ACCURACY IN SENTENCING

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ABSTRACT

A host of errors can occur at sentencing, but whether a particular sentencing error can be remedied may depend on whether judges characterize errors as involving a "miscarriage of justice"—that is, a claim of innocence. The Supreme Court's miscarriage of justice standard, created as an exception to excuse procedural barriers in the context of federal habeas corpus review, has colonized a wide range of areas of law, from "plain error" review on appeal, to excusing appeal waivers, the scope of cognizable claims under 28 U.S.C. § 2255, the postconviction statute for federal prisoners, and the "Savings Clause" that permits resort to habeas corpus rather than § 2255. That standard requires a judge to ask whether a reasonable decisionmaker would more likely than not reach the same result. However, the use of the miscarriage of justice standard with respect to claims of sentencing error remains quite unsettled. In this Article, I provide a taxonomy of types of innocence of sentence claims, and describe how each has developed, focusing on federal courts. I question whether finality should play the same role regarding correction of errors in sentences, and I propose that a single miscarriage of justice standard apply to all types of sentencing error claims, when not considering on appeal under reasonableness review. Finally, I briefly describe how changes to the sentencing process or sentencing guidelines could also reflect certain concerns with accuracy.

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INTRODUCTION

A host of errors can occur at sentencing. What if the judge enhanced a sentence based on a finding of a certain drug quantity, but it later emerges that the lab technician was dry labbing, or failing to test or weigh the seized contraband?[1] What if a judge calculated a sentence incorrectly due to a routine clerical error?[2] What if a judge followed an interpretation of a

1. *See, e.g.*, Commonwealth v. Charles, 992 N.E.2d 999, 1009 (Mass. 2013) (discussing review of many thousands of cases potentially affected by crime lab misconduct); MICHAEL R. BROMWICH, THIRD REPORT OF THE INDEPENDENT INVESTIGATOR FOR THE HOUSTON POLICE DEPARTMENT CRIME LABORATORY AND PROPERTY ROOM 12–14 (2005), http://www.hpdlabinvestigation.org/reports/050630report.pdf (discussing the use of DNA profiling in crime labs); Paul C. Giannelli, *Wrongful Convictions and Forensic Science: The Need to Regulate Crime Labs*, 86 N.C. L. REV. 163, 184 (2007) (describing the fallacy of hair samples used as evidence).

2. *See* Shawn D. Bushway, Emily G. Owens & Anne Morrison Piehl, *Sentencing Guidelines and Judicial Discretion: Quasi-Experimental Evidence from Human Calculation Errors*, 9 J. EMPIRICAL LEGAL STUD. 291, 298 (2012) (describing an "overall inaccuracy rate" of 10 percent between 2001 and 2004 in calculating sentences under advisory guidelines in Maryland, as well as a somewhat greater judicial tendency to catch and correct such errors when they result in higher

sentencing guidelines provision that appellate courts later rejected as incorrect? What if a judge gave a defendant a higher sentence based on conduct or crimes that new evidence shows the person did not commit? Which types of errors can an appellate judge later correct? Which types can a postconviction judge correct, even if the claim was not procedurally preserved in prior litigation? The answers may depend on whether judges characterize errors as involving a "miscarriage of justice"—that is, a claim of innocence.

Claims of innocence have a recognized status in postconviction law, even if it is not necessarily easy for an inmate to litigate innocence. The Supreme Court has yet to recognize a freestanding constitutional claim of actual innocence, except by assuming hypothetically that it might violate due process for an innocent person to be executed.[3] However, judges and lawmakers have fashioned a range of postconviction statutes and doctrines excusing procedural barriers or providing access to relief if an inmate can muster sufficient evidence of innocence.[4] In particular, the miscarriage of justice standard, created by the Court as an exception to excuse procedural barriers in the context of federal habeas corpus review,[5] has colonized a wide range of areas of law, from "plain error" review on appeal, to excusing appeal waivers, to postconviction innocence "gateway" claims, to the scope of cognizable claims under 28 U.S.C. § 2255, the postconviction statute for federal prisoners.

The use of the miscarriage of justice standard with respect to claims of sentencing error remains quite unsettled. Judges and scholars speak of "innocence of sentence" claims, but it is not clear which types of sentencing errors should be called a "miscarriage," and given a more privileged status over other sentencing errors.[6] Despite the ubiquity of the

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sentences).

3. The Court extended that hypothetical, for what that is worth, to a noncapital case in *District Attorney's Office v. Osborne*, 557 U.S. 52, 67–75 (2009). For additional discussion of the possible implications, see Brandon L. Garrett, Essay, *DNA and Due Process*, 78 FORDHAM L. REV. 2919, 2952–59 (2010).

4. Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1638–44 (2008) (describing the various doctrines altering availability of postconviction relief based on showings of innocence).

5. In 2013, the standard was extended to apply to the Antiterrorism and Effective Death Penalty Act of 1996 statute of limitations in *McQuiggin v. Perkins*, 133 S. Ct. 1924, 1935 (2013).

6. The phrase "innocence of sentence" or "actual innocence of sentence" has been used mostly in the context of the miscarriage of justice exception to procedural defaults in federal habeas corpus law. *See, e.g.*, McKay v. United States, 657 F.3d 1190, 1196–98 (11th Cir. 2011). As discussed in the sections that follow, however, federal courts have used "innocence" to refer to several types of sentencing errors, in several different procedural postures. *See infra* Part II.

miscarriage of justice standard, an error in sentencing is a far more elusive concept than an innocence claim that a conviction is erroneous. A sentencing error may not be binary like a conviction versus an acquittal, but rather an error that affects when a sentence might be imposed along a spectrum. At sentencing, the judge's role is to calibrate punishment by taking into account the defendant's background, record, crime characteristics, and other evidence, without constraint by formal rules of evidence. Sentencing has become more complex and fact intensive, particularly after the adoption of the U.S. Sentencing Guidelines, as well as many state sentencing guidelines.[7] To be sure, sentencing can contribute to a wrongful conviction. For example, innocent people can plead guilty in exchange for a reduced sentence. We do not know how often that happens.[8] Innocent people who plead guilty can sometimes obtain relief by challenging the conviction based on new evidence of innocence, or claims of prosecutorial misconduct or ineffective assistance of counsel during plea bargaining. Far more complex, however, is the question of when and whether to remedy a distinct error in the calculation of the sentence itself.

Nor have the Supreme Court's interventions into the law of sentencing reduced the difficulty in identifying sentencing errors, much less correcting them. The Court has focused on enhancing the factfinding role of the jury, increasing a judge's discretion to depart from U.S. Sentencing Guidelines recommendations, and requiring that the jury find facts that enhance the maximum and minimum sentences.[9] Those interventions have reduced

7. About half of the states use some type of sentencing guidelines. *See* U.S. SENTENCING COMM'N, 2012 SOURCEBOOK OF FEDERAL SENTENCING STATISTICS app. B (2012), *available at* http://www.ussc.gov/Research_and_Statistics/Annual_Reports_and_Sourcebooks/2012/sbtoc12.htm.

