Volume 91 | Number 1 Article 4

12-1-2012

Reluctance to Resentence: Courts, Congress, and Collateral Review

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RELUCTANCE TO RESENTENCE: COURTS, CONGRESS, AND COLLATERAL REVIEW*

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In a series of recent decisions, the Supreme Court overturned a number of circuit court opinions and adopted a more narrow reading of certain federal recidivist sentencing enhancements. Although the decisions revealed that many federal prisoners were sentenced incorrectly and are serving sentences that are much longer than they should be, few of these prisoners have obtained relief in the lower courts on collateral review. Courts have generally dismissed the claims on procedural grounds, citing interests in finality. Indeed, courts often refuse to correct sentencing errors on collateral review, even when both the judge and the prosecutor acknowledge that the prisoner is serving additional years in prison based on a sentencing mistake. After a criminal judgment has become "final," federal courts appear reluctant to resentence.

Federal prisoners seeking collateral review of sentences are subject to the same—and in some cases stricter—procedural barriers to relief as those seeking the more drastic remedy of undoing their convictions. But sentencing errors should be easier to fix than conviction-based errors because arguments favoring finality are much weaker in the sentencing context. Correcting a sentence is vastly easier than retrying a case, and staleness of evidence is not a major concern at a resentencing because judges, unlike juries, can rely on previous findings. Outside the special context of capital cases, the important distinctions between collateral review of sentences and convictions have received little attention from courts or scholars.

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Given the backdrop of extensive litigation in the lower courts about correcting sentencing errors at the collateral review stage, and the possibility that the Supreme Court will need to resolve divergent circuit decisions in this area, now is an important moment to consider whether interests in finality should carry as much weight when a court reviews a sentence rather than a conviction in a collateral proceeding, and when the federal court is reviewing its own decision rather than the decision of a state court. Courts have been overstating the interests in finality of sentences. They should be correcting more sentencing mistakes on collateral review, at least where an intervening decision has narrowed the reach of a substantive sentencing provision.

INTRODUCTION

In 2000, Marcus Jones was sentenced to 327 months' imprisonment for being a felon in possession of a firearm.[1] This sentence was based on the district court's conclusion that Jones had three prior convictions that triggered the Armed Career Criminal Act ("ACCA").[2] Ordinarily, possession of a firearm by a felon carries a statutory sentencing range of zero to ten years' imprisonment.[3] With the ACCA enhancement, however, the sentencing range is raised to a mandatory minimum of fifteen years and a maximum of life.[4] Eight years after Jones was sentenced, the Supreme Court's decision in *Begay v. United States*[5] established that the types of prior convictions on Jones's record should not have triggered the enhanced ACCA penalties.[6] It is now undisputed that Jones was sentenced incorrectly and is serving a sentence that is seventeen years longer than is authorized under a proper interpretation of the law. However, the Sixth Circuit recently denied him relief.[7]

The Eleventh Circuit, sitting en banc, denied a similar claim by Ezell Gilbert, whose sentencing range for crack distribution was increased from 151 to 188 months' imprisonment to 292 to 365 months based on the erroneous conclusion that his prior offense of carrying a concealed weapon triggered the career offender

1. Jones v. Castillo, No. 10-5376, 2012 WL 2947933, at *1 (6th Cir. July 20, 2012) (per curiam).
2. *Id.*
3. 18 U.S.C. §§ 924(a)(2), 922(g)(1) (2006).
4. *See id.* § 924(e)(1).
5. 553 U.S. 137 (2008).
6. *Id.* at 148.
7. *Jones*, 2012 WL 2947933, at *1.

enhancement under the Sentencing Guidelines.[8] After *Begay*, it is undisputed that Gilbert was sentenced incorrectly. Although the dissent argued that the court had "shirked [its] duty" by failing to correct the error,[9] the majority concluded that finality interests trumped and denied Gilbert relief.[10]

Federal courts today appear to be reluctant to resentence. Even when there have been clear and significant sentencing errors like those described above, federal prisoners face great difficulty in correcting the error once the period of direct appellate review is complete and the criminal judgment has become "final." Although criminal defendants can challenge many sentencing errors through the direct appeals process, some errors do not become apparent until that process is complete—for example, when a new case such as *Begay* establishes the illegality of the sentence, or when a prisoner discovers only later that counsel made a mistake. Yet it is surprisingly difficult to fix these errors at the collateral review stage. Courts often deny relief even in the face of an undisputed sentencing error that is causing someone to spend many extra years in prison.[11]

Courts and scholars have long debated society's interest in the finality of criminal judgments and the appropriate scope of collateral review.[12] However, outside the special context of capital cases, little attention has been paid to the distinctions between collateral review of *sentences* versus *convictions*. Yet there are major differences. Concerns about finality are much less pressing when a court

8. Gilbert v. United States, 640 F.3d 1293, 1300 (11th Cir. 2011) (en banc).

9. *Id.* at 1333 (Martin, J., dissenting).

10. *Id.* at 1310.

11. *See* discussion *infra* Part II.B.

12. Much of the habeas scholarship focuses on the appropriate scope of federal review of claims by state prisoners. *See, e.g.*, Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 441 (1963); Gary Peller, *In Defense of Federal Habeas Corpus Relitigation*, 16 HARV. C.R.-C.L. L. REV. 579, 665–69 (1982); Larry W. Yackle, *State Convicts and Federal Courts: Reopening the Habeas Corpus Debate*, 91 CORNELL L. REV. 541, 541–42 (2006). Scholars have also frequently explored the special issues raised in the death penalty context. *See, e.g.*, Carol S. Steiker & Jordan M. Steiker, *Cost and Capital Punishment: A New Consideration Transforms an Old Debate*, 2010 U. CHI. LEGAL F. 117, 137–50. Recently, scholarship has examined issues raised by executive detention and the "war on terror." *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029, 2045–49 (2007). Some have argued that the "terror cases" are not so different from ordinary cases involving detained persons. *See* Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 581–84 (2010). Issues surrounding post-conviction review of claims by federal prisoners in ordinary cases have received relatively little attention, and scholars have rarely focused on correction of noncapital sentencing errors at the collateral review stage.

reconsiders the length of a sentence rather than the validity of a conviction.

Those favoring finality of criminal judgments argue, among other things, that a broad scope of collateral review expends limited resources and can lead to less accurate fact-finding because evidence goes stale over time.[13] However, correcting a defendant's sentence in a noncapital case uses considerably less time and resources than retrying a case. When a federal prisoner seeks collateral review of a sentence, the federal judge who imposed the original sentence reviews the matter and is already familiar with the case.[14] Determining whether there was an error in the sentence is usually a simple and straightforward task. When a mistake is made, the court can then decide whether it actually impacted the ultimate sentence and correct the sentence only in those instances. Some sentencing errors can be corrected without the need for the defendant's presence and a full resentencing proceeding.[15] Even if a full proceeding is needed, it usually only takes about an hour. Thus, collateral review of sentence-based errors drains resources to a much lesser extent than review of convictions. Indeed, reducing a sentence of imprisonment to its lawful length actually saves resources that would have otherwise been spent on unnecessary incarceration.[16]

In addition, staleness of evidence is of less concern when a court corrects a sentence. When a conviction is vacated years later, it is often difficult to retry the case because witnesses may die or forget details, and evidence may decay. In contrast, at a resentencing, the court, unlike a jury at trial, can rely on evidence presented and findings made at the initial sentencing proceeding.[17]

Given these important differences, one might expect it to be easier to fix a sentencing-based error than an error relating to a conviction, but it is not. After the appeals process is complete, a federal prisoner must seek correction of the sentence through filing a motion with the original sentencing judge under 28 U.S.C. § 2255—the same provision used by federal prisoners trying to undo their convictions.[18] Historically, prisoners could utilize a separate mechanism to correct their sentences, like Rule 35 of the Federal

13. Anthony G. Amsterdam, *Search, Seizure, and Section 2255: A Comment*, 112 U. PA. L. REV. 378, 383–84 (1964); Bator, *supra* note 12, at 451.

14. *See* 28 U.S.C. § 2255(a) (Supp. 2011).

15. United States v. Hadden, 475 F.3d 652, 669 (4th Cir. 2007).

16. *See* discussion *infra* Part IV.B.2.

17. *See* discussion *infra* Part IV.B.3.

18. § 2255(a).

Rules of Criminal Procedure, which allowed courts to correct illegal sentences "at any time."[19] After 1987, however, federal prisoners seeking correction of their sentences have been limited to § 2255.[20] Their fate became tied to federal prisoners attempting to vacate their convictions and also linked in large part to the fate of state prisoners petitioning for habeas relief under § 2254.[21] Thus, although sentencing-based claims are distinct in many ways, they were grouped under the "collateral review" umbrella.

During the last few decades, the Supreme Court and Congress have placed great restrictions on the availability of collateral relief.[22] Although comity and federalism concerns are absent when federal prisoners seek collateral review in federal court under § 2255, federal prisoners today nonetheless face many of the same hurdles to relief as state prisoners asking for federal relief.[23] Moreover, even though the arguments favoring finality of sentences are relatively weak, prisoners seeking correction of sentencing errors are subject to the same procedural barriers to collateral relief as prisoners trying to vacate their convictions. Indeed, in some instances, lower courts are now placing even greater limitations on sentencing relief.[24]

As a result of several recent Supreme Court decisions, a new type of sentencing error is now being litigated on collateral review in the federal courts. Lower court decisions addressing these claims reveal how reluctant courts are to resentence, even when the error is clear and undisputed and the error resulted in a much longer prison sentence than should have been imposed.[25] Courts are valuing finality above correction of obvious and serious injustices.[26] In its recent decisions in *Begay v. United States*,[27] *Chambers v. United States*,[28] and *Johnson v. United States*,[29] the Supreme Court limited the types of prior offenses that trigger federal recidivist sentencing enhancements

19. FED. R. CRIM. P. 35 (1946) (amended 2009).

20. The Sentencing Reform Act of 1984 rewrote Rule 35, and the changes became effective in 1987. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

21. *See* 28 U.S.C. § 2254 (2006) (describing procedure for consideration of applications for writs of habeas corpus).

22. 1 RANDY HERTZ & JAMES LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 2.4[d] (6th ed. 2011).

23. *See* discussion *infra* Part I.C.

24. *See* discussion *infra* Part II.B.

25. *See* discussion *infra* Part II.B.

26. *See* discussion *infra* Part II.B.

27. 553 U.S. 137 (2008).

28. 555 U.S. 122 (2009).

29. 130 S. Ct. 1265 (2010).

and overturned a number of prior circuit court opinions.[30] These decisions addressed the scope of the ACCA, which imposes a fifteen-year mandatory minimum sentence in gun possession cases when the defendant has three or more qualifying prior convictions for particular types of offenses, including "violent felon[ies]."[31] Prior to the Supreme Court decisions, circuit courts broadly interpreted "violent felony" under the ACCA (and a similar enhancement provision under the Sentencing Guidelines) to cover a wide range of offenses such as drunk driving and failure to report to custody.[32] Many individuals were sentenced to long prison terms based on these broad and erroneous readings of the enhancement provisions.[33] In *Begay*, *Chambers*, and *Johnson*, the Supreme Court read the provisions much more narrowly and revealed that many defendants had been sentenced incorrectly under the prior circuit interpretations.[34]

Around the country, federal prisoners have sought correction of their sentences based on these new Supreme Court cases.[35] Although the Supreme Court and Congress have placed numerous procedural restrictions on the availability of collateral relief for prisoners, lower courts could nonetheless correct many of the errors revealed by *Begay*, *Chambers*, and *Johnson* ("*Begay*-type" errors) consistent with Supreme Court law and statutory provisions.[36] Although some courts have granted relief, most have denied relief on procedural grounds, even when it is absolutely clear that the prisoner is serving a sentence that would be erroneous if imposed today. Citing interest in the finality of judgments, courts have denied relief on the grounds that: *Begay* and its progeny are not retroactive; the claims of error are not cognizable in § 2255 motions; prisoners procedurally defaulted their claims; claims are barred by the statute of limitations or a ban on successive motions; and prisoners waived their collateral attack rights in their plea agreements.[37] Two circuits have taken cases en banc and reversed panel decisions that granted relief to prisoners raising *Begay*-type claims,[38] and several circuit splits have emerged on the

30. These cases are discussed further *infra* Part II.A.

31. 18 U.S.C. § 924(e)(1) (2006); *Johnson*, 130 S. Ct. at 1270; *Chambers*, 555 U.S. at 123; *Begay*, 553 U.S. at 139.

32. *See infra* notes 126, 137 and accompanying text.

33. *See* discussion *infra* Part II.B.

34. *Johnson*, 130 S. Ct. at 1270; *Chambers*, 555 U.S. at 123; *Begay*, 553 U.S. at 139.

35. *See* discussion *infra* Part II.B.

36. *See* discussion *infra* Part III.

37. *See* discussion *infra* Part II.B.

38. Sun Bear v. United States (*Sun Bear IV*), 644 F.3d 700, 705 (8th Cir. 2011) (en

scope of the procedural obstacles to relief.[39] Yet with the exception of several short discussions by dissenting judges,[40] courts have not reflected at all on the different finality issues at stake when a prisoner merely seeks a corrected sentence rather than a new trial.

The aftermath of *Begay* in lower courts reveals the great emphasis that courts place on finality when reviewing claims of sentencing errors at the collateral review stage. These concerns are overstated, particularly with respect to claims like those arising under *Begay*. *Begay*-type sentencing claims are easy to resolve, and the errors are quick to fix.

So why are courts reluctant to correct these sentencing errors? As a practical matter, federal judges today are rarely required to reconsider their sentencing decisions. Out of all the offenders sentenced in the federal system, less than one percent return to the sentencing court after an appeal.[41] Although there are several other

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banc); Gilbert v. United States, 640 F.3d 1293, 1324 (11th Cir. 2011) (en banc).

39. For example, there is a circuit split on whether a prisoner's claim that he or she was improperly sentenced as a career offender under the Guidelines is cognizable under § 2255. *Compare* Narvaez v. United States, 674 F.3d 621, 627 (7th Cir. 2011) (recognizing a career offender Sentencing Guideline error is cognizable on collateral review where a postconviction clarification in the law renders the sentencing court's decision unlawful), *with Sun Bear IV*, 644 F.3d at 706 (holding that defendant's collateral attack to his sentence under career offender Guideline was not cognizable). The circuits disagree as to whether prisoners erroneously sentenced under the ACCA who have used up their one shot under § 2255 can seek relief under § 2241 pursuant to the "savings clause." *Compare* Jones v. Castillo, No. 10-5376, 2012 WL 2947933, at *1 (6th Cir. July 20, 2012) (per curiam) (affirming denial of § 2241 relief by stating that "[c]laims alleging 'actual innocence' of a sentencing enhancement cannot be raised under § 2241"), *with* Chaplin v. Hickey, 458 F. App'x 827, 1 (11th Cir. 2012) (per curiam) (vacating district court order dismissing habeas petition under § 2241 for failing to state a claim). In addition, the circuits are split on whether the "actual innocence" exception to procedural default applies in the context of noncapital sentencing enhancements—in other words, whether you can be "actually innocent" of a sentencing enhancement. *Compare* Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 171 (2d Cir. 2000) ("[T]here is no reason why the actual innocence exception should not apply to noncapital sentencing procedures."), *with* Embrey v. Hershberger, 131 F.3d 739, 740–41 (8th Cir. 1997) (en banc) (holding that the "actual innocence" exception "applies only to the sentencing phase of death cases" and not to noncapital sentencing claims). Finally, the circuits also disagree on whether "actual innocence" can excuse or equitably toll the statute of limitations for § 2255 motions. *Compare* Lee v. Lampert, 653 F.3d 929, 931 (9th Cir. 2011) (en banc) (holding that a credible showing of "actual innocence" excuses the statute of limitations period established by AEDPA), *with* Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) (holding that claims of "actual innocence" do not preclude the dismissal of habeas petition as untimely).

40. *See infra* notes 191–95, 297–304 and accompanying text.

41. From March 2009 to March 2010, 88,973 defendants were convicted and sentenced in federal courts. Out of this number, only 757 (or 0.85%) returned to the sentencing court after an appeal. *See infra* note 478.

mechanisms that allow a court to modify a sentence, these mechanisms are narrowly circumscribed and rarely used.[42] A judge who has little experience in reconsidering prison sentences may be simply reluctant to do so, even when faced with compelling circumstances and a plain error.

The lack of judicial experience with resentencing is a relatively recent phenomenon. At common law and under the original Rule 35, sentencing judges had the authority to revise a sentence within a period of time after it was imposed for any reason,[43] including simply "a change of heart."[44] The Sentencing Reform Act of 1984 ("SRA") eliminated this change-of-heart discretion and also eliminated the court's ability to correct an illegal sentence "at any time."[45] Thus, historically, a federal judge enjoyed more discretion to reconsider a criminal sentence and may have been less inclined to elevate finality over the other goals of criminal sentencing.

The reluctance to resentence may also relate to concerns about workloads and the value placed on decisiveness in judging. Reconsidering sentences takes time away from other pressing matters, and second-guessing one's past decisions is generally disfavored.[46] Accordingly, while judges frequently cite society's interest in finality when denying requests for resentencing, the reluctance to resentence may also be explained by these other considerations.[47]

Although finality of criminal sentences may provide some benefits for society, finality certainly imposes costs. There are the obvious costs: first, to the prisoner who is serving more time than he or she should under the relevant sentencing laws, and second, to the state for the fiscal cost of continuing to incarcerate the prisoner. But broader questions about the legitimacy of the system are also raised when the system does not correct clear injustices that are easy to fix. There is particular cause for concern when the error relates to provisions that have a disproportionate impact on minority offenders,

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42. *See* discussion *infra* Part IV.C.

43. FED. R. CRIM. P. 35 & advisory committee's note (1944) (amended 2009); Andrew P. Rittenberg, Comment, *"Imposing" a Sentence Under Rule 35(c)*, 65 U. CHI. L. REV. 285, 289–90 (1998).

44. United States v. Abreu-Cabrera, 64 F.3d 67, 72 (2d Cir. 1995).

45. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.) (amending Rule 35 of the Federal Rules of Criminal Procedure).

46. *See* discussion *infra* Part IV.C.

47. *See* discussion *infra* Part IV.C.

such as recidivist sentencing enhancements.[48] Failing to fix these injustices undermines public confidence in the justice system, fosters a sense that the system is unfair, and can ultimately diminish the deterrent effect of the criminal law.[49]

Given the backdrop of extensive *Begay*-related litigation in the lower courts and the possibility that the Supreme Court will need to resolve divergent circuit decisions on these issues, now is an important moment to consider whether interests in finality should carry as much weight when a court reviews a sentence rather than a conviction in a collateral proceeding. Lower courts should correct sentencing errors in many more cases on collateral review, and they can do so consistent with Supreme Court jurisprudence and the governing statutory provisions. However, given the divergent opinions that are developing in the lower courts, the Supreme Court should clarify the scope of collateral review of federal sentencing errors and distinguish the very different finality issues at stake with requests for resentencing in noncapital cases. At the very least, the Court should make it clear that lower courts can correct sentencing errors on collateral review when a court decision's clarification of the scope of a sentencing provision reveals that a sentence is longer than it should be under the proper interpretation of the law. In addition, Congress should amend the relevant statutes to explicitly provide that courts have the power to correct sentences in these circumstances.

The Article proceeds in four parts. Part I discusses the historical power of federal courts to revisit sentences and the current procedural barriers that exist to adjudication of claims of sentencing errors on the merits after the appellate review period is complete. Part II considers the Supreme Court's recent decisions in *Begay*, *Chambers*, and *Johnson*, and the challenges that prisoners have faced in fixing their sentences based on these cases, even when the errors in their sentences are undisputed. Part III reveals how courts could, consistent with statutory restrictions and Supreme Court jurisprudence, nonetheless correct many *Begay*-type claims. Part IV examines the finality interests at stake regarding sentencing and concludes that arguments favoring finality are considerably weaker in the context of requests for sentence correction as compared to

48. *See infra* note 503 and accompanying text.

49. *See* discussion *infra* Part IV.D; *see also* 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) (suggesting that a high incarceration rate can undermine the legitimacy of the criminal justice system and undermine the deterrence effect of criminal sanctions).

requests to vacate convictions. The Article concludes by arguing that lower courts should correct sentencing errors in many more cases, and the Supreme Court and Congress should make explicit the authority of sentencing courts to fix more of their mistakes.

I. CORRECTION OF SENTENCING ERRORS: ITS HISTORY AND THE PRESENT

Today, 28 U.S.C. § 2255 is the primary mechanism for a federal prisoner to obtain review of his or her sentence after the period of direct review is complete. Federal prisoners must use the same provision regardless of whether they are challenging their sentences or their convictions. Historically, Rule 35 of the Federal Rules of Criminal Procedure existed as a separate mechanism for challenging illegal sentences.[50]

There are a range of types of sentencing claims that a prisoner might seek to raise at the collateral review stage. One category of claims relates to "procedural" errors. For example, a prisoner might claim that the sentencing court failed to give him an opportunity to allocute at sentencing as the Federal Rules of Criminal Procedure require, or that the court conducted the sentencing proceeding in a manner that violated his due process rights.[51] Another category of claims relates to "substantive" errors, such as where a prisoner asserts that the sentencing court enhanced his sentence based on an erroneous interpretation of a statute[52] or imposed a sentence that was excessively harsh under the Eighth Amendment.[53] Finally, some prisoners raise claims on collateral review that their attorneys provided ineffective assistance of counsel at sentencing or on direct appeal.[54]

The discussion below explores the historical power of courts to correct sentencing errors and details the major barriers to relief for federal prisoners seeking resentencing.

A. Correction of Sentences Through Appellate Review

Historically, appellate courts had little involvement in reviewing sentences. Federal district judges had wide discretion to determine a sentence within broad statutory ranges set by Congress. Before 1889,

50. Rittenberg, *supra* note 43, at 288–89.
51. *See, e.g.*, Hill v. United States, 368 U.S. 424, 424 (1962).
52. *See, e.g.*, Narvarez v. United States, 674 F.3d 621, 621 (7th Cir. 2011).
53. Orvitz v. United States, 664 F.3d 1151, 1151–52 (8th Cir. 2011).
54. Glover v. United States, 531 U.S. 198, 198 (2011).

there was effectively no appellate review at all in federal criminal cases.[55] By the early twentieth century, rehabilitation became the primary penal philosophy. In this indeterminate sentencing regime, sentencing judges examined the individual circumstances of each offense and offender and were viewed as the sentencing experts.[56] During this era, there was no substantive appellate review of sentences that were within statutory limits; appellate courts could vacate sentences only in limited circumstances.[57] The Parole Commission played a major role in determining the length of an offender's sentence, as federal prisoners became eligible for parole after serving only one-third of their sentence, or even earlier at the discretion of the sentencing judge.[58]

In the 1970s, concerns about unwarranted disparities in sentences began to grow, and many argued that judicial discretion in sentencing should be constrained.[59] Congress responded with the Sentencing Reform Act of 1984, which created the United States Sentencing Commission and abolished parole.[60] Under the new "truth in sentencing" regime, offenders had to serve at least eighty-five percent of their sentences.[61] The Commission wrote the Federal Sentencing Guidelines, which came into effect in 1987 and greatly limited sentencing discretion.[62] The Guidelines provided sentencing ranges based on circumstances relating to the offense and the defendant's prior criminal convictions; they left room for departures from these ranges only in narrowly specified circumstances.[63] The courts viewed the Sentencing Guidelines as mandatory.[64] With the introduction of the Guidelines came more sentencing law and an increased involvement by the appellate courts in sentencing decisions. Under the SRA, appellate courts had the power to review misapplications of the Guidelines, and correct sentences that departed from the

55. *See* Bator, *supra* note 12, at 473 n.75.

56. Nancy Gertner, *A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 695–97 (2010).

57. 6 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 26.3(g) (3d ed. 2007).

58. PETER B. HOFFMAN, HISTORY OF THE FEDERAL PAROLE SYSTEM 11, 15 (2003).

59. MARVIN E. FRANKEL, CRIMINAL SENTENCES: LAW WITHOUT ORDER 49 (1973); KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 31–32 (1998).

60. Pub. L. No. 98-473, §§ 217–218, 98 Stat. 1837, 2017, 2027 (1984).

61. Paul H. Robinson, *One Perspective on Sentencing Reform in the United States*, 1 CRIM. L.F. 1, 10 (1997).

62. Gertner, *supra* note 56, at 702.

63. U.S. SENTENCING GUIDELINES MANUAL § 1.1 (1987).

64. Gertner, *supra* note 56, at 703–04.

applicable range.[65]

In 2005, the Supreme Court held in *United States v. Booker*[66] that a mandatory Guideline regime violated the defendant's right to a jury trial under the Sixth Amendment and declared the Guidelines advisory.[67] Nevertheless, the Guidelines continue to have a major impact on sentences. In determining an appropriate sentence, the federal sentencing court must calculate the applicable Sentencing Guideline range and consider that range along with various statutory factors.[68] Ultimately, judges must impose a sentence that is sufficient, but not greater than necessary, to serve the purposes of sentencing.[69] Appellate court review is for the "reasonableness" of the sentence. Miscalculation of the applicable Sentencing Guideline range or misunderstanding of applicable statutory sentencing provisions will usually result in a remand by the appellate court.[70] Despite the flexibility that *Booker* provides to sentencing courts, courts continue to impose sentences within the Guideline ranges in the majority of cases.[71]

Although appellate review provides an opportunity to correct many sentencing errors, it is inadequate to address some situations. Criminal defendants must file a notice of appeal within fourteen days of the entry of judgment.[72] In some instances, however, the sentencing error does not become apparent until after the period of direct review is complete because of new case law developments, the discovery of new evidence, or ineffective counsel. As discussed below, prisoners face major hurdles in obtaining relief from sentencing errors after direct review has been exhausted, even if a sentence is undisputedly incorrect.

