis for voiding a punishment lawful when imposed."), *opinion supplemented on denial of reh'g*, Hawkins v. United States (*Hawkins II*), 724 F.3d 915 (7th Cir. 2013); Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011) (finding no miscarriage of justice in erroneous career offender sentence under mandatory guidelines where sentence remained within statutory maximum range for crime even without career offender designation); Narvaez v. United States, 674 F.3d 621, 628-29 (7th Cir. 2011) (finding miscarriage of justice where guidelines were mandatory and "[t]he imposition of a career offender status therefore increased the sentencing range the district court was authorized to employ").

[4] Davis v. United States, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

[5] 543 U.S. 220 (2005).

[6] *See id.* at 223; *see, e.g.*, *Spencer II*, 773 F.3d at 1144; *Hawkins I*, 706 F.3d at 825.

[7] *See, e.g.*, *Spencer I*, 727 F.3d. at 1100.

the Eighth Circuit held that the petitioner was not entitled to challenge his erroneous career offender status since his sentence fell within the Guidelines range for the underlying crime.[8] Conversely, in *Narvaez v. United States*, the Seventh Circuit applied the same standard but explicitly rejected the argument that there was no miscarriage of justice because the petitioner's erroneous sentence still fell within the twenty-year maximum for the underlying crime.[9] Instead, the court found that "[s]peculation that the district court today might impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, Mr. Narvaez was sentenced based upon the equivalent of a nonexistent offense."[10]

For sentences conferred post-*Booker*, although there is currently no active circuit split, federal appeals courts have struggled to reach a consensus on the question, with some reversing their original decisions in favor of cognizability upon en banc rehearing.[11] Nonetheless, each of these decisions denying § 2255 review has drawn strong dissents.[12] In *Hawkins v. United States*, the Seventh Circuit argued, despite its earlier decision in favor of cognizability in *Narvaez*, that "[a]n error in the interpretation of a merely advisory guideline is less serious."[13] It further found that society's interests in finality and administrability outweighed the possibility of injustice in the form of a longer-than-necessary sentence, particularly where, in the wake of *Booker*, the judge was free to give a lower sentence at the time of the initial sentencing.[14]

By contrast, in *Spencer v. United States* (*Spencer I*), the Eleventh Circuit held that erroneous designations of the career offender status could constitute a cognizable claim under a timely first § 2255 motion, even for petitioners sentenced after *Booker*.[15] The court found that the Guidelines, although advisory, continue to play a significant role in sentencing decisions, an argument it buttressed by pointing to the Supreme Court's recent decision in *Peugh v. United States*.[16] This opinion was ultimately vacated, however, and upon rehearing en banc, the Eleventh Circuit reached the opposite conclusion,

[8] *Sun Bear*, 644 F.3d at 705.

[9] *Narvaez*, 674 F.3d at 629.

[10] *Id.*

[11] *See, e.g.*, *Spencer II*, 773 F.3d at 1132 (en banc).

[12] *See Whiteside I*, 748 F.3d 541, 556 (4th Cir. 2014) (Wilkinson, J., dissenting) ("[The majority opinion] makes a shambles of the retroactivity doctrines that long safeguarded the basic finality of criminal convictions."); *Spencer II*, 773 F.3d at 1152 (Martin, J., dissenting) ("[The majority] punishes Mr. Spencer for a mistake we made in sentencing him when neither Supreme Court precedent nor the plain language of § 2255 requires this result."); Hawkins v. United States (*Hawkins I*), 706 F.3d 820, 825 (7th Cir. 2013) (Rovner, J., dissenting) ("The majority's rationale for a different result here is illusory . . . .").

[13] *Hawkins I*, 706 F.3d at 824.

[14] *Id.* at 824-25.

[15] *Spencer I*, 727 F.3d 1076, 1088 (11th Cir. 2013).

[16] *Id.* at 1087-88; *see also* Peugh v. United States, 133 S. Ct. 2072, 2084 (2013) (referring to the guidelines as "the lodestone of sentencing," even after *Booker*).

holding instead that since Spencer's sentence fell within the statutory maximum he could not collaterally attack his sentence based on an inherent miscarriage of justice.[17]

Such decisions denying cognizability of career offender claims clearly indicate that post-*Booker* challenges face an uphill, though not impossible, battle. Division within the circuits, along with the Supreme Court's decision in *Peugh*, may provide those seeking to attack their now-improper sentence enhancements with some hope for future relief. Thus, despite the recent setbacks described above, this Note will endorse the approach taken by the Eleventh Circuit in its original decision in *Spencer I*, prior to its en banc reversal. Although the circuits that have thus far refused to find erroneous career offender sentences subject to collateral attack raise important issues of finality and administrability in defense of their approach, these concerns are both overstated and of less significance in the face of excessive, unwarranted incarceration. Rather, justice and public confidence in the judiciary's ability to accurately and fairly confer justice are the bigger-picture concerns that should garner the most weight in this context. Accordingly, this Note will, relying in part on these considerations, argue that erroneous career offender designations, even where the sentence imposed falls within the statutory maximum for the crime, should be cognizable under § 2255.

Ultimately, this Note will make the case that the Supreme Court should intervene to resolve the continuing dissention within and among the circuits regarding collateral attack on sentencing errors under § 2255 in accordance with the Eleventh Circuit's position in *Spencer I* and the Seventh Circuit's position in *Narvaez*. That is, the Court should hold that an error in the imposition of the career offender sentence enhancement is cognizable under § 2255, even for defendants whose sentences remain within the statutory maximum and who were sentenced after *Booker*. First, however, this Note will explore in Part I the history and evolution of § 2255 and the requirements for finding a claim cognizable under this provision. Part II will review the circuit split between the Seventh and Eighth Circuits regarding the pre-*Booker* cognizability of erroneous career offender claims, while Part III will explore post-*Booker* circuit court decisions on the question. In Part IV, this Note will analyze the Supreme Court's decision in *Peugh* and discuss the role of that opinion in the cognizability debate. Part V will examine policy concerns implicated by such cases, focusing in particular on judicial interests in finality within the context of sentencing errors. Parts VI and VII will argue in favor of allowing collateral attack under § 2255 on erroneous career offender sentences both pre- and post-*Booker*. In doing so, this Note will argue for a more flexible application of the miscarriage of justice standard in light of important policy considerations before concluding that the Supreme Court should adopt the standards expounded by the Seventh and Eleventh Circuits, respectively, in *Narvaez* and *Spencer I*.

[17] *Spencer II*, 773 F.3d at 1144.

I. HISTORY AND EVOLUTION OF SECTION 2255

The current language of 28 U.S.C. § 2255 provides:

> [Petitioners] 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.[18]

Congress originally enacted § 2255 in 1948 "to provide an expeditious remedy for correcting erroneous sentences (of federal prisoners) without resort to habeas corpus."[19] The purpose of § 2255, then, was essentially to create a streamlined procedure for filing petitions for sentencing review in the court in which the petitioner was originally convicted as opposed to the jurisdiction in which they are currently held in custody.[20] This allows for more convenient and administrable review of the petition because the sentencing court is already familiar with the petitioner's record and is in closer proximity to necessary witnesses and/or court officials.[21]

After its original enactment, § 2255 was not significantly amended until the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA");[22] however, the statute underwent a number of judicial modifications during the intervening period, which initially expanded and then subsequently restricted the scope of habeas review for both state and federal judgments.[23] In 1962, the Supreme Court substantially limited the broad language of § 2255 in its decision in *Hill v. United States*.[24] In *Hill*, the Court found that the defendant's claim did "not present 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent'" because it was not a jurisdictional or constitutional error, nor was it a "fundamental defect which inherently results in a complete miscarriage of justice."[25] The Court left open

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[18] 28 U.S.C. § 2255(a) (2012).

[19] Sanders v. United States, 373 U.S. 1, 12 (1963) (internal quotation marks omitted).

[20] *See* United States v. Hayman, 342 U.S. 205, 219 (1952) ("[T]he sole purpose was to minimize the difficulties . . . by affording the same rights in another and more convenient forum."); Brandon L. Garrett, *Accuracy in Sentencing*, 87 S. CAL. L. REV. 499, 524 (2014) (discussing Congress's motivation in enacting § 2255).

[21] *Hayman*, 342 U.S. at 220-21 ("The very purpose of Section 2255 is to hold any required hearing in the sentencing court because of the inconvenience of transporting court officials and other necessary witnesses to the district of confinement.").

[22] Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214.

[23] *See* Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 95-96 (2012) (describing the judicial history of § 2255 up to AEDPA amendments in 1996).

[24] 368 U.S. 424, 430 (1962).

[25] *Id.* at 428 (quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939)).

the question of what constitutes a "complete miscarriage of justice" such that it would justify the correction of a sentencing error under § 2255. The miscarriage of justice standard has since come to be known as the cognizability doctrine.[26]

In *Davis v. United States*,[27] the Supreme Court addressed the question of whether a subsequent change in substantive law making a defendant's formerly criminal behavior lawful would constitute sufficient grounds for collateral attack on the conviction.[28] The Court found that "[t]here can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255."[29] However, *Davis* also qualified its application of § 2255 by observing that "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error."[30] Thus, although the *Davis* Court did provide some guidance as to what constitutes a complete miscarriage of justice, it also narrowed the application of the cognizability doctrine to cases involving actual prejudice.

In 1996, Congress passed AEDPA, placing strict statutory limitations on the scope of relief for prisoners under § 2255. This legislation imposed a one-year statute of limitation, restricted the filing of second or successive petitions, and required that petitioners obtain a certificate of appealability.[31]

A. *Procedural Restrictions on Collateral Review*

Given these statutory restrictions and earlier common law restrictions placed on § 2255 petitions prior to the enactment of AEDPA, petitioners seeking to challenge their sentences based on a change in the law need to clear a number of procedural barriers in order to make a cognizable claim. The first of these is the one-year statute of limitation period imposed by AEDPA under § 2255(f) beginning on one of four dates, with only two dates relevant in the context of this Note. These are: (1) the date the conviction is finalized; and (2) "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized . . . and made retroactively applicable to cases on collateral review."[32] Thus, in the case where a change of law due to a

[26] *See* Russell, *supra* note 23, at 96; *see also* 2 RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 2146-49 (6th ed. 2011).

[27] 417 U.S. 333 (1974).

[28] *Id.* at 334.

[29] *Id.* at 346 (quoting *Hill*, 368 U.S. at 428).

[30] *Id.* (quoting *Hill*, 368 U.S. at 429).

[31] 28 U.S.C. §§ 2253, 2255(f), (h) (2012). AEDPA imposed even more stringent restrictions on state prisoners filing for federal relief under 28 U.S.C. § 2254 (2012).

[32] § 2255(f)(1), (3). The other two dates are "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of

decision of the Supreme Court retroactively reduces or eliminates criminal sanctions, the prisoner's petition must be filed within one year of that modification or it will be dismissed.[33]

The statute also precludes cognizable claims where the petitioner is filing a "second or successive motion."[34] Thus, if the petitioner has already filed at least one unsuccessful petition under § 2255, he or she is barred from filing additional motions unless he or she falls into one of the exceptions provided for by the statute.[35] These exceptions allow for second or successive filings only where a motion is certified by the proper federal court of appeals to contain either "newly discovered evidence" that would demonstrate the innocence of the petitioner by clear and convincing evidence when "viewed in light of the evidence as a whole" or "new rule[s] of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that [were] previously unavailable."[36]

As Professor Brandon Garrett has pointed out, following the AEDPA amendments to § 2255, the second and successive motion limitation "could be interpreted to exclude sentencing errors that are not related to the jury's determination of guilt. Some courts have held that this language bars challenges to a sentence, given the language about whether the fact finder would have found guilt."[37] However, while there is some debate as to whether such sentencing errors can ever be procedurally cognizable under § 2255, the Supreme Court's decision in *McQuiggin v. Perkins*[38] seems to indicate that this remains an open question.[39] In *McQuiggin*, the Court highlighted the fact that the AEDPA second and successive motion limitation did restrict application of the exception; however, it also signaled that "courts should not lightly assume that Congress meant to eliminate the traditional miscarriage of justice

the United States is removed, if the movant was prevented from making a motion by such governmental action" and "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." § 2255(f)(2), (4).