8. *See, e.g.*, BRANDON L. GARRETT, CONVICTING THE INNOCENT: WHERE CRIMINAL PROSECUTIONS GO WRONG 150–53 (2011) (describing the cases of DNA exonerees who pleaded guilty, most of whom had falsely confessed); Samuel R. Gross, *Pretrial Incentives, Post-Conviction Review, and Sorting Criminal Prosecutions by Guilt or Innocence*, 56 N.Y.L. SCH. L. REV. 1009, 1018–19 (2011) (citing data from known individual exonerations, in which only 6 percent pleaded guilty in very serious cases, but also examples from "mass" exonerations involving modest sentences dominated by plea bargains). *See also* Gross, *supra*, at 1017 ("Plea bargaining does induce a very high proportion of guilty defendants to plead guilty . . . . Plea bargaining also induces some innocent defendants to plead guilty. Whether it improves the ratio of guilty to innocent defendants at trial is anybody's guess. We can[not] observe the effect directly since we do[not] know the proportions of innocent defendants before and after plea bargaining.").

9. Gall v. United States, 552 U.S. 38, 51 (2007) ("[The Court] may consider the extent of the deviation, but must give due deference to the district court's decision that the § 3553(a) factors, on a whole, justify the extent of the variance."); United States v. Booker, 543 U.S. 220, 245 (2005) (finding that the guidelines were "effectively advisory," and permitting courts to tailor sentences based on other statutory factors). *See also* S. Union Co. v. United States, 132 S. Ct. 2344, 2350 (2012) (noting that judicial discretion is subject to the limitation of a jury verdict); Rita v. United States, 551 U.S. 338, 346 (2007) (finding that judicial discretion, when in accordance with appropriate guideline application, is

certain types of factfinding by judges, but they are not focused on accuracy. Indeed, judges now have more discretion to sentence, and therefore an outright error might result in an appellate court requiring the judge to resentence by exercising discretion again, which may result in the same sentence.

Not only is it difficult to identify which types of sentencing errors should be remedied under the miscarriage of justice heading, but also what courts call a miscarriage of justice varies depending on the procedural context. While that standard was developed most prominently in the context of § 2254 federal habeas litigation by state prisoners, the same standard applies during federal criminal appeals as part of decisions regarding whether an unpreserved sentencing error satisfies the plain error standard. Courts also excuse waivers in plea bargains of appellate and postconviction remedies using the miscarriage of justice standard, which includes asking what type of sentencing error might result.[10] Additionally, in a rich and complex body of law in cases brought under § 2255, which permits postconviction motions by federal prisoners, federal judges have considered whether to grant relief on sentencing claims using a miscarriage of justice standard.[11] As a result, judges have increasingly considered when and whether to conceptualize sentencing related claims as ordinary or as more serious claims implicating innocence. Courts of appeals have badly split, and decisions in this area have engendered en banc opinions and heated dissents. In general, lower courts have typically been reluctant to permit late filed sentencing challenges, even after the Supreme Court has altered the interpretation of guideline provisions. Lower courts have opened the door more broadly if a convict can show innocence of a prior conviction used to enhance the sentence, or for a legal error in interpreting an element of an offense. Federal judges also ask whether the § 2255 "safety valve" provision permits access to habeas corpus remedies, by asking if a sentencing error might result in a miscarriage of justice. Suffice it to say that the miscarriage of justice caselaw in the sentencing error context is deeply confused in the lower courts. Nor has the Supreme Court spoken to these questions with any frequency to add much needed clarity.

"presumptively reasonable" (quoting United States v. Rita, 177 F. App'x 357, 358 (4th Cir. 2006)); *infra* Part I.B.

10. In addition, some courts suggest that a waiver may not apply if the sentence was imposed after the plea was entered; others hold that the waiver was made by a defendant informed by the fact that sentencing would be conducted subsequently by the judge. *See* 1 RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE § 41.7[b] (6th ed. 2012) (discussing cases of procedural default).

11. 28 U.S.C. § 2255 advisory committee's note (2012).

A single miscarriage of justice standard should apply in each of the varied contexts in which sentencing errors are raised. I argue that all sentencing errors should be cognizable under the miscarriage of justice standard. In the sentencing context, a judge does not ask whether a reasonable juror could find guilt (except regarding jury findings on sentence-related facts, or in states with jury sentencing[12]), but instead asks whether a reasonable judge would "more likely than not" adopt a different sentence. A more likely than not standard is the Supreme Court's miscarriage of justice standard, first clearly defined in *Schlup v. Delo* in the context in which a habeas judge reviews a state conviction.[13] Some judges have explained they are willing to more flexibly review sentencing errors given the reduced burden of conducting a resentencing as compared to the burden of potentially retrying a case after vacating a conviction. Further, in the context of state prisoner claims litigated under § 2254, having passed through a miscarriage of justice gateway, the prisoner must still obtain relief on an underlying constitutional claim permitting resentencing; that claim will typically be a claim of ineffective assistance of counsel at sentencing. Sentencing errors are far easier to correct than erroneous convictions, and they should be more broadly correctable on appeal and postconviction.

In this Article, I explore the related innocence of sentence or sentencing error-related miscarriage of justice doctrines. In Part I, I provide a taxonomy of types of innocence of sentence claims and describe how each has developed, focusing on federal courts. I question throughout whether finality should play the same role regarding sentences as it does regarding convictions. In Part II, I describe the different types of procedural contexts in which sentencing error claims are litigated, beginning with sentencing itself, and then how different miscarriage of justice or innocence of sentence doctrines have been developed on appeal when deciding whether to excuse plea bargain waivers in both § 2255 litigation and federal habeas corpus proceedings. In Part III, I propose that a single miscarriage of justice standard apply to the different types of sentencing error claims in the various procedural contexts at which they may be litigated. The Supreme Court's increased constitutional regulation of plea bargaining may open the door to greater scrutiny of defense counsel's role

12. Nancy J. King, *How Different is Death? Jury Sentencing in Capital and Non-Capital Cases Compared*, 2 OHIO ST. J. CRIM. L. 195, 196 (2004).

13. Schlup v. Delo, 513 U.S. 298, 327 (1995) ("To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.").

in assuring accuracy during plea bargaining, and as a result, ineffective assistance of counsel claims provide a vehicle to assert sentencing errors even in state prisoner cases under § 2254.[14] Although beyond the scope of this Article, I briefly describe how changes to the sentencing process or sentencing guidelines could also reflect certain concerns with accuracy.

I. TYPES OF SENTENCING ERROR CLAIMS

There are a range of types of sentencing errors and they have been treated quite differently by courts, sometimes for good reason, and sometimes based on questionable or unexplained distinctions. The sections that follow provide a partial taxonomy of types of innocence of sentence claims, focusing first on factual errors: (1) predicate facts, (2) predicate crimes, and (3) computational errors; and second on legal errors in sentencing, including mixed questions of fact and law, as to (1) greater offenses, (2) sentencing enhancements, and (3) retroactive guidelines amendments.

A. FACTUAL ERROR IN SENTENCING

1. Deference to Factual Errors in Sentencing

Factfinding plays a central role in the application of the U.S. Sentencing Guidelines, a problem that the Supreme Court has wrestled with, but which has escaped resolution.[15] The detailed federal Sentencing Table grid raises the possibility of bringing claims challenging errors as to both of its axes, both the offense level and criminal history. The vertical axis of the grid displays the offense level. Sentences may be enhanced based on fact dependent aspects of the offense, which may not have been proven at trial. Examples include presence of a weapon,[16] quantity of drugs,[17] broadly defined conduct "relevant"[18] to the offense including conduct "that is not formally charged or is not an element of the offense,"[19]

14. *See* Missouri v. Frye, 132 S. Ct. 1399, 1404 (2012) (involving plea offers that were not provided to client by counsel); Lafler v. Cooper, 132 S. Ct. 1376, 1396 (2012) (involving habeas relief based on a claim of ineffective assistance of counsel).