B. Common Law Correction of Sentences and Rule 35

Prior to the promulgation of the Federal Rules of Criminal Procedure in 1946, federal district courts had broad common law

65. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 213(a), 98 Stat. 1837, 2011 (codified at 18 U.S.C. § 3742(e) (1984)).

66. 543 U.S. 220 (2005).

67. *Id.* at 245.

68. *Id.* at 245–46.

69. 18 U.S.C. § 3553(a) (2006); Kimbrough v. United States, 552 U.S. 85, 90–91 (2007).

70. *See* Gall v. United States, 552 U.S. 38, 51 (2007).

71. U.S. SENTENCING COMM'N, 2011 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS 4 tbl. N (2011) (stating that 54% of sentences imposed are within Guideline ranges; non-government supported below-range sentences account for only 17.4% of sentences).

72. FED. R. APP. P. 4(b)(1)(A).

authority to correct an illegal sentence at any time.[73] Courts also had the power to reconsider the appropriateness of the original sentence in light of additional information or simply a change of heart.[74] This power to revise a lawful sentence was constrained only by the "term of court rule," which allowed the court to change the sentence only up until the end of the court's term.[75]

Rule 35 of the Federal Rules of Criminal Procedure "continue[d] existing law"[76] by providing that a "court may correct an illegal sentence at any time."[77] Under that Rule, courts could continue to reduce lawful sentences based on further reflection and change of heart, but had to make any such reduction within sixty days.[78] Subsequent amendments to the Rule further increased the flexibility of courts to reduce sentences.[79] During this era of wide discretion for trial courts under Rule 35, appellate courts reviewed a court's decision on a motion to correct an illegal sentence only for abuse of discretion.[80]

In 1984, the SRA dramatically changed this landscape and shifted sentencing authority away from district court judges in multiple ways.[81] As described above, the SRA created a sentencing Guideline regime, which constrained district court Sentencing discretion and increased appellate review of sentences. In addition, the SRA completely rewrote Rule 35. Under the older version of

73. Rittenberg, *supra* note 43, at 290.

74. *Id.*

75. *Id.* at 289.

76. FED. R. CRIM. P. 35 advisory committee's note (1946).

77. FED. R. CRIM. P. 35 (1946) (amended 2009).

78. *See, e.g., id.* (stating that the time limitation for motion for sentence reduction in Rule 35 was sixty days); United States v. Maynard, 485 F.2d 247, 248 (9th Cir. 1973) (stating that "the function of Rule 35 is simply to allow the district court to decide if, on further reflection, the original sentence now seems unduly harsh"); United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir. 1968) ("The motion to reduce a sentence is 'essentially a plea for leniency,' Rule 35 is intended to give every convicted defendant a second round before the sentencing judge, and at the same time, it affords the judge an opportunity to reconsider the sentence in the light of any further information about the defendant or the case which may have been presented to him in the interim." (citation omitted)).

79. *See* FED. R. CRIM. P. 35 advisory committee's note (1982) (clarifying the time for modifying sentences after revocation of probation); FED. R. CRIM. P. 35(b) (1979) (amended 2009) (clarifying that courts can change sentences from incarceration to probation); FED. R. CRIM. P. 35 (1966) (amended 2009) (extending the time for modifying a sentence from sixty days to 120 days and providing that courts can modify sentences imposed in an "illegal manner").

80. 3 CHARLES ALAN WRIGHT & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 616 (4th ed. 2011).

81. Gertner, *supra* note 56, at 702.

Rule 35, district courts were specifically authorized to modify lawful sentences.[82] The revised Rule, which became effective in 1987, eliminated this explicit authorization and created only two exceptions: (1) the court could reduce the sentence when the case was remanded after appeal, or (2) the court could reduce the sentence within one year if the government moved for reduction based on the defendant's substantial assistance in the investigation of others.[83] The 1987 version of Rule 35 contained no provision at all permitting sentencing courts to correct illegal sentences. Thus, as a result of the SRA, sentencing judges became constrained in their initial sentencing decisions by the Guidelines and lost most of their former ability to modify sentences that they imposed.

Following the 1987 changes to Rule 35, several circuits held that district courts retained inherent power to correct clear errors within the time permitted for the parties to appeal.[84] In response, Rule 35 was amended again in 1991 to allow courts to correct sentences within seven days based on "arithmetical, technical, or other clear error."[85] The Advisory Committee explained that the authority was intended to be "very narrow" and not intended to "afford the court the opportunity to reconsider the application or interpretation of the Sentencing Guidelines or for the court simply to change its mind about the appropriateness of the sentence."[86] The Advisory Committee also clarified that the revision was "not intended to preclude a defendant from obtaining statutory relief from a plainly illegal sentence" because "the Committee's assumption [was] that a defendant detained pursuant to such a sentence could seek relief under 28 U.S.C. § 2255 if the seven-day period provided in Rule 35(c) ha[d] elapsed."[87] The current version of Rule 35 now provides that courts may correct clear errors within fourteen days, and may, subject to various time restraints, reduce a sentence upon a substantial assistance motion from the government.[88]

As will be discussed, in the past few decades, courts and Congress have greatly restricted a prisoner's ability to use § 2255 to

82. FED. R. CRIM. P. 35 (1983) (amended 2009); Rittenberg, *supra* note 43, at 290.

83. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 215, 98 Stat. 1837, 2015–16; FED. R. CRIM. P. 35 (1987) (amended 2009).

84. United States v. Rico, 902 F.2d 1065, 1069 (2d Cir. 1990); United States v. Cook, 890 F.2d 672, 675 (4th Cir. 1989).

85. FED. R. CRIM. P. 35 (1991) (amended 2009).

86. FED. R. CRIM. P. 35 advisory committee's note (1991).

87. *Id.*

88. FED. R. CRIM. P. 35.

correct an unlawful sentence. Eliminating Rule 35 as a separate mechanism for resentencing meant putting sentence-based claims under the same collateral review framework as conviction-based claims. Since this change, little attention has been paid to the very different finality issues at stake with these two types of claims.

C. *Evolution of Habeas Corpus and § 2255 for Federal Prisoners*

In 1948, two years after Rule 35 became effective, Congress enacted 28 U.S.C. § 2255.[89] For a period of time, there was some overlap between Rule 35 and § 2255.[90] Historically, § 2255 provided a means for collateral attack on a conviction or sentence, whereas Rule 35 applied only to attacks on sentences imposed based on valid convictions.[91] As described above, Rule 35 has now been virtually eliminated as a means for challenging unlawful sentences.[92]

Prior to the enactment of § 2255, federal prisoners could challenge their convictions and sentences with habeas corpus petitions under 28 U.S.C. § 2241.[93] The First Judiciary Act of 1789 gave federal prisoners the right to petition for writs of habeas corpus to review "the cause of confinement,"[94] and the Act of February 5, 1867 extended the writ to all state prisoners as well.[95] Notably, although courts originally had a very narrow view regarding the scope of habeas review, several early decisions recognized the cognizability of claims of illegal sentences.[96]

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89. Act of June 25, 1948, ch. 646, 62 Stat. 869, 967 (codified as amended in 28 U.S.C. § 2255 (2006)).

90. § 2255 advisory committee's note (1976) ("The [Rule 35] remedy should be used, rather than a motion under these § 2255 rules, whenever applicable, but there is some overlap between the two proceedings which has caused the courts difficulty."). The Committee stated that "[a] major difficulty in deciding whether Rule 35 or § 2255 is the proper remedy is the uncertainty as to what is meant by an 'illegal sentence' under Rule 35." *Id.* The Committee stated that "[t]he movant should not be barred from an appropriate remedy because he misstyled his motion," and after discussing a number of cases, the Committee concluded that "[t]he flexible approach taken by the courts in the above cases seems to be the reasonable way to handle these situations in which Rule 35 and § 2255 appear to overlap." *Id.*

91. 3 WRIGHT & WELLING, *supra* note 80, § 612.

92. *See supra* notes 82–88 and accompanying text.

93. *See* 28 U.S.C. § 2255 & reviser's note (1948) (amended 2008) (clarifying that § 2255 provides the remedy for correcting erroneous sentences, "without resort to habeas corpus").

94. Act of Sept. 24, 1789, ch. 20, 1 Stat. 73, 81–82; 1 HERTZ & LIEBMAN, *supra* note 22, § 2.4[d][i].

95. Act of Feb. 5, 1867, ch. 28, 14 Stat. 385, 385.

96. *See, e.g.*, *Ex parte* Wilson, 114 U.S. 417, 418 (1885); *Ex parte* Lange, 85 U.S. (18 Wall.) 163, 163 (1873); Bator, *supra* note 12, at 471–72.

Section 2255 was enacted in 1948 for procedural reasons and was not intended to change the substantive rights of federal prisoners to seek habeas review.[97] With the same legislation in 1948, Congress created § 2254 for state prisoners to utilize in seeking relief from federal courts.[98] Although § 2255 for the most part replaced § 2241 (the former habeas corpus provision) with respect to claims by federal prisoners, prisoners may continue to utilize § 2241 if the attack relates to the execution rather than the imposition of a federal sentence[99] or where § 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention."[100] This "inadequate or ineffective" provision, called the "savings clause," operates to "save" the restrictions imposed under § 2255 from violating the Suspension Clause of the Constitution.

After its enactment in 1948, § 2255 was not amended in any significant way for almost fifty years. The scope of § 2255 nonetheless evolved over the years through case law developments. Following World War II, the Supreme Court began to dramatically expand the scope of federal habeas review of state and federal judgments. Under the Warren Court, Supreme Court cases established that state prisoners could re-litigate constitutional issues in federal court through habeas corpus petitions,[101] and prisoners would be prevented from raising claims not raised in the state only if they deliberately bypassed state procedures.[102] However, by the mid-1970s, the Burger Court began to emphasize principles of finality of criminal judgments and narrow the scope of habeas relief. The Court barred

97. Hill v. United States, 368 U.S. 424, 427 (1962) (quoting United States v. Hayman, 342 U.S. 205, 219 (1951)); *see also* 2 HERTZ & LIEBMAN, *supra* note 22, § 41.2[a], at 2130–31. Because § 2241 petitions had to be brought in the district of confinement, those courts sitting in jurisdictions containing federal prisons had a disproportionate number of petitions. *Id.* In addition, they had to rely on records stored at distant sentencing courts, and hearings could require witnesses to be brought from faraway places. *Id.* To address these concerns, under § 2255 the prisoner files the motion with the original sentencing judge rather than in the district of confinement. *Id.* at 2131. The legislative history of § 2255 suggests that Congress viewed the motion as a further step in the criminal case, rather than a new civil action. S. REP. NO. 80-1526, at 2 (1948). In the Habeas Rules, promulgated in 1976, the Advisory Committee stated that "a motion under § 2255 is a further step in the movant's criminal case rather than a separate civil action." 28 U.S.C. § 2255 advisory committee's note (1976).

98. Act of June 25, 1948, ch. 646, 62 Stat. 869, 967 (codified as amended at 28 U.S.C. § 2254 (2006)).

99. Examples include challenges to denial of good time credits, prison disciplinary procedures, or parole determinations. 2 HERTZ & LIEBMAN, *supra* note 20, § 41.2[b].

100. 28 U.S.C. § 2255(e) (2006).

101. *See* Brown v. Allen, 344 U.S. 443, 465 (1953).

102. *See* Fay v. Noia, 372 U.S. 391, 439 (1963).

consideration of Fourth Amendment exclusionary rule claims in habeas proceedings[103] and, regarding claims not previously raised, replaced the deliberate-bypass standard with a stricter requirement that prisoners show "cause" and "prejudice" for procedural default.[104] The Rehnquist Court further narrowed habeas relief by placing limitations on successive petitions[105] and by restricting the retroactive application of new case law to habeas cases.[106]

Although § 2255 and § 2254 address very different situations, the Supreme Court has stated that "§ 2255 was intended to mirror § 2254 in operative effect."[107] Courts have read the provisions together, and thus most of the judicially-created restrictions on habeas relief for state prisoners, including non-retroactivity and procedural default, have been held to limit § 2255 relief as well.[108] Courts have also placed additional limitations on the availability of § 2255 relief through the cognizability doctrine, which provides that non-constitutional claims must rise to the level of a "miscarriage of justice" in order to be cognizable at all in § 2255 proceedings.[109]

In 1996, with the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Congress greatly restricted the scope of habeas relief for both state and federal prisoners.[110] Although the AEDPA legislation was largely motivated by concerns about federal court review of state criminal judgments rather than federal court review of its own judgments,[111] the statute imposes similar constraints on both remedies. The AEDPA changed § 2255 by imposing the following: (1) a new one-year statute of limitations period, subject to narrow exceptions; (2) a restriction on filing second or successive petitions; and (3) a requirement that the prisoner obtain a "certificate of appealability" in order to appeal.[112] The AEDPA placed the same restrictions on state prisoners seeking federal relief and imposed

103. *See* Stone v. Powell, 428 U.S. 465, 494–95 (1976).

104. *See* Wainwright v. Sykes, 433 U.S. 72, 90–91 (1977).

105. *See* McCleskey v. Zant, 499 U.S. 469, 493 (1991).

106. *See* Teague v. Lane, 489 U.S. 288, 310 (1989).

107. Davis v. United States, 417 U.S. 333, 344 (1974).

108. 3 WRIGHT & WELLING, *supra* note 80, § 625, at 659.

109. 2 HERTZ & LIEBMAN, *supra* note 22, § 41.3[b]. See *infra* note 169 and accompanying text for further discussion on the meaning of "miscarriage of justice" in this cognizability context.

110. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-132, § 101, 110 Stat. 1214, 1217 (codified as amended at 28 U.S.C. §§ 2244, 2253–2255 (2006)).

111. Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 TUL. L. REV. 443, 458–80 (2007).

112. 28 U.S.C. §§ 2253, 2255(f), (h) (2006).

several additional limitations on § 2254 petitions.[113]

Thus, federal prisoners today seeking correction of sentencing errors at the collateral review stage face stringent statutory and judge-made barriers to relief. It bears noting that the executive pardon or parole systems are not used as error-correcting devices in the federal system. Executive pardon or clemency in the federal system is granted extremely rarely.[114] Indeed, of the few pardons granted, many are given after someone has been released from prison, or to someone who was never incarcerated.[115] In addition, parole is not available in the federal system.[116] Thus, unlike in some states where parole could serve an error-correcting function, parole cannot mitigate the impact of sentencing errors in the federal system.

Below, the Article considers the aftermath of several recent Supreme Court cases as federal prisoners have sought collateral review. Although the decisions established that many prisoners were sentenced incorrectly, courts have often denied relief on procedural grounds, citing interests in finality.

II. THE IMPACT OF NEW COURT DECISIONS ON OLD SENTENCES

When the Supreme Court decides a case involving sentencing, its holding applies in the particular case before the Court and to any case that is not yet "final"—meaning those cases still pending on direct review or for which the time to seek direct review has not expired.[117] Whether prisoners already serving final sentences at the time of the decision will obtain the benefit of the new holding is much more

113. *Id.* §§ 2244, 2254. For example, state prisoners seeking federal habeas relief must exhaust their claims in state court, *id.* § 2254(b), and relief may not be granted unless the adjudication of the claim in the state "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Id.* § 2254(d).

114. President Obama has granted only twenty-two pardons and one commutation request since 2009. *See Clemency Statistics*, U.S. DEP'T OF JUST., http://www.justice.gov/pardon/statistics.htm (last visited Sept. 9, 2012).

115. *See Pardons Granted by President Obama*, U.S. DEP'T OF JUST., http://www.justice.gov/pardon/obamapardon-grants.htm (last visited Sept. 9, 2012); *see also President Obama Grants Pardons*, THE WHITE HOUSE (May 20, 2011), http://www.whitehouse.gov/the-press-office/2011/05/20/president-obama-grants-pardons; *President Obama Grants Pardons and Commutation*, THE WHITE HOUSE (Nov. 21, 2011), http://www.whitehouse.gov/the-press-office/2011/11/21/president-obama-grants-pardons-and-commutation.

116. *See* Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.) (abolishing parole).

117. *See* Schriro v. Summerlin, 542 U.S. 348, 351 (2004).

uncertain.

In considering claims of sentencing errors at the collateral review stage, courts place a great emphasis on notions of finality. The aftermath of several recent Supreme Court decisions in the lower courts reveals a reluctance by courts to revisit sentences at the collateral review stage. The Court's decisions in *Begay v. United States*, *Chambers v. United States*, and *Johnson v. United States* established that many defendants had been sentenced based on erroneous interpretations of sentencing enhancement provisions.[118] However, lower courts have refused to correct these errors in many cases—even when it is clear on the merits that the prisoners were sentenced improperly. In justifying these decisions, courts have relied heavily on finality interests.[119] For the most part, however, they have not carefully analyzed the actual finality interests at stake with respect to sentencing claims.

A. Supreme Court Decisions in Begay, Chambers, *and* Johnson

In a series of recent decisions, the Supreme Court clarified the types of convictions that will trigger certain types of federal sentencing enhancements and established that most circuits had been reading these provisions too broadly. The Court's decisions in *Begay*, *Chambers*, and *Johnson* all addressed the scope of the definition of "violent felony" in the ACCA.[120] Under the ACCA, a defendant convicted of gun possession with three or more prior "violent felonies" or "serious drug offenses" will be subject to a mandatory minimum sentence of fifteen years' imprisonment and a maximum sentence of life.[121] A defendant without these predicate convictions is subject to a statutory range of zero to ten years.[122] In addition to

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118. *See infra* Part II.A.

119. The only other article to consider the impact of *Begay* on collateral proceedings was published before the major circuit decisions on the issue in *Sun Bear IV*, 644 F.3d 700 (8th Cir. 2011) (en banc), *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011), and before the Eleventh Circuit's en banc decision in *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011) (en banc). *See* Douglas J. Bench, Jr., *Collateral Review of Career Offender Sentences: The Case for Coram Nobis*, 45 U. MICH. J.L. REFORM 155, 182 (2011) (arguing that courts should resurrect the ancient writ of *coram nobis* to grant collateral relief on *Begay* claims). In contrast to Bench's article, this Article argues that lower courts can grant relief in many cases under § 2255 and § 2241 consistent with preexisting doctrines. In addition, the Article makes a broader argument about the very different finality interests at play when a prisoner requests resentencing rather than retrial.

120. Johnson v. United States, 130 S. Ct. 1265, 1268 (2010); Chambers v. United States, 555 U.S. 122, 124 (2009); Begay v. United States, 553 U.S. 137, 139 (2008).

121. 18 U.S.C. § 924(e) (2006).

122. *Id.* § 924(a)(2). A conviction under § 924(a)(2) requires simply a showing that the

narrowing the reach of the ACCA, these Supreme Court decisions also applied to enhancements under the Sentencing Guidelines based on "crimes of violence."[123] Guideline-based enhancements include the career offender provision, which can double, triple, or even quadruple a defendant's sentence.[124]

In *Begay*, the Supreme Court held that the offense of driving under the influence of alcohol ("DUI") was not a "violent felony" within the meaning of the ACCA.[125] Prior to *Begay*, the circuits that had addressed the issue had uniformly held that DUI convictions were ACCA predicates.[126] The ACCA defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another" or "(ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[127] In determining whether a prior offense is a "violent felony," the Court applied a "categorical approach."[128] In other words, the Court examined the crime "in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion."[129]

At issue in *Begay* was the meaning of subdivision (ii), the so-called "residual clause."[130] *Begay* clarified that the ACCA's listed examples—burglary, extortion, arson, and crimes involving use of explosives—"illustrate the kinds of crimes that fall within the statute's scope," and "[t]heir presence indicates that the statute covers only

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defendant was previously convicted of any felony offense prior to possessing the gun. *Id.*

123. Lower courts have generally held that Supreme Court decisions interpreting the definition of the ACCA's "violent felony" provision also apply to the Sentencing Guidelines' definition of "crime of violence." *See, e.g.*, United States v. Mobley, 687 F.3d 625, 628 n.3 (4th Cir. 2012); United States v. Grupee, 682 F.3d 143, 148–49 (1st Cir. 2012); United States v. Marrero, 677 F.3d 155, 160 n.1 (3d Cir. 2012); United States v. Meeks, 664 F.3d 1067, 1070 n.1 (6th Cir. 2011); United States v. Gray, 535 F.3d 128, 130–31 (2d Cir. 2008); *see also* U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (2011) (defining "crime of violence"). *But see* United States v. Raupp, 677 F.3d 756, 760 (7th Cir. 2012) (holding that the Guideline definition of "crime of violence" is somewhat broader than the ACCA's definition).

124. § 4B1.1. "Crimes of violence" can also lead to enhancements under the Guidelines in immigration and firearm cases. *See id.* §§ 2K2.1, 2L1.2.

125. *Begay*, 553 U.S. at 139.

126. *See, e.g.*, United States v. McCall, 439 F.3d 967, 971–72 (8th Cir. 2006) (en banc); United States v. Sperberg, 432 F.3d 706, 708–09 (7th Cir. 2005).

127. 18 U.S.C. § 924(e)(2)(B) (2011).

128. *Begay*, 553 U.S. at 141.

129. *Id.*

130. § 924(e)(2)(B)(ii); *Begay*, 553 U.S. at 155 (Alito, J., dissenting).

similar crimes, rather than every crime that 'presents a serious potential risk of physical injury to another.' "[131] The Court reasoned that a DUI offense, unlike the enumerated offenses, did not require "purposeful, violent, and aggressive conduct."[132] Rather, DUI offenses are comparable to strict liability offenses where criminal intent need not be shown. The Court found this distinction relevant because although "[i]n both instances, the offender's prior crimes reveal a degree of callousness toward risk," crimes involving intentional or purposeful conduct "also show an increased likelihood that the offender is the kind of person who might deliberately point the gun and pull the trigger."[133] The Court concluded: "We have no reason to believe that Congress intended a 15-year mandatory prison term where that increased likelihood does not exist."[134]

Following *Begay*, the Court held in *Chambers v. United States*[135] that an escape conviction based on a failure to report to custody also does not qualify as a violent felony under the ACCA's residual clause.[136] The circuits had previously split on the issue, with most holding that this form of escape conviction triggered the ACCA enhancement.[137] Soon after, in *Johnson v. United States*,[138] the Supreme Court held that the crime of battery by offensive touching did not qualify under subparagraph (i) of the ACCA.[139] The Court concluded that subparagraph (i) requires that the predicate offense's element of "physical force" involve "violent force—that is, force capable of causing physical pain or injury to another person."[140] A number of circuits considering the issue had reached the opposite conclusion prior to *Johnson*.[141]

Since these Supreme Court cases apply not only to

131. *Begay*, 553 U.S. at 142.
132. *Id.* at 144–45.
133. *Id.* at 146.
134. *Id.*
135. 555 U.S. 122 (2009).
136. *Id.* at 130.
137. Most circuits concluded that an escape conviction based on failure to return to custody was a "violent felony" under the ACCA or a "crime of violence" under the Guidelines. *See, e.g.*, United States v. Winn, 364 F.3d 7, 8 (1st Cir. 2004); United States v. Jackson, 301 F.3d 59, 63 (2d Cir. 2002); United States v. Luster, 305 F.3d 199, 202 (3d Cir. 2002). *But see* United States v. Piccolo, 441 F.3d 1084, 1085 (9th Cir. 2006) (holding that an escape conviction is not an offense which categorically constitutes a "crime of violence").
138. Johnson v. United States, 130 S. Ct. 1265, 1267 (2010).
139. *Id.* at 1271.
140. *Id.*
141. *See, e.g.*, United States v. Llanos-Agostadero, 486 F.3d 1194, 1195 (11th Cir. 2007) (per curiam); United States v. Nason, 269 F.3d 10, 20 (1st Cir. 2001); United States v. Smith, 171 F.3d 617, 621 n.2 (8th Cir. 1999).

enhancements under the ACCA but also to Guidelines enhancements,[142] the decisions will impact a large number of cases going forward.[143] But what about the prisoners who are already serving sentences that were imposed under an incorrect view of the law?

B. Addressing Claims of Erroneous Enhancements on Collateral Review

In the wake of the Supreme Court's recent decisions clarifying the reach of statutory and Guideline enhancement provisions, a number of federal prisoners have sought relief through filing motions under 28 U.S.C. § 2255. In most of these cases, it is undisputed that the prisoners were sentenced incorrectly—i.e., if they were sentenced today, their prior conviction would plainly not trigger a sentencing enhancement, and they would receive a shorter sentence.

In light of the clear errors and the relative ease of correcting them, one might expect prisoners to obtain relief. However, although courts have granted resentencing in some cases, relief has been denied in many cases. As is demonstrated below, courts have rejected motions on the ground that *Begay* and its progeny are not retroactive, that Sentencing Guidelines errors are not cognizable under § 2255, that claims are procedurally defaulted or barred by the statute of limitations, and that prisoners waived their right to seek collateral review in their plea agreements.