[33] Greg Siepel, Note, *The Wrong Kind of Innocence: Why* United States v. Begay *Warrants the Extension of "Actual Innocence" to Include Erroneous, Non-Capital Offenses*, 116 W. VA. L. REV. 665, 673-74 (2013); *see, e.g.*, Begay v. United States, 553 U.S. 137, 139 (2008) (holding that driving under the influence of alcohol is not a violent felony under the ACCA and therefore the "armed career criminal" sentencing enhancement does not apply to the petitioner).

[34] § 2255(h).

[35] *Id*.

[36] § 2255(h)(1), (2).

[37] Garrett, *supra* note 20, at 530; *see also* § 2255(h)(1) (barring second or successive motions in the absence of "newly discovered evidence that . . . establish[es] . . . *no reasonable factfinder would have found the movant guilty of the offense*" (emphasis added)).

[38] 133 S. Ct. 1924 (2013).

[39] *See id.* at 1932 ("The miscarriage of justice exception, our decisions bear out, survived AEDPA's passage."); *see also* Garrett, *supra* note 20, at 530-31.

exception."[40] Thus, to read the limitation as a per se bar on all second or successive motions for sentencing errors appears to be an overly restrictive interpretation of the AEDPA amendments to § 2255, and many courts have, in fact, declined to apply such a narrow reading.[41]

Finally, and somewhat related to the second or successive motion limitation, is the procedural default rule, which bars § 2255 claims for petitioners who fail to raise their claims on direct appeal before applying for collateral review of the alleged error.[42] This rule "is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments."[43]

B. *Retroactivity and Sentencing Errors*

A number of recent Supreme Court decisions have raised significant questions as to the cognizability of claims relating to sentencing errors under § 2255. In *Johnson v. United States*,[44] *Chambers v. United States*, and *Begay v. United States*, the Court looked at the scope of the "violent felony" definition in the Armed Career Criminal Act of 1984 ("ACCA").[45] Under the ACCA, a defendant convicted of illegal possession of a firearm, as defined by 18 U.S.C. § 922(g), and who has three prior convictions for violent felonies and/or drug offenses, will be sentenced to a minimum fifteen years imprisonment.[46] In each of these cases, the Court narrowed the definition of violent felony and, in doing

[40] Garrett, *supra* note 20, at 530-31; *see also McQuiggin*, 133 S. Ct. at 1933.

[41] *See, e.g.*, Narvaez v. United States, 674 F.3d 621, 627-28 (7th Cir. 2011).

[42] Massaro v. United States, 538 U.S. 500, 504 (2003); *see also* Bousley v. United States, 523 U.S. 614, 621 (1998) ("[T]he voluntariness and intelligence of a guilty plea can be attacked on collateral review only if first challenged on direct review. Habeas review is an extraordinary remedy and 'will not be allowed to do service for an appeal.'" (quoting Reed v. Farley, 512 U.S. 339, 354 (1994))); United States v. Frady, 456 U.S. 152, 165 (1982) ("It has . . . long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." (internal quotation marks omitted) (quoting United States v. Addonizio, 442 U.S. 178, 184 (1979))); Siepel, *supra* note 33, at 673 ("A prisoner seeking to challenge his *Begay*-type claim is required to raise his claim on direct appeal before he raises the claim on collateral review.").

[43] *Massaro*, 538 U.S. at 504.

[44] 559 U.S. 133 (2010).

[45] *Id.* at 144; Chambers v. United States, 555 U.S. 122, 130 (2009); Begay v. United States, 553 U.S. 137, 148 (2008).

[46] 18 U.S.C. § 924(e)(1) (2012) ("In the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years . . . .").

so, moved certain defendants who had previously fallen within the scope of the statute outside its newly restricted reach.[47]

The implications of these three decisions extend beyond firearms convictions under the ACCA. Like the ACCA, the Federal Sentencing Guidelines impose heightened sentences on certain repeat offenders, known as "career offenders."[48] To qualify as a career offender under the Guidelines, a defendant must be at least eighteen at the time of the instant offense, the offense must be a "felony that is either a crime of violence or a controlled substance offense," and the offender must have "at least two prior felony convictions of either a crime of violence or a controlled substance offense."[49] The term "crime of violence" is defined in the Guidelines very similarly to "violent felony" under the ACCA; thus courts tend to apply *Johnson*, *Chambers*, and *Begay* to cases involving the Sentencing Guidelines as well.[50]

Given the requirement under § 2255(f)(3) that Supreme Court decisions must be retroactive for the provision to apply, it is essential to address the question of whether these cases apply retroactively.[51] Retroactivity of a Supreme Court decision is determined by asking whether the rule is substantive or procedural in nature.[52] In the context of § 2255 motions, the Supreme Court has not addressed whether its classic retroactivity analysis, set

[47] For a discussion of *Johnson*, *Chambers*, and *Begay*, see Douglas J. Bench, Jr., *Collateral Review of Career Offender Sentences: The Case for Coram Nobis*, 45 U. MICH. J.L. REFORM 155, 159-65 (2011).

[48] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2014).

[49] *Id.*

[50] *Compare* 18 U.S.C. § 924(e)(2)(B) (2012) ("'[V]iolent felony' means any crime punishable by imprisonment for a term exceeding one year . . . that has an element the use, attempted use, or threatened use of physical force . . . or is burglary, arson, or extortion, involves use of explosives, or . . . presents a serious potential risk of physical injury to another . . . ."), *with* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a)(1) (U.S. SENTENCING COMM'N 2014) ("The term 'crime of violence' means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that has as an element the use, attempted use, or threatened use of physical force against the person of another . . . ."). *See, e.g.*, United States v. Peterson, 629 F.3d 432, 439 (4th Cir. 2011) (applying *Begay* to Sentencing Guidelines case); United States v. Womack, 610 F.3d 427, 433 (7th Cir. 2010) (interpreting "crime of violence" in Sentencing Guidelines coterminously with "violent felony" under ACCA); United States v. Templeton, 543 F.3d 378, 380-81 (7th Cir. 2008) (applying *Begay* and *Chambers* to Sentencing Guidelines case); United States v. Tiger, 538 F.3d 1297, 1298 (10th Cir. 2008) (finding Sentencing Guidelines' definition of "crime of violence" to be "virtually identical to that contained in the ACCA").

[51] 28 U.S.C. § 2255(f)(3) (2012); *see, e.g.*, Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010); United States v. Shipp, 589 F.3d 1084, 1089 (10th Cir. 2009) (holding that *Chambers* introduced a substantive rule and therefore applies retroactively).

[52] Bousely v. United States, 523 U.S. 614, 620-21 (1998).

forth in *Teague v. Lane*,[53] applies; however, federal appellate courts that have addressed the issue directly have held that it does.[54] Under this framework, substantive rules generally "include[] decisions that narrow the scope of a criminal statute by interpreting its terms, as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish."[55] Therefore, the Supreme Court's narrowing of the ACCA's definition of "violent felony" per *Johnson*, *Chambers*, and *Begay* would appear to be substantive in the context of career offender sentencing errors that rise to the level of a complete miscarriage of justice since "[p]eople sentenced under prior circuit precedent are serving sentences 'that the law cannot impose' on them under *Begay's* holding."[56] Nonetheless, there is no clear consensus among federal circuit courts as to whether these cases should apply retroactively.[57] The answer to the question of retroactivity will determine the outcome of many § 2255 motions filed by petitioners who were designated career offenders before the Supreme Court first addressed the definition of a violent felony in *Begay*, but who, under the new, narrower definition, would not fall within that statutory designation.

Despite this lack of complete, unambiguous accord on the matter of retroactivity, most courts nonetheless seem to accept that *Teague*'s

[53] 489 U.S. 288, 311 (1989) (holding that new rules of criminal procedure do not apply retroactively to cases; only substantive rules apply retroactively); *see also* Schriro v. Summerlin, 542 U.S. 348, 351 (2004) (holding that *Teague*'s retroactivity analysis applies in capital sentencing); Varela v. United States, 400 F.3d 864, 867 (11th Cir. 2005) (applying *Teague* analysis in non-capital sentencing context).

[54] Russell, *supra* note 23, at 102-03, 103 n.152 (noting that the Eleventh, First, and Sixth Circuits have found *Teague* applicable to § 2255 motions).

[55] *Schriro*, 542 U.S. at 351-52 (citations omitted).

[56] *See* Russell, *supra* note 23, at 100-03 (quoting *Schriro*, 542 U.S. at 352) (arguing that *Teague* does not preclude retroactive application of *Begay*).

[57] *See* Jones v. United States, 689 F.3d 621, 625 (6th Cir. 2012) (finding *Begay* to articulate a substantive, not a procedural, rule); Narvaez v. United States, 674 F.3d 621, 625 (7th Cir. 2011) (finding *Begay* and *Chambers* to apply retroactively on collateral review); United States v. Shipp, 589 F.3d 1084, 1089 (10th Cir. 2009) (finding that *Chambers* introduced substantive rules that generally apply retroactively). *But see Spencer I*, 727 F.3d 1076, 1096 (11th Cir. 2013), *vacated en banc Spencer II*, 773 F.3d 1132 (11th Cir. 2014) (accepting retroactivity of *Begay*); Sun Bear v. United States, 644 F.3d 700, 703-04 (8th Cir. 2011) (declining to reach the question of retroactivity despite previously accepting retroactive application of *Begay*); Gilbert v. United States (*Gilbert I*), 609 F.3d 1159, 1165 (11th Cir. 2010), *vacated en banc*, 640 F.3d 1293, 1323 (11th Cir. 2011) (vacating opinion accepting retroactivity of *Begay* and declining to reach retroactivity question). Additionally, though not explicitly deciding the issue, both the Fourth and First Circuits addressed the question, but came to opposite conclusions on the matter. *See* United States v. Williams, 396 F. App'x 951, 952 (4th Cir. 2010) (remanding for resentencing following Supreme Court's decision in *Begay*); United States v. Giggey, 551 F.3d 27, 36 n.3 (1st Cir. 2008) (noting no retroactive effect following recent Supreme Court interpretations narrowing scope of ACCA offenses).

substantiveness standard is met here. Thus, though the question of retroactivity is central to the outcome of § 2255 motions challenging career offender status designations, this Note will assume the retroactivity of *Johnson*, *Chambers*, and *Begay* for purposes of the ensuing analysis and will instead focus primarily on whether sentencing errors falling within the statutory maximum can rise to the level of a complete miscarriage of justice. In the next two Parts, this Note will explore the split that has developed among the circuits for sentences conferred pre-*Booker*, the lingering uncertainty of § 2255's applicability for sentences handed down post-*Booker*, and the reasoning behind courts' disparate treatment of erroneous career offender designations.

II. PRE-*BOOKER* COGNIZABILITY

A great deal of controversy has surfaced in recent years as to the cognizability of non-constitutional, non-jurisdictional claims raised under § 2255 within the Seventh, Eighth, and Eleventh Circuits, among others. This uncertainty focuses in particular on claims raised by defendants who received enhanced sentences under the Guidelines as career offenders, but whose status as such has since been called into question by the Supreme Court's narrowing of the definition of violent felonies.[58] To be cognizable under § 2255 in such cases, the alleged error must rise to the level of a "complete miscarriage of justice."[59] Courts tend to agree that such claims are cognizable for pre-*Booker* challenges where the erroneous sentence enhancement moves the defendant above the statutory maximum for the crime.[60] The real disagreement occurs where the defendant's sentence falls below the maximum sentence even with the wrongfully imposed enhancement.[61]

Following the Supreme Court's decision in *Begay*, the Seventh Circuit first addressed the question of cognizability of a § 2255 motion for an erroneous

[58] *See* Johnson v. United States, 559 U.S. 133, 141-42 (2010) (holding that prior battery conviction did not constitute a violent felony under the ACCA); Chambers v. United States, 555 U.S. 122, 130 (2009) (holding that walkaway escapes are not violent felonies under the ACCA); Begay v. United States, 553 U.S. 137, 148 (2008) (clarifying the definition of "violent felony" under the ACCA).