15. FEDERAL RULES OF EVIDENCE COMMITTEE, AMERICAN COLLEGE OF TRIAL LAWYERS, THE LAW OF EVIDENCE IN FEDERAL SENTENCING PROCEEDINGS, 177 F.R.D. 513, 513 (1998) ("Fact-finding assumes a central, critical role under [g]uidelines sentencing.").

16. U.S. SENTENCING GUIDELINES MANUAL § 2D1.1(b)(1) (2012), http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_2_D.pdf.

17. *Id.* § 2D1.1(c).

18. *Id.* § 1B1.3, *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_1.pdf.

19. *Id.* § 1B1.3 cmt. background. *See also id.* § 1B1.3(a)(1)(A) (the base offense level is

or obstruction of justice as to the offense or a closely related one.[20] Difficult factual questions may be raised concerning the amount of the loss to victims, or intended loss.[21] Perhaps, in contrast, acceptance of responsibility and "substantial assistance" to the authorities are forms of mitigation based on postoffense conduct that can be determined with more flexibly.[22] One might think the horizontal axis of the grid, which reflects the criminal history of the defendant, would be more determinate. Yet as I will develop, how to treat prior offenses that have been vacated, or applying enhancements for a "career criminal," for example, can raise complex questions.

A sentence may be calculated based on erroneous predicate facts. This may be due to a clerical error by the judge, an error in making a guidelines calculation, or a reliance on erroneous facts by the judge. The judge's error may also arise due to an error by the probation officer, or because law enforcement or the prosecutor supplied incorrect information. Of course, the defendant might accede to a statement including incomplete or erroneous facts, if doing so provides for a more lenient sentence. What if the defendant later learns that incomplete or erroneous facts supported a harsher sentence?

On appeal, a sentence may be challenged if imposed based on an "incorrect application of the sentencing guidelines," or if in "violation of law," but the relevant statutory section does not, clearly at least, speak to errors of fact.[23] However, the Supreme Court noted in *Gall v. United States* that a sentence may be procedurally unsound if based on "clearly erroneous facts."[24] A range of claims may challenge failures to mitigate the sentence for any number of reasons, ranging from failure to acknowledge acceptance of responsibility or cooperation, failure to consider the defendant's background, or other mitigating evidence. While errors in sentence enhancements may typically arise from factual determinations by the judge based on the information presented, claims challenging failures to mitigate

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determined by "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant").

20. *Id.* § 3C1.1, *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_3.pdf.

21. *Id.* § 2B1.1 cmt. application notes 3(A) (noting that the loss is the greater of the actual or intended loss), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_2_A-C.pdf.

22. *Id.* § 5K1.1, *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_5.pdf. *See also id.* § 3E1.1 (discussing reduced sentences for acceptance of responsibility).

23. 18 U.S.C. § 3742(a) (2012).

24. Gall v. United States, 552 U.S. 38, 51 (2007).

may also involve the situation in which mitigating evidence was never presented by the defense, and the claim is that counsel was ineffective. Appellate review of such factfinding is deferential, where as noted, the underlying standard is broad, and evidence need not be admissible to be part of the sentencing calculus. As the Sixth Circuit put it, "This standard presents a 'relatively low hurdle.'"[25] Harmless error, or plain error review for unpreserved errors, also applies on appeal, including post-*Booker v. United States*.[26] That said, the Supreme Court emphasized in *Porter v. McCollum* that the same *Strickland v. Washington* standard applies for sentencing errors: whether "but for his counsel's deficiency, there is a reasonable probability he would have received a different sentence."[27] In *Porter*, the Court emphasized, that despite being in the context of the punishment phase of a capital case, that "[t]he judge and jury at Porter's original sentencing heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability."[28] When counsel makes a serious error during sentencing, an ineffective assistance of counsel claim may succeed.

2. Innocence of Predicate Conviction Claims

A distinct breed of sentencing error claim relies on the vacatur of a predicate conviction as the basis of a claim seeking resentencing. In a sense the claim is one of factual error, since that prior criminal conviction no longer exists; however, the prior conviction also is no longer legally valid, and the underlying vacatur may very well have been for either factual or legal defects in the prior conviction. Such claims are a hybrid: the new showing relates to a vacated predicate crime, while the relief being sought is a resentencing to adjust the sentence to remove an enhancement based on the now altered prior criminal record. Such claims may involve innocence if the prior conviction was vacated in part based on evidence of innocence,

25. United States v. Manis, 344 F. App'x 160, 165 (6th Cir. 2009) (quoting United States v. Greene, 71 F.3d 232, 235 (6th Cir. 1995)).

26. *See* Washington v. Recuenco, 548 U.S. 212, 222 (2006) (holding that state court's "[f]ailure to submit a sentencing factor to the jury, like failure to submit an element to the jury, is not structural error," and therefore the error potentially could be harmless). *Booker* was a drug case in which the sentencing judge gave the defendant an increased sentence based on additional facts proved beyond a reasonable doubt at the sentencing hearing. United States v. Booker, 543 U.S. 220, 227 (2005). The Court held that the Sixth Amendment applies to federal sentencing guidelines. *Id.* at 226–27.

27. Porter v. McCollum, 558 U.S. 30, 41 (2009) (per curiam). *Strickland* involved a defendant's claim of ineffective assistance of counsel, necessitating the defendant's conviction or sentence to be put aside. Strickland v. Washington, 466 U.S. 668, 671 (1984). The Court held that sentence or conviction reversal based on ineffective assistance of counsel must establish deficient counsel resulting in prejudice. *Id.* at 700.

28. *Porter*, 558 U.S. at 41.

although a legal or nonfactual innocence related vacatur could have the same effect.

For federal convicts, the Supreme Court held in *Custis v. United States* that if a defendant "is successful in attacking [the defendant's] state sentences, [the defendant] may then apply for reopening of any federal sentence enhanced by the state sentences."[29] Thus, courts more broadly permit sentencing error challenge to claims that a predicate crime was not committed, such as innocence of another crime that affects the sentence. If the convict was able to have the prior conviction vacated, and can, therefore, show factual or legal innocence of the crime for which the enhancement was based, the inmate may then apply for resentencing, although the Court has added the caveat that there may be procedural barriers to doing so if the appeal is complete and postconviction motions have already been litigated.[30] The Court has added that the convict must act diligently to obtain the state court vacatur.[31] Several courts have characterized these as innocence claims, and have held that the actual innocence exception to excuse procedural barriers under § 2255 applies if a person can show innocence of predicate crimes, say, for a habitual offender enhancement provision.[32]

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29. Custis v. United States, 511 U.S. 485, 497 (1994).

30. Daniels v. United States, 532 U.S. 374, 382 (2001). For a list of collected cases, see generally Bryan Florendo, Note, Prost v. Anderson *and the Enigmatic Savings Clause of § 2255: When is a Remedy by Motion "Inadequate or Ineffective"?*, 89 DENV. U. L. REV. 435 (2012). The Seventh Circuit, for example, asks whether the inmate had a prior "unobstructed procedural shot" at raising the claim. *In re* Davenport, 147 F.3d 605, 609 (7th Cir. 1998). The Ninth Circuit also asks whether a petitioner had an "unobstructed procedural shot," but asks whether there was a "material" change in the law after the first § 2255 motion, justifying a Savings Clause exception to permit an otherwise barred habeas petition § 2241. Harrison v. Ollison, 519 F.3d 952, 959–60 (9th Cir. 2008). The Second Circuit interprets the clause more generally to include: "the set of cases in which the petitioner cannot, for whatever reason, utilize § 2255, and in which the failure to allow for collateral review would raise serious constitutional questions." Triestman v. United States, 124 F.3d 361, 377 (2d Cir. 1997).