1. Retroactivity of the Supreme Court Decisions

A threshold question is whether *Begay* and its progeny apply

142. *See supra* note 123.

143. Last term, the Court appeared to retreat somewhat from *Begay* with its decision in *Sykes v. United States*, 131 S. Ct. 2267 (2011). In *Sykes*, the Court held that an Indiana statute making it a criminal offense when the driver of a vehicle knowingly or intentionally flees from a law enforcement officer was a violent felony within the meaning of the ACCA. *Id.* at 2270. The Court emphasized that the DUI offense at issue in *Begay* did not require a showing of deliberate and purposeful conduct. *Id.* at 2275. In contrast, the crime at issue in *Sykes* involved intentional conduct. *Id.* Rather than following the "purposeful, violent, and aggressive" formulation from *Begay*, the Court focused instead on whether the crime involved a showing of criminal intent and the level of risk presented by the offense. *Id.* at 2275. After *Sykes*, it is unclear whether *Begay*'s "purposeful, violent, and aggressive" test "will make a resurgence" as Justice Kagan suggests in her *Sykes* dissent, or whether risky intentional crimes that are not "violent" or "aggressive" will be included within the scope of the residual clause. *Id.* at 2289 n.1 (Kagan, J., dissenting). However, after *Sykes*, it is still clear that crimes involving unintentional conduct do not count as ACCA predicates. Justice Scalia dissented in *Sykes*, and argued that the residual clause was void for vagueness. *See id.* at 2284 (Scalia, J., dissenting).

retroactively to cases on collateral review. Although it seems obvious under Supreme Court case law that the decisions are retroactive, a number of courts have held that *Teague v. Lane*[144] precludes relief.[145]

Teague established a new framework for considering issues of retroactivity and greatly narrowed the possibilities for relief for prisoners in collateral proceedings.[146] *Teague* involved a state prisoner seeking federal review of a conviction and was motivated by concerns about federalism, comity, and finality.[147] The Supreme Court has since held the *Teague* framework applicable in the capital sentencing context,[148] and lower courts have assumed that it applies in noncapital sentencing cases.[149] The Supreme Court has explicitly left open the question of whether *Teague* binds federal courts when they review federal criminal judgments in § 2255 proceedings.[150] Some scholars have argued that *Teague* should not bar retroactive application of new rules to federal judgments because federalism and comity concerns are absent in the context of federal review of federal judgments.[151] However, the courts of appeals to consider the issue

144. 489 U.S. 288 (1989).

145. *See infra* note 158 and accompanying text (listing cases that have precluded relief based on *Teague*).

146. In *Teague*, the Supreme Court held that federal courts cannot create a new rule recognizing a constitutional right in a habeas case unless it is a right that would be applied retroactively; "[r]etroactivity is properly treated as a threshold question." *Teague*, 489 U.S. at 300. Prior to *Teague*, the Court considered habeas petitions alleging constitutional violations even when the right would not be applied retroactively in other habeas cases. ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 15.5.1, at 932 (5th ed. 2007). *Teague* broadly defined "new": "[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301. Under *Teague*, rights have retroactive effect only where the new rule (1) places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to prescribe" or (2) is a "watershed" rule of criminal procedures. *Id.* at 307, 311. *Teague* thus greatly limited the ability of federal courts to identify and protect new constitutional rights.

147. *Teague*, 489 U.S. at 305–10.

148. Schriro v. Summerlin, 542 U.S. 348, 351 (2004); Penry v. Lynaugh, 492 U.S. 302, 314 (1989).

149. *See, e.g.*, Duncan v. United States, 552 F.3d 442, 444 n.4 (6th Cir. 2009); United States v. Cruz, 423 F.3d 1119, 1120 (9th Cir. 2005); Varela v. United States, 400 F.3d 864, 867 (11th Cir. 2005).

150. Danforth v. Minnesota, 552 U.S. 264, 269 n.4 (2008). In *Danforth*, the Court also held that state courts are not bound by *Teague* in determining the rules governing the retroactive application of new federal constitutional rules in state postconviction proceedings. *Id.* at 269.

151. *See* Christopher N. Lasch, *The Future of* Teague *Retroactivity, or "Redressability," After* Danforth v. Minnesota*: Why Lower Courts Should Give Retroactive Effect to New Constitutional Rules of Criminal Procedure in Postconviction Proceedings*, 46 AM. CRIM. L. REV. 1, 1 (2009). For more scholarship critiquing *Teague*, see generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*,

thus far have held *Teague* applicable to § 2255 motions.[152]

Assuming that the *Teague* framework applies at all to § 2255 motions, the general rule is that new substantive rules apply retroactively, whereas new procedural rules are retroactive only if the rule is a watershed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceedings. As the Supreme Court has explained:

> New *substantive* rules generally apply retroactively. This includes decisions that narrow the scope of a criminal statute by interpreting its terms, see *Bousley v. United States*, 523 U.S. 614, 620-621 (1998), as well as constitutional determinations that place particular conduct or persons covered by the statute beyond the State's power to punish, see *Saffle v. Parks*, 494 U.S. 484, 494-495 (1990); *Teague v. Lane*, 489 U.S. 288, 311 (1989) (plurality opinion). Such rules apply retroactively because they "necessarily carry a significant risk that a defendant stands convicted of 'an act that the law does not make criminal' " or faces a punishment that the law cannot impose upon him. *Bousley*, *supra*, at 620 (quoting *Davis v. United States*, 417 U.S. 333, 346 (1974)).[153]

Begay is a substantive decision about the scope of criminal statute.[154] With the decision, the Supreme Court held that some types of prior convictions will trigger the ACCA penalty, and some will not.[155] People sentenced under prior circuit precedent are serving sentences "that the law cannot impose" on them under *Begay*'s holding.[156] Thus, *Teague* should not prevent retroactive application of *Begay*. Indeed, the government conceded the retroactivity of *Begay* in one of the first decisions to address the issue.[157]

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104 HARV. L. REV. 1731 (1991); James S. Liebman, *More than "Slightly Retro:" The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537 (1990-91); Linda Meyer, *"Nothing We Say Matters":* Teague *and New Rules*, 61 U. CHI. L. REV. 423 (1994); Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of Seeking Certiorari from Judgments of State Courts*, 50 WM. & MARY L. REV. 211 (2008) (arguing that *Teague* and AEDPA have effectively ended the constitutional dialogue between lower federal courts and state courts).

152. *See, e.g.*, United States v. Chang Hong, 671 F.3d 1147, 1150 (11th Cir. 2011); *Duncan*, 552 F.3d at 444 n.2; Sepulveda v. United States, 330 F.3d 55, 66 (1st Cir. 2003).

153. *Schriro*, 542 U.S. at 351–52 (footnote and parallel citations omitted).

154. Begay v. United States, 553 U.S. 137, 140 (2008).

155. *Id.* at 142.

156. *Schriro*, 542 U.S. at 352.

157. *See* United States v. Glover, No. 05-CR-0111-CVE, No. 08-CV-0261-CVE-FHM, 2008 WL 2951085, at *4 (N.D. Okla. July 28, 2008).

Yet somewhat remarkably, district courts have been split on whether *Begay*, *Chambers*, and *Johnson* are retroactive, with a large number of district courts holding that the cases are not retroactive.[158] These cases typically involved pro se prisoners, and most decisions did not provide extensive reasoning on the retroactivity question. Some courts simply stated that *Begay* "is not a substantive change in the law, nor a watershed rule bearing on the accuracy or fairness of the criminal process" without further analysis.[159] Several courts, facing claims of erroneous Guideline calculations under *Begay*, said that rules for calculating Sentencing Guidelines are not retroactive and cited decisions holding that the Supreme Court's decision rendering the Guidelines advisory in *Booker v. United States* is not retroactive.[160] The *Booker* analogy is unpersuasive: at issue in *Booker* was the constitutionality of the procedures for enhancing sentences under the Guidelines.[161] *Begay* concerned the substantive scope of an enhancement provision.[162]

The number of district courts finding that *Begay* and its progeny are not retroactive is striking, given the strength of the argument that the cases addressed a substantive issue regarding the reach of a criminal statute. At the circuit level, the Sixth, Seventh, and Tenth Circuits have held that *Begay* and/or *Chambers* are retroactive.[163] The

158. *See, e.g.*, United States v. Ross, Nos. 06-cr-132-jcs, 09-cv-779-bbc, 2010 WL 148397, at *2 (W.D. Wis. Jan. 12, 2010); United States v. Jones, Criminal Action No. 6: 04-70-DCR, Civil Action No. 6: 09-7082-DCR, 2010 WL 55930, at *3–6 (E.D. Ky. Jan. 4, 2010), *rev'd*, 689 F.3d 621 (6th Cir. 2012); United States v. Holt, 677 F. Supp. 2d 1063, 1065 (W.D. Wis. 2009); Kirkland v. United States, Nos. 3:09-CV-335 RLM, 3:06-CR-3(01) RLM, 2009 WL 3526185, at *8 (N.D. Ind. Oct. 22, 2009), *vacated*, Aug. 30, 2010; United States v. Johnson, Criminal No. 04-269 (MJD/AJB), 2009 WL 2611279, at *2 (D. Minn. Aug. 24, 2009); Lindsey v. United States, Case No. 09-0249-CV-W-ODS, Crim. No. 06-00340-01-CR-W-ODS, 2009 WL 2337120, at *2 (W.D. Mo. July 29, 2009), *aff'd on other grounds*, 615 F.3d 998 (8th Cir. 2010); Sun Bear v. United States (*Sun Bear II*), No. CIV 08-3021, No. CR 01-30051, 2009 WL 2033028, at *4 (D.S.D. July 9, 2009), *rev'd*, 611 F.3d 925 (8th Cir. 2010), *aff'd en banc*, 644 F.3d 700 (8th Cir. 2011); United States v. Narvaez, No. 09-cv-222-bbc, No. 03-cr-0081-jcs-01, 2009 WL 1351811, at *2 (W.D. Wis. May 12, 2009), *rev'd*, 641 F.3d 877 (7th Cir. 2011); Cadieux v. United States, Civil No. 09-42-B-W, Crim. No. 03-41-B-W, 2009 WL 1286421, at *7 (D. Me. May 8, 2009); United States v. Campbell, CR No. 6:06-812-HMH, 2009 U.S. Dist. LEXIS 37542, at *4 (D.S.C. May 1, 2009).

159. *Johnson*, 2009 WL 2611279, at *4.

160. *See, e.g.*, *Holt*, 677 F. Supp. 2d at 1065; *see also Jones*, 2010 WL 55930, at *3–6 (discussing the 6th Circuit, Wisconsin district court, and Maine district court decisions not to apply *Begay* retroactively).

161. United States v. Booker, 543 U.S. 220, 220 (2005).

162. *See* Begay v. United States, 553 U.S. 137, 137–38 (2008).

163. *See* Jones v. United States, 689 F.3d 621, 625 (6th Cir. 2012) ("*Begay* is a new substantive rule and not procedural because it substantially altered the punishment certain categories of defendants may face for a crime."); Narvaez v. United States, 674 F.3d 621,

Eighth and Eleventh Circuit decisions initially held that *Begay* was retroactive, but subsequently vacated the panel decisions and issued en banc decisions that denied relief without reaching the retroactivity question.[164] The Fourth Circuit, while not explicitly ruling on the issue, ordered a resentencing based on *Chambers* in a case on collateral review.[165] The First Circuit stated in dicta that *Begay* is not retroactive.[166]

2. Cognizability of Claims

In addition to holding that *Begay* and its progeny are not retroactive, some courts have denied relief to prisoners on the ground that the claims are not "cognizable" in § 2255 motions. In other words, courts have held that § 2255 simply does not provide a remedy for the claimed sentencing error.[167]

Under § 2255, a federal prisoner may move the court to "vacate, set aside or correct the sentence" if 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."[168] The Supreme Court has held that for errors that are non-constitutional to be cognizable, the error must be "a fundamental defect which inherently results in a complete

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625 (7th Cir. 2011) ("We also agree that, in these circumstances, the *Begay* and *Chambers* decisions apply retroactively on collateral review."); United States v. Shipp, 589 F.3d 1084, 1089–91 (10th Cir. 2009) ("[W]e hold that the Supreme Court's construction of the ACCA in *Chambers* applies retroactively to Mr. Shipp on collateral review.").

164. *See* Sun Bear v. United States (*Sun Bear III*), 611 F.3d 925, 929 (8th Cir. 2010) ("[W]e hold that the rule in *Begay* is applicable retroactively to cases on collateral review."), *vacated en banc*, *Sun Bear IV*, 644 F.3d 700, 703–04 (8th Cir. 2011) (en banc) ("We decline to consider these [retroactivity] issues because we agree with the government's alternative contention that Sun Bear's collateral attack on an application of the career offender guidelines provisions is not cognizable under § 2255."); Gilbert v. United States, 609 F.3d 1159, 1165 (11th Cir. 2010) ("[T]he government . . . concedes that *Begay* . . . appl[ies] retroactively . . . . We agree."), *vacated en banc*, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc) (holding that "the savings clause does not authorize a federal prisoner to bring in a § 2241 petition a claim, which would otherwise be barred by § 2255(h), that the Sentencing Guidelines were misapplied in a way that resulted in a longer sentence not exceeding the statutory maximum").

165. *See* United States v. Williams, 396 F. App'x 951, 952 (4th Cir. 2010).

166. *See* United States v. Giggey, 551 F.3d 27, 36 n.3 (1st Cir. 2008).

167. *See, e.g.*, Crawford v. United States, No. 8:11–cv–1866–T–30TGW, No. 8:07-cr-454-T-30TGW, 2011 WL 3702664, at *3 (M.D. Fla. Aug. 23, 2011); *Sun Bear IV*, 644 F.3d at 703–04; United States v. Smith, Criminal No. 3:06–1126–CMC, 2010 WL 4340340, at *3 (D.S.C. Oct. 25, 2010); Eason v. United States, No. 09-80172-CIV, 2010 WL 1645092, at *7 (S.D. Fla. Apr. 21, 2010) (rejecting magistrate judge's recommendation).

168. 28 U.S.C. § 2255(a) (Supp. IV 2011).

miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure."[169]

Courts seem to agree that claims by prisoners that their sentences were imposed in excess of the statutory maximum are cognizable in § 2255 motions.[170] Thus, claims are cognizable if they allege that a conviction should not have triggered the ACCA enhancement under *Begay*—as the ACCA requires imposition of a sentence above the otherwise applicable statutory maximum.[171] Courts disagree, however, on whether sentences may be challenged on collateral review if they were imposed based on erroneous calculations under the Sentencing Guidelines, but do not exceed the maximum permitted by statute. There is a circuit split as to whether a prisoner's claim that he or she was incorrectly sentenced as a career offender under the Guidelines is cognizable in a § 2255 motion. The Eighth Circuit, sitting en banc, held in *Sun Bear v. United States*[172] that such Guidelines-based claims are not cognizable.[173] The Seventh Circuit reached the opposite conclusion in *Narvaez v. United States*,[174] holding that imposition of an erroneous career offender sentence is a miscarriage of justice and cognizable in a § 2255 motion.[175]

a. Sun Bear v. United States

In 2002, the district court in *Sun Bear* sentenced the defendant in to 360 months' imprisonment under the then-mandatory Sentencing Guidelines after finding that he qualified as a career offender based

169. United States v. Addonizio, 442 U.S. 178, 185 (1979) (noting that errors of law do not support collateral attack claims unless the "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)); 2 HERTZ & LIEBMAN, *supra* note 22, § 41.3[b] (describing cognizable claims and noting that when "the conviction or sentence violates other federal law . . . [or is] otherwise open to collateral attack because it results in a fundamental miscarriage of justice," such errors must "amount to a violation of the Constitution, or a fundamental defect which inherently results in a complete miscarriage of justice, or an omission inconsistent with the rudimentary demands of fair procedure" (internal quotation marks and citations omitted)).

170. Courts have granted resentencings in these situations where no other procedural barriers exist. *See, e.g.*, Jones v. United States, 689 F.3d 621, 627–28 (6th Cir. 2012); Welch v. United States, 604 F.3d 408, 412–13 (7th Cir. 2010); *Williams*, 396 F. App'x at 953 (4th Cir. 2010) (per curiam).

171. *See* 18 U.S.C. § 924(a)(2), (e) (2006). Of course, courts would only grant relief if they also found *Begay* retroactive, and found no other procedural barrier to relief.

172. 644 F.3d 700.

173. *Id.* at 704.

174. 674 F.3d 621 (8th Cir. 2011) (en banc).

175. *Id.* at 623.

on his prior convictions.[176] The defendant appealed, challenging his career offender designation, and the Eighth Circuit affirmed.[177] In 2008, Sun Bear filed a § 2255 motion arguing that under *Begay*, his sentence was unlawful because his prior conviction for attempted auto theft was not a "crime of violence" under the career offender Guidelines.[178] Following *Begay*, the Eighth Circuit had held that auto theft was not a crime of violence,[179] and thus it was undisputed that Sun Bear would not be a career offender if sentenced today.

Nevertheless, the district court found the motion time-barred, concluding that the statute of limitations did not restart under § 2255(f)(3) because *Begay* was not retroactive.[180] On appeal, a panel of the Eighth Circuit reversed, holding that *Begay* announced a substantive rule that retroactively applies to career offender decisions under the Guidelines.[181] In response to the government's claim that the error was not cognizable, the panel reasoned that "Sun Bear's claim [was] more than a run-of-the-mill claim that the district court misapplied the Sentencing Guidelines."[182] Instead the case "[was] based on a post-conviction change in the law that render[ed] unlawful the district court's sentencing determination."[183] Since there was no indication that the district court would have imposed the same sentence absent the error, the panel concluded that a miscarriage of justice had occurred and resentencing was warranted.[184]

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176. United States v. Sun Bear (*Sun Bear I*), 307 F.3d 747, 753 (8th Cir. 2002). The district court calculated a Sentencing Guideline range of 360 months to life. *Id.* Under the Sentencing Guidelines, a sentencing range is calculated by determining the "offense level" and the "criminal history category." U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (2011). The probation office calculated Sun Bear's offense level as 32, and his criminal history category was VI. *Id.* Thus, without application of the career offender Guideline or any departure, his Guideline range was 210 to 262 months' imprisonment. *Sun Bear I*, 307 F.3d at 750. However, the district court found that the career offender provision applied, and also departed upward by three levels on the ground that criminal category VI understated Sun Bear's criminal history. *Id.* Had the district court only departed, and not applied the career offender enhancement, the range would have been 292 to 365 months' imprisonment. *See Sun Bear IV*, 644 F.3d at 705.

177. *Sun Bear I*, 307 F.3d at 753.

178. *Sun Bear II*, No. CIV 08-3021, No. CR 01-30051, 2009 WL 2033028, at *3 (D.S.D. July 9, 2009), *rev'd*, 611 F.3d 925 (8th Cir. 2010), *aff'd en banc*, 644 F.3d 700.

179. *See* United States v. Williams, 537 F.3d 969, 975–76 (8th Cir. 2008).

180. *Sun Bear II*, 2009 WL 2033028, at *4.

181. *Sun Bear III*, 611 F.3d at 929.

182. *Id.* at 930.

183. *Id.*

184. *Id.* at 931–32 ("The district court has had two opportunities to state that an error in applying the career offender Guideline would not have impacted its sentencing determination, and yet has not done so. In these circumstances, we are unable to say Sun Bear's sentence was inevitable. Accordingly, we hold that Sun Bear has raised a

Sitting en banc, and in a split six to five decision, the Eighth Circuit vacated the panel decision and affirmed the district court's dismissal of the § 2255 motion.[185] Without reaching the retroactivity question, the court held that Sun Bear's claim that he had been sentenced erroneously under the career offender Guideline was simply not cognizable under § 2255.[186] The court noted that "this court and our sister circuits have consistently held that ordinary questions of Guideline interpretation falling short of the miscarriage of justice standard do not present a proper § 2255 claim."[187] The Court rejected the panel's conclusion that the miscarriage-of-justice exception applied because Sun Bear's claim was based on a post-conviction change in the law that rendered unlawful the district court's sentencing decision.[188] The en banc court stated: "Sun Bear's 360-month sentence is not unlawful. An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority."[189] Since "the same 360-month sentence could be reimposed were Sun Bear granted the § 2255 relief he request[ed]," the court concluded that "no miscarriage of justice [was] at issue."[190]

Five judges dissented, arguing that the "majority's holding promotes finality at the expense of justice in a situation where, unlike most AEDPA cases, there [were] no concerns of comity or federalism."[191] Writing for the dissent, Judge Melloy stated: "I find the sole justification for the majority's holding today to be an uncompelling and unjust denial of process resting on hollow claims of a need to promote finality."[192] In response to the government's presentation of "a parade of horribles suggesting there will be an overwhelming burden caused by the application of Section 2255 in this context," the dissent responded: "This alarmist argument is 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

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cognizable claim for relief under § 2255.").

185. *See Sun Bear IV*, 644 F.3d 700, 706 (8th Cir. 2011) (en banc).

186. *Id.* at 705 ("[T]he panel concluded that the miscarriage-of-justice exception applies because Sun Bear's claim is based on a post-conviction change in the law that renders unlawful the district court's sentencing determination . . . . We disagree." (internal quotation marks omitted)).

187. *Id.* at 704 (internal quotation marks omitted).

188. *See id.* at 705.

189. *Id.*

190. *Id.*

191. *Id.* at 707 (Melloy, J., dissenting).

192. *Id.* at 712.

cannot pass a harmless error inquiry."[193] The dissent continued: "[T]he government's argument suggests that keeping court dockets clear is more important than the liberty of those prisoners who potentially should not be serving career-offender sentences."[194] However, the dissent reasoned that "[e]ven if there were merit to the government's assertions, resentencings pursuant to recent guideline amendments ha[d] shown the courts' ability to efficiently process sentencing adjustments en mass."[195]

b. Narvaez v. United States

In *Narvaez v. United States*, the Seventh Circuit reached the opposite conclusion from the Eighth Circuit and reversed the district court's decision denying the defendant relief on his § 2255 motion.[196] Narvaez had pleaded guilty to bank robbery and was sentenced in 2003 as a career offender based on his two prior escape convictions involving failure to return to confinement. At the time of the sentencing, the Guidelines were mandatory.[197] Narvaez later filed a motion under § 2255, asserting that he was erroneously sentenced as a career offender based on *Chambers* and *Begay*.[198] The district court denied the motion, holding that *Chambers* and *Begay* did not apply retroactively.[199]

On appeal, the government conceded that *Chambers* and *Begay* applied retroactively to the case and that Narvaez's prior convictions were not "crimes of violence" within the meaning of the career offender guideline.[200] However, the government argued that Narvaez's claim was not cognizable under § 2255.[201] The Seventh Circuit reversed the district court's denial of relief and ordered that Narvaez be resentenced without application of the career offender guideline.[202] The court originally issued an opinion in June 2011, which asserted that the error in the sentence amounted to a due process violation.[203] After the government moved for en banc

193. *Id.*
194. *Id.*
195. *Id.*
196. Narvaez v. United States, 674 F.3d 621, 623 (7th Cir. 2011).
197. *Id.* at 623.
198. *Id.*
199. United States v. Narvaez, No. 09-CV-222-BBC, 2009 WL 1351811, at *2 (W.D. Wis. May 12, 2009).
200. *Narvaez*, 674 F.3d at 625.
201. *Id.*
202. *Id.* at 630.
203. United States v. Narvaez, 641 F.3d 877, 883 (7th Cir. 2011).

consideration, the court issued an amended opinion in December 2011, which eliminated the due process holding but reached the same result.[204] The amended opinion noted that it had been circulated to the active judges on the court, and none favored hearing the case en banc.[205]

The *Narvaez* Court acknowledged that Sentencing Guideline errors are generally not cognizable on collateral review.[206] However, the court found that Narvaez's case "present[ed] a special and very narrow exception: A post-conviction clarification in the law ... rendered the sentencing court's decision unlawful."[207] The court reasoned that "Mr. Narvaez never should have been classified as a career offender."[208] Since "[t]he career offender status illegally increased Mr. Narvaez's sentence approximately five years beyond that authorized by the sentencing scheme," "Mr. Narvaez's claim [went] to the fundamental legality of his sentence and assert[ed] an error that constitute[ed] a miscarriage of justice, entitling him to relief."[209]

The Seventh Circuit in *Narvaez* rejected the government's assertion that Narvaez's claim did not present a miscarriage of justice because his sentence was within statutory limits—and he would be exposed to the same possible sentence if resentenced. The court reasoned: "The sentencing court's misapplication of the then-*mandatory* § 4B1.1 career offender categorization in Mr. Narvaez's case was the lodestar to its Guidelines calculation," and "[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."[210] The court concluded: "The Government is correct that Mr. Narvaez does not have an absolute right to a lower sentence. Nevertheless, he does have an absolute right not to stand before the court as a career offender when the law does not impose that label on him."[211]

In sum, the Seventh Circuit found a claim of misapplication of the career offender Guideline cognizable in a § 2255 motion—at least

204. *Narvaez*, 674 F. 3d at 627 n.10.
205. *Id.* at 623 n.3.
206. *Id.* at 627.
207. *Id.*
208. *Id.*
209. *Id.* at 630.
210. *Id.* at 629.
211. *Id.*

where an intervening clarification in the law has established the illegality of the sentence. The Seventh Circuit's decision is plainly at odds with the Eighth Circuit's decision in *Sun Bear*[212] and with decisions of some district courts in other circuits.[213]

3. Procedural Default

Some courts have denied § 2255 motions raising *Begay*-type claims on the ground that the prisoners failed to raise the claims on direct appeal and thus procedurally defaulted the claim.[214] District courts generally may not consider a claim under § 2255 if the issue could have been raised at trial or on direct appeal and was not raised.[215] Failure to raise a claim—or "procedural default"—may be excused if the prisoner can establish both "cause" for not raising the claim sooner and "prejudice" that resulted from the error.[216] Although the cause and prejudice standard was developed in the context of federal review of a claim by a state prisoner,[217] courts have extended it to § 2255 cases.[218]

Prisoners who cannot establish cause and prejudice may overcome procedural default if they demonstrate that failure to consider the claim will result in a "fundamental miscarriage of justice."[219] Courts have found this standard satisfied where prisoners make a persuasive showing that they are actually innocent of the offense of conviction.[220] In capital cases, the Supreme Court has held that procedural default is excused if a prisoner shows he is actually ineligible for the death penalty—i.e., innocent of the aggravating factors that rendered him eligible for death.[221] The circuits are split on whether an "actual innocence" exception applies in the context of

212. Although the Seventh Circuit distinguished *Sun Bear*, noting that Sun Bear's sentence had fallen within the Guideline range applicable without the career offender enhancement, the court stated that "to the extent a tension between this opinion and the Eighth Circuit's reasoning in *Sun Bear* exists, we respectfully disagree with our colleagues on the Eighth Circuit." *Id.* at 630 n.14.