[59] United States v. Addonizio, 442 U.S. 178, 185 (1979) ("[A]n error of law does not provide a basis for collateral attack unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" (quoting Hill v. United States, 368 U.S. 424, 428 (1962))).

[60] Russell, *supra* note 23, at 106; *see Narvaez*, 674 F.3d at 627 (discussing applicability of § 2255 for defendants whose sentence is above statutory maximum); Welch v. United States, 604 F.3d 408, 412-13 (7th Cir. 2010) (finding cognizable § 2255 claim where subsequent change in law reduced statutory maximum below sentence imposed).

[61] *Compare Narvaez*, 674 F.3d at 629 ("The fact that Mr. Narvaez's sentence falls below the applicable statutory-maximum sentence is not alone determinative of whether a miscarriage of justice has occurred."), *with Sun Bear*, 644 F.3d at 705-06 (finding no miscarriage of justice where sentence falls within statutory maximum).

designation of the career offender status in *Narvaez v. United States*.[62] In *Narvaez*, the defendant was sentenced under section 4B1.1 of the then-mandatory Sentencing Guidelines as a career offender, increasing his sentencing range from 100-125 months to 151-188 months.[63] Two of the three convictions that qualified Narvaez for the career offender enhancement were for non-violent escape attempts, which the Seventh Circuit found to fall within the scope of the Supreme Court's decisions in *Begay* and *Chambers*.[64] As a result, such crimes also fell outside the ACCA's definition of "violent felony" and, by extension, outside the Guidelines' definition of "crime of violence."[65] The court found that *Begay* and *Chambers* apply retroactively,[66] that the defendant filed a timely motion within one year of the Supreme Court's decisions in *Begay* and *Chambers*,[67] and that his claim qualified him to obtain a certificate of appealability.[68] Narvaez therefore met all of the procedural requirements necessary to advance his petition for § 2255 relief.

Though recognizing that sentencing errors typically cannot rise to the level of a miscarriage of justice under § 2255, particularly when they are not raised on direct appeal, the court found that Narvaez's claim represented a narrow exception to this rule due to a post-conviction change of law by the Supreme Court with retroactive applicability.[69] In light of this determination, the court applied the miscarriage of justice standard to Narvaez's erroneous career offender designation, acknowledging that much of the precedent applying this standard typically provided collateral relief only where the defendant was actually innocent of the underlying crime.[70] The court nonetheless extended the reasoning of those precedents to cover the circumstances present in *Narvaez*.[71]

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[62] 674 F.3d at 623.

[63] *Id.* at 623-34.

[64] *Id.* at 624 ("[F]ailure to report was a 'passive' offense that did not inherently involve conduct presenting 'a serious potential risk of physical injury to another' . . . .").

[65] *Id.* (quoting Chambers v. United States, 555 U.S. 122, 130 (2009) (internal quotation marks omitted)).

[66] *Id.* at 625-26.

[67] *Id.* at 625; *see* 28 U.S.C. § 2255(f)(3) (2012) (stating that defendants must file within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review").

[68] *Narvaez*, 674 F.3d at 626-27 (finding erroneous career offender designation leading to enhanced sentence raises claims of denial of a constitutional right); *see also* 28 U.S.C. § 2253(c)(2) (2012) (requiring applicants for certificates of appealability to make "a substantial showing of the denial of a constitutional right").

[69] *Narvaez*, 674 F.3d at 627 ("A postconviction clarification in the law has rendered the sentencing court's decision unlawful.").

[70] *Id.* at 628.

[71] *See id.* ("Although these cases provide collateral relief when a defendant is innocent of the underlying crime, we believe that reasoning extends to this case, where a post-

Because Narvaez's sentence was imposed while the Guidelines were still mandatory, the sentencing court was required to increase the sentence range given to the defendant.[72] The court rejected the government's arguments that because Narvaez's enhanced sentence fell within the twenty-year maximum established for his crime, the career offender categorization did not warrant relief under § 2255.[73] Narvaez's below-maximum sentence was not determinative since his erroneous designation as a career offender "branded [him] as a malefactor . . . [and] created a legal presumption that he was to be treated differently from other offenders because he belonged in a special category reserved for the violent and incorrigible."[74] The *Narvaez* court also rejected the argument that a sentencing court's authority to reimpose the same sentence should bar appellate relief, stating that "[s]peculation that the district court today might impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, Mr. Narvaez was sentenced based upon the equivalent of a nonexistent offense."[75] As a result, the Seventh Circuit held that the sentencing error at issue constituted a miscarriage of justice that illegally enhanced the defendant's sentence beyond the mandated Guidelines range, "go[ing] to the fundamental legality of his sentence . . . [and] entitling him to relief."[76]

The Eighth Circuit's deeply divided decision in *Sun Bear* marks a stark contrast to the conclusions drawn by the Seventh Circuit in *Narvaez*.[77] Like Narvaez, the defendant in *Sun Bear* challenged his career offender designation, which had increased his sentence from the 292-365 month range[78] to 360 months to life, on the premise that *Begay* retroactively made the enhancement inapplicable to his case.[79] Like the *Narvaez* court, the Eighth Circuit applied

conviction Supreme Court ruling made clear that Mr. Narvaez was not eligible for the categorization of violent offender wrongfully imposed upon him.").

[72] *Id.* at 624; *see also* U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (U.S. SENTENCING COMM'N 2014).

[73] *Narvaez*, 674 F.3d at 629.

[74] *Id.*

[75] *Id.*

[76] *Id.* at 630 (remanding with instructions to resentence the defendant without a career offender enhancement). The sentence still fell within the twenty-year statutory maximum for the crime, however. *Id.* at 629.

[77] Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011). Sitting en banc, the *Sun Bear* court was almost evenly split, reaching its ultimate decision by a 6-5 vote. *Id.* at 701.

[78] *Id.* at 701-02. This sentencing range had already been adjusted upward three levels at the discretion of the district court based on Sun Bear's violent criminal history. *Id.*

[79] *Id.*at 702. In rejecting Sun Bear's § 2255 motion and vacating its prior holding in the case, the Eighth Circuit, sitting en banc, rejected an earlier panel's decision that *Teague* applied to make *Begay* retroactively applicable to career offender designations. The court instead declined to address the question of retroactivity by basing its decision on the question of cognizability. In doing so, however, the court affirmed the district court's

Hill and *Davis*'s miscarriage of justice standard to the sentencing error at issue in *Sun Bear*.[80] Unlike the Seventh Circuit, however, the *Sun Bear* court found that a sentencing error could not rise to the level of a complete miscarriage of justice unless that error imposed a sentence above the statutory maximum.[81] Significantly, Sun Bear had received a sentence of 360 months, which had the anomalous effect of placing him within *both* the original Guidelines range and the enhanced range at the same time.[82] The court reasoned that since "the same 360-month sentence could be reimposed were Sun Bear granted the § 2255 relief he requests . . . no miscarriage of justice is at issue."[83] Because the underlying conduct that resulted in Sun Bear's conviction and sentence remained untouched by the change in law wrought by *Begay*, the sentence remained lawful in the absence of a showing of actual innocence.[84] The Eighth Circuit, then, clearly rejected *Narvaez*'s contention that erroneously classifying defendants as career offenders and therefore increasing "the point of departure for [their] sentence[s] is . . . as serious as the most grievous misinformation that has been the basis for granting habeas relief."[85] Instead, the court seemed to imply that a miscarriage of justice can only occur in the sentencing context where resentencing would unquestionably result in a reduced sentence—i.e., where there is no overlap between the sentence actually imposed and the correct, unenhanced sentencing range.

decision finding Sun Bear's motion untimely based on its determination that *Begay* did not apply retroactively to cases on collateral review. *Id.* at 703-05.

[80] *Id.* at 704-05 (finding no precedent for finding a complete miscarriage of justice cognizable under § 2255 in cases involving misapplication of Sentencing Guidelines).

[81] *See id.* at 705 ("An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority.").

[82] *Id.* at 701-02.

[83] *Id.* at 705.

[84] *See id.* at 705-06 ("'[T]he miscarriage-of-justice exception to the rule against relitigating matters decided on direct appeal' applies 'only when petitioners have produced convincing new evidence of actual innocence'; new evidence that defendant was 'actually innocent of the sentence imposed' would not be sufficient because 'the actual-innocence exception does not apply to noncapital sentences.'" (quoting United States v. Wiley, 245 F.3d 750, 752 (8th Cir. 2001))). Circuits are split on whether the actual innocence standard applies to noncapital sentences. *Compare id.* (finding that actual innocence does not apply to noncapital sentencing), *with* Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 171 (2d Cir. 2000) (finding that actual innocence exception may apply to noncapital sentencing). The Supreme Court declined to resolve this issue. *See* Dretke v. Haley, 541 U.S. 386, 393-94 (2004) (declining to address question of noncapital application of actual innocence exception and holding "that a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default").

[85] Narvaez v. United States, 674 F.3d 621, 629 (7th Cir. 2011).

By contrast, the dissent in *Sun Bear* seems to echo the *Narvaez* court, contending that Sun Bear's claim was cognizable under § 2255.[86] Judge Melloy, like the *Narvaez* court, acknowledged the fact that "run-of-the-mill" errors in sentencing are not cognizable, but argued instead that this was not an ordinary sentencing error.[87] Though Judge Melloy did not provide a definition for run-of-the-mill errors, his emphasis on the fact that Sun Bear met all procedural requirements of § 2255 and on the need to address demands of justice in making this determination indicates that his understanding of run-of-the-mill errors encompasses (somewhat circularly) all those procedurally valid errors that fail to rise to the level of a miscarriage of justice.[88]

III. POST-*BOOKER* COGNIZABILITY

This disagreement between the circuits is further complicated by the question of how the Supreme Court's decision in *Booker* affects the § 2255 cognizability analysis for those defendants sentenced after this judgment.[89] *Booker* made the formerly mandatory Federal Sentencing Guidelines merely advisory, holding that mandatory application would result in a violation of the Sixth Amendment.[90] However, even after *Booker*, district courts must still consider the Guidelines when sentencing as one of several factors listed in 18 U.S.C. § 3553(a).[91] Subsequent Supreme Court decisions have expanded on the manner in which the newly advisory Guidelines should be implemented.[92] For example, *Gall v. United States* made clear that, though the Guidelines remain "the starting point and the initial benchmark," they should not be considered in isolation or be presumed reasonable.[93] Following this line of decisions, "sentencing court[s] must first calculate the Guidelines range, and then consider what sentence is appropriate for the individual defendant in light

[86] *See Sun Bear*, 644 F.3d at 707 (Melloy, J., dissenting) ("[I]t is not clear the error below was harmless, and Sun Bear . . . diligently pressed his correct interpretation of the law at every available opportunity. It is 'inconsistent with the rudimentary demands of fair procedure,' and therefore amounts to a miscarriage of justice . . . ." (citations omitted) (quoting Hill v. United States, 368 U.S. 424, 428 (1962))).

[87] *Id.*

[88] *Id.*

[89] United States v. Booker, 543 U.S. 220, 226-27 (2005).

[90] *Id.* at 232-34.

[91] 18 U.S.C. § 3553(a) (2012) (listing seven factors for consideration in imposing a sentence); *Booker*, 543 U.S. at 259-60 ("Without the 'mandatory' provision, the Act nonetheless requires judges to take account of the Guidelines together with other sentencing goals.").

[92] *See* Nelson v. United States, 555 U.S. 350, 352 (2009); Gall v. United States, 552 U.S. 38, 41 (2007).