31. Johnson v. United States, 544 U.S. 295, 310 (2005). For examples of lower courts permitting § 2255 motions of this type, see United States v. Pettiford, 612 F.3d 270, 277 (4th Cir. 2010) (collecting cases). *But see id.* at 278–80 (denying relief where inmate, even after vacatur of two state offenses, still had three offenses that supported enhancement).

32. *See* Haley v. Cockrell, 306 F.3d 257, 264 (5th Cir. 2002) (holding that exception "applies to noncapital sentencing procedures involving a career or habitual felony offender"); Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 171 (2d Cir. 2000) (holding that actual innocence exception applies to claim of nonbreach of plea agreement provision); United States v. Maybeck, 23 F.3d 888, 892–93 (4th Cir. 1994) (finding that only one prior felony conviction was insufficient to satisfy career offender guidelines). The Fourth Circuit limits application of the actual innocence gateway exception in the sentencing context to career or habitual offender sentences. United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999) ("If the actual innocence exception is available anytime a guideline is misapplied (such that the defendant is 'actually innocent' of the application of the guideline), the actual innocence exception would swallow the rule that issues not raised on appeal cannot be considered in a § 2255 motion absent a showing of cause and prejudice to excuse the

Some courts of appeals do not entertain claims challenging a sentence based on the vacatur of a prior conviction.[33] Courts have struggled with sentencing claims raising legal challenges to the interpretation of criminal history enhancements, where doing so means applying federal definitions of a prior sentence to prior state court practices and proceedings.[34] For example, the Third Circuit ultimately concluded in one decision that a discontinued juvenile adjudication did not count as a prior sentence under the federal guidelines.[35] In contrast, suspended or probationary state sentences have been counted as sentences.[36] In rejecting consideration of legal challenges to prior conviction-related sentence enhancements, the Eleventh Circuit reasoned that the Supreme Court did not, in *Dretke v. Haley*, answer whether innocence of sentence claims may be litigated in noncapital cases, and assumed that "the actual-innocence exception can apply to noncapital sentences," but required a showing that the inmate is "factually innocent of one of the prior convictions."[37] Under that approach, also adopted by the Fourth Circuit, a legal claim that a prior conviction should not be counted as a predicate for an enhanced sentence would not satisfy the miscarriage of justice exception.

Those courts emphasize the Supreme Court's language in *Sawyer v. Whitley* that "the miscarriage of justice exception is concerned with actual as compared to legal innocence,"[38] and in *Bousley v. United States* that "actual innocence means factual innocence, not mere legal insufficiency."[39]

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default.").

33. *See* Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997) ("[W]e think that *Sawyer*, in terms, applies only to the sentencing phase of death cases."); United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993) ("A person cannot be actually innocent of a noncapital sentence . . . .").

34. For the relevant guideline, see U.S. SENTENCING GUIDELINES MANUAL § 4A1.2 (2012) ("If the defendant has multiple prior sentences, determine whether those sentences are counted separately or as a single sentence."), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_4.pdf.

35. United States v. Langford, 516 F.3d 205, 210–11 (3d Cir. 2008).

36. *See* United States v. Holland, 195 F.3d 415, 417–18 (8th Cir. 1999) (finding a suspended sentence imposed by juvenile court to be a prior sentence); United States v. Holland, 26 F.3d 26, 28–29 (5th Cir. 1994) (same).

37. Rivers v. United States, 476 F. App'x 848, 850 (11th Cir. 2012). *See also* United States v. Pettiford, 612 F.3d 270, 284 (4th Cir. 2010) ("[A]ctual innocence [of sentence exception] applies in the context of habitual offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes.").

38. Sawyer v. Whitley, 505 U.S. 333, 339 (1992).

39. McKay v. United States, 657 F.3d 1190, 1197 (11th Cir. 2011) (emphasis omitted) (quoting Bousley v. United States, 523 U.S. 614, 623 (1998)) (internal quotation marks omitted). *See also id.* at 1199 ("We thus decline to extend the actual innocence of sentence exception to claims of legal innocence of a predicate offense justifying an enhanced sentence."); Orso v. United States, 452 F. App'x 912, 914–15 (11th Cir. 2012) (per curiam) (applying the factual innocence standard to an actual innocence exception), *cert. denied*, 133 S. Ct. 110 (2012).

They highlight that the miscarriage of justice exception was designed to be a narrow "safety valve for the extraordinary case."[40] However, the safety valve provided in a federal court for resentencing following a federal conviction raises far fewer concerns with finality or federalism than the reversal of a state conviction.

Innocence can more broadly excuse procedural barriers when the convict can show evidence of innocence of the underlying crime, rather than the sentence, under the Court's *Schlup* formulation of an innocence gateway exception. The distinction between innocence of sentence and innocence of a crime may be fine as a practical matter, but it can decide whether a prisoner may challenge a sentencing error or not. After all, many distinct crimes nevertheless function as a sentencing enhancement. Thus, prisoners convicted of "us[ing]" a firearm during a drug crime or violent crime are in effect sentenced to an aggravated drug crime or violent crime, although formally they are convicted under a different statute whose elements must be proven beyond a reasonable doubt.[41] A series of prisoners had argued their innocence after the Court narrowly defined "use" in *Bailey v. United States*.[42] The Court then held in *Bousley* that such prisoners could retroactively litigate the issue, and could also excuse any procedural default if they could show "actual innocence" of the crime of use of a firearm.[43] The Court explained in *Bousley* that errors involving factual innocence of an element of an enhanced crime might satisfy a miscarriage of justice innocence gateway showing to excuse a procedural default.[44] Although the offense served as a sentence enhancer for the underlying drug crime or violent crime, the claim formally involved the sufficiency of the proof for an element of the crime, and not to the sentence.

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40. Schlup v. Delo, 513 U.S. 298, 333 (1995) (O'Connor, J., concurring) (quoting Harris v. Reed, 489 U.S. 255, 271 (1989) (O'Connor, J., concurring)) (internal quotation marks omitted).

41. *See* 18 U.S.C. § 924(c)(1)(A) (2012) (listing additional penalties for firearm use).

42. Bailey v. United States, 516 U.S. 137, 149–50 (1995).

43. *Bousley*, 523 U.S. at 623. *See also id.* at 623–24 (holding in a § 2255 case that procedural default, failure to raise a *Bailey* claim on appeal, could be overcome by a showing of "actual innocence").

44. *Id.* at 623 ("Petitioner's claim may still be reviewed in this collateral proceeding if he can establish that the constitutional error in his plea colloquy 'has probably resulted in the conviction of one who is actually innocent.'" (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986))). *See also* 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, 82–83 (2005) (exploring the use of § 2255 post-AEDPA to challenge sentences based on conduct the Supreme Court later deemed not to be a crime).