213. *See supra* note 149.

214. *See, e.g.*, United States v. Gibson, 424 F. App'x 461, 466 (6th Cir. 2011).

215. 3 WRIGHT & WELLING, *supra* note 80, § 631. Issues resolved on direct appeal cannot be raised in a § 2255 motion, absent a showing of an intervening change in law, new evidence, "actual innocence," or counsel's ineffectiveness in presenting the issue. *Id.* § 628; 2 HERTZ & LIEBMAN, *supra* note 22, § 41.7[e].

216. 2 HERTZ & LIEBMAN, *supra* note 22, § 26.3.

217. *See generally* Wainwright v. Sykes, 433 U.S. 72 (1977) (establishing the cause and prejudice standard).

218. *See* United States v. Frady, 456 U.S. 152, 167 (1982).

219. *See* 2 HERTZ & LIEBMAN, *supra* note 22, § 26.4.

220. Schlup v. Delo, 513 U.S. 298, 321 (1995).

221. Sawyer v. Whitley, 505 U.S. 333, 345 (1992).

noncapital sentencing where a prisoner shows he is ineligible for an enhanced sentence,[222] and the Supreme Court declined to resolve this issue in 2004 in *Dretke v. Haley*.[223] Thus, at least some circuits apply a stricter procedural default rule to noncapital sentencing claims than to conviction-based claims because they do not permit an "actual innocence" exception in the sentencing context. In addition, some circuits have said that *Begay*-type claims do not satisfy the "actual innocence" exception because they relate to "legal innocence" and not "factual innocence."[224]

Prisoners raising *Begay*-type claims have not had much success in persuading courts to excuse procedural default based on either "cause" and "prejudice" or "actual innocence." Cause may be established if the prisoner shows that counsel was ineffective for failing to raise a *Begay*-type claim[225] or that the claim was so novel prior to the Supreme Court decision that the "legal basis for his claim was not reasonably available to counsel."[226] This procedural default framework causes many prisoners to fall between the cracks. Where current law is against a defendant, courts still expect claims to be preserved, at least if there are cases raising similar claims in the pipeline. For example, the Sixth and Eighth Circuits held that defendants procedurally defaulted their *Begay*-type claims even though circuit law precluded relief at the time of appeal.[227] However, courts are also unlikely to find that counsel was ineffective for failing to raise an issue that was precluded by law at the time.[228]

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222. *Compare* Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 171 (2d Cir. 2000) ("[T]here is no reason why the actual innocence exception should not apply to noncapital sentencing procedures."), *with* Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997) (en banc) ("More fundamentally, we think that *Sawyer*, in terms, applies only to the sentencing phase of death cases."), *and* Reid v. Oklahoma, 101 F.3d 628, 630 (10th Cir. 1996) ("Accordingly, because '[a] person cannot be actually innocent of a noncapital sentence,' petitioner's challenge to his recidivist enhancement does not fall within the potential scope of the miscarriage of justice exception." (quoting United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993))).

223. 541 U.S. 386, 393–94 (2004).

224. *See infra* note 229–43 and accompanying text.

225. Murray v. Carrier, 477 U.S. 478, 496 (1986) (ineffective assistance of counsel can establish cause for procedural default); *see also* Massaro v. United States, 538 U.S. 500, 504–06 (2003) (claim of ineffective assistance of counsel may be raised in § 2255 motion).

226. Bousley v. United States, 523 U.S. 614, 622 (1998).

227. *See* United States v. Gibson, 424 F. App'x 461, 466 (6th Cir. 2011); Lindsey v. United States, 615 F.3d 998, 1000–01 (8th Cir. 2010); *see also* United States v. Coley, 336 F. App'x 933, 936 (11th Cir. 2009) (holding that because the defendant did not raise a non-constitutional issue on direct appeal, it is not cognizable on collateral review under § 2255).

228. United States v. Stewart, No. 1:06-CR00046, 2011 WL 4595243, at *11 (W.D. Va. Oct. 3, 2011) (finding no ineffective assistance of counsel for failing to raise *Begay* claim).

Prisoners have also not had much luck under the "actual innocence" exception to the procedural default doctrine. In *McKay v. United States*,[229] the Eleventh Circuit concluded that the prisoner had procedurally defaulted his claim that he was erroneously sentenced as a career offender because his prior conviction for carrying a concealed weapon was not a "crime of violence."[230] Although McKay had not previously challenged his career offender designation, he sought to excuse procedural default on the ground that he was "actually innocent" of being a career offender.[231] The Eleventh Circuit noted the circuit split on whether the "actual innocence" exception extends to noncapital sentences at all and concluded that McKay would not prevail even if it did.[232] The court reasoned that the "actual innocence" exception relates to "factual innocence" and not "legal innocence," stating "McKay makes the purely legal argument that he is actually innocent of his career offender sentence because his prior conviction for carrying a concealed weapon should not have been classified as a 'crime of violence' under the Guidelines."[233] The court reasoned further: "McKay does not even suggest, because he cannot, that he did not actually commit the crime of carrying a concealed weapon. In other words, he makes no claim of *factual* innocence of the predicate offense."[234] The court concluded: "We thus decline to extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense justifying an enhanced sentence."[235]

Curiously, prior to *McKay*, the government conceded in the Eleventh Circuit in *King v. United States*[236] that the "actual innocence" exception excused procedural default when a petitioner argued that he was erroneously sentenced under the ACCA in light of *Begay*.[237] The Eleventh Circuit ordered resentencing in *King*,[238] and a district court in Georgia similarly ordered resentencing based on the government's concession in another case.[239]

229. 657 F.3d 1190 (11th Cir. 2011).
230. *Id.* at 1192.
231. *Id.* at 1196.
232. *Id.* at 1197–98.
233. *Id.* at 1199.
234. *Id.*
235. *Id.*
236. 419 F. App'x 927 (11th Cir. 2011) (per curiam).
237. *Id.* at 928.
238. *Id.*
239. Brown v. United States, No. CV 409-070, 2010 WL 3656016, at *1 (S.D. Ga. Sept. 15, 2010).

In reaching its conclusion in *McKay*, the Eleventh Circuit relied on the Fourth Circuit's opinion in *Pettiford v. United States*.[240] In *Pettiford*, the petitioner claimed in a § 2255 motion that he had been erroneously sentenced under the ACCA because he did not have three qualifying convictions.[241] The Fourth Circuit had previously held that the "actual innocence" concept applied to noncapital sentencing proceedings, at least where habitual offender enhancements were at issue.[242] The court nonetheless found that Pettiford's claim that his prior conviction did not trigger the ACCA was a claim of "legal innocence," not "factual innocence," and thus procedural default could not be excused.[243]

In sum, in the Fourth and Eleventh Circuits, a prisoner seeking relief for a *Begay*-type claim not previously raised will not be able to take advantage of the "actual innocence" exception because these courts have concluded that such a claim relates to "legal," not "factual," innocence.[244] In addition, the Eighth and Tenth Circuits have explicitly held that the "actual innocence of sentence" exception is limited to the capital sentencing context.[245]

4. Statute of Limitations

Courts have also dismissed § 2255 motions raising *Begay*-type claims on statute-of-limitations grounds. Under the AEDPA, a strict one-year limitation period applies to § 2255 motions. The statute provides that the limitations period begins to run from the latest of four possible dates.[246] The first, and most common, is the "the date on which the judgment of conviction becomes final."[247] The second is "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action."[248] Third, is "the date on which

240. *McKay*, 657 F.3d at 1199.

241. Pettiford v. United States, 612 F.3d 270, 274 (4th Cir. 2010).

242. United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999) ("[W]e conclude that under the reasoning of *Maybeck* actual innocence applies in non-capital sentencing only in the context of eligibility for application of a career offender or other habitual offender guideline provision."); United States v. Maybeck, 23 F.3d 888, 892–93 (4th Cir. 1994) (holding the "actual innocence" exception applicable in case involving incorrect career offender enhancement under the Guidelines).

243. *Pettiford*, 612 F.3d at 284.

244. *McKay*, 657 F.3d at 1199; *Pettiford*, 612 F.3d at 284.

245. *See supra* note 222.

246. 28 U.S.C. § 2255(f) (2006).

247. *Id.* § 2255(f)(1).

248. *Id.* § 2255(f)(2).

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."[249] Fourth, and finally, is "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence."[250]

Five circuits and a number of district courts, have held that a claim of "actual innocence" can excuse or equitably toll the statute of limitations because of the constitutional concerns that would result from finding such claims time-barred.[251] Other circuits have rejected these arguments.[252] Moreover, as noted above, circuits are also split on whether the "actual innocence" concept applies at all with respect to noncapital sentencing enhancements.[253]

Courts that have found *Begay* and its progeny retroactive have generally held that petitioners have a year from the date of the Supreme Court decisions to file a § 2255 motion,[254] whereas courts holding that *Begay* and its progeny are not retroactive have found that the cases do not restart the statute of limitations.[255] Some courts have considered § 2255 motions raising claims under *Begay*, *Chambers*, or *Johnson* that have been brought more than a year after the decisions. In these cases, courts have generally rejected arguments that the statute of limitations should be equitably tolled or excused

249. *Id.* § 2255(f)(3).

250. *Id.* § 2255(f)(4).

251. *See, e.g.*, Rivas v. Fischer, No. 10-1300-pr., 2012 WL 2686117, at *32 (2d Cir. July 9, 2012); Perkins v. McQuiggin, 670 F.3d 665, 675 (6th Cir. 2012); Lee v. Lampert, 653 F.3d 929, 931 (9th Cir. 2011) (en banc); San Martin v. McNeil, 633 F.3d 1257, 1267–68 (11th Cir. 2011), *cert. denied*, 132 S. Ct. 158 (2011); Lopez v. Trani, 628 F.3d 1228, 1230–31 (10th Cir. 2010); Garcia v. Portuondo, 334 F. Supp. 2d 446, 462 (S.D.N.Y. 2004); Holloway v. Jones, 166 F. Supp. 2d 1185, 1190 (E.D. Mich. 2001). Other courts have noted at least the potential for constitutional concerns in failing to recognize an "actual innocence" exception to the statute of limitations. *See In re* Dorsainvil, 119 F.3d 245, 248 (3d Cir. 1997). In 2010, the Supreme Court held in *Holland v. Florida*, 130 S. Ct. 2549, 2564 (2010), that the limitations period of § 2254(d) may be equitably tolled under extraordinary circumstances. The Court emphasized the equitable nature of the remedy and the need for courts to have some degree of flexibility. *Id.* at 2560.

252. *See, e.g.*, Escamilla v. Jungwirth, 426 F.3d 868, 871–72 (7th Cir. 2005) (holding that there is no "actual innocence" exception to § 2244(d)); David v. Hall, 318 F.3d 343, 347 (1st Cir. 2003) (same); Cousin v. Lensing, 310 F.3d 843, 849 (5th Cir. 2002) (same).

253. *See supra* note 222.

254. *See, e.g.*, United States v. Narvaez, 674 F.3d 621, 625–26 (7th Cir. 2011).

255. *See, e.g.*, United States v. Jones, No. 6:04-70-DCR, 2010 WL 55930, at *5 (E.D. Ky. Jan. 4, 2010), *rev'd*, No. 10-5105, 2012 WL 3089348, at *1 (6th Cir. July 31, 2012) ("Although we have not yet decided whether *Begay* applies retroactively, we hold so today.").

because the prisoner is serving a sentence that is illegal.[256] One district court found that the statute of limitations should be excused on the ground that the petitioner was "actually innocent" of being a career offender under *Begay*.[257]

5. Ban on Second and Successive Motions

Courts have also considered whether prisoners can obtain resentencing under *Begay* and its progeny even if they have already litigated a previous § 2255 motion.[258] The AEDPA provides that courts may grant relief on second or successive motions only if the claim is based on: (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense," or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable."[259] The exceptions are quite narrow. For example, the first exception relates only to the guilt determination and not to sentencing determinations—capital or otherwise.[260] The second exception includes cases announcing new "constitutional rules" and not decisions interpreting statutes.[261]

Following the AEDPA, some courts have allowed prisoners who have previously used up their "one shot" at a § 2255 motion to use § 2241 petitions as a vehicle to pursue relief. Section 2255(e), the "savings clause," specifically provides that § 2241 may be used where

256. *See, e.g.*, United States v. Harris, No. 04-40111-JAR, 2010 WL 3946328, at *3 (D. Kan. Oct. 5, 2010). *But see Jones*, 2012 WL 3089348, at *4.

257. Scott v. United States, 740 F. Supp. 2d 1317, 1331 (S.D. Fla. 2010). This decision is no longer good law in light of recent Eleventh Circuit decisions. *See* McKay v. United States, 657 F.3d 1190, 1199 (11th Cir. 2011).

258. *See, e.g.*, Jones v. Castillo, No. 10-5376, 2012 WL 2947933, at *1–2 (6th Cir. July 20, 2012) (per curiam) (denying relief to prisoner erroneously sentenced under the ACCA); Maher v. Shartle, 458 F. App'x 108, 108–09 (3d Cir. 2012) (per curiam) (denying relief to prisoner claiming he was improperly sentenced as "career offender" under the Guidelines); United States v. Brown, 456 F. App'x 79, 81 (3d Cir. 2012) (per curiam); Stine v. Davis, 442 F. App'x 405, 405–06 (10th Cir. 2011); Bradford v. Tamez, 660 F.3d 226, 230 (5th Cir. 2011) (per curiam); Gilbert v. United States, 640 F.3d 1293, 1323 (11th Cir. 2011) (en banc), *cert. denied*, 123 S. Ct. 1001 (2012); Darden v. Stephens, 426 F. App'x 173, 174 (4th Cir. 2011) (per curiam); Collins v. Ledezma, 400 F. App'x 375, 376 (10th Cir. 2010).

259. 28 U.S.C. § 2255(h) (2006).

260. *See, e.g.*, *In re* Dean, 341 F.3d 1247, 1248 (11th Cir. 2003); *In re* Vial, 115 F.3d 1192, 1198 (4th Cir. 1997) (en banc); Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997).

261. *See, e.g.*, United States v. Reyes, 358 F.3d 1095, 1097 (9th Cir. 2004); United States v. Prevatte, 300 F.3d 792, 798 (7th Cir. 2002).

§ 2255 is "inadequate or ineffective to test the legality of [the prisoner's] detention."[262] Courts agree that prisoners may not use § 2241 simply because they are barred by restrictions contained in § 2255—as that result would render the AEDPA's provisions meaningless. However, courts have held that § 2241 may be utilized in certain narrow circumstances, such as when failure to allow collateral review would raise serious constitutional questions.[263]

The scope of the savings clause was heavily litigated after the Supreme Court held in 1995 in *Bailey v. United States*[264] that mere possession of a firearm in connection with a drug-related offense was not "use" of a firearm within the meaning of 18 U.S.C. § 924(c)(1).[265] A conviction under § 924(c)(1) requires imposition of a five-year consecutive sentence on top of a defendant's sentence for a federal drug offense,[266] and most courts had previously defined "use" much more broadly.[267] *Bailey* thus established that many prisoners were serving longer sentences based on conduct that was not, in fact, criminal under the statute. Some of the prisoners had already litigated § 2255 motions and could not file a successive motion because their claim was not based on either "newly discovered evidence" or "a new rule of constitutional law"—but rather on an interpretation of a federal statute.[268] Thus, a number of prisoners sought relief based on *Bailey* under § 2241, alleging that § 2255 was inadequate and ineffective to test their detention.[269] Courts generally permitted these claims to proceed, although the circuits adopted somewhat different standards for permitting use of the savings clause. The tests from all the circuits shared a focus on two factors: the prisoner had to establish that (1) under a change in the law, he was actually innocent of the offense and (2) he had no previous opportunity to pursue his claim.[270]

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262. 28 U.S.C. § 2255(e) (2006).

263. 3 WRIGHT & WELLING, *supra* note 80, § 623 n.18.

264. 516 U.S. 137 (1995).

265. *Id.* at 143.

266. 18 U.S.C. § 924(c) (2006).

267. *Bailey*, 516 U.S. at 140–46.

268. *See, e.g.*, Triestman v. United States, 124 F.3d 361, 369–70 (2d Cir. 1997).

269. *See* Lyn S. Entzeroth, *Struggling for Federal Judicial Review of Successive Claims of Innocence: A Study of How Federal Courts Wrestled with the AEDPA to Provide Individuals Convicted of Non-Existent Crimes with Habeas Corpus Review*, 60 U. MIAMI L. REV. 75, 97–102 (2005).

270. *See, e.g.*, Abdullah v. Hedrick, 392 F.3d 957, 960–63 (8th Cir. 2004); Reyes-Requena v. United States, 243 F.3d 893, 903–04 (5th Cir. 2001); *In re* Jones, 226 F.3d 328, 333–34 (4th Cir. 2000); Charles v. Chandler, 180 F.3d 753, 757 (6th Cir. 1999); Wofford v. Scott, 177 F.3d 1236, 1244–45 (11th Cir. 1999); *In re* Davenport, 147 F.3d 605, 610–11 (7th

A number of prisoners have tried to use § 2241 to obtain relief on *Begay*-type claims and have analogized their situation to prisoners raising *Bailey* claims.[271] As with *Bailey* prisoners, they are serving additional time in prison based on a misinterpretation of the scope of a federal statute. The Eleventh Circuit initially held in *Gilbert v. United States*[272] that prisoners may bring second or successive petitions raising claims under *Begay*,[273] but then changed course in an en banc decision.[274]

In *Gilbert*, the defendant pleaded guilty to possession with intent to distribute drugs and was classified as a career offender under the Guidelines. As a result of this classification, his sentencing range was increased from 151 to 188 months to 292 to 365 months.[275] At his sentencing in 1997, Gilbert argued that his predicate conviction for carrying a concealed weapon was not a "crime of violence" under the Guidelines.[276] The district court rejected the argument and imposed a sentence of 292 months under the then-mandatory Sentencing Guidelines.[277] The court noted its belief that the sentence was "too high," but said that it did not see a basis under law to depart downward.[278] The Eleventh Circuit affirmed, and Gilbert was later unsuccessful on his pro se § 2255 motion.[279]

After *Begay* was decided, the Eleventh Circuit held that carrying a concealed firearm was not a "crime of violence" under the Guidelines.[280] Gilbert sought relief under § 2241. Gilbert cited the Eleventh Circuit's decision in *Wofford v. Scott*,[281] which had held that the savings clause applies to an otherwise barred claim when:

> 1) [t]hat claim is based upon a retroactively applicable Supreme Court decision; 2) the holding of that Supreme Court decision establishes the petitioner was convicted for a nonexistent offense; and, 3) circuit law squarely foreclosed such a claim at

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Cir. 1998); *Triestman*, 124 F.3d at 363; *In re* Dorsainvil, 119 F.3d 245, 251–52 (3d Cir. 1997).

271. *See, e.g.*, Jones v. Castillo, No. 10-5376, 2012 WL 294733, at *1 (6th Cir. July 20, 2012); Gilbert v. United States, 640 F.3d 1293, 1300–02 (11th Cir. 2011) (en banc), *cert. denied*, 123 S. Ct. 1001 (2012).

272. 609 F.3d 1159 (11th Cir. 2010), *rev'd en banc*, 640 F.3d 1293.

273. *Id.* at 1160–62.

274. *Gilbert*, 640 F.3d at 1295.

275. *Gilbert*, 609 F.3d at 1160.

276. *Gilbert*, 640 F.3d at 1300.

277. *Id.*

278. *Id.* at 1300–01.

279. *Id.*; United States v. Gilbert, 138 F.3d 1371, 1372 (11th Cir. 1998) (per curium).

280. *See* United States v. Archer, 531 F.3d 1347, 1347 (11th Cir. 2008).

281. 177 F.3d 1236 (11th Cir. 1999).

> the time it otherwise should have been raised in the petitioner's trial, appeal, or first § 2255 motion.[282]

The district court held that erroneous sentencing as a career offender did not constitute conviction for a "nonexistent offense," and thus relief was not available to Gilbert.[283] A three-judge panel of the Eleventh Circuit reversed.[284] The panel began by noting that, as of the time of the decision, Gilbert had served 171 months and, but for the erroneous enhancement, would be entitled to release.[285] The panel found *Wofford*'s test applicable.[286] The court reasoned: "Gilbert's *Begay/Archer* claim does not assert mere factual error in the application of the Sentencing Guidelines. His claim is like a *Bailey* claim in that it asserts error of fundamental dimension—enhancement of his sentence based upon a nonexistent offense."[287] The court concluded that the "animating principle underlying the writ of habeas corpus is fundamental fairness" and "the principle of finality 'must yield to the imperative of correcting a fundamentally unjust incarceration.' "[288]

The Eleventh Circuit, sitting en banc—and over forceful dissents—vacated the panel decision and affirmed the district court's dismissal of the petition.[289] The en banc opinion stated its assumptions that Gilbert would have received a lower sentence had *Begay* been the law at the time of his sentencing and that he would receive a lower sentence today if he was resentenced.[290] Nonetheless, the court denied relief.[291] The court dismissed Gilbert's "actual innocence" argument, stating: "The *Wofford* dicta and the *Bailey*-related "actual innocence" decisions of other circuits are of no use to Gilbert because the crimes for which he was convicted, possessing crack cocaine with intent to distribute and possessing marijuana with intent to distribute, do exist, as thousands of federal prisoners can attest."[292] In considering Gilbert's claim, the court reasoned that the "critically

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282. *Id.* at 1244.

283. Gilbert v. United States, 609 F.3d 1159, 1162 (11th Cir. 2010), *rev'd en banc*, 640 F.3d 1293.

284. *Id.* at 1160.

285. *Id.* at 1163.

286. *Id.* at 1165–67.

287. *Id.* at 1165.

288. *Id.* at 1167–68 (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

289. Gilbert v. United States, 640 F.3d 1293, 1293 (11th Cir. 2011) (en banc), *cert. denied*, 123 S. Ct. 1001 (2012).

290. *Id.* at 1302–03.

291. *Id.* at 1324.