[93] *Gall*, 552 U.S. at 49-50 (stating that the sentencing court "must make an individualized assessment based on the facts presented"); *see also Nelson*, 555 U.S. at 352 (describing continuing impact and limitations of post-*Booker* Guidelines).

of the statutory sentencing factors, 18 U.S.C. § 3553(a), explaining any variance from the former with reference to the latter."[94] Thus, while the Sentencing Guidelines are no longer mandatory, they are far from irrelevant.

When first faced with the issue of § 2255 cognizability of erroneous career offender sentences post-*Booker*, the Seventh Circuit held in *Hawkins I* that under merely advisory Guidelines, such error did not constitute a cognizable claim.[95] In *Hawkins I*, the defendant was sentenced to 151 months imprisonment, significantly above the applicable Guidelines range of 15 to 21 months without the career offender enhancement, but still below the statutory maximum of 20 years.[96] In reaching this decision, the court found correct calculation of the Guideline range "less important now that the guidelines, including the career offender guideline, are merely advisory . . . ."[97] Because the Guidelines are no longer mandatory, Judge Posner reasoned, it can no longer be argued that sentences below the statutory maximum are imposed in excess of that authorized by law.[98] The court supported its conclusion that errors in sentencing cannot rise to the level of miscarriage of justice under advisory Guidelines, even in cases of such extreme departure from the correct Guidelines range, by pointing to concerns regarding the administrability of resentencing such cases.[99] In light of these considerations and in the interest of finality in sentencing, the Seventh Circuit narrowed its holding in *Narvaez* to apply only to sentences imposed prior to *Booker*, that is, only to those sentences exceeding either the statutory maximum or a mandatory Guidelines ceiling.[100]

In dissent, Judge Rovner found the majority's rationale for distinguishing *Hawkins* from *Narvaez* "illusory."[101] Specifically, Rovner argued that the

[94] Anjelica Cappellino & John Meringolo, *The Federal Sentencing Guidelines and the Pursuit of Fair and Just Sentences*, 77 ALB. L. REV. 771, 781 (2013-2014) (quoting *Nelson*, 555 U.S. at 351).

[95] *Hawkins I*, 706 F.3d 820, 823 (7th Cir. 2013), *opinion supplemented on denial of reh'g*, *Hawkins II*, 724 F.3d 915 (7th Cir. 2013).

[96] *Id.* at 821. It is unclear whether the defendant's Guidelines range would have been 15 to 21 months or 24 to 30 months without the sentence enhancement since the district judge found it unnecessary to decide in light of the defendant's career offender status. *Id.*

[97] *Id.* at 822-23 (citation omitted).

[98] *Id.* at 823. The court drew from the language of § 2255(a) in reaching this conclusion: "A prisoner in custody under sentence of a court . . . claiming the right to be released upon the ground that . . . the sentence was in excess of *the maximum authorized by law* . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a) (2012) (emphasis added).

[99] *See Hawkins I*, 706 F.3d at 824 (acknowledging that resentencing is not as burdensome as retrial, but finding nonetheless that "it is a burden, and the cumulative burden of resentencing in a great many stale cases could be considerable").

[100] *See id.* at 824-25 (declining to extend *Narvaez* to cover post-*Booker* sentencing errors).

[101] *Id.* at 825 (Rovner, J., dissenting).

miscarriage of justice identified by the *Narvaez* court was actually the "branding of 'career offender.' Such a label, in addition to creating a legal presumption of incorrigibility (or perhaps because of it), increased dramatically the point of departure for the sentence."[102] In this case, the error led to prejudice to the defendant by increasing the baseline sentencing range by over a hundred months in excess of the starting point without the career offender enhancement.[103] As a result, the sentencing judge imposed a sentence "through career-offender tinted glasses," therefore anchoring the judge in a higher range.[104] Since, even after *Booker*, district courts are still *required* to begin the sentencing process by calculating the correct Guidelines range, and since the sentencing error arose out of this initial calculation, *Hawkins* cannot be distinguished from *Narvaez*.[105] For Judge Rovner, then, it would appear that *any* error in calculating the initial Guidelines range resulting in a higher base sentence could constitute a miscarriage of justice. In the case of *Hawkins*, where the error led to such an extreme departure from the correct starting range, the miscarriage is merely more egregious.

The Seventh Circuit subsequently released a supplementary opinion explaining its decision not to rehear *Hawkins* despite the Supreme Court's seemingly contrary decision in *Peugh v. United States*.[106] In *Peugh*, the Supreme Court held that, even for advisory Guidelines, "[a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation."[107] The Seventh Circuit reasoned that *Hawkins*, unlike *Peugh*, was not an unconstitutional error since Hawkins's sentence did not exceed the statutory maximum, nor did it implicate the Ex Post Facto Clause.[108] This characterization removes any Guidelines error that results in a sentence below the statutory maximum from *Peugh*'s purview. Thus, such errors cannot constitute a miscarriage of justice despite *Peugh*'s recognition on direct appeal that an error in calculating the advisory Guidelines range can invalidate erroneous sentences.[109]

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[102] *Id.* at 826.

[103] *Id.* at 827.

[104] *Id.*

[105] *Id.* at 826-27. In *Narvaez*, the court rejected arguments against finding the defendant's claim cognizable on the basis that the same sentence might be re-imposed even without the career offender enhancement, finding that such arguments could not "overcome the fact that . . . Mr. Narvaez was sentenced based upon the equivalent of a nonexistent offense." Narvaez v. United States, 674 F.3d 621, 629 (7th Cir. 2011).

[106] *Hawkins II*, 724 F.3d 915 (7th Cir. 2013).

[107] Peugh v. United States, 133 S. Ct. 2072, 2084 (2013); *see also infra* Part IV.

[108] *Hawkins II*, 724 F.3d at 917 (distinguishing *Peugh* from the case at hand because it involved constitutional errors governed by different legal standards).

[109] *See id.* ("*Peugh* tells us only that the advisory nature of the guidelines in the present era, the *Booker* era, which allows the sentencing judge broad discretion, nevertheless does

Judge Rovner again dissented, arguing for broad application of the Supreme Court's reasoning in *Peugh* and stressing the significance of *Peugh*'s confirmation of the anchoring effects of the Guidelines and its introduction of empirical evidence to that effect.[110] In the context of collateral attack, *Peugh*, though decided on direct appeal, suggests that an error in calculating an advisory Guidelines range that leads to actual harm to the defendant *could* rise to the level of a miscarriage of justice, even where the statutory maximum has not been exceeded, given the *Peugh* Court's focus on prejudice to the defendant in reaching its decision and given the similar effects of retroactive reductions in sentences in both contexts.[111] By extension, then, Hawkins's sentence, though within the statutory maximum, was nonetheless a cognizable miscarriage of justice since he almost certainly suffered actual harm in the form of eleven additional years of incarceration because the district court miscalculated his Guidelines starting point.[112] Though Hawkins could have been sentenced to a similar span under the post-*Booker* discretionary sentencing regime, the unwarranted severity of the sentence, paired with *Peugh*'s account of courts' continued adherence to the Guidelines, indicates that, minus the erroneous career offender designation, Hawkins would have received a much reduced sentence.

In contrast to the Seventh Circuit's decision, the Eleventh Circuit initially adopted an approach similar to Judge Rovner's pointed dissents in the *Hawkins* opinions. In *Spencer v. United States* (*Spencer I*), the Eleventh Circuit, basing its decision partially on *Johnson*, found that § 2255 motions could provide relief, if timely filed, for career offender sentencing errors.[113] In reaching this conclusion, the *Spencer I* Court explicitly considered, and ultimately rejected, the approaches adopted by the Eighth and Seventh Circuits in *Sun Bear* and *Hawkins*.[114] The court distinguished *Sun Bear* by pointing out that the enhanced sentence imposed on Sun Bear as a result of his career offender

not excuse *constitutional* violations arising from the judge's miscalculating the applicable guideline.").

[110] *Id.* at 920 (Rovner, J., dissenting); *see also Peugh*, 133 S. Ct. at 2084 ("[T]he Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it."); U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF UNITED STATES V. BOOKER ON FEDERAL SENTENCING, Part A, 60-68 (2012), http://sentencing.typepad.com/files/part-a---continuing-impact-of-booker-on-federal-sentencing.pdf [http://perma.cc/2SXG-4AVS] [hereinafter BOOKER REPORT].

[111] *Cf. Peugh*, 133 S. Ct. at 2086 (arguing that errors in calculating Guidelines range may constitute ex post facto violations even where statutory maximum remains unchanged); *see also infra* Part IV.

[112] *Hawkins I*, 706 F.3d at 821 (explaining that Hawkin's sentence was 151 months instead of a possible 21 months).

[113] *Spencer I*, 727 F.3d 1076, 1085 (11th Cir. 2013).

[114] *Id.* at 1085-87. The *Spencer I* court did note, however, that those cases would likely have been procedurally barred from § 2255 relief despite its belief that they were otherwise cognizable. *Id.* at 1087.

status was still within the same Guideline range as would have been imposed without the enhancement.[115] For this reason, Sun Bear's claim that his erroneously imposed sentence enhancement constituted a complete miscarriage of justice was considerably diminished.[116]

In discussing the Seventh Circuit's rulings on the issue, the Eleventh Circuit agreed with Judge Rovner that the Guidelines, though no longer mandatory, remain central to the substantive rather than the procedural law of federal sentencing.[117] In short, the court found, contrary to Judge Posner's opinion in *Hawkins I*, that a post-*Booker* "Guideline sentencing error can be serious" *if* it amounts to a complete miscarriage of justice.[118] Since the erroneous career offender status effectively doubled Spencer's sentence to 151 months, the enhancement imposed a "particularly severe punishment" that amounted to actual prejudice, as required by *Davis*, and thus created an inherent miscarriage of justice requiring post-conviction relief.[119] For the Eleventh Circuit, then, a miscarriage of justice occurred where the sentence imposed in error not only fell outside the Guidelines range that would otherwise apply, but where the additional time added to the sentence resulted in a significant departure leading to a "particularly severe punishment" as well.[120]

The Eleventh Circuit later vacated its initial opinion, however, and granted a rehearing en banc. The court reversed its earlier ruling in a 5-4 split opinion in *Spencer II*, holding instead that Spencer could not collaterally attack his sentence based on a misapplication of the career offender enhancement because his sentence fell within the statutory maximum.[121] Rather, a federal prisoner could not collaterally attack a sentence imposed below the statutory maximum unless he or she could prove actual innocence or vacation of a prior sentence-enhancing offense; otherwise, the sentencing error would not meet

[115] *Id.* at 1086.

[116] *Id.*

[117] *See id.* at 1087 ("The Seventh Circuit may think that mistakenly categorizing a defendant as a career offender became not very serious once *Booker* made the Guidelines advisory, but the Supreme Court told us [in *Peugh*] . . . that the Guidelines are still 'the lodestone of sentencing.'" (quoting Peugh v. United States, 133 S. Ct. 2072, 2084 (2013))).

[118] *Id.* at 1088.

[119] *Id.* at 1089 (quoting Buford v. United States, 532 U.S. 59, 60 (2001) (internal quotations omitted)); *see also* Davis v. United States, 417 U.S. 333, 346 (1974) (introducing actual prejudice requirement for § 2255 relief). The Court's discussion here also helps contextualize Judge Melloy's otherwise circular understanding of the miscarriage of justice standard. *See supra* note 88 and accompanying text.

[120] *Spencer I*, 727 F.3d at 1089 (quoting Buford, 532 U.S. at 60 (internal quotations omitted)) (arguing that a miscarriage of justice results when a sentence is doubled as a result of the erroneous career offender enhancement).