3. Factually Incorrect Calculation of Sentence

The Supreme Court has emphasized that one way a sentence may not be reasonable is when the judge makes an error by failing to calculate "or improperly calculating" the guideline range.[45] An outright miscalculation can occur. One way to challenge such an error is through an ineffective assistance of counsel claim, if defense counsel simply failed to raise the error at the time of sentencing. Showing prejudice in that circumstance, however, may not be easy, and state and federal courts have struggled with the question of what demonstrates prejudice, and what remedy should result if a claim has merit.[46] On appeal, federal courts have held that errors in calculating a sentencing range may or may not be harmless, depending on the error and how the sentence was calculated. As the Court has held, while the appellant has the initial burden to raise the sentencing error, having shown that the judge sentenced based on an "invalid factor," the government then has the burden of "persuad[ing] the court of appeals that the district court would have imposed the same sentence absent the erroneous factor."[47]

In some situations, the error may not be harmless, even if the erroneous range overlapped with the proper range, and even given the district judge's discretion to depart from the result under the U.S. Sentencing Guidelines. As the Third Circuit has explained, "given the importance of a correct guidelines calculation both to the sentencing process that district courts are required to conduct and to our ability to carry out reasonableness review, the use of an erroneous guidelines range will typically require reversal."[48] However, even if the appellate court agrees that the district judge used the wrong range, the remedy is typically a resentencing, at which the district judge might very well impose the same

45. Gall v. United States, 552 U.S. 38, 51 (2007).

46. *See* David A. Perez, Note, *Deal or No Deal? Remedying Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1541–44 (2011) (discussing the difficulties a court has in determining prejudice).

47. Williams v. United States, 503 U.S. 193, 203 (1992).

48. United States v. Langford, 516 F.3d 205, 215 (3d Cir. 2008). *See also* United States v. Hammons, 558 F.3d 1100, 1105–06 (9th Cir. 2009) (finding that the failure to calculate appropriate guidelines range constituted plain error); United States v. Ramos-Paulino, 488 F.3d 459, 462–63 (1st Cir. 2007) (finding a guidelines enhancement unwarranted in sentencing); United States v. Felton, 55 F.3d 861, 869 n.3 (3d Cir. 1995) ("This circuit and others have found that the miscalculation of a defendant's offense level 'certainly is error that seriously affect[s] [the defendant's] rights, and so amounts to plain error.'" (alterations in original) (quoting United States v. Pollen, 978 F.2d 78, 90 (3d Cir. 1992))). *Contra* United States v. Rivera, 22 F.3d 430, 439 (2d Cir. 1994) (finding the sentencing error harmless where there was overlap in the range used by the court and where the sentencing judge made clear that the same sentence would have been imposed with the defendants' preferred range).

sentence.[49] Moreover, post-*Booker*, the Supreme Court has emphasized the broad discretion of district courts engaging in resentencing following a postappeal remand.[50]

B. LEGAL ERRORS IN SENTENCING

1. Legal Defect in Greater Offense

A concededly guilty person may be convicted of a more serious offense, one with an enhanced punishment, based on an incorrect interpretation of that criminal statute. The inmate may be still properly convicted of the lesser offense, and therefore the remedy for the vacatur of the more serious offense is resentencing. For example, there was a rash of litigation after the Supreme Court narrowed broad interpretations adopted in lower courts of a provision of the Armed Career Criminal Act ("ACCA") providing for an enhanced sentence for a person who commits a defined firearms offense and who had three previous convictions for a "violent felony" or a "serious drug offense."[51] Those convicts were challenging their ACCA convictions based on the Court's interpretation of the criminal statute under which they had been convicted, and not the judge's application of the guidelines, and lower courts entertained those challenges.[52] Such a case falls more squarely into the category of a claim of innocence of a criminal offense that resulted in an enhanced sentence. On appeal, such claims may constitute a miscarriage of justice that would satisfy the plain error doctrine, but as noted, some courts emphasize a more restrictive case-by-case discretion to decide whether to remedy even clear sentencing errors under the plain error doctrine.[53] Regarding postconviction

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49. *See* United States v. Conlan, 500 F.3d 1167, 1170 (10th Cir. 2007) ("[W]hat the district court will do upon resentencing absent the illegal presumption 'places us in the zone of speculation and conjecture.'" (quoting United States v. Labastida-Segura, 396 F.3d 1140, 1143 (10th Cir. 2005))); United States v. Crawford, 407 F.3d 1174, 1183 (11th Cir. 2005) ("We cannot presume that, in the absence of those errors, the district court would have decided that a downward departure was warranted in calculating an advisory guideline range.").

50. Pepper v. United States, 131 S. Ct. 1229, 1243, 1249 (2011).

51. 18 U.S.C. § 924(e)(1) (2012). *See also* Johnson v. United States, 559 U.S. 133, 135 (2010) (assessing the factor of physical force in a "violent felony"); Nijhawan v. Holder, 557 U.S. 29, 40 (2009) (defining the parameters of the Armed Career Criminal Act); Chambers v. United States, 555 U.S. 122, 130 (2009) (same); Begay v. United States, 553 U.S. 137, 148 (2008) (same).

52. *See* Welch v. United States, 604 F.3d 408, 413–15 (7th Cir. 2010) (assessing the validity of an ACCA challenge); United States v. Shipp, 589 F.3d 1084, 1089, 1091 (10th Cir. 2009) (same).

53. *See* United States v. Garcia-Gonzalez, 714 F.3d 306, 317–19 (5th Cir. 2013) (describing the Fifth Circuit's general case-by-case approach, under which the court asks whether a case warrants the exercise of our discretion where a potential error might result in a miscarriage of justice); United States v. Torres-Rosario, 658 F.3d 110, 117 (1st Cir. 2011) (remanding noting the "difference in potential jail time" under the ACCA enhancement that was incorrectly applied and finding "the threat of miscarriage

challenges to errors in applying the ACCA, in *Davis v. United States*, the Court noted such a claim involves an unlawful sentence "for an act that the law does not make criminal."[54] The Court held that there was "no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief," under the federal statute authorizing postconviction challenges in federal criminal cases, § 2255.[55]

2. Legally Incorrect Sentencing Enhancement Claims

Claims solely challenging sentencing enhancements have not fared well in federal courts. On the one hand, many guidelines have language that may be "in perfect good faith" interpreted multiple ways, as Judge Gerard E. Lynch has described it.[56] In contrast to challenges based on statutory interpretation of criminal statutes providing for enhanced sentences, many inmate challenges to career offender guidelines have failed where courts hold that they are not challenging elements of the crime itself, but rather sentencing enhancements.[57] The same Supreme Court decisions concerning the statutory meaning of the ACCA were used to challenge the same definitional language concerning a "crime of violence" under the "career offender" guideline enhancement,[58] resulting in lower court rulings that the crime of violence guideline must be similarly narrowed in its interpretation.[59]

Yet litigation under § 2255 has resulted in prominent en banc decisions denying relief to convicts who argued that this change rendered their sentences incorrect. Some found the Court's decisions interpreting the

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of justice if we declined to remand").

54. Davis v. United States, 417 U.S. 333, 346 (1974).

55. *Id.* at 346–47 (alteration in original) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

56. Panel Discussion, *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 FORDHAM L. REV. 1, 16 (2006) (quoting Judge Gerard E. Lynch, Southern District of New York).

57. *See, e.g.*, McKay v. United States, 657 F.3d 1190, 1199 (11th Cir. 2011) (holding that error in treating prior conviction for carrying a concealed weapon as a "crime of violence" under the career-offender guideline in U.S. Sentencing Guideline § 4B1.1 did not satisfy the miscarriage of justice exception because claimed error did not allege factual innocence of underlying crime of violence).