292. *Id.* at 1319–20.

important nature of the finality interests safeguarded by § 2255(h) weighs heavily against an interpretation of the savings clause that would lower the second or successive motions bar and permit Guidelines-based attacks years after the denial of an initial § 2255 motion."[293] The court reasoned that accepting Gilbert's rule would open the floodgates because it could not be "confined to sentence miscalculations based on enhancement errors."[294] As a result, "no federal judgment imposing a sentence would be truly final until the sentence was completely served or the prisoner had gone on to face a different kind of final judgment."[295] Thus, "[t]he exception that Gilbert would have us write into § 2255(h) using the savings clause as our pen would wreak havoc on the finality interests that Congress worked so hard to protect with the AEDPA provisions."[296]

Judge Martin, joined by Judges Barkett and Hill, dissented vigorously. Judge Martin noted that Gilbert had "diligently pursued every legal avenue available to him, including, of course, direct appeal to this Court," and yet he still "face[d] a sentence of more than 24 years despite [the court's] admission that [it] decided his case wrongly."[297] The dissent reasoned that "[o]ur duty to interpret [the savings clause] according to its plain terms is especially robust in light of the Suspension Clause of the United States Constitution." The dissent further noted, "By today's decision we have shirked our duty in that regard, and in doing so we diminish the institution of the federal courts."[298] Regarding the finality interests cited by the majority, the dissent stated:

> Surely Mr. Gilbert's case is a poor vehicle to promote the idea that finality builds confidence in our criminal justice system. Today we tell a man he must sit in the penitentiary for years beyond the sentence that a proper application of the law would have imposed when we rejected his correct interpretation of what the law meant back in 1998.[299]

The dissent emphasized that arguments favoring finality in some cases such as spoliation of evidence were simply not in play in this scenario, given that the issue presented was a "purely legal one."[300]

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293. *Id.* at 1309.
294. *Id.* at 1310.
295. *Id.*
296. *Id.*
297. *Id.* at 1330 (Martin, J., dissenting).
298. *Id.* at 1333.
299. *Id.* at 1334.
300. *Id.*

Responding to the majority's concerns about opening the "floodgates," the dissent remarked:

> [I]f there are others who are wrongfully detained without a remedy, we should devote the time and incur the expense to hear their cases. What is the role of the courts, if not this? But what is important today is the consequence to Mr. Gilbert of our unwillingness to correct our past legal error.[301]

Judge Hill dissented separately and was joined by Judge Barkett. Regarding the result reached by the majority, Judge Hill said: "I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement. Case closed. Move on to the next."[302] Judge Hill emphasized that "[f]or this court to hold that it is without the power to provide relief to a citizen that the Sovereign seeks to confine illegally for eight and one-half years is to adopt a posture of judicial impotency that is shocking in a country that has enshrined the Great Writ in its Constitution."[303] He concluded:

> Much is made of the "floodgates" that will open should the court exercise its authority to remedy the mistake made by us in Gilbert's sentence. The government hints that there are many others in Gilbert's position—sitting in prison serving sentences that were illegally imposed. We used to call such systems "gulags." Now, apparently, we call them the United States.[304]

Thus far, the Third, Fourth, Fifth, and Tenth Circuits have agreed with the Eleventh Circuit in *Gilbert* and have rejected the use of the savings clause to permit prisoners erroneously sentenced as career offenders under the Guidelines to pursue relief in § 2241 petitions. Prisoners have analogized their situation to prisoners raising *Bailey* claims and argued that they are "actually innocent" of being career offenders, as *Bailey* prisoners were actually innocent of their firearm offenses. However, the circuits have refused to extend to the Sentencing Guidelines context the savings clause exception that allowed *Bailey* claims to proceed.[305] Notably, at least one district court has permitted relief on a Guideline claim under § 2241,

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301. *Id.* at 1336.

302. *Id.* at 1337 (Hill, J., dissenting).

303. *Id.*

304. *Id.*

305. *See, e.g.*, United States v. Brown, 456 F. App'x 79, 81–82 (3d Cir. 2012); Bradford v. Tamez, 660 F.3d 226, 230 (5th Cir. 2011); Darden v. Stephens, 426 F. App'x 173, 174 (4th Cir. 2011) (per curiam); Collins v. Ledezma, 400 F. App'x 375, 376 (10th Cir. 2010).

apparently without opposition from the government.[306]

However, a circuit split has developed regarding prisoners wrongfully sentenced as Armed Career Criminals. Following *Gilbert*, the Eleventh Circuit allowed a prisoner who had already used up his § 2255 shot to pursue a § 2241 petition alleging that *Begay* and *Chambers* established that he had been erroneously sentenced under the ACCA.[307] In *Chaplin*, the government conceded that the prisoner should have been permitted to pursue his claim because § 2241 relief is available "where the defendant had no prior opportunity to obtain judicial correction of a fundamental defect in his sentence."[308] The government noted:

> The government undeniably has a strong interest in the finality of its criminal convictions and in preventing frivolous and repetitive prisoner postconviction litigation, and thereby conserving the limited resources of government attorneys and courts alike. At the same time, however, the government does not have a valid institutional interest in keeping in prison an individual who is innocent of the crime for which he was convicted. The government likewise has no valid institutional interest in keeping an individual in prison beyond the statutory maximum sentence prescribed by Congress; in fact, the government has a strong interest in preventing this type of injustice.[309]

In addition, in a district court case within the Fourth Circuit, the government also conceded the availability of § 2241 to challenge erroneous ACCA sentences.[310]

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306. In *Phillips v. Holinka*, No. 10-cv-439-bbc, 2012 WL 1516605 (W.D. Wis. Apr. 26, 2012), the district court granted the prisoner's unopposed motion for relief under § 2241 on the ground that the prisoner had been erroneously sentenced as a career offender. *Id.* at *1–2. The court stated that

> [t]o satisfy the savings clause, petitioner had to show that (1) that [sic] he was barred under § 2255(h) from raising his claim in a second or successive § 2255 motion; (2) his petition was based on a rule of law not yet established at the time he filed his first § 2255 motion and that the law has retroactive effect on collateral review; and (3) there was a fundamental defect in his sentence that would lead to a complete miscarriage of justice if not corrected.

Id. at *1. Relying on *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011), the court found the "miscarriage of justice" test applicable, and ordered resentencing without the application of the career offender guideline. *Phillips*, 2012 WL 1516605, at *2.

307. Chaplin v. Hickey, 458 F. App'x 827, 827 (11th Cir. 2012).

308. Brief of Appellee at 6, Chaplin v. Hickey, 458 F. App'x 827 (11th Cir. 2010) (No. 10-12022-D).

309. *Id.* at 10–11 (citing Berger v. United States, 295 U.S. 78, 88 (1935)).

310. *See* Gallimore v. Stansberry, No. 1:10cv138, 2011 WL 797320, at *1–2 (E.D. Va.

In contrast, in *Jones v. Castillo*,[311] the government argued that § 2241 was not available to prisoners alleging erroneous ACCA sentences based on *Begay*.[312] The Sixth Circuit agreed and denied relief.[313]

6. Waivers of Collateral Attack Rights in Plea Agreements

Finally, many courts have rejected § 2255 motions alleging erroneous Guideline sentences under *Begay*, *Chambers*, or *Johnson* on the ground that defendants waived in their plea agreements the right to seek collateral review at all.[314]

In recent years, the government has increasingly sought and obtained plea agreements in which defendants specifically waive the right to appeal and to seek § 2255 relief.[315] A 2005 study randomly sampled 971 federal cases and found that two-thirds of defendants

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Mar. 1, 2011). In this case, the government noted:

> [T]he United States as a result of a decision by the Solicitor General of the United States, has modified its position regarding those instances in which one may invoke habeas jurisdiction pursuant to 28 U.S.C. § 2241 to challenge putative sentencing errors. More specifically, the United States presently maintains that the so-called "savings clause" of § 2255(e) applies to vest district courts with jurisdiction to entertain habeas petitions that challenge sentences that now—after intervening Supreme Court authority unavailable either at the time of sentencing or when § 2255 provided a viable remedial mechanism—are in excess of the otherwise statutory maximum punishment for the particular crime.

Supplemental Memorandum of Law Regarding Respondent's Motion to Dismiss at 1–2, Gallimore v. Stansberry, No. 1:10cv138, 2011 WL 797320 (E.D. Va. Mar. 1, 2011). The government recently described its position on the issue as follows:

> It is the position of the United States that the savings clause permits a § 2241 petition for a sentencing error where the error resulted in a sentence above the statutory maximum for the crime of conviction; but savings clause relief is foreclosed for an erroneous sentence within the statutory maximum, even if the sentence was imposed pursuant to a mandatory guidelines regime.

Wilson v. Wilson, No. 1:11cv645, 2012 WL 1245671, at *3 (E.D. Va. Apr. 12, 2012) (emphasis and citation omitted).

311. No. 10-5376, 2012 WL 2947933 (6th Cir. July 20, 2012).

312. *Id.* at *1–2. The government made these arguments after its concessions in the Eleventh Circuit and in the district court within the Fourth Circuit. Presumably, the government took a different position in *Jones* because of differing circuit precedent.

313. *Id.*

314. *See, e.g.*, Ramirez v. United States, No. 8:10-cv-988-T-27EAJ, 2011 WL 3489600, at *1 (M.D. Fla. Aug. 9, 2011); United States v. Watkins, No. 1:08-cr-270, 2011 WL 3100377, at *4 (W.D. Mich. July 25, 2011); Bender v. United States, No. 11-CV-2004, 2011 WL 2110760, at *1 (C.D. Ill. May 26, 2011).

315. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 230–31 & n.83 (2005).

waived appeal rights in the plea agreement.[316] Three-quarters of the group that waived appeal rights also waived collateral attack rights.[317]

Although courts usually enforce waivers of collateral attack rights in plea agreements,[318] the waivers must have been knowing and voluntary.[319] Prisoners who have waived collateral attack rights may nonetheless seek relief on a claim that the sentence exceeded the statutory maximum,[320] was based on an impermissible factor such as race,[321] or resulted in a "miscarriage of justice."[322] Courts have recognized that "actual innocence" may render waiver provisions unenforceable.[323] A plea agreement waiver does not bar a claim that counsel was ineffective in negotiating the plea agreement or waiver provision, but courts have found waivers enforceable as to claims of ineffective assistance of counsel at sentencing.[324]

Although plea agreement waivers should not be enforced if denial of relief results in a miscarriage of justice, courts have apparently concluded that *Begay*-type Guideline errors do not amount to a sufficient injustice to preclude enforcement of waivers. Courts have even enforced plea agreement waivers when prisoners claim that the sentence was imposed in excess of the statutory maximum—i.e., in an ACCA case.[325]

In sum, courts have made it very difficult for prisoners with "final" sentences to obtain relief based on *Begay*-type claims. For the most part, courts have narrowly construed existing exceptions to procedural barriers and barred relief for prisoners.

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316. *Id.* at 212.

317. *Id.* at 213. "Of the sample, 113 agreements barred appeal only (18.3 percent of 619 waivers), and 494 barred appeal and collateral review (79.8 percent of all 619 waivers)." *Id.* at 243 n.105.

318. *See, e.g.*, Williams v. United States, 396 F.3d 1340, 1342 (11th Cir. 2005) (collecting cases).

319. United States v. Cockerham, 237 F.3d 1179, 1181–83 (10th Cir. 2001).

320. DeRoo v. United States, 223 F.3d 919, 923 (8th Cir. 2000).

321. *Cockerham*, 237 F.3d at 1182.

322. *See, e.g.*, United States v. Johnson, 410 F.3d 137, 151 (4th Cir. 2005) (quoting United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003)); United States v. Porter, 405 F.3d 1136, 1142 (10th Cir. 2005) (quoting United States v. Hahn, 359 F.3d 1315, 1325 (10th Cir. 2004)).

323. *See, e.g.*, United States v. Ray, 358 F. App'x 329, 331 (3d Cir. 2009); United States v. Torres-Oliveras, 583 F.3d 37, 43 (1st Cir. 2009).

324. King & O'Neill, *supra* note 315, at 247 & n.122 (collecting cases).

325. *See, e.g.*, Bender v. United States, No. 11-CV-2004, 2011 WL 2110760, at *2 (C.D. Ill. May 26, 2011).

III. OVERCOMING BARRIERS TO RESENTENCING

As discussed above, prisoners asserting claims in collateral proceedings that their sentences were wrongfully enhanced under *Begay* and its progeny have faced major hurdles to relief. In many cases, judges have refused on procedural grounds to correct clear injustices. What is striking about many of these cases is that the sentencing error itself is entirely undisputed: everyone agrees that the prisoner was sentenced incorrectly. In addition, because of the intervening Supreme Court cases, the error did not become apparent until *after* the period of direct review was complete. Thus, the prisoner did not have a previous opportunity to get the error fixed. Yet even under these circumstances, courts have often denied relief.

The obstacles to relief for prisoners raising *Begay*-type claims are based on both judge-made doctrines and statutory provisions. The discussion below explores how even within the constraints of current Supreme Court doctrine and Congressional statutes, there is room for lower courts to correct many *Begay*-type errors. In particular, the various procedural barriers to collateral relief can be overcome if courts: (1) find all sentencing errors impacting the length of the sentence cognizable under § 2255; (2) excuse procedural default based on a prisoner's "actual innocence" of a sentencing enhancement; (3) toll the statute of limitations based on a showing of "actual innocence"; (4) allow prisoners who litigated a § 2255 motion to seek relief under § 2241 because an intervening clarification of the law established the inapplicability of the enhancement; and (5) refuse to enforce collateral attack waivers in plea agreements where the prisoner is ineligible for the enhancement. Even if courts adopt narrower exceptions to the procedural barriers, many *Begay*-type errors could be corrected. Courts can permit correction of these errors without opening the door to relitigation of every sentence. In fact, many errors could be corrected without the need for full resentencing hearings.

A. Relief for Sentencing Enhancement Claims Under the AEDPA and Supreme Court Precedent

Lower courts could, within existing law, correct sentencing errors on collateral review much more frequently. Courts may excuse many of the barriers to relief where there has been a "miscarriage of justice," and they have considerable flexibility under Supreme Court

law in determining what constitutes such a miscarriage.[326] Other barriers may be excused based on a showing of "actual innocence"—and the Supreme Court has explicitly left open the question of whether the "actual innocence" concept applies with respect to noncapital sentencing enhancements.[327] Thus, lower courts could use this flexibility to grant relief more frequently in cases seeking sentencing relief.

It bears noting that the Supreme Court has already allowed correction of sentences in analogous circumstances. The Court has explicitly held that a prisoner is permitted to return to federal court for resentencing under § 2255 when his federal sentence was based on a prior conviction that was subsequently vacated after the federal sentence was imposed.[328] The prisoner simply needs to show that he acted with reasonable diligence in trying to vacate the conviction after it was used to enhance the federal sentence.[329] If a prisoner can get his sentence fixed when a prior conviction is vacated, why shouldn't the court correct the sentence when a clarification in the law establishes that the prior conviction should have never triggered the enhancement in the first place? In both cases, the person does not, in fact, have qualifying convictions. If anything, the latter circumstance is more sympathetic because the person *never* had a prior qualifying conviction. It is difficult to discern a policy basis for granting relief when a conviction is vacated but denying relief when the conviction should not have been used at all for the enhancement.

1. Exceptions to Judge-Made Barriers

Judge-made barriers to relief on § 2255 claims include doctrines of retroactivity, cognizability, and procedural default. All of these barriers may be overcome in some circumstances.

Retroactivity doctrines should not be a bar to relief when a prisoner seeks to rely on a case, such as *Begay*, that has narrowed the

326. *See infra* notes 334–45 and accompanying text.

327. Dretke v. Haley, 541 U.S. 386, 389 (2003).

328. Johnson v. United States, 544 U.S. 295, 298 (2005).

329. *Id.* at 310. In *Johnson*, the Court held that a defendant must act diligently after his sentence is enhanced based on a prior conviction to obtain a state court order vacating his predicate conviction. *Id.* If he does so, then the one-year statute of limitations begins to run from the date he receives notice of that vacatur. *Id. Johnson* relied on the AEDPA provision that begins to run the statute of limitations on "the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. § 2255(f)(4) (2006). The Court reasoned that the state order vacating the conviction was a "fact" within the meaning of this provision. *Johnson*, 544 U.S. at 306–07.

scope of a sentencing enhancement provision. The Supreme Court has established that substantive decisions that "narrow the scope of a criminal statute by interpreting its terms" apply retroactively because they carry the risk that a defendant "faces a punishment that the law cannot impose upon him."[330] The circuits that have squarely addressed this issue have held that *Begay* and its progeny are retroactive, and the government has even conceded the issue in some cases.[331] Thus, retroactivity should be a non-issue in these cases.

Cognizability is a more complicated issue, but should not be a bar to most *Begay*-type enhancement claims. Courts will certainly find cognizable in a § 2255 motion a claim that a recidivist enhancement such as the ACCA was erroneously imposed and resulted in a sentence above the otherwise applicable statutory maximum. However, as noted above, the circuits are split on whether a claim of an erroneous career offender enhancement under the Guidelines is cognizable.[332] Courts presumably would be even less likely to find cognizable a claim of an erroneous Guideline enhancement that raises the sentence less dramatically than the career offender provision.[333]

Lower courts have considerable leeway under the statutory language of § 2255 and Supreme Court law in determining cognizability. Section 2255, by its terms, applies to sentences imposed in "violation of . . . the laws of the United States."[334] The Supreme Court has held that non-constitutional claims are cognizable if the error results in a "miscarriage of justice."[335] The Court has addressed in five cases the issue of whether a non-constitutional claim amounts to a miscarriage of justice and thus is cognizable under § 2255. Four cases dealt with procedural errors, and the Court found that no miscarriage of justice had occurred.[336] In the fifth case, *Davis v.*

330. Schriro v. Summerlin, 542 U.S. 348, 351–52 (2003) (internal quotation marks and citations omitted).

331. *See supra* notes 157, 163.

332. *See* discussion *supra* Part II.B.2.

333. For example, Guideline enhancements based on "crimes of violence" apply in immigration and gun possession cases. *See* U.S. SENTENCING GUIDELINES MANUAL §§ 2K2.1, 2L1.2 (2011) (covering firearm and immigration Guidelines, respectively). These enhancements are substantial, but less severe than the career offender enhancement.

334. 18 U.S.C. § 2255(a) (Supp. IV 2011).

335. *See infra* notes 336–39 and accompanying text.

336. *See* Reed v. Farley, 512 U.S. 339, 342, 350 (1994) (holding that a lack of compliance with time limit for commencing trial did not amount to a miscarriage of justice); United States v. Addonizio, 442 U.S. 178, 186–87 (1979) (holding no miscarriage of justice where there was a subsequent change in the policies of the United States Parole Commission that impacted parole eligibility date); United States v. Timmreck, 441 U.S.

United States,[337] the Supreme Court addressed a substantive error—the petitioner had been convicted under a statute for conduct that a subsequent interpretation of the statute established was not criminal.[338] There, the Court found that a miscarriage of justice had occurred and § 2255 relief was available.[339]

Although lower courts have considerable flexibility under Supreme Court law in defining what claims are cognizable under § 2255, courts have generally developed the doctrine of cognizability to limit the sentencing claims that can be considered with § 2255 motions. Many courts have simply stated that "ordinary" claims of erroneous sentences under the Guidelines are not cognizable even when it is clear that the error has impacted sentence length.[340] Yet nothing in the text of § 2255 or Supreme Court case law requires this result. Even after *Booker*, courts must calculate the Guidelines accurately and consider the correctly calculated range.[341] Sentences imposed without correct Guideline calculations are in violation of law, and, on direct review, these cases are remanded to the district court from the appellate court. Why shouldn't a claim that a court erroneously applied a Guideline enhancement be cognizable in a § 2255 motion, at least where the court concludes that the mistake impacted the ultimate sentence? Isn't this a miscarriage of justice?

Some courts have asserted that no miscarriage of justice occurs with respect to Guideline errors because the sentence is within statutory limits.[342] Yet it is undeniable that Guideline calculations still drive federal sentences in federal court,[343] and it will often be clear from the record that the court would have imposed a different sentence but for the Guideline miscalculation. Moreover, since the sentencing judge is the one ruling on the § 2255 motion, the court can simply deny relief if the erroneous calculation did not actually impact the ultimate sentence. Erroneous Guideline calculations are not

780, 781, 784–85 (1979) (holding error under Federal Rule of Criminal Procedure 11 regarding the taking of a guilty plea not cognizable); Hill v. United States, 368 U.S. 424, 428–29 (1962) (finding denial of allocution at sentencing, which violated Federal Rule of Criminal Procedure 32(a), not cognizable).

337. 417 U.S. 333 (1974).

338. *Id.* at 346–47.

339. *Id.*

340. *See, e.g.*, United States v. McGee, 201 F.3d 1022, 1023 (8th Cir. 2000); United States v. Pregent, 190 F.3d 279, 284 (4th Cir. 1999); United States v. Williamson, 183 F.3d 458, 462 (5th Cir. 1999).

341. United States v. Booker, 543 U.S. 220, 245–46 (2005).

342. *Sun Bear IV*, 644 F.3d 700, 705 (8th Cir. 2011).

343. *See supra* note 71.

"procedural" mistakes but are much more akin to the substantive error the Supreme Court found cognizable in *Davis*.[344]

Courts categorize some Guideline errors as non-cognizable because they view them as too small or trivial to be worthy of fixing on collateral review. However, when Guideline errors result in sentences that are longer than would otherwise have been imposed, courts should reject the view that the errors are too small or trivial to correct. Guideline errors, such as those under the career offender provision, can result in enormous sentencing jumps. From the perspective of someone sitting in prison, any additional time on a sentence can hardly be considered a trivial error.

Thus, consistent with statutory and Supreme Court law, courts could conclude that all Guideline errors impacting the length of the sentence are cognizable under § 2255. However, even if courts did not want to go this far, they could still draw the cognizability line in a way that permits correction of many *Begay*-type errors. For example, courts could conclude that a guideline-based claim is cognizable where an intervening clarification of the law establishes that the sentencing court's decision was unlawful. The theory there is that to deny consideration of a claim that was not available at the time of the original sentencing or on direct review would be "a miscarriage of justice." Alternatively, courts could conclude that a lot of extra time (such as an erroneous career offender determination) is a "miscarriage of justice," but a smaller jump resulting from a less severe enhancement is not.[345]

Finally, procedural default rules are also judge-made and, consistent with Supreme Court doctrine, courts could apply these doctrines more flexibly in reviewing *Begay*-type errors. The Supreme Court has held that "actual innocence" excuses procedural default[346] and has left open the question of whether "actual innocence" applies in the noncapital sentencing context.[347] Thus, lower courts have the ability to excuse procedural default based on a prisoner's "actual innocence" of a sentencing enhancement. Those courts that have

344. *See* Narvaez v. United States, 674 F.3d 621, 627–28 (7th Cir. 2011).

345. In *Narvaez*, the Seventh Circuit found a claim cognizable where the prisoner was sentenced as a career offender under a mandatory Guideline regime and an intervening clarification of law revealed he was not a career offender. *Id.* at 627–28. It is unclear which of these factors—the length of the sentencing increase, the mandatory nature of the Guidelines at the time of sentencing, or the intervening clarification—drove the decision, and if the Seventh Circuit would require the existence of all of these factors to grant relief.

346. Sawyer v. Whitley, 505 U.S. 333, 347 (1992); Murray v. Carrier, 477 U.S. 478, 497 (1986).

347. Dretke v. Haley, 541 U.S. 386, 389 (2004).

refused to extend the "actual innocence" concept to the sentencing enhancement context are not prohibited by Supreme Court law from changing course.

Some courts have left open the possibility of the "actual innocence" concept applying in the noncapital sentencing enhancement context, but have concluded that a *Begay*-type claim raises only a claim of "legal innocence" and not "factual innocence."[348] Courts have suggested that for a career offender to establish his "factual innocence," he would have to establish his innocence of the underlying state convictions.[349] This approach makes little sense. To be a career offender (or an Armed Career Criminal), a defendant must be convicted of a qualifying federal offense and have a certain number of prior predicate convictions.[350] If he does not have the type of convictions that qualify for the enhancement, then it is perfectly logical to say that he is actually—and factually—innocent of being a career offender. It does not matter whether he actually committed the conduct underlying the predicate conviction, as it is not the prior *conduct* that triggers the enhancement, but the nature of the prior *conviction*. The nature of the prior conviction is established by court records from the prior case. In contrast, to determine if someone is factually innocent of the conduct underlying the prior case, the court would need to examine the factual circumstances of the prisoner's past conduct. Presumably, the prisoner would submit affidavits from himself or others asserting his innocence, and the government would need to produce evidence to the contrary. In most cases, a hearing would be required. It seems odd that courts concerned with finality principles would prefer re-litigation of the facts underlying a prior state conviction over the very simple analysis of whether the prisoner in fact has the type of prior conviction that triggers the federal enhancement.

In an analogous context, prisoners are currently obtaining relief for their "actual innocence." In *United States v. Simmons*,[351] the Fourth Circuit held that a defendant's prior North Carolina

348. McKay v. United States, 657 F.3d 1190, 1198 (11th Cir. 2011); United States v. Pettiford, 612 F.3d 270, 282 (4th Cir. 2010); *see also* Tellado v. United States, 799 F. Supp. 2d 156, 172 (D. Conn. 2011) (holding that petitioner failed to assert valid "actual innocence" claim because "he raise[d] only a legal argument" that two of his convictions should not count for the purpose of "a career offender designation").

349. *McKay*, 657 F.3d at 1198–99.

350. 18 U.S.C. § 924(e) (2006); U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2011).

351. 649 F.3d 237 (4th Cir. 2011).

marijuana possession offense did not meet the definition of a "felony" under federal law.[352] North Carolina has a complicated scheme for determining the maximum sentence for many offenses, and *Simmons* overruled prior circuit precedent on the issue.[353] As a result of *Simmons*, it is now apparent that many prisoners are serving sentences for felon-in-possession-of-firearm offenses when they are not, in fact, felons.[354] After first opposing relief for these individuals, the government has now shifted positions and supports the release of these prisoners based on their "actual innocence."[355] It is unclear why *Simmons*-claims would be considered claims of "factual innocence," whereas *Begay*-type claims are merely ones of "legal innocence." In both scenarios, an intervening court decision has clarified that a prior state conviction does not satisfy a federal definition. Of course, prisoners under *Simmons* are actually innocent of the offense of conviction, whereas *Begay*-prisoners are innocent of a sentencing enhancement. Yet this distinction should have no bearing on the "factual/legal innocence" issue. *Begay*-type claims should qualify under the "actual innocence" exception.[356] In sum, the judicial doctrines that limit habeas relief—retroactivity, cognizability, and procedural default—need not be a bar to relief for *Begay*-type claims.