[121] *Spencer II*, 773 F.3d 1132, 1135 (11th Cir. 2014). The court also determined that Spencer's certificate of appealability was defective since it failed to show the denial of a constitutional right, but the court nonetheless exercised its discretion to reach the merits of the case. *Id.* at 1137-38.

the complete miscarriage of justice standard.[122] Spencer's underlying conviction no longer qualified as a violent crime, but his conviction remained valid; therefore, he did not have a cognizable § 2255 claim.[123]

Four judges wrote separate dissents in *Spencer II*, and all four agreed that a "lawful" sentence did not create an automatic bar to the cognizability of career offender sentencing errors.[124] All four dissenters argued, contrary to the majority's conclusion, that a miscarriage of justice does not require vacation of an underlying conviction or that the sentence imposed be above the statutory maximum for the crime.[125] For instance, Judge Wilson conceptualized the miscarriage of justice standard as "reserved for those rare instances like this one when a person's individual freedom is at stake."[126] Here, given the unlikelihood that Spencer would receive such a severe sentence without the career offender designation, Spencer was deprived of freedom for the period of his sentence attributable to that enhancement and thus suffered exceptional prejudice warranting relief under § 2255.[127] Though Judge Wilson does not identify a specific excess period that would in all cases rise to the level of miscarriage of justice, like the majority in *Spencer I*, he did find that a sentence

[122] *Id.* at 1139.

[123] *See id.* at 1140-41 (finding that erroneous classification as a career offender alone is not sufficient prejudice to warrant a finding of complete miscarriage of justice where the sentence falls within the statutory maximum for the crime after *Booker*). Additionally, the majority rejected what it viewed as an overreliance on *Peugh* by the dissenters, finding that while Spencer may meet *Peugh*'s "sufficient risk of a higher sentence" standard, he did not meet the higher bar of the complete miscarriage of justice standard required of a § 2255 motion, as defined by the Eleventh Circuit. *Id.* at 1142-44 (citation omitted).

[124] *E.g.*, *id.* at 1145, 1146-47 (Wilson, J., dissenting). "Lawful" in this context refers to sentences falling within the maximum allowed by statute for a given crime. *Id.* at 1145.

[125] *See id.* (arguing that the additional six years added to Spencer's "lawful" sentence as a result of the career offender enhancement can amount to a miscarriage of justice); *id.* at 1152-53 (Martin, J., dissenting) ("It seems to me to draw an arbitrary line to say (on the one hand) that a prisoner may use § 2255 to collaterally attack his career offender status if that prior conviction has been vacated, but not (on the other) if that same prior conviction was never a qualifying conviction in the first place . . . ." (citations omitted)); *id.* at 1160 (Jordan, J., dissenting) ("There is no principled reason for allowing § 2255 review of a career offender sentence where a prior conviction has been vacated post-sentencing, while at the same time precluding § 2255 review of a career offender sentence where a prior conviction, due to a retroactive change in Supreme Court precedent, no longer constitutes a predicate offense."); *id.* at 1174-80 (Rosenbaum, J., dissenting) ("Spencer could not have had his 'crime of violence' predicate conviction vacated because he was never convicted of or pled guilty to such a crime in the first place. As in *Johnson*, the 'fact' upon which the sentencing court relied to conclude that Spencer was a career offender was effectively a legal nullity, resulting in an erroneous application of the Sentencing Guidelines.").

[126] *Id.* at 1148 (Wilson, J., dissenting).

[127] *Id.*

which doubles as a result of the career offender enhancement meets this standard.[128]

Judges Martin and Rosenbaum, on the other hand, both took particular issue with the majority's emphasis on the distinction between legal and factual innocence when the language of § 2255 itself does not speak to such partitioning.[129] Such a distinction is arbitrary given that, under the majority's reasoning, "a prisoner may use § 2255 to collaterally attack his career offender status if that prior conviction has been vacated but not . . . if that same prior conviction was never a qualifying conviction in the first place . . . ."[130] Thus, for these dissenters, because the erroneously imposed enhancement is the legal equivalent of an enhancement for a vacated underlying conviction, such sentencing errors must be cognizable.

Finally, Judge Jordan argued in his dissent that *Peugh* weighs in favor of treating even advisory Guidelines as laws for the purposes of § 2255.[131] Specifically, he, like Judge Rovner and others, pointed to the anchoring effects of the Guidelines on sentencing decisions, adding that "[a]lthough district courts do not presume that the advisory guideline range is reasonable, they certainly know that within-guidelines sentences are effectively immune from reversal on appeal—think of them as appellate safe harbors—and can feel comfortable in imposing such sentences."[132] In light of this effect, Spencer's erroneous designation as a career offender made it significantly more likely that he did receive a sentence above what otherwise would have been imposed in the absence of that enhancement.[133] Since the defendant can demonstrate the existence of prejudice based on the divergent Guidelines range starting points, then he has met all the statutory requirements of a cognizable § 2255 claim.[134]

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[128] *See id.* (asserting that an increase in applicable Guidelines range from 70-87 months to 151-180 months rises to the level of a miscarriage of justice).

[129] *Id.* at 1153 (Martin, J., dissenting); *id.* at 1175 (Rosenbaum, J., dissenting).

[130] *Id.* at 1153 (Martin, J., dissenting) (citation omitted); *see also id.* at 1164-78 (Rosenbaum, J., dissenting) ("[U]nlike Johnson, whose conviction existed at the time of sentencing, Spencer never had a conviction for a second predicate crime that ever qualified as such. That renders Spencer at least as 'actually innocent' of the predicate crime as Johnson was of his when the Supreme Court implicitly found his claim to be cognizable under § 2255.").

[131] *See id.* at 1157 (Jordan, J., dissenting) ("If the advisory Sentencing Guidelines are laws for *ex post facto* purposes, it is difficult to see why they are not also laws under § 2255.").

[132] *Id.* at 1161 (citation omitted).

[133] *See id.* at 1161 (rejecting the majority's argument that Spencer did not have a cognizable claim because "the district court could have imposed the same sentence even without characterizing [him] as a career offender").

[134] *See id.* (arguing that the majority misapplied the actual innocence standard in *Spencer II* in a manner unsupported by either the statutory language of § 2255 or Supreme Court precedent); Cappellino & Meringolo, *supra* note 94, at 781 (discussing use of Guidelines range as starting point for sentencing decisions post-*Booker*). Sentencing statistics collected

Together, then, the *Spencer II* dissenters all agreed that an error in calculating advisory Guidelines can rise to the level of miscarriage of justice even where the sentence remains within the statutory maximum. They also seemed to agree, however, that this error must also be accompanied by actual harm to the defendant, and though Judge Martin did provide hints as to what that might mean, there was no clear delineation of the level of harm required to meet the miscarriage of justice standard. However, there is some support in other areas of § 2255 jurisprudence for the argument that a relatively low prejudice threshold may support a finding of a miscarriage of justice. For example, in *Reed v. Farley*,[135] a plurality opinion addressing federal statutory violations in the context of §§ 2254 and 2255, Justice Scalia argued:

> As for *Hill*['s] . . . reservation of the question whether habeas would be available "in the context of other aggravating circumstances," that seems to me clearly a reference to circumstances *that cause additional prejudice to the defendant*, thereby elevating the error to a fundamental defect or a denial of rudimentary procedural requirements—*not* a reference to circumstances that make the trial judge's behavior more willful or egregious.[136]

Arguably, then, any erroneous enhancements resulting in additional imprisonment than would otherwise have been imposed as a result of a change in law (and thus, outside the control of the sentencing judge), could be considered an aggravating circumstance causing additional prejudice to the defendant. Though only a plurality opinion, Justice Scalia's concurrence nonetheless represents the narrowest opinion in *Reed*, and, under *Marks v. United States*,[137] the narrowest holding of a plurality opinion is the holding of the Court.[138]

IV. EFFECTS OF *PEUGH* ON THE COGNIZABILITY ANALYSIS

The Supreme Court's recent decision in *Peugh*, along with sentencing statistics compiled since *Booker* was decided, appear to confirm that under the advisory Guidelines, "district courts have in the vast majority of cases imposed either within-Guidelines sentences or sentences that depart downward . . . on

after *Booker* made the Guidelines advisory can also support a showing of prejudice by pointing to the continued reliance by sentencing judges on the Guidelines. BOOKER REPORT, *supra* note 110, at pt. A, pp. 60-68 (presenting data "indicating relative stability over time in the relationship between the average guideline minimum and the average sentence for offenses in the aggregate").

[135] 512 U.S. 339 (1994).

[136] *Id.* at 357 (Scalia, J., concurring in part and concurring in the judgment).

[137] 430 U.S. 188 (1997).

[138] *Id.* at 193; *see also* BRIAN R. MEANS, POSTCONVICTION REMEDIES 167-71 (2012) (discussing *Reed*'s plurality opinions).

the Government's motion."[139] Thus, it can be presumed that judges are about as likely to impose career offender enhancements under the advisory system as they were under the mandatory system.[140] Though in *Spencer II* the majority noted that only half of career offender enhancements imposed post-*Booker* were within the appropriate Guidelines range, the court also indicated that over a quarter of the remaining sentences were imposed below Guidelines range at government request.[141] Only about twenty percent were imposed below *or* above the appropriate Guidelines range solely at the discretion of the district court.[142] Most significantly, though, "the Sentencing Commission's data indicate that when a Guidelines range moves up or down, offenders' sentences move with it."[143] As a result, the Court held in *Peugh* that, in the context of retroactive increases in advisory Guidelines' ranges, because the Guidelines nonetheless remain the "lodestone of sentencing"—that is, they are often still applied as though mandatory—such increases therefore constitute violations of the Ex Post Facto Clause.[144]

Read broadly, as Judge Rovner suggests, this reasoning extends to erroneous career offender sentences as well. It is true that the latter cases involve retroactive reductions of sentences rather than retroactive increases and therefore do not fall within the literal scope of the Court's decision in *Peugh*.[145] As in the government's claim in *Peugh*, however, the *Spencer II* and *Hawkins* decisions are based in significant degree on the claim that the advisory Guidelines no longer have the "force of law" and that only a sentence

[139] Peugh v. United States, 133 S. Ct. 2072, 2084 (2013) (citing 16 U.S. SENTENCING COMM'N SOURCEBOOK OF FED. SENT'G STAT. 63 (FIGURE G) (2011)) (arguing that less than twenty percent of cases since *Booker* have had non-Guidelines range sentences imposed without government motion); *see also* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1677 (2012) (discussing small percentage of cases receiving below Guidelines sentences post-*Booker*).

[140] *See* BOOKER REPORT, *supra* note 110, at 59 (finding that *on government motion*, career offenders are frequently sentenced below Guidelines range). It is significant, however, that though sentenced below Guidelines range, career offenders still receive significant sentence enhancements over what they would otherwise receive. *Id.* ("Average sentences for career offenders were 180 months in the *Koon* period, 187 months in the PROTECT Act period, 184 months in the *Booker* period, and 172 months in the *Gall* period.").

[141] *Spencer II*, 773 F.3d 1132, 1142 (11th Cir. 2014) (discussing percentage of defendants sentenced within Guidelines range in 2013).

[142] *Id.*

[143] *Peugh*, 133 S. Ct. at 2084 (citations omitted).

[144] *Id.*

[145] *Hawkins II*, 724 F.3d 915, 922 (2013) (Rovner, J., dissenting) ("It is the widely applicable rationale of *Peugh* as opposed to the specific holding in cases of ex post facto violations that I am suggesting should inform a decision in *Hawkins*—that is, that advisory Guidelines do not mitigate the harm caused by errant sentencing calculations that have extraordinary effect.").

contrary to law can constitute a miscarriage of justice.[146] Yet, in *Peugh*, the Supreme Court recognized the continuing importance of the Guidelines as "represent[ing] the Federal Government's authoritative view of the appropriate sentences for specific crimes."[147] Additionally, though speaking to the applicability of the Ex Post Facto Clause, the Court in *Peugh* also stressed that the Ex Post Facto Clause, like § 2255 and the writ of habeas corpus, "reflects principles of 'fundamental justice.'"[148] The underlying principles, then, are present in both cases, and retroactive sentence reductions, like retroactive increases, therefore warrant review under § 2255 if those reductions lead to an unmerited increase in time served by the defendant. After all, § 2255, like the Ex Post Facto Clause, "safeguards 'a fundamental fairness interest . . . in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life.'"[149]

Furthermore, as the Court highlights at various points throughout the opinion, the federal sentencing regime post-*Booker* "achieved its 'binding legal effect' through a set of procedural rules and standards for appellate review that, in combination, encouraged district courts to sentence within the guidelines."[150] It follows, then, that "by law" in § 2255 does not mean merely a formal violation of the law, as in the case of a sentence imposed above the statutory maximum. Rather, according to *Peugh*, "by law" stands for the need for sentences to be imposed in keeping with principles of predictability, fairness, and justice. Sentencing errors that result in additional incarceration to the degree that the sentence inherently departs from these foundational principles therefore rises to the level of a miscarriage of justice under § 2255.