58. U.S. SENTENCING GUIDELINES MANUAL § 4B1.2 (2012).

59. *See, e.g.*, United States v. Archer, 531 F.3d 1347, 1352 (11th Cir. 2008) (holding that based on *Begay*, carrying a concealed firearm was not a crime of violence, as defined in § 4B1.2(a) for purposes of the § 4B1.1 career offender enhancement). Similarly, the Court narrowed the interpretation of a "controlled substance offense" finding that mere possession did not satisfy the career offender provision. Salinas v. United States, 547 U.S. 188, 188 (2006) (per curiam). *See also* Stevens v. United States, 466 F. App'x 789, 790 (11th Cir. 2012) (per curiam) (looking favorably on *Salinas* but for a procedural default in the case).

provisions not to be retroactive.[60] Others relied on the fact that those convicts did not raise the issue in their initial postconviction motion, and as a result, were barred by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[61] As Sarah French Russell characterized it, some of these rulings exemplify a "reluctance to resentence."[62] Courts of appeals have emphasized that even if the career offender guideline was applied incorrectly, the judge could have departed upward for a range of other reasons, or perhaps the guideline did not result in a sentence above the otherwise applicable statutory range.[63] Appellate courts also grapple with a real uncertainty about whether these claims involve claims of innocence—a question that the Supreme Court declined to answer in *Dretke*.[64] Courts have held that "ordinary questions of guideline interpretation falling short of the 'miscarriage of justice' standard do not present a proper [§] 2255 claim."[65]

3. Finality and Retroactive Guidelines Amendments

Not only is finality generally less of a concern in the sentencing context, but also changes in U.S. Sentencing Guidelines may be made retroactively, in contrast to newly announced rules of constitutional criminal procedure. In *Dillon v. United States*, the Supreme Court held, following language in federal statutes, that retroactive changes to

60. *See* Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 104–05 nn.158–66 (2012) (collecting decisions both finding the Court's rulings retroactive and not).

61. *See* Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011) (en banc) (barring a collateral attack to a sentence under the career offender guideline); Gilbert v. United States, 640 F.3d 1293, 1300 (11th Cir. 2011) (en banc) (barring a federal habeas petition to raise a sentencing claim).

62. Russell, *supra* note 60, at 87.

63. *See, e.g.*, *Sun Bear*, 644 F.3d at 705 ("An unlawful or illegal sentence is one imposed without, or in excess of, statutory authority." (citing United States v. Foster, 514 F.3d 821, 824 (8th Cir. 2008); United States v. Stobaugh, 420 F.3d 796, 804 (8th Cir. 2005))); *Gilbert*, 640 F.3d at 1304–05 (noting that judge could have enhanced sentencing by considering various § 3553(a) factors).

64. *See* 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."). *But see* Embrey v. Hershberger, 131 F.3d 739, 740 (8th Cir. 1997) (en banc) (noting that the actual innocence exception "applies only to the sentencing phase of death cases" and not claims challenging noncapital sentencing).

65. Auman v. United States, 67 F.3d 157, 161 (8th Cir. 1995). *See also* Brydon v. United States, 494 F. App'x 684, 685 (8th Cir. 2012) (finding a sentence below the applicable statutory maximum, even if based on an offense later determined not to be a crime of violence, was ordinary error); United States v. Pregent, 190 F.3d 279, 284 (4th Cir. 1999) (finding that the denial of a motion to terminate a term of supervised release did not meet the miscarriage of justice standard); United States v. Williamson, 183 F.3d 458, 462 (5th Cir. 1999) (denying a collateral attack based on the miscarriage of justice standard); Graziano v. United States, 83 F.3d 587, 590 (2d Cir. 1996) (claiming that the scope of review on a § 2255 motion be "narrowly limited" for finality and efficiency purposes).

sentencing guidelines could result in modified sentences.[66] Percy Dillon had sought a reduced sentence under 18 U.S.C. § 3582(c)(2) following the U.S. Sentencing Commission's two-level reduction for crack offenses in 2008; the judge reduced his sentence to the minimum under the new guidelines, but did not take into account other evidence of rehabilitation and postsentencing conduct.[67] The Court interpreted § 3582 as providing for a narrow opportunity to modify an otherwise final sentence, and the Court emphasized notions of finality.[68] However, adopting a somewhat different attitude toward finality in sentencing, in *Freeman v. United States*, the Court upheld the power of a district judge to modify a plea agreement entered before the retroactive reduction in the crack offense level.[69] The plurality explained the commission's amendment helps to "isolate whatever marginal effect the since-rejected guideline had on the defendant's sentence," and therefore the inmate may make a motion for resentencing.[70]

II. PROCEDURAL POSTURE OF SENTENCE ERROR CLAIMS

This part turns from a description of the types of sentencing error claims to a description of the varied procedural settings in which those claims are made.

A. ACCURACY IN SENTENCING

When approving a sentence in the typical situation in which the parties enter a plea bargain, the judge may know very little about the facts of a case. The hearing may be fairly brief, although the judge will be informed by representations by the parties, information provided by a probation officer in a Presentence Investigative Report, or perhaps another report or examination specially requested by the judge.[71] A plea bargain will typically include a provision waiving any right to an appeal and collateral remedies.[72] Even in cases raising erroneous sentence claims, courts have upheld such waivers, although courts have recognized that a claim of innocence or potential miscarriage of justice may excuse such waivers.[73]

66. Dillon v. United States, 560 U.S. 817, 831 (2010).

67. *Id.* at 822–23.

68. *Id.* at 827–28.

69. Freeman v. United States, 131 S. Ct. 2685, 2690 (2011) (plurality opinion).

70. *Id.* at 2692.

71. FED. R. CRIM. P. 11(c)(1), (3). *See also* 18 U.S.C. § 3552(b)–(c) (2012) (allowing a judge to order study of additional information concerning the defendant, or a psychological or psychiatric examination of the defendant); FED. R. CRIM. P. 32 (regarding presentence reports).

72. *See* Nancy J. King & Michael E. O'Neill, *Appeal Waivers and the Future of Sentencing Policy*, 55 DUKE L.J. 209, 230–31 n.82 (2005).

73. *See* United States v. Johnson, 410 F.3d 137, 151 (4th Cir. 2005); United States v. Porter, 405

In the years prior to 1987, when the U.S. Sentencing Guidelines took effect, the federal system was one of indeterminate sentencing, in which the judge imposed a sentence within a statutory range, but a parole official could later alter the length of the actual prison term. Congress abolished the parole office and made sentences "basically determinate," which placed far more pressure on the accuracy of sentencing.[74] The guidelines seek to provide for uniformity, or "certainty and fairness," by "avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct," but at the same time "maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors."[75] A judge must also consider statutory factors outside the detailed guidelines, including "the nature and circumstances of the offense and the history and characteristics of the defendant."[76]

When sentencing a defendant, the judge follows a reduced preponderance of the evidence standard of proof. Without adopting such a standard, in 1991, the commission added a recommendation in commentary that judges use a preponderance of the evidence standard at sentencing "to meet due process requirements."[77] Putting to one side the question whether the commission has the authority to recommend a constitutional standard, the Supreme Court tacitly endorsed such a standard pre-*Booker*.[78] What evidence may be considered during sentencing? The federal guidelines preserved the preexisting statute providing factual disputes concerning sentencing may be resolved by evidence "without regard to its admissibility under the rules of evidence applicable at trial," but adding that the evidence must have a "sufficient indicia of reliability to support its probable

F.3d 1136, 1145 (10th Cir. 2005); Bender v. United States, No. 11-CV-2004, 2011 U.S. Dist. LEXIS 56457, at *4–5 (C.D. Ill. May 26, 2011); Russell, *supra* note 60, at 124.