2. Excusing Statutory Barriers

Unlike the judicial doctrines discussed above, the statute of limitations and ban on successive § 2255 motions have been dictated by Congress. However, there are both statutory exceptions and judge-made exceptions to these statutory barriers.[357] Prisoners raising most

352. *Id.* at 249–50.

353. *Id.* at 240–41.

354. *See id.*

355. Brad Heath, *Dozens of "Innocent" Prisoners Could Be Freed*, USA TODAY, Aug. 13, 2012, http://usatoday30.usatoday.com/news/nation/story/2012-08-13/innocent-federal-prisoners-justice/57041342/1.

356. Notably, shortly after the United States Department of Justice's decision not to oppose relief in felon-in-possession cases, the Fourth Circuit denied collateral relief to a prisoner who argued that his sentence for a drug offense was erroneously enhanced based on the miscategorization of his prior conviction as a felony drug conviction. United States v. Powell, No. 11-6152, 2012 WL 3553630, at *5 (4th Cir. Aug. 20, 2012). The enhancement increased the defendant's sentence from ten years to twenty years' imprisonment. The court reasoned that the Supreme Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), upon which *Simmons* relied, was not retroactive. *Powell*, 2012 WL 3553630, at *3–5. Although this case addressed *Simmons* in the sentencing context, the retroactivity holding would apply also in felon-in-possession cases as well. *See id.* at *6 (King, J., dissenting in part and concurring in part).

357. The statutory exceptions to the statute of limitations are set forth in 28 U.S.C. § 2255(f)(2)–(4) (2006). Judge-based exceptions to the statute of limitations include the

Begay-type claims could fit within these recognized exceptions, consistent with current Supreme Court law.

First, regarding the statute of limitations, the AEDPA already states an exception to the one-year limitations period for claims based on a right that has been "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review."[358] Thus, if *Begay*-type claims are brought within one year of the relevant Supreme Court decision, the statute of limitations will not bar relief.

However, some individuals do not fit within this statutory exception—either because they filed their *Begay*-type claim more than a year after the relevant Supreme Court decision, or because they based their claim on a circuit court decision rather than a Supreme Court decision.[359] Courts could nonetheless toll the statute of limitations in some of these cases based on a prisoner's "actual innocence" of the enhancement provision.[360] An equitable tolling approach would work well to address these cases. Rather than excuse the statute of limitations in every case involving a claim of an improper enhancement, courts could toll the statute of limitations only when an intervening clarification of law establishes the prisoner's "actual innocence" and the prisoner pursues relief with reasonable diligence. The Supreme Court used a similar standard when determining when a prisoner can obtain resentencing after vacating a state conviction.[361] Using the equitable tolling doctrine,

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doctrine of equitable tolling and, in some circuits, the "actual innocence" exception. *See, e.g.*, Rivas Holland v. Florida, 130 S. Ct. 2549, 2554 (2010) ("We here decide that the timeliness provision in the federal habeas corpus statute is subject to equitable tolling."); v. Fischer, No. 10 1300 pr., 2012 WL 2686117, at *2 (2d Cir. July 9, 2012). The statutory exceptions for the ban on successive § 2255 petitions appear at § 2255(h). 28 U.S.C. 28 U.S.C. § 2255(h) (2006). Section 2255(e), the "savings clause," allows § 2241 to be used when § 2255 is "inadequate or ineffective" to test the legality of the detention. 28 U.S.C. § 2255(e) (2006).

358. § 2255(f)(3).

359. *See, e.g.*, Tellado v. United States, 799 F. Supp. 2d 156, 160 (D. Conn. 2011) (holding that claim was time barred when prisoner relied on the Second Circuit decision decided after his sentencing that established that prior conviction was not a "controlled substance offense" and should not have triggered the career offender guideline).

360. As noted above, a number of courts have now recognized that a claim of "actual innocence" can excuse or toll the statute of limitations, and the Supreme Court has left open the question of whether "actual innocence" exceptions apply in the noncapital sentencing context. *See Holland*, 130 S. Ct. at 2549; Dretke v. Haley, 541 U.S. 386, 393–94 (2004); *Rivas*, 2012 WL 2686117, at *2; Lee v. Lampert, 653 F.3d 929, 931 (9th Cir. 2011); Lopez v. Trani, 628 F.3d 1228, 1230–31 (10th Cir. 2010); Souter v. Jones, 395 F.3d 577, 585 (6th Cir. 2005); Garcia v. Portuondo, 334 F. Supp. 2d 446, 462 (S.D.N.Y. 2004); Holloway v. Jones, 166 F. Supp. 2d 1185, 1190 (E.D. Mich. 2001).

361. *See supra* notes 328–29 and accompanying text.

courts could permit prisoners to seek relief under circuit court decisions establishing their innocence of the enhancement as long as they act diligently in seeking relief after the decision.[362] Courts could generally refuse to toll the limitations period for prisoners raising claims based on new Supreme Court cases—as the AEDPA already allows these decisions to restart the statute of limitations. However, in rare instances, there may be equitable reasons for tolling.[363]

Second, although § 2255 generally prohibits the filing of second or successive motions, the "savings" clause allows a prisoner to seek relief under § 2241 where § 2255 proves to be an "inadequate or ineffective remedy" to test the legality of a prisoner's detention.[364] Any prisoner barred from filing a second or successive § 2255 motion cannot simply file a § 2241 petition.[365] As discussed above, courts have held that a prisoner raising a claim of "actual innocence" may nonetheless proceed under § 2241 if the claim is based on an intervening decision and the prisoner has not had a previous opportunity to raise the claim.[366] Courts could hold that a prisoner raising a *Begay*-type claim fits within this existing exception because the Supreme Court decision established "actual innocence" of a recidivist enhancement provision, and the prisoner did not have a previous opportunity to raise the claim. Alternatively, if courts wanted to avoid the "actual innocence" characterization, they could simply hold that § 2241 is available when the defendant had no prior opportunity to obtain judicial correction of a fundamental defect in the sentence. As noted above, the government has adopted this position in some circuits.[367] In the government's view, however, a fundamental sentencing defect occurs only when the sentence exceeds

362. In *Tellado*, the court rejected "actual innocence" as a basis for equitable tolling in these circumstances. 799 F. Supp. 2d at 160. In reaching this conclusion, the court relied heavily on finality interests. *See id.* ("This is a difficult case because it places the societal interest in finality of judgments against the possibility of a shorter sentence for the Petitioner, Shawn Tellado. In the end and for the reasons discussed below, the Court believes that the societal interest in finality overcomes Mr. Tellado's personal interest in a shorter sentence.").

363. The Sixth Circuit recently granted relief to a prisoner who filed his § 2255 petition raising a *Begay* claim three months after the one-year statute of limitations (that had been restarted with the *Begay* decision) expired. The court applied the equitable tolling doctrine based on the prisoner's diligence in pursuing relief, his difficulty in obtaining legal materials because of frequent transfers, and his partial illiteracy. *See* Jones v. United States, No. 10-5105, 2012 WL 3089348, at *4 (6th Cir. July 31, 2012).

364. 28 U.S.C. § 2255(e) (2006).

365. Triestman v. United States, 124 F.3d 361, 363 (2d Cir. 1997).

366. *See supra* note 270 and accompanying text.

367. *See supra* notes 308–10 and accompanying text.

the statutory maximum. Courts should adopt a somewhat broader view and hold that a fundamental sentencing defect has occurred when a defendant is erroneously subject to a Guideline enhancement, such as the career offender enhancement, which results in a major sentence increase.

3. Avoiding Plea Agreement Waivers

Waivers of collateral attacks in plea agreements need not prevent courts from considering *Begay*-type claims. Courts have held that waivers will not preclude consideration of claims that a prisoner was sentenced in excess of the statutory maximum or where failure to consider a claim would result in a "miscarriage of justice."[368] Courts have recognized that "actual innocence" may render waiver provisions unenforceable.[369]

It could be argued that collateral attack waivers should never be enforced because they cannot be truly knowingly and voluntarily made. Appeal waivers and collateral waivers are substantially different in nature. Appeal waivers relate to a proceeding that occurs relatively close in time to the plea.[370] A defendant generally will have a good sense at the time of plea what rights he or she is giving up because those rights will relate to issues that have already been decided (i.e., suppression or severance motions) or matters regarding the Sentencing Guidelines (i.e., whether certain disputed enhancements will apply). Waiving one's right to ever bring a collateral attack is a much broader waiver in many respects because a collateral attack can occur much later in time. One cannot be sure about how the law may change, what new evidence might emerge, or how technological developments might impact an assessment of the case.

Despite these differences, courts have generally treated appeal waivers and collateral attack waivers as analogous.[371] However, at the very least, collateral attack waivers should not preclude relief when (1) the claim is based on an intervening change of law that could not have been anticipated at the time of the plea, and (2) the prisoner is serving a sentence based on an enhancement that was plainly

368. *See, e.g.*, United States v. Johnson, 410 F.3d 137, 151 (4th Cir. 2005); United States v. Porter, 405 F.3d 1136, 1145 (10th Cir. 2005).

369. *See, e.g.*, United States v. Ray, 358 F. App'x 329, 330 (3d Cir. 2009); United States v. Torres-Oliveras, 583 F.3d 37, 43 (1st Cir. 2009).

370. Notices of appeal must be filed within fourteen days of the entry of judgment. FED. R. APP. P. 4(b)(1)(A).

371. *See, e.g.*, Williams v. United States, 396 F.3d 1340, 1342 (11th Cir. 2005).

erroneous. Under these circumstances, failure to consider the claim would result in a miscarriage of justice. The government should decline to seek enforcement of collateral attack waivers in these circumstances, and courts should refuse to enforce them.

B. Addressing Concerns About Floodgates

As described above, courts could correct many *Begay*-type errors, even in light of Supreme Court constraints and the AEDPA's limitations. The various procedural barriers to collateral relief can be overcome if courts (1) find all sentencing errors impacting the length of the sentence cognizable under § 2255; (2) excuse procedural default based on a prisoner's "actual innocence" of a sentencing enhancement; (3) toll the statute of limitations based on a showing of "actual innocence"; (4) allow prisoners who litigated a § 2255 motion to seek relief under § 2241 because an intervening clarification of the law established the inapplicability of the enhancement; and (5) refuse to enforce collateral attack waivers in plea agreements where the prisoner is ineligible for the enhancement.

Courts may be concerned that excusing procedural barriers on these grounds will open the floodgates to resentencing in every case. However, the number of resentencings will be contained. Moreover, courts could place further restrictions on resentencings while still correcting many *Begay*-type errors.

The "actual innocence" exception, which would excuse some procedural barriers, is a narrow one. In many cases, prisoners would be unable to make a persuasive showing of "actual innocence" of a sentencing enhancement. In the context of capital sentencing errors, the Supreme Court has held that "to show 'actual innocence' one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty."[372] The Second Circuit has extended the "actual innocence" exception to noncapital sentencing enhancements, and explained the inquiry is "whether, by clear and convincing evidence, defendant has shown that he is actually innocent

372. Sawyer v. Whitley, 505 U.S. 333, 336 (1992). This is a higher standard than the standard applicable to "actual innocence" of the crime itself, which requires only a showing that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." Schlup v. Delo, 513 U.S. 298, 327 (1994); *see also* Calderon v. Thompson, 523 U.S. 538, 559–60 (1998) (holding that a capital petitioner must show by clear and convincing evidence that no reasonable juror would have found him eligible for the death penalty).

of the act on which his harsher sentence was based."[373]

Thus, in the context of a claim of an erroneous enhancement, for a court to find the "actual innocence" exception applicable, the court would have to find that the prisoner presented "clear and convincing evidence" that the enhancement was inapplicable.[374] With *Begay*-type claims, the court will be able to easily determine based on objective records of the prior conviction whether the enhancement was applied in error. In contrast, prisoners will generally not be able to meet the "clear and convincing" standard if the enhancement related to a factual issue, such as whether they played a leadership role in the offense or possessed a gun. In most instances, courts would likely find that the evidence submitted by the defendant disputing these enhancements does not demonstrate by clear and convincing evidence their innocence of the conduct. Therefore, the high standard for establishing "actual innocence" of an enhancement would prevent many resentencings.

Moreover, courts could consider *Begay*-type claims on the merits without holding that inapplicability of an enhancement alone will suffice to excuse all of the procedural barriers. As suggested above, courts could toll the statute of limitations in cases only if the prisoner shows that an intervening change of law establishes the inapplicability of the enhancement and when the prisoner has exercised reasonable diligence in pursuing the claim. Similarly, courts could permit prisoners to avoid the ban on successive motions by filing § 2241 petitions only when an intervening change of law establishes "actual innocence" (or inapplicability) of the enhancement and where the prisoner has not had a previous opportunity to raise the claim. Courts could also require both "actual innocence" *and* an intervening change of law to excuse procedural default and plea agreement waivers. Finally, courts could hold that guideline-based claims are only cognizable if there has been an intervening change of law. This more restrictive approach, requiring "actual innocence" plus an intervening change of law to excuse procedural barriers, would reduce the number of viable claims. For example, if a prisoner merely claimed a Guideline enhancement was based on an erroneous factual finding by the sentencing court, collateral relief could not be granted. Notably,

373. Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 172 (2d Cir. 2000). According to the Second Circuit, "[w]here a petitioner shows by clear and convincing proof that he is actually innocent of the conduct on which his sentence is based, the incarceration is fundamentally unjust and the miscarriage of justice exception to the procedural default bar applies." *Id.*

374. *See id.*

even with this more restrictive approach, many *Begay*-type errors would be fixed.

In addition to requiring an intervening change of law, courts could restrict relief further by holding that the concept of "actual innocence" applies with respect to noncapital sentencing enhancements only if the enhancement is a recidivist enhancement—i.e., an enhancement triggered by a prior conviction. The justification for including only recidivist enhancements is that they generally lead to big sentencing jumps, and it is very easy to determine at the collateral review stage—based simply on documentary evidence—whether one was correctly imposed. Again, *Begay*-type claims would be fixed under this approach.

A final approach is to restrict relief to only those instances where the sentence exceeds the statutory maximum—i.e., ACCA cases. Courts could hold that Guidelines claims are noncognizable or could restrict the "actual innocence" concept to cases where the sentence exceeds the statutory maximum. However, errors in calculating the Guidelines can impact a defendant's sentence just as much as errors in applying statutes. Defendants should be sentenced according to the correct interpretation of the law. These guideline-based sentencing errors should be corrected, at least where the defendant had no previous opportunity to obtain correction of the error or the error led to a major sentence increase.

C. *Crafting a Limited Scope of Relief*

Another issue to consider is the precise nature of relief available under § 2255 for sentencing errors. In *Narvaez*, when the Seventh Circuit reversed the district court's denial of relief under § 2255, the court stated that on remand: "the district court [was] to impose the sentence applicable without the imposition of a career offender status" and "[n]o other aspect of the sentence [was] to be revisited."[375] In contrast, in some cases where district courts have granted § 2255 motions based on *Begay*-type claims, they have ordered full resentencings, including the preparation of new presentence reports.[376]

The statutory text of § 2255 provides that if grounds exist for granting the motion, the court "shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a

375. Narvaez v. United States, 674 F.3d 621, 630 (7th Cir. 2011).

376. Brown v. United States, Nos. CV-409-070, CR-404-11, 2010 WL 3656016, at *1 (S.D. Ga., Sept. 15, 2010).

new trial or correct the sentence as may appear appropriate."[377] Thus, with respect to sentencing errors, courts have the power to "resentence" or to "correct the sentence as may appear appropriate."[378] Courts have held that this language "confers a 'broad and flexible' power to the district courts 'to fashion an appropriate remedy.' "[379]

If the error was Guideline-based and did not affect the applicable statutory range for the sentence, then it seems that the court could determine that the appropriate remedy in some cases is to simply impose a new sentence within the corrected-Guideline range—much as courts reduced a large number of sentences without full resentencings in crack cases pursuant to the retroactive Sentencing Guideline amendments.[380] Such a sentence reduction may not even require the presence of the prisoner in court.[381] Given the flexibility granted to courts by the § 2255 remedy, it appears that courts would have the power to fashion this sort of limited relief. Indeed, decisions

377. 28 U.S.C. § 2255(b) (2006).

378. *Id.* § 2255(b).

379. United States v. Hillary, 106 F.3d 1170, 1171 (4th Cir. 1997); *see also* United States v. Torres-Otero, 232 F.3d 24, 30 (1st Cir. 2000) ("As an initial matter, we note the broad leeway traditionally afforded district courts in the exercise of their § 2255 authority.").

380. In 2007, and again in 2010, the Sentencing Commission reduced the recommended sentencing ranges in crack cases. In both instances, the Commission gave retroactive effect to the amended Guidelines, which permits courts to modify "final" sentences under 18 U.S.C. § 3582(c)(2) (2006). Under the 2007 amendments, federal district courts processed 25,515 motions, granting 16,433 and denying 9,082. *See* Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively (June 30, 2011), http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20110630_Press_Release.pdf. The Supreme Court in *Dillon v. United States*, 130 S. Ct. 2683 (2010), recently clarified that when a sentence is modified pursuant to a retroactive Guideline amendment, the prisoner is not entitled to a full resentencing. *Id.* at 2691. Instead, the court may impose a new sentence within the amended Guideline range, but generally may not go lower than the bottom of that range. *Id.* In addition, the presence of the defendant is not required before the court adjusts the sentence. *Id.* at 2692.

381. Last year, in *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Supreme Court affirmed the wide discretion of courts in resentencing when cases are remanded after appeal. *Id.* at 1241. The Court concluded that § 3742(g)(2), which prohibited a district court at resentencing after remand from imposing a sentence outside the Guidelines range except upon a ground it relied upon at the prior sentencing, was invalid after *Booker*. *Id.* at 1243. Because this provision required the district court to treat the Guidelines as mandatory, it could not withstand *Booker*. *Id.* at 1241. Thus, after *Pepper*, district courts conduct full resentencings after cases are remanded, and can consider any factor that they could have considered at the first sentencing, as well as post-sentencing rehabilitation. *Id.* at 1249–50. *Pepper* interpreted the statute governing sentences after remands from appeal, and did not speak to a district court's power to fashion relief under § 2255(a). *Id.* Since nothing about § 2255(a) requires the court to treat the Guidelines as mandatory, granting limited relief—and not a full resentencing—is not inconsistent with *Booker* or *Pepper*.

by sentencing courts to grant § 2255 motions and impose a new sentence without a hearing have been affirmed.[382] Thus, although courts plainly have the power to grant a full resentencing under § 2255,[383] in some instances they could simply reduce the sentence without a hearing.[384] In other instances, they may conclude that they should start afresh and hold a new hearing. A district court judge, who is already familiar with the case and the reasoning behind the original sentence, has the ability to make this call.

IV. RETHINKING FINALITY AND SENTENCING

The above discussion has demonstrated that although there are numerous barriers to relief for federal prisoners seeking resentencing on collateral review, exceptions to these barriers exist. Consistent with statutory provisions and existing Supreme Court law, lower courts could fix many more sentencing errors. But although they could correct the mistakes, courts are choosing not to do so in many cases. Citing interests in finality, they often refuse on procedural grounds to correct the sentences of prisoners who are serving plainly unjust sentences. The aftermath of *Begay* has revealed the great emphasis that courts place on notions of finality when reviewing claims of sentencing errors.

Despite the increasing amount of litigation in this area, courts and scholars have not carefully analyzed the specific finality interests at stake in reviewing a challenge to a *sentence* as opposed to a *conviction.* A close examination of the arguments favoring finality reveals 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.

A. Articulating Finality Interests

Arguments favoring finality of criminal judgments have developed over the years in scholarship and court decisions. After an

382. United States v. Hadden, 475 F.3d 652, 669 (4th Cir. 2007) ("The text of § 2255 clearly affords the district courts the authority to 'correct' a prisoner's unlawful sentence without conducting a formal 'resentenc[ing]' hearing . . . .").

383. *See* United States v. Green, No. 3:06-00143, 2010 WL 1905012, at *4 (S.D. W. Va. May 11, 2010).

384. In addition, if the request for sentence correction comes through a § 2241 petition, the court also possesses broad power to "dispose of the matter as law and justice require." 28 U.S.C. § 2243 (2006). It seems there too that courts could correct errors in some cases without conducting a full resentencing.

expansion in the reach of habeas review under the Warren Court, the Burger and Rehnquist Courts greatly narrowed the availability of collateral relief.[385] Central to the rationale for limiting habeas review is the asserted interest in finality of criminal judgments.

Roughly speaking, the arguments in favor of finality that have emerged from scholarship and court decisions can be divided into six main categories: Promoting finality (1) respects notions of comity and federalism; (2) preserves resources and avoids delay in other court cases; (3) furthers the criminal law's goal of deterrence and rehabilitation of offenders; (4) avoids problems that result from staleness of evidence; (5) protects victims from the harm that may come from the repeated revisiting of the case by the courts; and (6) provides psychological benefits by allowing society to move on and feel confident in the judicial system. As explored below, many of these arguments favoring finality are considerably weaker in the context of correcting a sentencing error as opposed to a conviction error.

In his 1963 article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*,[386] Paul Bator articulated arguments in favor of finality of criminal judgments. Over the years, the Supreme Court has relied heavily on Bator's views regarding the importance of finality,[387] and his work has shaped scholarly attention to the topic.[388]

As a starting point, Bator reasoned that we can never really be sure that a judgment is actually free from legal or factual error, and at a certain point, we must conclude that detention is "legal," not in some "actual" or absolute sense, but because institutional processes have been empowered to definitively establish legality.[389] Thus, "*if* a criminal judgment is ever to be final, the notion of legality must at some point include the assignment of final competencies to determine legality."[390] Bator identified a number of arguments favoring more restrictive habeas review.

First, Bator argued that "conservation of resources"—not just economic, but also the intellectual, moral, and political resources of

385. 1 HERTZ & LIEBMAN, *supra* note 22, § 2.4[d].

386. Bator, *supra* note 12, at 452.

387. *See, e.g.*, Danforth v. Minnesota, 552 U.S. 264, 272 (2008); Calderon v. Thompson, 523 U.S. 538, 555 (1998); Teague v. Lane, 489 U.S. 288, 309 (1989).

388. Bator's article is cited in 471 law review articles available on WestlawNext alone. WESTLAWNEXT, https://1.next.westlaw.com (search "76 HARV. L. REV. 441"; then click "Citing References"; then click "Secondary Sources"; then click "Law Reviews").

389. Bator, *supra* note 12, at 447.

390. *Id.* at 450–51.

the legal system—was at stake. Efforts should not be duplicated just for sake of it. Rather, there must be some reasoned justification for another "go-around."[391] In addition, Bator argued that multiple go-arounds could actually be harmful because he could "imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."[392]

Second, Bator asserted that the effectiveness of the "substantive commands" of the criminal law is jeopardized by a lack of finality. The idea that someone who violates the law will swiftly and certainly be subject to just punishment is "essential to the educational and deterrent functions of the criminal law."[393] In addition, Bator suggested that lack of finality actually undermines the rehabilitation of offenders because re-education may not even begin "if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place."[394]

Finally, Bator argued that "[r]epose is a psychological necessity in a secure and active society, and it should be one of the aims"—though not the sole aim—of "a procedural system to devise doctrines which, in the end, do give us repose, do embody the judgment that we have tried hard enough and thus may take it that justice has been done."[395] According to Bator, "There comes a point where a procedural system which leaves matters perpetually open no longer reflects humane concern but merely anxiety and a desire for immobility." Bator asserted that "we must accept the fact that human institutions are short of infallible; there is reason for a policy which leaves well enough alone and which channels our limited resources of concern toward more productive ends."[396] He stressed that he did "not counsel a smug acceptance of injustice merely because it is disturbing to worry whether injustice has been done," but rather he sought a "general procedural system which does not cater to a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system."[397]

391. *Id.*
392. *Id.*
393. *Id.* at 452.
394. *Id.*
395. *Id.*
396. *Id.* at 453.
397. *Id.*

The next year, Anthony Amsterdam published *Search, Seizure, and Section 2255: A Comment*, an influential piece focusing on the finality interests specifically at stake with respect to federal review of federal convictions.[398] In addition to concerns about duplication of efforts and delay, Amsterdam emphasized the problem of stale evidence. He observed that postponed litigation of fact "will often be less reliable in reproducing facts (i) respecting the postconviction claim itself and (ii) respecting the issue of guilt if the collateral attack succeeds in a form which allows retrial."[399] Amsterdam noted that the combination of these considerations will present a more or less persuasive argument against the cognizability of a claim, depending on "the nature of the claim, the manner of its treatment (if any) in the conviction proceedings, and the circumstances under which collateral litigation must be had."[400] For example, Amsterdam reasoned that a claim that a prisoner pleaded guilty to a statute unconstitutional on its face "offends none of these interests significantly," whereas "a claim that he was irresponsible by reason of insanity at the time of the crime for which he was sentenced ten years ago given a full trial without his raising the issue, significantly offends them all."[401]

Several years later, in his article *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*,[402] Judge Friendly argued that habeas relief for federal prisoners should be limited to (1) challenges to the criminal process itself, including lack of counsel; (2) cases "where the defendant poses constitutional claims he could not practically have advanced before the conviction or where proper procedures were not provided for doing this;" (3) constitutional claims "resulting from changes in the rules of the game to whatever extent the Supreme Court indicates;" and (4) all other constitutional claims subject only to "a colorable showing of innocence."[403] Judge Friendly cited a number of problems with delaying finality. Relying on Bator, he expressed concern with collateral attacks interfering with the rehabilitation of offenders and emphasized "the human desire that things must sometime come to an end."[404] Like

398. Amsterdam, *supra* note 13, at 390.

399. *Id.* at 384.