Judge Posner responded to *Peugh* in his supplementary *Hawkins II* opinion, denying rehearing of that case in response to the Supreme Court's decision.[151] Posner distinguished *Peugh*, arguing that the case merely stood for the proposition that "the advisory nature of the guidelines in the present era, the *Booker* era, which allows the sentencing judge broad discretion, nevertheless does not excuse *constitutional* violations arising from the judge's

[146] *Spencer II*, 773 F.3d at 1139-40; *Hawkins I*, 706 F.3d 820, 822-23 (7th Cir. 2013).

[147] *Peugh*, 133 S. Ct. at 2085.

[148] *Id.* (quoting Carmell v. Texas, 529 U.S. 513, 531 (2000)).

[149] *Id.* (quoting *Carmell*, 529 U.S. at 533) (discussing the underlying purpose of the Ex Post Facto Clause); *cf.* Hill v. United States, 368 U.S. 424, 428 (1962) (arguing that a non-constitutional error may be cognizable under § 2255 if it is "a fundamental defect which inherently results in a complete miscarriage of justice . . . present[ing] 'exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent.'" (quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939))).

[150] *Peugh*, 133 S. Ct. at 2084-86 (citation omitted) (discussing similar state statute, but arguing that federal sentencing Guidelines have the same effect).

[151] *Hawkins II*, 724 F.3d 915, 916 (7th Cir. 2013).

miscalculating the applicable guideline."[152] That is, ex post facto violations and career offender sentencing errors cannot be so easily conflated. Rather, when dealing with non-constitutional claims, in order for errors to rise to the level of miscarriage of justice, there must be a formal violation of law, as in *Narvaez*, where the Guidelines were still mandatory and therefore

> the consequence for the defendant in such a case is "actual prejudice"—an "injurious effect" on the judgment. But it doesn't follow that postconviction relief is proper just because the judge, though he could have imposed the sentence that he did impose, might have imposed a lighter sentence had he calculated the applicable guidelines sentencing range correctly.[153]

However, this reading takes for granted that, post-*Booker*, any error falling below the statutory maximum must be a run-of-the-mill error that, under *Davis*, cannot be a miscarriage of justice. *Peugh* rejects such a hardline reading of the meaning of "in violation of law" in the context of the Ex Post Facto Clause, pointing to *Lindsey v. Washington*,[154] in which the Court held that "[a]lthough the upper boundary of the sentencing court's power to punish remained unchanged, it was enough that the petitioners were 'deprived of all *opportunity* to receive a sentence which would give them freedom from custody and control prior to the expiration of the 15-year term.'"[155] Since similar principles underlie § 2255 and since the effect on the defendants in erroneous career enhancement cases are essentially the same as those described in *Lindsey*, *Peugh* does not support Judge Posner's reading of the statute in *Hawkins*.

Further, in her dissent in *Hawkins*, Judge Rovner explicitly rejected the presumption that Hawkins had not experienced "actual prejudice" as a result of his erroneous career offender designation, given both the ongoing anchoring effects of the Guidelines and *Peugh*'s implications for the meaning of "by law."[156] Though *Peugh* and *Hawkins* are distinguishable if narrowly construed, under a broad reading of the underlying policy concerns, *Peugh* mandated a finding of cognizability in *Hawkins*.[157] Thus, the anchoring effects of the

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[152] *Id.* at 917.

[153] *Id.*

[154] 301 U.S. 397 (1937).

[155] *Peugh*, 133 S. Ct. at 2086 (quoting *Lindsey*, 301 U.S. at 402).

[156] *See Hawkins II*, 724 F.3d at 921 (Rovner, J., dissenting) ("The *Peugh* Court rejected the idea that a Guidelines error causes only a potential prejudice . . . .").

[157] *See id.* at 920, 922, 925 (arguing that *Peugh* rejected the distinction between *Narvaez* and *Hawkins*, "instructing that the advisory nature of the Guidelines and the presence of discretion do not alleviate the infirmities that arise when a sentencing court chooses the improper Guideline range as a starting point"). The dissent further argued that because the Supreme Court did not have the present issue before it in *Peugh*, the case should not be read narrowly to bar application of § 2255 relief since errors constituting a miscarriage of justice "begin[] to look much like . . . constitutional error[s]." *Id.* at 922, 924.

Guidelines that led to the ex post facto violation recognized by the Court in *Peugh* are equally present in the case of erroneous career offender enhancements. As a result, the misapplication of the Guidelines in establishing a starting point in the sentencing process creates a miscarriage of justice when resentencing is later denied following a retroactive change in law. To find otherwise would be to ignore actual harm to the defendant in the form of years of additional incarceration, which almost certainly would not have been imposed, based on procedural rules.[158] Such an outcome may serve judicial interests in finality, but, for the dissent, this outcome strikes an unacceptable balance with that of fairness since the criminal justice system seeks to reach the "correct result—not simply the provision of process . . . . [W]here *all know the result is error*, to adhere to the process as though it were the end goal is unfair in the purest sense of the word."[159]

V. POLICY GOALS

A. *Countering Finality Concerns*

Having reviewed the current division within the circuit courts regarding the cognizability of collateral attack on erroneous career offender sentence enhancements and *Peugh*'s effects on this debate, I now turn to the policy goals undergirding each side of the issue. Though judicial interests in justice relate to and complement those of finality and administrability, in the present context there is an undeniable tension between these concerns that must be resolved in order to settle the cognizability debate.

There is a proliferation of scholarly work on the need for finality in the criminal justice system, and the topic has received significant attention in judicial opinions as well, though largely in the context of challenges to convictions rather than sentences.[160] Much of this topic is beyond the scope of this Note and thus will not be addressed at length here, but typically, arguments favoring finality claim that it (1) "respects notions of comity and federalism"; (2) "avoids problems that result from staleness of evidence"; (3) "protects victims from the harm that may come from the repeated revisiting of the case by the courts"; (4) "furthers the criminal law's goal of deterrence and

[158] *Id.* at 924.

[159] *Id.* at 923 (quoting Rozier v. United States, 701 F.3d 681, 690-91 (11th Cir. 2012) (Hill, J., dissenting)).

[160] See Russell, *supra* note 23, at 139-45, for a review of scholarly literature and judicial decisions developing this concept. *See, e.g.*, Teague v. Lane, 489 U.S. 288, 309 (1989) ("Without finality, the criminal law is deprived of much of its deterrent effect."); Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441 (1963) (arguing in favor of finality as an important interest in criminal adjudications); Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970) ("'[C]onventional notions of finality' should not have *as much* place in criminal as in civil litigation, not that they should have *none*.").

rehabilitation of offenders"; (5) "preserves resources and avoids delay in other court cases"; and (6) "provides psychological benefits by allowing society to move on and feel confident in the judicial system."[161]

Several of these arguments in favor of finality are central to the reasoning of many of the recent circuit decisions denying the applicability of the cognizability doctrine to career offender sentencing errors.[162] However, some commentators contend that there is "considerably less justification for treating sentences as final as compared to convictions. Courts have been overstating the interests in finality of sentences, and they should be fixing more sentencing mistakes."[163]

Indeed, as dissenting judges in *Sun Bear* and *Hawkins II* have pointed out, issues of comity and federalism are not present in the context of § 2255 cases since these cases, by nature, deal with federal prisoners seeking to challenge sentences imposed by federal courts.[164] Likewise, staleness of evidence is also a surmountable obstacle since petitioners are not attacking their underlying convictions and, thus, no new evidence or testimony is required.[165] Rather, the existing record is generally sufficient to resentence in § 2255 sentencing challenges.[166] As a dissenter in *Gilbert v. United States* explained, in resentencing hearings "spoliation is not a concern" "because the only issue before [courts] is a purely legal one" and "there is no evidence [they] must consult."[167]

For similar reasons, protecting victims from re-litigation is also less of an issue in sentencing since, as in the case of spoliation, new testimony from victims is not needed in § 2255 challenges to erroneous sentence enhancements.[168] And while the possibility of a reduced sentence for the perpetrator of a crime may cause some distress to his or her victim, it likely is

[161] Russell, *supra* note 23, at 140.

[162] *See, e.g.*, *Spencer II*, 773 F.3d 1132, 1144 (11th Cir. 2014); *Hawkins II*, 724 F.3d at 918-19.

[163] Russell, *supra* note 23, at 139.

[164] Sun Bear v. United States, 644 F.3d 700, 712 (8th Cir. 2011) (Melloy, J., dissenting); *see also Hawkins II*, 724 F.3d at 923 (Rovner, J., dissenting).

[165] Russell, *supra* note 23, at 153-54.

[166] *Id.*

[167] *Gilbert II*, 640 F.3d 1293, 1334 (11th Cir. 2011) (Martin, J., dissenting). Dissenters in both *Hawkins* and *Sun Bear* relied on this point in refuting that finality interests demanded findings of no cognizability in those cases. *Hawkins II*, 724 F.3d at 923 (Rovner, J., dissenting); *Sun Bear*, 644 F.3d at 712 (Melloy, J., dissenting). Furthermore, Professor Russell has argued that the delay between conviction and imposition of a new sentence may actually help courts, in their discretion, to apply an appropriate sentence based on the individual's good behavior, or lack thereof, while incarcerated. *See* Russell, *supra* note 23, at 153.

[168] *See supra* text accompanying notes 165-166; *cf.* Russell, *supra* note 23, at 155 (arguing that review of sentencing is less troubling for victims than review of underlying convictions).

of lesser magnitude when compared to challenges to the conviction itself since there is no danger the perpetrator will avoid punishment.[169] Finally, it is also worth noting that, "in many federal cases, there is no identifiable victim."[170]

Arguments that such challenges undermine the rehabilitative and deterrent functions of the criminal justice system, such as those made in *Spencer II*, also fall flat.[171] Since defendants seeking to challenge wrongfully imposed sentences are not avoiding punishment for their crimes, but are merely seeking to reduce their punishment to the appropriate level absent the erroneous enhancement, the deterrent effect of the sentence is unaffected.[172] Disallowing such challenges might actually have the contrary effect of undermining the criminal justice system since "[m]aking people serve unjust sentences is unlikely to promote their respect for the law" or to promote rehabilitation.[173]

Perhaps the most pertinent finality interests here are arguments that such review would exhaust the limited resources of federal courts and would interfere with the psychological benefits that finality in criminal cases confers on society (i.e., confidence in the efficacy and efficiency of the criminal justice system).[174] In many ways, these concerns, though distinct, are intertwined, and this Note will treat them together, as is common in the case law on career offender sentencing errors. The majorities in the *Hawkins* opinions and in *Spencer II*, in particular, lean most heavily on these two justifications.[175] For

[169] *See* Russell, *supra* note 23, at 155 ("In these cases, the conviction will stand, and the defendant will likely not be immediately released.").

[170] *Id.* This is true of many immigration and drug cases. *See, e.g.*, U.S. SENTENCING GUIDELINES MANUAL § 3D1.2 cmt. 2 (U.S. SENTENCING COMM'N 2014) ("For offenses in which there are no identifiable victims (e.g., drug or immigration offenses, where society at large is the victim), the 'victim' for purposes of subsections (a) and (b) is the societal interest that is harmed.").

[171] *See Spencer II*, 773 F.3d 1132, 1144 (11th Cir. 2014) (arguing that a lack of finality undermines the deterrent effect of criminal law).

[172] *Id.*; Russell, *supra* note 23, at 154; *see also* Bator, *supra* note 160, at 452 n.21 (arguing that "certainty and immediacy of punishment" rather than length of sentence are more effective at deterring crime).