74. Mistretta v. United States, 488 U.S. 361, 367 (1989).

75. 28 U.S.C. § 991(b) (2012).

76. 18 U.S.C. § 3553(a)(1).

77. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (2012) (emphasis omitted) ("The [c]ommission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements and policy concerns in resolving disputes regarding application of the guidelines to the facts of a case." (emphasis omitted)), *available at* http://www.ussc.gov/Guidelines/2012_Guidelines/Manual_PDF/Chapter_6.pdf.

78. *Cf.* Edwards v. United States, 523 U.S. 511, 513–14 (1998) (noting that the defendant's constitutional argument would not change the Court's decision because the U.S. Sentencing Guidelines dictate otherwise); United States v. Watts, 519 U.S. 148, 157 (1997) (per curiam) (same); Deborah Young, *The Freedom to Sentence: District Courts After* Booker, 37 MCGEORGE L. REV. 649, 664–70 (2006) (describing uncertainty post-*Booker* in lower courts concerning appropriate standard of proof during sentencing).

accuracy."[79] In that latter respect, the guidelines did improve on the previous standard, which required only "minimal indici[a] of reliability."[80] The guidelines commentary notes "[r]eliable hearsay evidence may be considered" but not "[u]nreliable allegations," without defining what reliability means during sentencing.[81] Critics such as Deborah Young have argued the Federal Rules of Evidence should apply at sentencing, due to accuracy concerns.[82] But the Court has long emphasized that a wide range of information may be considered during sentencing, including acquitted conduct. The Court's classic articulation of this principle was in *Williams v. New York*, a 1949 death penalty case. The Court emphasized that unlike at trial, in which rules of evidence carefully confine admissible evidence, at sentencing a judge must be liberated to consider "the fullest information possible concerning the defendant's life and characteristics," without "rigid adherence to restrictive rules of evidence properly applicable to the trial."[83]

B. SENTENCING ERROR UNDER ADVISORY SENTENCING GUIDELINES

The *Apprendi v. New Jersey* line of cases is not about accuracy, but rather enhancing the factfinding role of the jury.[84] The Court's decisions

79. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3(a). *See also id.* § 1B1.4 ("In determining the sentence to impose within the guideline range, or whether a departure from the guidelines is warranted, the court may consider, without limitation, any information concerning the background, character[,] and conduct of the defendant, unless otherwise prohibited by law."); 18 U.S.C. § 3661 ("No limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."); FED. R. CRIM. P. 32(i)(3) (providing that the court must resolve disputed matters at sentencing).

80. United States v. Miele, 989 F.2d 659, 663–64 (3d Cir. 1993) (quoting United States v. Baylin, 696 F.2d 1030, 1040 (3d Cir. 1982)) (internal quotation marks omitted).

81. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (emphasis omitted) (citations omitted).

82. Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 302–03 (1994).

83. Williams v. New York, 337 U.S. 241, 247 (1949). The Court noted in *Dretke* that it had not extended the *In re Winship*, 397 U.S. 358 (1970), requirement that a beyond a reasonable doubt standard apply to proof of each element of a crime, "to proof of prior convictions used to support recidivist enhancements," or the timing of prior convictions used to calculate a recidivist enhancement, and called these "difficult constitutional questions." Dretke v. Haley, 541 U.S. 386, 395–96 (2004).

84. *See* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."); Oregon v. Ice, 555 U.S. 160, 167 (2009) ("The Federal Constitution's jury-trial guarantee assigns the determination of certain facts to the jury's exclusive province."); Blakely v. Washington, 542 U.S. 296, 313 (2004) ("There is not one shred of doubt, however, about the Framers' paradigm for criminal justice: not the civil-law ideal of administrative perfection, but the common-law ideal of limited state power accomplished by strict division of authority between judge and jury."); Ring v. Arizona, 536 U.S. 584, 609 (2002) ("The right to trial by jury guaranteed by the Sixth Amendment would be senselessly diminished if it encompassed

hold that facts, other than a prior conviction, that enhance a sentence beyond the statutory minimum or maximum, and not admitted by the defendant, must be proven beyond a reasonable doubt to a jury.[85] The *Apprendi* cases do not address the concerns of critics who complain that lax treatment of sentencing burdens of proof and admissibility of hearsay or uncharged crimes permits a range of potential errors.[86] One federal judge described the principle of proof applied at sentencing as "[a]nything [g]oes."[87]

The Supreme Court in *Booker* rendered the guidelines advisory, and also added a new layer of "reasonableness" review by appellate judges, supplementing the preexisting appeal standard (discussed below).[88] The *Booker* remedy may have powerful effects by liberating judges from constraints of the guidelines,[89] including perhaps by encouraging the U.S. Sentencing Commission and Congress to improve on the guidelines. The *Booker* remedy, however, does not squarely address the accuracy problem.[90] While sentencing has become more discretionary, it is not purely indeterminate as before the guidelines, and factfinding continues to result in potentially identifiable increases in sentences. The *Booker* decision did not alter the use of relevant conduct and other uncharged evidence related to the "real offense" as part of sentencing.[91] Thus, as courts of appeals have held, acquitted conduct can still form the basis for

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the factfinding necessary to increase a defendant's sentence by two years, but not the factfinding necessary to put him to death."); Jones v. United States, 526 U.S. 227, 245 (1999) ("[T]here is reason to suppose that in the present circumstances, however peculiar their details to our time and place, the relative diminution of the jury's significance would merit Sixth Amendment concern.").

85. *Apprendi*, 530 U.S. at 483–84, 490. *See also* Alleyne v. United States, 133 S. Ct. 2151, 2158 (2013) (plurality opinion) ("The touchstone for determining whether a fact must be found by a jury beyond a reasonable doubt is whether the fact constitutes an element or ingredient of the charged offense." (citations omitted) (internal quotation marks omitted)).

86. *See Alleyne*, 133 S. Ct. at 2158; *Apprendi*, 530 U.S. at 490; Margaret A. Berger, *Rethinking the Applicability of Evidentiary Rules at Sentencing: Of Relevant Conduct and Hearsay and the Need for an Infield Fly Rule*, 5 FED. SENT'G REP. 96, 96 (1992) ("[T]he sentencing guidelines have rarely been critiqued from an evidentiary vantage point.").

87. United States v. Smiley, 997 F.2d 475, 483 (8th Cir. 1993) (Bright, J., dissenting) (footnote omitted) (citation omitted).

88. United States v. Booker, 543 U.S. 220, 263, 266 (2005). *See also* Rita v. United States, 551 U.S. 338, 347 (2007) (concluding that appellate courts can presume that a sentence is reasonable).

89. Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1690 (2012).

90. For a detailed exploration of the due process concern with factfinding at sentencing, see generally Susan N. Herman, *The Tail That Wagged the Dog: Bifurcated Fact-Finding Under the Federal Sentencing Guidelines and the Limits of Due Process*, 66 S. CAL. L. REV. 289 (1992); Stephen J. Schulhofer, *Due Process of Sentencing*, 128 U. PA. L. REV. 733 (1980).