400. *Id.*

401. *Id.* at 384 (footnotes omitted). In weighing arguments in favor and against finality, Amsterdam concluded that Fourth Amendment claims should not be cognizable in § 2255 motions. *Id.* at 388.

402. Henry J. Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 150 (1970).

403. *Id.* at 170.

404. *Id.* at 149.

Amsterdam, he argued that the longer the delay, the less reliable the fact-finding on the issue giving rise to the attack, and the reduced likelihood of a successful retrial.[405] Judge Friendly was also concerned about resources: he asserted that the time of judges and lawyers was better spent bringing the accused to trial promptly, rather than devoted to collateral attacks.[406] Finally, he cited Justice Jackson's observation that "[i]t must prejudice the occasional meritorious application to be buried in a flood of worthless ones."[407]

Notably, the articles by Bator, Friendly, and Amsterdam focus on issues impacting convictions and do not discuss the specific finality interests at issue when prisoners challenge only sentences. It bears noting that in the era of this scholarship, the length of a federal sentence was considerably less "final" than it is now, as Rule 35 continued until 1987 to allow sentencing courts to correct illegal sentences "at any time," and, until 1984, the federal Parole Commission had a great deal of control over release dates as the law required offenders to serve no more than one-third of their sentences.[408] In fact, the Parole Guidelines were specifically designed to smooth out disparities between sentencing judges—i.e., "finality" was postponed in many ways.

Over the years, the Supreme Court has relied heavily on the finality arguments developed by these scholars in developing doctrines to restrict habeas relief. For example, Judge Friendly's article was cited in Supreme Court cases limiting successive petitions,[409] expanding the procedural default doctrine,[410] and holding habeas relief unavailable for Fourth Amendment claims already litigated in state court.[411] The Court has articulated similar arguments favoring finality—including the need to preserve resources, avoid problems from stale evidence, promote deterrence and rehabilitation, and the human desire to simply put matters to rest.[412]

Justice Harlan, a strong proponent of finality of criminal

405. *Id.* at 147.

406. *Id.* at 148–49.

407. *Id.* at 149 (quoting Brown v. Allen, 344 U.S. 443, 537 (1953) (Jackson, J., concurring)).

408. *See* discussion *supra* Part I.B.

409. Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986).

410. Murray v. Carrier, 477 U.S. 478, 490–91 (1986) (quoting Reed v. Ross, 468 U.S. 1, 10 (1984)); Smith v. Murray, 477 U.S. 527, 539 (1986); Engle v. Isaac, 456 U.S. 107, 126 n.31 (1982).

411. Stone v. Powell, 428 U.S. 465, 491 n.31 (1976). Professor Lasch has carefully charted the Court's reliance on Judge Friendly's work. *See* Lasch, *supra* note 151, at 24.

412. *See, e.g.*, *Engle*, 456 U.S. at 126–29.

judgments, argued that "[b]oth the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation," and "that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community."[413] In his concurrence in *Mackey v. United States*,[414] he set forth a framework for determining the retroactivity of new constitutional rules that would later be adopted by the Court in *Teague v. Lane*.[415] In *Mackey*, Justice Harlan argued that "[s]urely it is an unpleasant task to strip a man of his freedom and subject him to institutional restraints" but "this does not mean that in so doing, we should always be halting or tentative."[416] Citing Friendly, Justice Harlan emphasized the drain on resources,[417] and relying on Amsterdam, he expressed concern about stale evidence.[418]

Chief Justice Burger also promoted the finality of criminal judgments, and echoed the arguments of others before him.[419] He asserted that "collateral review undermines the interest in repose that underlies the principle of res judicata, degrades the importance of the trial, frustrates penological goals and drains the resources of the judicial system."[420] He reasoned, "Our willingness to entertain these late claims tells prisoners that they need never reconcile themselves to what has happened: they need never 'make peace' with society, learn a new way of life, or attempt to build a realistic future."[421] In addition, "[i]nmates exploit society's misplaced sentiment" and have an "incentive to 'store up' technical challenges" to conviction.[422]

Moreover, the Court has frequently emphasized the special

413. Sanders v. United States, 373 U.S. 1, 24–25 (1963) (Harlan, J., dissenting).

414. 401 U.S. 667, 675 (1971) (Harlan, J., concurring).

415. 489 U.S. 288, 310 (1989).

416. *Mackey*, 401 U.S. at 691.

417. *Id.* ("While men languish in jail, not uncommonly for over a year, awaiting a first trial on their guilt or innocence, it is not easy to justify expending substantial quantities of the time and energies of judges, prosecutors, and defense lawyers litigating the validity under present law of criminal convictions that were perfectly free from error when made final.").

418. *Id.* ("This drain on society's resources is compounded by the fact that issuance of the habeas writ compels a State that wishes to continue enforcing its laws against the successful petitioner to relitigate facts buried in the remote past through presentation of witnesses whose memories of the relevant events often have dimmed. This very act of trying stale facts may well, ironically, produce a second trial no more reliable as a matter of getting at the truth than the first.").

419. Spalding v. Aiken, 460 U.S. 1093, 1095–96 (1983).

420. *Id.*

421. *Id.*

422. *Id.*

finality concerns present when a federal court reviews a state judgment. Central to the holding in *Teague v. Lane* were concerns about federalism and comity.[423] In *McCleskey v. Zant*, which placed limits on successive petitions, the Court emphasized:

> Finality has special importance in the context of a federal attack on a state conviction. Reexamination of state convictions on federal habeas frustrate[s] . . . both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights. Our federal system recognizes the independent power of a State to articulate societal norms through criminal law; but the power of the State to pass laws means little if the State cannot enforce them.[424]

Over time, an additional concern about the harm to victims from a lack of finality began to emerge in Court opinions. For example, in *Calderon v. Thompson*, Justice Kennedy noted in reversing the Ninth Circuit's decision vacating a death sentence that "[o]nly with real finality can the victims of crime move forward knowing the moral judgment will be carried out."[425]

The value the Court places on finality continues to have a major influence on its decisions today.[426] Strikingly, outside the context of capital cases, the Court has rarely noted the different finality interests at stake with respect to sentencing claims as compared to conviction-based claims.[427]

B. Finality and Correction of Sentences

Below, the Article discusses finality interests in the context of collateral review of sentencing errors. Before turning to this topic, a note about capital cases is in order. Capital sentences raise a whole host of finality concerns that differ from those of noncapital sentences. Death itself is "final" in a way that other sentences are not,[428] and occurs at a moment of time rather than over a continuous

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423. Teague v. Lane, 489 U.S. 288, 308 (1989).

424. McCleskey v. Zant, 499 U.S. 467, 480 (1991) (citations and internal quotation marks omitted); *see also* Calderon v. Thompson, 523 U.S. 538, 555–56 (1998) (discussing the importance of the finality of state judgments).

425. *Calderon*, 523 U.S. at 556.

426. *See, e.g.*, Greene v. Fisher, 132 S. Ct. 38, 44 (2011).

427. One exception is with respect to double jeopardy claims, where the Court has observed that defendants have less of an expectation in the finality of sentencing decisions as compared to acquittals. *See* Sattazahn v. Pennsylvania, 537 U.S. 101, 114–15 (2003); United States v. DiFrancesco, 449 U.S. 117, 139 (1980).

428. Ake v. Oklahoma, 470 U.S. 68, 87 (1985) (Burger, C.J., concurring) ("In capital cases the finality of the sentence imposed warrants protections that may or may not be

period of time, as with a sentence of incarceration.[429] Vacating a death sentence raises resource issues not at play in noncapital cases—as capital sentencing proceedings are much more time consuming and must be held before a jury. The special finality concerns present in capital cases have received scholarly attention elsewhere[430] and are beyond the scope of this Article. The discussion below examines finality arguments in the context of noncapital sentences.

1. Comity and Federalism

Courts and scholars often cite concerns about comity and federalism when emphasizing the importance of finality of criminal judgments. Indeed, as discussed above, the Supreme Court has recognized that finality is most important in the context of federal court review of state court convictions.[431] Concerns about comity and federalism are entirely absent when a federal court reviews its own judgment in a § 2255 proceeding, and thus these principles do not weigh in favor of treating federal convictions as final.[432]

2. Resources

Those advocating for limitations on federal post-conviction review point to a concern about preservation of judicial and other resources.[433] As described below, these concerns are more pronounced in the context of federal review of state judgments as compared to federal review of federal judgments. In addition, when a habeas petition seeks merely a correction of a sentence, rather than a retrial, there should be less of a concern about draining resources as a court can correct a sentence more efficiently than holding a new trial, and shortening a sentence means saving money that would otherwise have been spent on incarceration.

Regarding resources, several distinctions should be drawn

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required in other cases.").

429. Schriro v. Summerlin, 542 U.S. 348, 363 (2004) (Breyer, J., dissenting).

430. *See, e.g.*, Robert Batey, *Federal Habeas Corpus and the Death Penalty: "Finality with a Capital F,"* 36 U. FLA. L. REV. 252, 253–54 (1984); Robert S. Catz, *Federal Habeas Corpus and the Death Penalty: Need for a Preclusion Doctrine Exception*, 18 U.C. DAVIS L. REV. 1177, 1178 (1985); James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2078 (2000).

431. *See supra* notes 423–24 and accompanying text.

432. *See generally* NANCY J. KING & JOSEPH L. HOFFMAN, HABEAS FOR TWENTY-FIRST CENTURY: USES, ABUSES, AND THE FUTURE OF THE GREAT WRIT 108–21 (arguing that § 2254 should be restricted but § 2255 slightly expanded, in light of different federalism concerns).

433. *See supra* text accompanying notes 391–92, 406.

between § 2254 and § 2255 proceedings. A § 2255 petition differs from a § 2254 petition in that it represents a federal prisoner's first chance at collateral review. With a § 2254 petition, the prisoner has already had an opportunity for collateral review in the state, and the federal § 2254 petition is the second chance at collateral review.[434] Thus, the federal resources spent on a § 2254 petition are on top of the resources provided at the post-conviction stage in the state.[435] A § 2255 petition, by contrast, is just the first shot at collateral attack.[436] Some types of claims, by their nature, could not have been raised at all previously, such as a claim of ineffective assistance of counsel.

There is another important difference with respect to resources between review of § 2254 and § 2255 petitions. When a federal judge reviews a § 2254 petition from a state prisoner, review of the case will take considerable time because the judge lacks any familiarity with the case. Thus, the original state proceeding must be examined, along with the subsequent appeal and any state collateral review proceedings and appeals. In contrast, a § 2255 motion goes back to the original trial judge who took the plea or oversaw the trial and imposed the original sentence.[437] Thus, § 2255 motions are adjudicated more efficiently.

Most sentencing-based claims are easy to evaluate. Judges will usually need to review only a short sentencing transcript rather than an entire trial transcript. Motions raising *Begay*-type claims are particularly easy to resolve. At issue in resolving the collateral attack is whether the defendant actually had the type of prior conviction that qualifies for the recidivist enhancement. To evaluate the § 2255 motion, the federal judge simply looks at court records from the earlier proceeding that adjudicated the prior case and does not engage in new fact-finding about the defendant's prior conduct.[438] No

434. Lasch, *supra* note 151, at 66.

435. *Id.* at 67 (arguing that § 2255 proceedings "are a second round of litigation—not a third round, as in federal habeas review of state-court judgments" and thus "the finality interests attaching in such proceedings are not as great as a state's interest in finality at the time of federal habeas review").

436. Taylor v. Gilkey, 314 F.3d 832, 836 (7th Cir. 2002); *see also* Lasch, *supra* note 151, at 65–66 (describing the functional differences between federal postconviction proceedings and federal habeas review).

437. 2 HERTZ & LIEBMAN, *supra* note 22, § 41.4[c].

438. The Supreme Court has held that in determining whether a prior conviction triggers a federal recidivist enhancement, the sentencing court must use a "categorical approach" and ordinarily may " 'look only to the fact of conviction and the statutory definition of the prior offense.' " Shepard v. United States, 544 U.S. 13, 17 (2005) (quoting Taylor v. United States, 495 U.S. 575, 602 (1990)). In some instances, the prior conviction is under a statute that is either a perfect match for the federal enhancement, or covers a

hearing is necessary. Instead, the court can resolve the issue based purely on documentary evidence, which may already be part of the record or can be easily submitted by the parties.

In addition, with respect to sentencing claims, even when the court finds there has been an error, the court does not necessarily need to conduct a full resentencing. In cases where the original sentence does not exceed the statutory maximum, the judge can determine whether the error in the original sentence actually made a difference in the result. If the error was harmless, the judge need not impose a new sentence. Since the judge is analyzing the impact of the error on his or her own decision, this sort of harmless-error review is easier and more accurate than when a judge imagines what the jury would have done absent an error at trial.

When there has been an error impacting the sentence, a full resentencing may still not be required in some cases. As described above, § 2255 provides that a judge may "resentence" or "correct the sentence."[439] If the error was guideline-based and did not affect the applicable statutory range for the sentence, then the court could determine that the appropriate remedy is to simply impose a new sentence within the corrected-Guideline range—much as courts reduced sentences in crack cases pursuant to the retroactive Guideline amendments.[440] Such a sentence reduction may not even require the presence of the prisoner in court. Thus, although courts plainly have the power to grant a full resentencing under § 2255, in some instances they might simply reduce the sentence without a

narrower range of conduct than the enhancement—in those circumstances, the enhancement automatically applies. *Id.* However, if a conviction was obtained under a state statute that is broader than the federal enhancement, then mere proof that the defendant was convicted under the statute will not suffice to trigger the enhancement. *Id.* Instead, the enhancement is triggered only if the conviction was narrowed in scope during the prior proceeding to within-enhancements limits. *Id.* If the conviction resulted from trial, it triggers the federal enhancement only if the charging paper and jury instructions "actually required [the jury] to find all the elements" of the enhancement provision. *Id.* (citing *Taylor*, 495 U.S. at 602). If the conviction resulted from a guilty plea, then the court determines whether it was narrowed by looking at "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Id.* at 26. Thus, whether a prior conviction triggers an enhancement depends on what state records establish regarding the nature of the defendant's prior conviction. *Id.* The inquiry does not focus on what the defendant actually did. *Id.* In resolving the collateral attack, the court will not engage in fact-finding about the defendant's conduct. *Id.* Indeed, such fact-finding might violate the Sixth Amendment's jury trial right. *Id.* at 25–26.

439. 28 U.S.C. § 2255(b) (2006); *see supra* text accompanying notes 377–79.

440. *See supra* note 380.

hearing. Since 2008, federal district courts have processed more than 25,000 motions for sentence reduction under the crack amendments.[441] A similarly efficient process could be devised to correct *Begay*-type errors, which impact far fewer cases.[442]

Even where a resentencing is needed because of a sentencing error, the process will not be very time consuming—particularly as compared to conducting a new trial. To conduct a resentencing, the judge will simply need to read an update to the presentence report, which will likely contain a relatively short account of the defendant's conduct in prison, and any additional sentencing memoranda from the parties. The court will not need to reevaluate Guideline determinations that were previously made and not the basis for granting the resentencing. The actual court proceeding should not take any longer than the original sentencing—usually less than an hour. In addition, the resentencing process would not consume much in the way of resources from others involved in the process. The probation officer may well be the same person involved in the original case, and it is not difficult to update a presentence report with information on the defendant's conduct in prison. Counsel for the defendant and government may also be the same original players and thus already have a familiarity with the case.[443]

For these reasons, sentencing errors are relatively easy to identify and fix. In contrast, conviction-based errors are often harder to evaluate and are certainly much more resource-intensive to correct. If the conviction is vacated, the entire process begins again. Resources need to be expended on a new trial or plea negotiations, and another sentencing proceeding if conviction results.[444]

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441. *See supra* note 380.

442. Career offender sentences are imposed in only approximately 2,250 cases a year, and many cases will not involve *Begay*-type errors at all. U.S. SENTENCING COMM'N, *supra* note 71, at tbl. 22. In addition to career offender cases, sentences in firearm and illegal reentry cases could also involve *Begay*-type errors. However, these sentences will be shorter than career offender sentences, and many individuals will have been released before they would have an opportunity to obtain collateral relief. *See generally* Carissa Byrne Hessick, *Ineffective Assistance at Sentencing*, 50 B.C. L. REV. 1069, 1072–73 (2009) (arguing that articulating legal standards governing ineffective assistance of counsel claims at sentencings will not open the floodgates because only defendants serving sentences of more than a few years will have the opportunity to raise such a claim at all). Hessick also argues that the "costs associated with a remand for new sentencing—when compared to the costs of a new trial or a new capital sentencing hearing—are limited." *Id.* at 1073.

443. This discussion is based on the author's experience as an assistant federal defender in the District of Connecticut.

444. Lower courts have also rarely explored the differences with respect to resources when a sentence is vacated rather than there being a conviction. The Second Circuit has, however, pointed to resource differences when adopting a more relaxed standard for

There is another important resources issue at play when a prisoner seeks correction of a sentence. When a court reduces a sentence of incarceration, funds are freed up because the government no longer needs to pay for the same length of incarceration. It costs approximately $28,000 per year for the federal government to incarcerate someone.[445] Why should the government continue to pay for a sentence that is inappropriate under a proper interpretation of law? If a cost-benefit analysis is used to influence the scope of habeas review, shouldn't the additional cost of the erroneous incarceration be part of the calculus?

Finally, it is important to recognize that imposing strict procedural barriers on habeas petitions does not mean that there will be an absence of resources spent on habeas litigation. Prisoners will

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reviewing unpreserved sentencing errors on appeal. United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005). In the wake of *Booker*, the Second Circuit determined that for unpreserved Sixth Amendment claims "there is no need to apply the plain error doctrine in the sentencing context with precisely the same procedure that has been used in the context of review of errors occurring at trial, whether civil or criminal." *Id.* at 457. In reaching this conclusion, Judge Newman noted that "[i]n recognition of the costs of a second trial to remedy an unpreserved error, a reviewing court uses the power to order one 'sparingly.' " *Id.* at 456 (quoting Jones v. United States, 527 U.S. 373, 389 (1999)). In contrast, "the context of review of a sentencing error is fundamentally different." *Id.* In particular:

> From the standpoint of the parties, the error might have great significance. An error yielding an unduly low sentence would deny the public its entitlement to a sentence sufficient to achieve the purposes of punishment. An error yielding an unduly high sentence would deny the defendant freedom for some length of time. More importantly, the cost of correcting a sentencing error is far less than the cost of a retrial. A resentencing is a brief event, normally taking less than a day and requiring the attendance of only the defendant, counsel, and court personnel. Equally important, review of a sentencing error, unlike a trial error, does not require the appellate court to make its estimate of whether it thinks the outcome would have been non-trivially different had the error not occurred. The district court, familiar with that type of task and able to receive submissions of information that is not part of the existing record and that might have been submitted at the time of the original sentence had the *Booker* standards been in effect, can answer the question whether those standards would have resulted in a non-trivially different sentence at that time. Such an inquiry is very similar to a district court's task in cases where the outcome of a bench trial is remanded for reconsideration untainted by an error.

Id. Thus, the court reasoned that fewer resources are expended in the context of sentence review not only because resentencings are easier to perform, but because the court can assess the actual impact of an error. *Id.* These same considerations are applicable in the collateral review setting.

445. *See* Annual Determination of Average Cost of Incarceration, 76 Fed. Reg. 57,081, 57,081 (Sept. 15, 2011) (stating that the cost of incarceration of federal inmates for the 2010 fiscal year was $28,284).

continue to seek relief, and litigation over procedure in habeas cases expends considerable resources. The barriers to relief are not absolute: there are judicial exceptions even to strict statutory restrictions, such as the statute of limitations and the ban on successive petitions.[446] Judicial and prosecutorial resources must be spent resolving these issues, which are at times complex. For example, it takes much more time for a court to figure out *whether* to consider a *Begay*-type claim on the merits than it takes to actually consider the merits of the claim. In some cases, litigation over finality will take more time than identifying and fixing the mistake.[447]

A recent case, *United States v. Wyatt*,[448] reveals the incredible amount of judicial resources that can be expended in avoiding the correction of an undisputed sentencing error.[449] In *Wyatt*, the defendant was erroneously sentenced as a career offender based on a walkaway escape from a halfway house,[450] which *Chambers v. United States* established was not a career offender predicate.[451] His case was considered at least six times by the Seventh Circuit, three times by the district court in Texas, and once by the Fifth Circuit.[452] The Seventh Circuit, in rejecting his claim on procedural grounds, stated:

> Wyatt would not be sentenced as a career offender today and likely would receive a substantially lower sentence; the taxpayer is footing the bill to keep Wyatt in prison far longer than Congress or the Sentencing Commission intended, but there is no longer any judicial procedure to remedy the situation. At this point, only the executive branch has the authority to grant Wyatt the relief he seeks.... As matters stand now, Wyatt's claims are being batted back and forth between two circuits with differing views of how (and perhaps

446. *See supra* Section III.A.2.

447. Judith Resnik's observation several decades ago that "habeas litigation is now litigation about finality" is even more true today. Judith Resnik, *Tiers*, 57 S. CAL. L. REV. 840, 962 (1984). Resnik observed then:

> My own guess is that the time saved by virtue of the cases not filed is far outweighed by the time spent picking through the cases filed to decide whether to think about the merits. While the Court has constricted the number of applications that may be considered on the merits, the Court has not made the search for those rare petitions easier or quicker.

Id. at 961.

448. 672 F.3d 519 (7th Cir. 2012).

449. *Id.* at 519–20.

450. *Id.* at 520.

451. *Id.* at 520–21.

452. *Id.* at 520–23.

> whether) he may be heard on the merits of his claim. This is an untenable and unseemly waste of judicial resources.[453]

In sum, although correcting sentencing errors in federal cases at the collateral review stage expends resources, the drain on the system is considerably less than in the context of courts vacating convictions. Moreover, resources are actually saved by not incarcerating someone for longer than is proper under a correct interpretation of law. Lower courts have rarely noted these significant resource differences.

3. Stale Evidence

Those advocating for greater finality of criminal convictions also cite a concern about stale evidence. In some instances, the longer the delay, the less accurate the fact-finding will be about the matter giving rise to the collateral attack. In addition, when a conviction is vacated, it may be difficult to obtain a conviction after retrial. Witnesses may die or forget things; physical evidence may decay.[454]

Staleness of evidence is typically less of a concern with § 2255 motions as compared to § 2254 petitions because § 2255 proceedings tend to occur closer in time to the original conviction.[455] In addition, many sentencing-based claims brought in § 2255 motions relate to legal interpretations of statutory and Guideline provisions and will not require a hearing or new evidence to resolve.

If an error is found, vacating a sentence raises fewer concerns about stale evidence. When a sentence is altered, a guilty defendant does not go unpunished—the conviction stands, and it is simply a matter of determining the appropriate punishment. At a new sentencing proceeding, the court may still rely on the original presentence report and on Guideline determinations previously made that were not the basis for the error. The court, unlike a jury, may also rely on its previous fact-finding, and hearsay rules do not bar admission of evidence.[456] Thus, vacating a sentence does not raise the same staleness-of-evidence concerns as vacating a conviction.

The only real change at the time of imposing the new sentence

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453. *Id.* at 524 (citation omitted).

454. *See supra* notes 399, 412 and accompanying text.

455. Section 2254 petitions are brought only after post-conviction litigation in the state has concluded. *See* Lasch, *supra* note 151, at 57 (arguing that "intra-system postconviction proceedings occur earlier in time than federal habeas review" and "[t]his reduces Judge Friendly's concern that accurate factfinding would not be possible in collateral proceedings and on retrial, as his concern increases in direct proportion to the amount of time that elapses between conviction and subsequent litigation events").

456. Williams v. New York, 337 U.S. 241, 250 (1949).

may be the circumstances of the defendant. But in this instance, the passage of time could actually enhance the court's ability to determine an appropriate sentence. If the court grants a full resentencing, the court can consider the defendant's conduct in prison. The court thus has additional relevant information absent at the earlier proceeding. The court may determine that the person's extraordinary efforts at rehabilitation justify a shorter sentence than the one originally imposed, even absent the impact of whatever error led to the resentencing. In contrast, if the person has engaged in violent conduct while in prison, the court may determine that the prisoner continues to present a threat to society and should be incapacitated for a longer period of time. In this sense, the evidence at the resentencing has ripened rather than spoiled.

With *Begay*-type claims, staleness of evidence is of minimal concern.[457] In determining the merits of the collateral attack, the court considers whether a prior conviction in fact should have triggered the federal enhancement.[458] To make this evaluation, the court looks at records from a prior court proceeding.[459] These records—which show the nature of the prior conviction—were set in stone at the time of the prior proceeding, and have not changed at all between the time of the federal sentencing and the time of the collateral review.[460] In determining whether recidivist enhancements apply, courts do not hear from witnesses or find facts regarding the conduct underlying a defendant's prior conviction.[461] Records of convictions do not go "stale" in the way that witnesses and some types of physical evidence may. Thus, resolving a collateral attack

457. Staleness of evidence is more of a concern when the claim relates to an enhancement that requires the sentencing court to resolve a disputed factual issue. For example, a prisoner might assert that a firearm enhancement under § 2D1.1(b)(1) of the Guidelines was unwarranted because a gun was not present during a drug deal. The government would have much more difficultly establishing this type of factual matter many years later in a collateral proceeding.