[173] Russell, *supra* note 23, at 154-55. Unlike many of the finality interests discussed here, the same arguments against deterrence and rehabilitation as a justification for the need for finality in the justice system appear as strong in the context of attack on wrongful convictions as well as on sentencing errors.

[174] *See, e.g.*, *Spencer II*, 773 F.3d at 1144; *Hawkins II*, 724 F.3d 915, 918-19 (7th Cir. 2013); *Hawkins I*, 706 F.3d 820, 824 (7th Cir. 2013); *see also* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179 (2014) (defending finality interests in the context of sentencing review in habeas corpus proceedings). *But cf.* Russell, *supra* note 23, at 136-52, 156 (arguing extensively that such interests are of less significance in the context of sentencing review as opposed to review of convictions).

[175] *Spencer II*, 773 F.3d at 1144; *Hawkins II*, 724 F.3d at 918-19; *Hawkins I*, 706 F.3d at 824.

instance, in *Spencer II*, the majority argues that a lack of finality in sentencing creates problems of inefficiency and undermines confidence in the judiciary, while in *Hawkins II*, Judge Posner contends that finality in sentencing promotes efficiency and avoids unreasonable delays within the judiciary.[176] Further, though Judge Posner did concede that "[r]esentencing is not as heavy a burden for a district court as a complete retrial," he nonetheless found that "the cumulative burden of resentencing in a great many stale cases could be considerable."[177]

The dissents in these cases did not find these arguments persuasive, however. Instead, they asserted that such concerns are overblown in the context of § 2255 career offender sentencing challenges. In *Sun Bear*, Judge Melloy rejected implied finality concerns similar to those expressed by the *Spencer II* and *Hawkins* courts, quoting a dissenter in an Eleventh Circuit case denying collateral review based on a successive motion defect:

> First, denying relief does not build confidence in our court system because this looks to the world like a court refusing to acknowledge or make amends for its own mistake. Second, to the extent that there have been administrative costs and delay in considering [petitioner's] request for relief, they have already been incurred, and we need only grant him that relief to end his very expensive incarceration.[178]

Finally, Judge Melloy also refuted slippery slope arguments that the administrative burden would become overwhelming given the number of career offenders and potential Guidelines errors that might come to light post-*Begay*.[179] The judge found this argument unpersuasive based on the inherently narrow applicability of § 2255 motions in such contexts and because he felt administrability should not trump liberty where it has been unlawfully denied.[180]

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[176] *Spencer II*, 773 F.3d at 1144; *Hawkins II*, 724 F.3d at 918-19. To support his contention that finality avoids undue delay and promotes efficiency, Judge Posner points to statistics showing long backlogs from countries that "have a weak concept of finality." *Id.* at 918.

[177] *Hawkins I*, 706 F.3d at 824.

[178] Sun Bear v. United States, 644 F.3d 700, 712 (8th Cir. 2011) (Melloy, J., dissenting) (quoting *Gilbert II*, 640 F.3d 1293, 1334 (11th Cir. 2011) (Martin, J., dissenting)); *see also Spencer II*, 773 F.3d at 1154 (Martin, J., dissenting) (questioning "how insisting on the finality of a sentence that was calculated on a judge-made mistake instills confidence in the courts").

[179] *Sun Bear*, 644 F.3d at 712 (Melloy, J., dissenting).

[180] *See id.* (finding "parade of horribles" presented by the government "wholly without merit given the limitation of the facts of the present case: fully preserved error in the context of new Supreme Court authority issued with retroactive effect as applied in a case that cannot pass a harmless error inquiry"); *see also* Douglas A. Berman, *Re-Balancing Fitness, Fairness, and Finality for Sentences*, 4 WAKE FOREST J.L. & POL'Y 151, 170 (2014) ("[R]eview or reconsideration of an initial sentence may be an efficient way to save long-term punishment costs, may result in a more accurate assessment of a fair and effective

Judge Rovner's *Hawkins* dissents echoed these concerns, but put more emphasis on the inefficiency and expense that results from the extra months of imprisonment caused by such erroneous sentence enhancements.[181] Indeed, some studies have reached similar conclusions, providing support for Rovner's position. For instance, in reviewing wrongful incarceration costs, Andrew Chongseh Kim argues that, contrary to Judge Posner's assertions, "the wrongful incarceration savings produced by expanding access to substantive review and relief could help offset the administrative costs of federal habeas corpus."[182] By making access to review easier, more meritorious petitions would find relief, while on the other hand, "further restrictions on federal habeas [relief] would be unlikely to deter petitions or save federal resources."[183]

Given such arguments, it is difficult to assert that finality interests should override the fairness and substantial justice concerns implicated by excessive, unwarranted incarceration of erroneously designated career offenders. As Judge Jordan's *Spencer II* dissent argued, the criminal justice system should not seek to satisfy "bureaucratic achievement" in the form of finality divorced from justice.[184] Fairness, not finality, is "'the central concern of the writ of habeas corpus' . . . . Refusing to correct a sentencing error that has resulted in an extra 81 months of prison time ignores that § 2255, like the correlative writ of habeas corpus, 'is, at its core[,] an equitable remedy.'"[185]

punishment, and may foster respect for a criminal justice system willing to reconsider and recalibrate the punishment harms that it imposes upon its citizens.").

[181] *See Hawkins I*, 706 F.3d at 831-32 (Rovner, J., dissenting) (discussing the many limitations on petitioners seeking resentencing under § 2255 based on erroneous career offender designations). The dissent also took issue with the majority's references to the violent nature of the defendant's crime in concluding that his § 2255 claim was not cognizable, arguing that "[w]hether a crime is a violent felony is determined by how the law defines it and not how an individual offender might have committed it on a particular occasion." *Id.*

[182] Andrew Chongseh Kim, *Beyond Finality: How Making Criminal Judgments Less Final Can Further the "Interests of Finality,"* 2013 UTAH L. REV. 561, 607. Kim defines "wrongful incarceration" specifically to include defendants "who are factually innocent," "who are factually guilty but were convicted only through a violation of important rights," and "who are factually guilty but are serving improperly lengthy sentences. Wrongful incarceration, thus, is incarceration in excess of that intended by the legislature." *Id.* at 564. Thus, his article is intended to address the circumstances covered in this Note.

[183] *Id.* at 606-07.

[184] *Gilbert II*, 640 F.3d 1293, 1337 (11th Cir. 2011) (Hill, J., dissenting).

[185] *Spencer II*, 773 F.3d 1132, 1164 (11th Cir. 2014) (Jordan, J., dissenting) (citations omitted) (quoting Schlup v. Delo, 513 U.S. 298, 319 (1995); Strickland v. Washington, 466 U.S. 668, 697 (1984)); *see also* United States v. Hayman, 342 U.S. 205, 219 (1952) (holding that § 2255 should be applied as broadly as the writ of habeas corpus).

B. *Stigmatic Effects of the Career Offender Designation*

In addition to relying on the underlying goals of habeas corpus to support their contention that fairness should trump finality in the correction of sentencing errors, Judge Rovner and the dissenting Eleventh Circuit judges in *Spencer II* also use the stigmatic effects of the label "career offender" to bolster their arguments in favor of elevating justice over finality.[186] Many of the opinions favoring a finding of cognizability, both before and after *Booker*, point to the "branding effects" of the career offender status and the resulting likelihood of a longer sentence based on the perception that such offenders are "malefactor[s] deserving of far greater punishment than that usually meted out for an otherwise similarly situated individual who had committed the same offense."[187] Such misperceptions amount to actual prejudice when they result in longer sentences than would otherwise be imposed. Because it is difficult to know definitively when such wrongfully extended sentences result, and given the lesser finality interests and inherent restrictions on the numbers of qualifying § 2255 petitioners, interests of justice and fairness require review of all erroneous career offender enhancements, even those sentenced after *Booker*.

VI. COURTS SHOULD ADOPT *NARVAEZ* AS THE STANDARD FOR PRE-*BOOKER* SENTENCING ERRORS

Despite the Eighth Circuit's decision in *Sun Bear*, three of the five circuit courts that have directly addressed the issue appear at least open to the argument that erroneous career offender sentence enhancements imposed prior to *Booker* should be subject to collateral review under § 2255.[188] For this reason, the Seventh Circuit's decision in *Narvaez*, holding that such errors do represent cognizable claims, should control pre-*Booker* sentencing errors.[189] Although the Seventh Circuit appears to have retreated from its original position in *Narvaez* by refusing to extend that holding to cover post-*Booker* sentences in *Hawkins*, it has in no way abrogated the effect of *Narvaez* on cases sentenced prior to *Booker*.[190]

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[186] *See Spencer II*, 773 F.3d at 1150 (Martin, J., dissenting) (discussing impact of the career offender label on defendant's applied Guidelines range); *Hawkins I*, 706 F.3d 820, 826 (7th Cir. 2013) (discussing detrimental "branding effects" of career offender label).

[187] Narvaez v. United States, 674 F.3d 621, 629 (7th Cir. 2011).

[188] *See Spencer II*, 773 F.3d 1132, 1139-40 (11th Cir. 2014) (arguing that "lawful" career offender sentences cannot be cognizable errors under § 2255 but declining to address the meaning of "lawful" in the context of pre-*Booker* sentences); *Hawkins I*, 706 F.3d at 822 (narrowing but not overruling *Narvaez*'s holding allowing cognizable claims for pre-*Booker* career offender sentencing errors); *Narvaez*, 674 F.3d at 630 (holding pre-*Booker* sentencing errors cognizable under § 2255 for erroneously imposed career offender enhancements).

[189] *Narvaez*, 674 F.3d at 630.

[190] *Hawkins II*, 724 F.3d 915, 917 (7th Cir. 2013); *Hawkins I*, 706 F.3d at 822.

This is borne out by the fact that, in both *Spencer II* and *Hawkins*, the Seventh and Eleventh Circuits both implied that, were the Guidelines still mandatory, the defendants' claims would likely have been cognizable under § 2255 in the absence of any procedural bars.[191] For example, in declining to extend *Narvaez* to cover the misapplication of the now-advisory Guidelines in *Hawkins I*, Judge Posner stated that "[f]inality is an important social value, but not important enough to subject a defendant to 'a punishment that the law cannot impose upon him,' such as a sentence that exceeds the statutory maximum sentence for his crime *or a guideline ceiling that has the force of a statute . . . .*"[192]

In *Spencer II*, the Eleventh Circuit devoted a great deal of discussion to the significance of the advisory nature of the Guidelines in reaching its decision that collateral challenges to career offender sentencing errors cannot be cognizable under § 2255.[193] The court relied heavily on the reasoning of the Seventh Circuit in *Hawkins* and the Eighth Circuit in *Sun Bear*, focusing on the "lawfulness" of sentences falling within the statutory maximum for a crime.[194] Nonetheless, the court did imply at several points that, under a mandatory Guidelines sentence, such error would be cognizable under § 2255.[195] For example, the *Spencer II* court reasoned that "any miscalculation of the guideline range cannot be a complete miscarriage of justice because the guidelines are advisory. If the district court were to resentence Spencer, the district court could impose the same sentence again."[196] The majority's language in this passage, among others, seems to indicate that *any* miscalculation of the Guidelines under a *mandatory* system resulting in an upward variation in the sentence imposed would be unlawful and therefore a cognizable error.

Though it may initially appear to the contrary, this interpretation is actually consistent with the Eighth Circuit's decision in *Sun Bear*. *Sun Bear* was unique in that, even with the career offender enhancement, the defendant still received a sentence within the same Guidelines range that would have applied even without the enhancement.[197] As a result, there was arguably no upward variation and no actual prejudice to justify a finding that Sun Bear's sentence

[191] *See Spencer II*, 773 F.3d at 1140-43 (discussing impact of the advisory nature of Guidelines on cognizability analysis); *Hawkins II*, 724 F.3d at 917-18 (affirming *Narvaez* for pre-*Booker* sentencing errors); *Hawkins I*, 706 F.3d at 822 (declining to extend *Narvaez*, but affirming applicability to pre-*Booker* sentencing errors).

[192] *Hawkins I*, 706 F.3d at 824 (emphasis added) (citations omitted) (quoting Schriro v. Summerlin, 542 U.S. 348, 352 (2004)).

[193] *Spencer II*, 773 F.3d at 1140-43.

[194] *Id.* at 1140-41.

[195] *See id.* at 1140-43 (discussing impact of advisory nature of Guidelines on cognizability analysis).

[196] *Id*. at 1140.

[197] Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011).

resulted in a complete miscarriage of justice. Errors in imposing mandatory sentencing ranges, including erroneously imposed enhancements, are therefore subject to collateral attack.

Judicial interests in fairness and justice support this conclusion and should be elevated above finality interests. Indeed, such concerns are arguably stronger in the face of a misapplication of *mandatory* Guidelines given that actual prejudice is admittedly more readily identified in such circumstances. Finally, as discussed in Section V.A, finality interests are not as strong in challenges to sentencing errors as they are in collateral attacks on underlying convictions.[198] Given the strength of the interests of justice raised by the erroneous imposition of sentences in excess of mandatory Guidelines ranges, the comparatively feeble finality interests implicated in such cases must give way. For this reason, courts should adopt *Narvaez* as the standard for deciding the cognizability of pre-*Booker* erroneous career offender enhancements under § 2255.

VII. COURTS SHOULD ADOPT *SPENCER I* AS THE STANDARD FOR POST-*BOOKER* SENTENCING ERRORS

For cases of post-*Booker* misapplication of the career offender designation, the question of cognizability becomes more complex. It is no longer as obvious that the wrongfully imposed enhancement results in a complete miscarriage of justice in all cases, given the discretion conferred upon sentencing judges by the now advisory Guidelines. However, the argument that finality interests hold less weight in the case of sentencing review than in the case of collateral attack on convictions is as compelling in post-*Booker* career offender sentencing errors as it is in pre-*Booker* errors like that seen in *Narvaez*. And while it might be true that such errors are perhaps less glaring in the case of advisory rather than mandatory Guidelines, the arguments that these errors nonetheless impose actual prejudice on such defendants remain in light of the branding effects of the career offender label.[199]

Defendants like Spencer and Hawkins may have been sentenced within the statutory maximum, but while the Guidelines remain the "lodestone of sentencing," it seems very likely that they received dramatically higher sentences as a result of their status as career offenders.[200] As one dissenter in *Spencer II* pointed out, in deciding *Peugh*,

> the [Supreme] Court expressly rejected the argument that "the Sentencing Guidelines lack sufficient legal effect to attain the status of a 'law' within the meaning of the *Ex Post Facto* Clause." If the advisory Sentencing

[198] *See supra* Section V.A.

[199] *See supra* Part IV and Section V.B for a discussion of how the branding effect causes actual prejudice even under an advisory Guidelines regime.

[200] *See Hawkins II*, 724 F.3d 915, 920 (7th Cir. 2013) (Rovner, J., dissenting) (discussing continuing importance of the Guidelines in the sentencing process).

> Guidelines are laws for *ex post facto* purposes, it is difficult to see why they are not also laws under § 2255.[201]

Though it is true, as Judge Posner observed, that *Peugh* dealt specifically with a constitutional violation, that fact does not foreclose sentencing error review under the miscarriage of justice standard. Those arguing against cognizability in the case of post-*Booker* erroneous career offender enhancements contend that the now-advisory nature of the Sentencing Guidelines makes such errors "less serious" given judicial discretion to adjust the Guidelines range where district courts deem such adjustment appropriate.[202] However, there is actual prejudice to such defendants that deserves redress in order to serve the interests of substantial justice even where a defendant's sentence remains within the statutory maximum. Although no enhancement is required, the "*legal* presumption that [career offenders are] to be treated differently from other offenders because [they belong] in a special category reserved for the violent and incorrigible" indicates that the sentence such defendants receive is applied "in excess of the maximum authorized by law" under the standard established by *Peugh*.[203]

Peugh tells us, then, that as a general matter, the anchoring effects of the Guidelines are strong enough to create prejudice even when the sentence imposed in error falls within the statutory maximum. As the Supreme Court pointed out in that case, "[c]hanges in law need not bind a sentencing authority for there to be an *ex post facto* violation, and '[t]he presence of discretion does not displace the protections of [that] Clause.'"[204] And, as discussed in Part IV, *supra*, there is no principled reason to distinguish an ex post facto violation from a career offender sentencing error under advisory Guidelines where the error rises to the level of a miscarriage of justice. Indeed, the Supreme Court has recognized similar interpretations of the miscarriage of justice standard in other contexts based on the same general principles underlying the Court's decision in *Peugh*. For instance, the Court held that a miscarriage of justice warranting plain error review results from "a plain forfeited error affecting substantial rights if the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' . . . An error may 'seriously affect the

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[201] *Spencer II*, 773 F.3d at 1157 (Jordan, J., dissenting) (citations omitted).

[202] *See id.* at 1140 (majority opinion) ("A misapplication of advisory sentencing guidelines, in contrast [to mandatory Guidelines], does not violate an 'ancient' right, nor does it raise constitutional concerns."); *Hawkins I*, 706 F.3d 820, 824 (7th Cir. 2013) (arguing that sentencing errors under advisory Guidelines are "less serious" than under mandatory Guidelines).

[203] Narvaez v. United States, 674 F.3d 621, 629 (7th Cir. 2011); *see also* 28 U.S.C. § 2255 (2012).

[204] Peugh v. United States, 133 S. Ct. 2072, 2077, 2086 (2013) (quoting Garner v. Jones, 529 U.S. 244, 253 (2000)).

fairness, integrity or public reputation of judicial proceedings' independent of the defendant's innocence."[205]

These same policy rationales form the basis of arguments in favor of finding career offender sentencing errors cognizable under § 2255. Not only are the policy rationales behind § 2255 based inherently on such concepts as fundamental justice and fairness, but erroneous sentence enhancements also implicate the integrity and reputation of the judiciary as well. The reputation of the criminal justice system will not be enhanced by blind pursuit of administrative goals at the expense of defendants like Hawkins, serving excessive, costly sentences, and at the expense of the public, who pays for that extra period of incarceration. When such errors could be corrected with relatively minimal cost and without opening the resentencing floodgates, given the small subset of cases that would qualify, there is little reason to rigidly deny collateral relief in such cases.

In the context of erroneous career offender enhancements, then, I suggest adopting the *Spencer I* court's interpretation of the miscarriage of justice standard. Under *Spencer I*, such miscarriages occur where the erroneously imposed sentence falls outside the Guidelines range that would otherwise apply and where the additional period of incarceration is so significant a departure that it constitutes a "particularly severe punishment."[206] This standard allows for appropriate flexibility, in keeping with *Booker* and its progeny, for courts to determine how much additional time constitutes a "particularly severe punishment" in a given case. A sentence that is twice what would have otherwise been imposed or an additional hundred months of imprisonment would be examples of erroneous career offender enhancements that rise to the level of a miscarriage of justice.[207] An error that results in a sentence that still falls within the correct Guidelines range does not create a miscarriage of justice.[208]

Thus, given this interpretation of the miscarriage of justice standard, to exclude defendants such as Spencer and Hawkins from redress would be to elevate form over fairness, particularly given the relative ease with which such errors could be corrected without substantially undermining interests in finality. By contrast, allowing such injustices to go uncorrected would undermine the foundation upon which the justice system rests in favor of administrative convenience. Society is not bettered by the incarceration of criminals beyond that which their behavior actually merits. The public will not

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[205] United States v. Olano, 507 U.S. 725, 736-37 (1993) (citations omitted) (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).

[206] *See Spencer I*, 727 F.3d 1076, 1089 (11th Cir. 2013) (citations omitted) (internal quotations omitted) (arguing that a miscarriage of justice results when a sentence is doubled as a result of the erroneous career offender enhancement).

[207] *See, e.g.*, *id.* at 1080 (doubling applicable sentence); *Hawkins I*, 706 F.3d at 821 (enhancing sentence by over one hundred months).

[208] *See, e.g.*, Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011).

perceive such excessive punishment as fair or just. Rather, it will view inaction with regard to an admitted and easily remedied error as the judiciary sitting on its hands in the face of a complete miscarriage of justice. This undermines confidence in the judiciary, which creates its own inefficiencies and works against deterrence goals.[209] For these reasons, post-*Booker* errors in applying the career offender designation should be cognizable under § 2255 even where the sentence falls below the statutory maximum.

CONCLUSION

To date, no circuit court decisions holding that post-*Booker* erroneous career offender sentence enhancements are cognizable under § 2255 have survived en banc rehearing.[210] Only a handful of federal appellate courts have addressed the question, however, and those courts that have decided the issue have been deeply divided on the question of cognizability.[211] Even those circuits that have not yet had occasion to confront the question have recognized the significance of this issue.[212] Given the ongoing controversy surrounding the question and its acknowledged importance, to echo Judge Jordan's *Spencer II* dissent, "it is time for the Supreme Court to address the important § 2255 cognizability question."[213]

I would also urge the Court to tackle this significant issue and, in doing so, weigh in on whether courts, in the context of sentencing errors, should give greater weight to judicial interests in justice or in finality. Though both of these rationales are undeniably essential to the functionality and administrability of the criminal justice system, in the context of § 2255 motions to review erroneous career offender sentences, there is a tension that must be resolved. In approaching this question, the Supreme Court should adopt the reasoning of the Seventh Circuit in *Narvaez* for those erroneous career offender sentences given prior to *Booker*. The Court should further adopt the approach taken by the Eleventh Circuit in its original *Spencer I* decision for those sentences imposed after the Court's decision in *Booker*.

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[209] Russell, *supra* note 23, at 87-88 (asserting that the legitimacy of the judicial system suffers "when the system does not correct clear injustices that are easy to fix," simultaneously reducing deterrence and promoting resentment). *See generally* Jeffrey Fagan & Tracey L. Meares, *Punishment, Deterrence and Social Control: The Paradox of Punishment in Minority Communities*, 6 OHIO ST. J. CRIM. L. 173, 176-77 (2008).

[210] *Whiteside I* 748 F.3d 541, 555 (4th Cir. 2014), *rev'd en banc*, *Whiteside II*, 775 F.3d 180 (4th Cir. 2014); *Spencer I*, 727 F.3d at 1076, *vacated en banc*, *Spencer II*, 773 F.3d 1132 (11th Cir. 2014).

[211] *See, e.g.*, *Spencer II*, 773 F.3d at 1132 (5-4 en banc decision); Sun Bear v. United States, 644 F.3d at 704-05 (6-5 en banc decision).

[212] *See, e.g.*, Damon v. United States, 732 F.3d 1, 3-4 (1st Cir. 2013) (referring to the cognizability question as "longstanding" and "interesting").

[213] *Spencer II*, 773 F.3d at 1163 (Jordan, J., dissenting).

The Seventh, Eighth, and Eleventh Circuits raise important concerns regarding finality and administrability in resentencing; however, these issues are not present to the same extent in the case of collateral attack on convictions. In light of the competing concerns of justice, fairness, and public confidence in the judiciary, such "bureaucratic" interests must give way as suggested by the Supreme Court's plain error jurisprudence.[214] As Judge Rovner put it, "fairness is the lifeblood of our system of justice, and more specifically, justice requires the ability to rectify substantial uncontroverted judicial errors that cause significant injury."[215] For these reasons, the Supreme Court should intervene to resolve the continuing uncertainty regarding collateral attack on sentencing errors under § 2255. The Court should find that an error in the application of career offender sentence enhancement is cognizable under § 2255, even for defendants whose sentences remain within the statutory maximum and who were sentenced after *Booker*.

[214] *See* United States v. Olano, 507 U.S. 725, 736-37 (1993).

[215] *Hawkins II*, 724 F.3d 915, 922 (7th Cir. 2013) (Rovner, J., dissenting).