458. Shepard v. United States, 544 U.S. 13, 26 (2005).

459. *Id.*

460. *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. DAVIS L. REV. 1135, 1220–21 (2010). In some instances, it is possible that the actual prior records (usually from state proceedings) were not obtained at the first federal sentencing proceeding, and the court simply relied on a rap sheet in enhancing the sentence. In some of these cases, the records will have been destroyed pursuant to state record keeping rules, sometime between the time of the federal sentencing and the collateral review. *Id.* However, it seems more likely that either (1) the records were obtained at the time of the sentencing and can be reviewed at the time of the collateral review or (2) the records had already been destroyed by the time of the sentencing and thus were never available.

461. *Shepard*, 544 U.S. at 26.

that alleges an erroneous recidivist sentencing enhancement generally does not become more difficult with the passage of time. Moreover, if relief is granted, then the accuracy of the new sentencing determination is likely not negatively impacted by the passage of time. If the government cannot obtain an enhancement at a resentencing after a successful collateral attack, it is because the documents regarding the prior conviction did not, and never did, prove the enhancement—not because a witness died or forgot something with the passage of time.

4. Rehabilitation and Deterrence

Scholars and courts have also maintained that a lack of finality in criminal judgments undermines the deterrence and rehabilitation goals of criminal law. Some have asserted that effective deterrence is undermined if would-be criminals observe that criminal judgments do not always stand up, and endless litigation in cases prevents prisoners from accepting their fate and beginning the process of rehabilitation.[462] These arguments have been subject to scholarly critique on various grounds[463] and seem particularly weak in the context of the correction of sentencing errors.

With respect to deterrence, as Bator himself noted, the swiftness and certainty of conviction, rather than sentence severity, is most relevant to effective deterrence.[464] Shortening a sentence will not tell would-be criminals that they might get off scott-free from their criminal acts. Moreover, evidence suggests that people are better deterred by a system that they view as just and legitimate.[465] Making people serve unjust sentences is unlikely to promote their respect for the law. Regarding rehabilitation, federal law specifically provides that "imprisonment is not an appropriate means of promoting correction and rehabilitation,"[466] and last term, the Supreme Court

462. *See supra* notes 393–94, 421 and accompanying text.

463. Lasch, *supra* note 151, at 58 (finding that no evidence exists to support the claim that collateral attacks actually weaken deterrence or rehabilitation); Issachar Rosen-Zvi & Talia Fisher, *Overcoming Procedural Boundaries*, 94 VA. L. REV. 79, 89 (2008) (stating that the conviction of an innocent person prevents the rehabilitation of the actual guilty party); Katherine J. Strandburg, *Deterrence and the Conviction of Innocents*, 35 CONN. L. REV. 1321, 1321 (2003) ("If increased conviction rates are accompanied by less accurate determination of guilt—and hence increased conviction of the innocent—increasing the conviction rate can actually *decrease* deterrence.").

464. Bator, *supra* note 12, at 452 n.21 ("It is of course a commonplace of classical criminal-law theory that certainty and immediacy of punishment are more crucial elements of effective deterrence than its severity.").

465. *See, e.g.*, Fagan & Meares, *supra* note 49, at 176.

466. 18 U.S.C. § 3582(a) (2006).

held that federal courts may not impose or lengthen a prison term in order to foster a defendant's rehabilitation.[467] It would seem inconsistent with these principles to deny collateral sentencing review based on the view that more time in prison is fostering rehabilitation. Moreover, empirical evidence suggests that lengthy prison sentences can be counter-productive to rehabilitation.[468] Thus, the argument that the availability of collateral review of sentencing errors delays a prisoner's rehabilitation is far from compelling.

5. Harms to Victims from Continued Litigation

Advocates for victims' rights argue that a lack of finality of criminal judgments and prolonged litigation harms victims.[469] A victim may feel some closure after a defendant has been convicted and sentenced. If a lengthy sentence is imposed, the victim may feel a sense of security knowing that the offender will not be released for a long time. Collateral review of convictions and sentences can disrupt this sense of closure and security. In addition, the review process itself may require the victim to relive the event. Should the conviction be vacated, the victim may have to testify at another trial, and there is a risk that conviction will not be obtained.

Although the harm to victims from a lack of finality is quite real, collateral attacks on federal sentences should be somewhat less concerning from a victim's perspective. In these cases, the conviction will still stand, and the defendant will likely not be immediately released. In addition, it bears emphasizing that in many federal cases, there is no identifiable victim. In 2010, 28.9% of all federal offenders were sentenced under the drug Guideline, and most of these cases likely do not involve an identifiable victim.[470] In addition, 34.4% of offenders were sentenced under immigration Guidelines.[471] The vast majority of these offenses (more than 80%) were illegal reentry crimes, which have no identifiable victim.[472] Thus, concerns about the impact of finality on victims are reduced in the § 2255 context.

6. Psychological Benefits of Finality for Society

In addition to the finality considerations discussed above, some

467. Tapia v. United States, 131 S. Ct. 2382, 2385 (2011).

468. *See* Russell, *supra* note 460, at 1152 & nn. 83–85 (collecting studies).

469. *See, e.g.*, Susan L. Karamanian, *Victims' Rights and the Death-Sentenced Inmate: Some Observations and Thoughts*, 29 ST. MARY'S L.J. 1025, 1031 (1998).

470. U.S. SENTENCING COMM'N, ANNUAL REPORT 35 (2010).

471. *Id.* at fig. A.

472. *Id.* at 35.

have argued that finality offers psychological benefits to society. Bator describes a psychological benefit to society that comes from feeling that "we have tried hard enough and thus may take it that justice has been done," and he sees harm coming from a system catering to "a perpetual and unreasoned anxiety that there is a possibility that error has been made in every criminal case in the legal system."[473] Judge Friendly also emphasized "the human desire that things must sometime come to an end."[474]

These arguments are certainly subject to criticism,[475] and they undoubtedly carry less weight in the sentencing context. Society already lives with more uncertainty about the length of criminal sentences than about the finality of guilt-innocence determinations. In many jurisdictions, the opportunity for parole exists, and there can thus be a great deal of uncertainty about how much time a prisoner will actually spend in prison.[476] In addition, states often change rules regarding the calculation of good time credit, particularly in times of budgetary crises.[477] Thus, society already copes with uncertainty regarding the length of sentences. Broadening collateral review of sentences surely has less of a psychological impact than a broader scope of conviction-based review.

C. *Federal Judges: A Reluctance to Look Back?*

As discussed above, the arguments supporting finality are particularly weak with respect to *Begay*-type claims. Yet courts, for the most part, have refused to fix *Begay*-type errors. Given that finality interests are much less pronounced in the context of collateral review of a sentence, and *Begay*-type errors are so easy to fix, are there other factors that might help explain the reluctance of federal courts to resentence?

Judges may be reluctant to revisit sentences because they have become accustomed to not looking back. As a practical matter, federal judges today are rarely required to reconsider their sentencing decisions. Once the sentence is declared, the judge moves on to another case and does not look at the sentence again except in rare

473. Bator, *supra* note 12, at 452–53.

474. Friendly, *supra* note 402, at 149.

475. *See, e.g.*, Resnik, *supra* note 447, at 853–54.

476. *See* WILLIAM J. SABOL ET AL., THE INFLUENCE OF TRUTH-IN-SENTENCING REFORMS ON CHANGES IN STATES' SENTENCING PRACTICES AND PRISON POPULATIONS 7 (2002).

477. Cecelia Klingele, *The Early Demise of Early Release*, 114 W. VA. L. REV. 415, 439 (2012).

cases. To the extent federal judges see defendants again, it is after they have been released and they have violated some condition of supervised release.

Out of all the cases sentenced, less than one percent will likely return to the sentencing court after an appeal.[478] Although there are several other mechanisms that allow the sentencing court to modify a sentence, these mechanisms are narrowly circumscribed and used infrequently. A court may correct clear errors under Rule 35(a) only within fourteen days of sentencing.[479] Courts may also reduce "final" sentences if the government files a motion under Rule 35(b) based on the defendant's post-sentencing cooperation[480] or if the Bureau of Prisons ("BOP") files a motion under 18 U.S.C. § 3582(c)(1).[481] But in 2010, sentences were reduced in only 2,006 cases pursuant to government motion and in thirty-four cases pursuant to BOP motion.[482] Courts may also modify sentences based on changes to the Sentencing Guidelines that have been made retroactive by the Sentencing Commission,[483] but historically this mechanism has been used infrequently because so few Guideline amendments have been made retroactive.[484] Courts modify sentences based on § 2255 motions in very few cases—only 150 sentences were changed in this fashion in 2010.[485] Accordingly, federal resentencing is incredibly rare.

The lack of judicial experience with resentencing is a relatively recent phenomenon. At common law, a sentencing judge could correct an illegal sentence at any time and could revise a legal sentence after it was imposed for any reason—including simply "a change of heart"—up until the end of the "term of court."[486] The original Rule 35 retained the power of courts to resentence within a

478. From March 2009 to March 2010, 88,973 defendants were convicted and sentenced in federal courts. ADMIN. OFFICE FOR THE U.S. COURTS, FEDERAL JUDICIAL CASELOAD STATISTICS, tbl. D-4 (2011). During that time period, 9,913 criminal appeals were terminated on the merits. *Id.* tbl. B-5. Out of this number, only 757 (or 7.6%) were reversed or remanded to the district court. *Id.*

479. FED. R. CRIM. P. 35(a).

480. *Id.* 35(b).

481. 18 U.S.C. § 3582(c)(1) (2006).

482. U.S. SENTENCING COMM'N, *supra* note 470, at tbl. 62.

483. 18 U.S.C. § 3582(c)(2) (2006).

484. Indeed, out of the 760 amendments to the Guidelines since they were first promulgated, less than thirty are retroactive. U.S. SENTENCING GUIDELINES MANUAL § 1B1.10 & app. C (2011). Although there was a recent spike in the number of sentences modified under § 3582(c)(1) because of the recent retroactive crack amendments to the Guidelines, the number of modifications has usually been very low. *See* U.S. SENTENCING COMM'N, *supra* note 470, at tbl. 62.

485. U.S. SENTENCING COMM'N, *supra* note 470, at tbl. 62.

486. Rittenberg, *supra* note 43, at 290.

period of time based on a defendant's "plea of leniency" and a judge's further reflection and change of heart.[487] Indeed, the purpose of Rule 35 was to "give every convicted defendant a second round before the sentencing judge."[488] This change-of-heart discretion was eliminated by the SRA, which also eliminated the court's ability to correct an illegal sentence at any time.[489] Moreover, the SRA eliminated parole, which had also contributed to a sense that a federal sentence was not truly final, but would be looked at again after a period of time to determine the appropriate release date.[490] Thus, historically, the moment of imposition of sentence may have carried less of a sense of finality, and judges may have been more open to modification of sentences down the road. In contrast, under the modern procedural regime, judges may have grown accustomed to not looking back at sentences. A judge who has little experience in reconsidering sentences may be reluctant to do so, even when faced with compelling circumstances and a plain error.

In addition to these procedural considerations, various other factors may help to explain the reluctance to resentence. A recent article about Denny Chin, a former federal district judge and now circuit judge, sheds some light on this issue. The *New York Times* reported:

> [Judge Chin] took the bench in 1994 at age 40 with little experience in criminal law. He has since sentenced more than 1,100 defendants, including at least a dozen who received sentences of life or the equivalent, according to court statistics. He quickly learned, he said, that preparation was crucial and that he must not agonize over his decisions. One seasoned judge had advised: "Rule and roll." Be decisive. Don't second-guess yourself.[491]

A "rule and roll" philosophy may be necessary in the daily life of

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487. *Id.* at 291.

488. United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir. 1968) (explaining that the objective of Rule 35 was to "give every convicted defendant a second round before the sentencing judge" and afford "the judge an opportunity to reconsider the sentence in . . . light of any further information about the defendant or the case which may have been presented to him in the interim").

489. Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

490. *Id.*; *see* U.S. SENTENCING GUIDELINES MANUAL § 1A1.2 (2011) (stating that "[t]he Act also abolishes parole"). Today, absent very narrow exceptions, a defendant will serve at least eighty-five percent of the sentence. *Id.* § 1A1.3.

491. Benjamin Weiser, *A Judge's Education, One Sentence at a Time*, N.Y. TIMES, Oct. 9, 2011, at MB1.

judging. Judges, like everyone, need to manage their workloads. They may be concerned that reconsidering a sentencing decision in a single case will open the "floodgates" to many other resentencings and take time away from other pressing matters.[492]

The "rule and roll" mindset also suggests that finality or "decisiveness" itself is valued heavily in judging. Judges make judgments. It is not judicial to look back and second-guess decisions. For these reasons, the quality of review may be diminished when the sentencing judge reviews his or her own sentence, rather than the decision of another judge.[493] If one views decisiveness as an essential part of being a federal judge, that places a thumb firmly on the side of the scale containing the erroneous sentence.[494] Judges may also be concerned that acknowledging the mistake will make the public think that they "got it wrong," and this will diminish their reputation and authority.[495]

In addition, as Judge Friendly observed, there is a "human desire that things must sometime come to an end."[496] Judges typically put criminal cases behind them after imposing a sentence, and they are rarely called upon to look back. Although the prisoner lives each day that follows with the sentence, the judge will not see the prisoner again after he or she has served one year in prison, or two years, or

492. The Eleventh Circuit in *Gilbert* placed great emphasis on the "floodgates" concern. Gilbert v. United States, 640 F.3d 1293, 1310 (11th Cir. 2011) (en banc) ("And the rule Gilbert is seeking could not be confined to sentence miscalculations based on enhancement errors. If the savings clause operates to allow attacks on old sentences that were lengthened by enhancements that later decisions have called into doubt, there is no reason it would not also operate to do the same with any other guidelines calculation error. As a result, no federal judgment imposing a sentence would be truly final until the sentence was completely served or the prisoner had gone on to face a different kind of final judgment."), *cert. denied*, 132 S. Ct. 1001 (2012). As described above, workload concerns appear overstated in the *Begay* context given the relative ease of identifying and correcting these types of errors.

493. *See* Resnik, *supra* note 447, at 906–10 (discussing the competing values at issue in the procedural structure of § 2255).

494. Judge Chin showed through the interviews with the *New York Times* a unique willingness to "look back" at cases and publicly reflect on his sentencing decisions, noting that sentencing was the "the hardest thing" about being a judge. Weiser, *supra* note 491, at MB1. He explained: "It is just not a natural or everyday thing to do . . . to pass judgment on people, to send them to prison or not." *Id.*

495. One would not expect this to be a major factor with respect to claims based on intervening changes in the law. In scenarios like *Begay*, circuit precedent dictated the erroneous result—the error was not the result of a mistake made by the individual sentencing judge. United States v. Begay, 377 F. Supp. 2d 1141, 1144–45 (D.N.M. 2005). Thus, you would not expect judges to be defensive about their original decisions.

496. Friendly, *supra* note 402, at 149.

ten.[497] The current regime provides a distancing between the act of imposing sentence and its impact.[498] There may be a certain unpleasantness in revisiting something that one had thought was in the past.

A final factor that might play a role is that sentencing proceedings are now usually the main event for district judges in federal criminal cases. Issues of pretrial release are determined by magistrate judges; pretrial motions such as motions to suppress the evidence are rarely pursued; and the trial has virtually disappeared—more than ninety-six percent of federal convictions are obtained by guilty plea.[499] District judges play no role in plea negotiations. Plea proceedings are often referred to magistrate judges, and even when district judges conduct them, the proceedings tend to be uneventful and follow a standard script. Sentencing becomes the focus for judges in federal criminal cases. Even though the proceedings are relatively short, judges may feel that the sentencing amounts to the bulk of the case. Thus, a judge may view the decision to grant a resentencing to be equivalent to revisiting the entire case again. Objectively speaking, however, vacating a conviction drains resources to a much greater degree, and a resentencing is a relatively minor task.

D. Other Interests at Stake

The finality interests identified above are not without relevance in the sentencing context. Bator, Friendly, and others have raised valid arguments about the harms to society of a procedural system catering to unwarranted anxiety about errors in criminal cases.[500] Similarly, a court system would not function well with judges who are constantly second guessing themselves and who are unable to move their attention on to new matters. And although the other arguments

497. Supreme Court Justice Anthony M. Kennedy, in a 2003 speech to the ABA Annual Meeting, remarked on the lack of attention by judges and lawyers to what happens to a prisoner after he is "taken away." Justice Anthony Kennedy, Address at the American Bar Association Annual Meeting (Aug. 9, 2003) (transcript available at http://new.abanet.org/sections/criminaljustice/PublicDocuments/JusticeKennedySpeech.pdf). He observed: "The focus of the legal profession, perhaps even the obsessive focus, has been on the process for determining guilt or innocence. When someone has been judged guilty and the appellate and collateral review process has ended, the legal profession seems to lose all interest. When the prisoner is taken away, our attention turns to the next case. When the door is locked against the prisoner, we do not think about what is behind it." *Id.*

498. Some judges seem to make a concerted effort to counter this distancing. For example, Judge Stefan Underhill in the District of Connecticut comes off the bench and shakes hands with each defendant after sentencing.

499. U.S. SENTENCING COMM'N, *supra* note 71, at fig. C.

500. *See supra* notes 473–474 and accompanying text.

favoring finality—preservation of resources, concern about stale evidence, and harm to victims—are weaker in the sentencing context, they are not non-existent. Yet does the fact that finality interests carry some weight in the sentencing context justify refusal to correct sentencing mistakes, such as *Begay*-type errors, which are easy to identify and fix?

There are weighty counter-arguments to finality. Obviously, individual prisoners have strong interests in correcting sentences that were imposed on them in error. Often, *Begay*-type errors are causing prisoners to spend many additional years in prison. For a prisoner who is serving five extra years based on a drunk driving conviction that should not have triggered an enhancement, treating the sentence as final hardly fosters the prisoner's rehabilitation. Rather, the failure of the court to correct the sentence may cause the prisoner to feel angry and disrespected by society. It is important for society to treat all of its members with dignity and fairness. Convicted people should feel that their sentences have been determined through fair procedures and that the results are just. Permitting injustice to stand can cause unrest and undermine safety in institutions.[501]

In addition, the broader society is undoubtedly harmed by leaving major injustices uncorrected.[502] Society has an interest in seeing people sentenced correctly in accordance with its laws. Allowing people to continue to serve years of extra prison time despite a plain error in their sentence undermines the legitimacy of the criminal justice system—particularly when some racial or ethnic groups are disproportionally impacted by lengthy federal sentences and recidivist enhancements.[503] As scholars have remarked, when

501. *Cf.* Dependants-Appellees' [sic] Petition for Rehearing and Rehearing En Banc at 11, Peralta v. Vasquez, No. 04-2822-pr., 2006 WL 4452743 (2d. Cir. Oct. 30, 2006) (noting that permitting inmates to waive claims for restoration of good time to allow them to bring § 1983 claims could undermine institutional security). The New York Solicitor General's Office stated: "The Court should also consider the potential impact on the safety and security of DOCS's facilities if DOCS were to do what the panel authorizes. Despite any 'waiver,' if DOCS persists in denying an inmate good time based on an unconstitutional determination, this would understandably be perceived by the inmate population as blatant defiance of the federal courts. The likely negative effect on security is obvious." *Id.*

502. *See* Dist. Attorney's Office for Third Judicial Dist. v. Osborne, 557 U.S. 52, 98 (2009) (Stevens, J., dissenting) ("While we have long recognized that States have an interest in securing the finality of their judgments, finality is not a stand-alone value that trumps a State's overriding interest in ensuring that justice is done in its courts and secured to its citizens." (citations omitted)).

503. The United States Sentencing Commission recently found that Hispanic offenders accounted for the largest group of offenders convicted of an offense carrying a mandatory minimum penalty, followed by Black offenders. U.S. SENTENCING COMM'N, REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE

individuals view a criminal justice system as illegitimate, its commands are less likely to deter them from crime.[504]

Moreover, we should want judges to feel a sense of moral duty to correct their own mistakes. Bator says that he can "imagine nothing more subversive of a judge's sense of responsibility, of the inner subjective conscientiousness which is so essential a part of the difficult and subtle art of judging well, than an indiscriminate acceptance of the notion that all the shots will always be called by someone else."[505] It is questionable whether any judge actually thinks like this. And more troublesome than the system Bator fears is a system that does not allow the prisoner to have the shot called by anyone at all. In *Begay*-type situations, where there has been an intervening clarification of law, prisoners are not getting a chance to have a judge consider the merits of their claims under the correct interpretation of the law.[506]

SYSTEM 124 (2011). The career offender enhancement disproportionately impacts minority offenders. U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 133 (2004) (finding that twenty-six percent of offenders sentenced in 2000 were African American offenders, but African American offenders constituted fifty-eight percent of those subject to the career offender provision).

504. *See, e.g.*, Fagan & Meares, *supra* note 49, at 176. *See generally* Tracey Meares, *The Legitimacy of Police Among Young African-American Men*, 92 MARQ. L. REV. 651, 656–58 (2009) (arguing that a person's views regarding the legitimacy of the criminal justice system influence the likelihood that he or she will comply with the law).

505. Bator, *supra* note 12, at 451.

506. Given the weaker finality interests at stake in the sentencing context, should the government be able to obtain a longer sentence when an intervening clarification of law reveals that a sentencing error worked to a prisoner's benefit? If a case is still on direct appeal, the government may utilize new case law, and is subject to the same plain error standard as a defendant for errors not raised below. *See, e.g.*, United States v. Barajas-Nunez, 91 F.3d 826, 830 (6th Cir. 1996). However, only the prisoner may seek resentencing after the sentence has become final. *See* 28 U.S.C. § 2255(a) (Supp. 2011) ("A *prisoner* in custody under sentence of a court . . . may move . . . ." (emphasis added)); *id.* § 2241(c) ("The writ of habeas corpus shall not extend to a *prisoner* unless . . ." (emphasis added)). Should the government have a mechanism for seeking resentencing at this later stage? Some of the justifications for finality of sentences are weak, regardless of whether the government or the prisoner claims error. For example, an error that resulted from a court too narrowly defining a recidivist enhancement provision would be relatively easy to identify and fix, and staleness of evidence does not present a major concern if the government requests resentencing based on this form of error. Moreover, society has an interest in ensuring that its laws are applied correctly—whether the government or the prisoner is seeking the correct application of the law. However, there are some major differences between the prisoner and government seeking resentencing. Society's interest in "repose" should not carry much weight when a prisoner seeks correction of a sentencing error because society already lives with uncertainty about the actual length of time that prisoners will serve. However, if the government sought to increase a sentence years after it was imposed, there would be much more direct psychological damage to the prisoner. Imagine serving four and a half years of what you think is a five-year sentence, only to

CONCLUSION

Recent Supreme Court decisions have demonstrated that many prisoners are currently serving sentences that were improperly enhanced.[507] Despite the clear and undisputed errors in these sentences, federal courts are reluctant to fix them. The aftermath of these cases has revealed that lower courts are overemphasizing the value of finality of sentences.

Courts should fix more sentencing errors at the collateral review stage. There is a compelling argument that a prisoner should be able to obtain collateral relief where there has been a substantive intervening clarification of law impacting the length of the prisoner's sentence and he or she has not had an opportunity to previously seek relief. Although courts have excused procedural barriers when an intervening court decision impacts the conviction, they are often applying stricter standards to sentencing-based claims. Yet the finality interests are quite weak in the sentencing context. Given the balance of interests at stake, sentencing errors should be easier to fix than conviction-based errors, not harder to fix.

Lower courts could correct many more sentencing mistakes consistent with statutory provisions and Supreme Court law. However, in light of the reluctance of courts to resentence and the emerging conflicts in the circuits over how to treat sentencing errors in collateral proceedings, the Supreme Court or Congress should intervene to clarify the power of the courts to fix these types of mistakes. The Court or Congress can craft clear exceptions to finality in sentencing that will not open the door to unwarranted litigation and resentencings. This approach would promote notions of fairness, would strengthen the legitimacy of the federal criminal justice system, and could ultimately save resources that are currently being spent litigating procedural issues and incarcerating people for longer than is appropriate under the law. These injustices can and should be corrected.

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learn that you have five more years to go? It is fair for prisoners to live with some uncertainly about sentence length during the appeals process (as they do under current law). But at a certain point, prisoners should have certainty about the outer reach of the time they must serve. If a prisoner does choose to seek review under § 2255, he might be said to have accepted the risk that things could get worse, and perhaps the government should be able to take advantage of any changes in the law at a resentencing hearing. However, unless a prisoner chooses to reopen a case under § 2255, the government should not be able to seek a higher sentence after the direct appeal process is concluded.

507. Johnson v. United States, 130 S. Ct. 1265, 1268–69 (2010); Chambers v. United States, 555 U.S. 122, 123–24 (2009).