91. *Cf.* H.R. REP. NO. 98-1017, at 98 (1984) (expressing concerns regarding the constitutionality of real offense sentencing).

an increased sentence, even where the jury plainly rejected those facts.[92] Prosecutors may have significant influence on relevant conduct brought before the judge, or what drug amounts or amount of loss is charged, or whether motions are brought for career offenders or substantial assistance.[93] The guidelines continue to recommend "[r]eliable hearsay evidence may be considered" but not "[u]nreliable allegations," without defining what reliability means.[94]

This uncertainty affects claims of sentencing errors. Post-*Booker*, courts have struggled with how to identify cognizable sentencing errors under the new reasonableness standard of review. Some courts have adopted far more deferential standards than others. Moreover, very few criminal cases go to a trial. Perhaps in cases that do go to trial, prosecutors may have good reasons to put before the jury evidence that would enhance a sentence, even if they are not required to do so post-*Apprendi*. The accuracy of jury factfinding related to sentencing raises still additional questions. In contrast, plea bargaining can involve fact bargaining about what facts justify the sentence.[95] This may also have, as Stephanos Bibas has argued, perverse consequences of treating more fact-bound questions as "elements" of crimes that are agreed on in plea bargains, rather than tested at a sentencing hearing.[96] Post-*Booker*, courts still permit binding plea agreements, which include a sentencing range as part of its terms, under Federal Rules of Criminal Procedure 11(c)(1)(C), but emphasize that judges continue to have discretion to reject plea agreements that are involuntary and unfair.[97]

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92. United States v. White, 551 F.3d 381, 382 (6th Cir. 2008) (en banc).

93. *See* 21 U.S.C. § 851 (2012) (discussing the proceedings that establish a defendant's prior convictions); Statement of Judge Robert L. Hinkle, Federal District Judge, before the United States Sentencing Commission (Feb. 11, 2009), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20090210-11/Hinkle_statement.pdf.

94. U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (2012) (emphasis omitted) (citations omitted).

95. William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2559–60 (2004) ("[W]hen necessary, the litigants simply bargain about what facts will (and [will not]) form the basis for sentencing. It seems to be an iron rule: guidelines sentencing empowers prosecutors, even where the guidelines' authors try to fight that tendency." (footnote omitted) (citations omitted)).

96. Stephanos Bibas, *Judicial Fact-Finding and Sentence Enhancements in a World of Guilty Pleas*, 110 YALE L.J. 1097, 1101 (2001).

97. *See* United States v. Kling, 516 F.3d 702, 704 (8th Cir. 2008) ("*Booker*, however, did not address the sentencing discretion of the district court in accepting Rule 11(c)(1)(C) agreements. Courts are not obligated to accept plea agreements and have discretion to reject those which are deemed involuntary or unfair." (citing FED. R. CRIM. P. 11(b)(2))); Gov't of the Virgin Islands v. Walker, 261 F.3d 370, 374–75 (3d Cir. 2001) (finding that the appellate court did not err in vacating the defendant's

C. APPEALS AND PLAIN ERROR REVIEW

Federal district judges have limited ability to correct a sentence, absent "clear error" detected within 14 days of sentencing.[98] However, the adoption of the U.S. Sentencing Guidelines also brought appellate review of sentences. Congress enacted a statute providing for an appeal of a sentence that "was imposed in violation of law," "as a result of an incorrect application of the sentencing guidelines," or in excess of the "applicable guidelines range."[99] On appeal, any error in sentencing could be found harmless, or if not preserved by a contemporaneous objection at trial or at sentencing, the error could be found not to be a plain error.[100] The plain error doctrine raised uncertainties, since the statutory language that an unpreserved error may be raised if it affects "substantial rights" is not entirely clear.[101] The Supreme Court added the gloss that such an error is one that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings."[102] Such a standard is not necessarily innocence-related, but the Court has long connected the standard with the concept of a miscarriage of justice, although noting that the remedy is not "*only* warranted in cases of actual innocence."[103] (Indeed, the Court has held there was no reason to import the "more vague" plain error standard in the context of the habeas corpus miscarriage of justice exception to procedural defaults.[104]) Some lower courts, however, have used problematic language

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sentence based on finding that the judge punished the defendant for not accepting a plea deal); Scott D. Hammond, Deputy Assistant Att'y Gen. Criminal Enforcement, U.S. Dep't of Justice, The U.S. Model of Negotiated Plea Agreements: A Good Deal with Benefits for All, Address at the OECD Competition Committee Working Party No. 3, at 8 (Oct. 17, 2006), http://www.justice.gov/atr/public/speeches/219332.pdf (noting the U.S. Department of Justice, Antitrust Division's "near perfect track record in persuading courts to accept negotiated 'C' agreements.").

98. FED. R. CRIM. P. 35.

99. 18 U.S.C. § 3742 (2012). That provision was added by the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 212, 98 Stat. 1837, 1987 (1984). Prior to that addition, Federal Rule of Criminal Procedure 35 permitted the sentencing judge to correct an error at "any time." United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir. 1968) (Rule 35 gave "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").

100. FED. R. CRIM. P. 51–52.

101. *Id.* 52.

102. Johnson v. United States, 520 U.S. 461, 466–67 (1997) (alteration in original) (quoting United States v. Olano, 507 U.S. 725, 732 (1993)).

103. *Olano*, 507 U.S. at 736. *See also* United States v. Cotton, 535 U.S. 625, 633 (2002) (emphasizing "overwhelming" evidence supporting sentence, and therefore finding error not substantial); *Johnson*, 520 U.S. at 469 ("No 'miscarriage of justice' will result here if we do not notice the error." (quoting *Olano*, 507 U.S. at 736)); United States v. Frady, 456 U.S. 152, 163 (1982) ("Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice.").

104. Engle v. Isaac, 456 U.S. 107, 136 (1982).

suggesting something stricter than the typical miscarriage of justice standard, which under *Schlup* requires that more likely than not no reasonable factfinder would convict or reach the same sentence; those courts instead cite a "manifest miscarriage of justice" standard and insist that the record be "devoid of evidence pointing to guilt."[105]

That appellate standard for challenging sentences has been supplanted by the Court's decision in *Booker* and subsequent rulings developing a new reasonableness standard for appellate review of sentencing, although the *Booker* Court emphasized that the traditional plain error test still applies.[106] Those changes, as discussed, do not fully diminish the accuracy concern with factfinding during sentencing, and questions about what constitutes a miscarriage of justice in that setting continue to be important. Some courts have applied a more relaxed version of plain error review post-*Booker* because "the cost of correcting a sentencing error is far less than the cost of a retrial."[107] As Judge Jon O. Newman, writing for the Second Circuit Court of Appeals, explained:

> 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.[108]

Other courts, as will be described in detail below, adopt far more constrained views of what sentencing errors should be cognizable on appeal under traditional appellate standards,[109] and post-*Booker* reasonableness review, as well as postconviction.

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105. United States v. Castro, 704 F.3d 125, 138 (3d Cir. 2013) (quoting United States v. Green, 293 F.3d 886, 895 (5th Cir. 2002)). *See also id.* at 137–38 (citing cases).

106. United States v. Booker, 543 U.S. 220, 268 (2005). For more information on reasonableness review, see generally Toby J. Heytens, Essay, *The Framework(s) of Legal Change*, 97 CORNELL L. REV. 595, 607 (2012), and Nancy J. King, Essay, *Reasonableness Review After* Booker, 43 HOUS. L. REV. 325 (2006).

107. United States v. Williams, 399 F.3d 450, 456 (2d Cir. 2005). *See also id.* at 457 ("[T]he Supreme Court has never applied the *Olano* formulation of the plain error doctrine to ignore a judge's sentencing error that affected substantial rights, nor required a court of appeals to do so.").

108. *Id.*

109. *See, e.g.*, United States v. Ellis, 564 F.3d 307, 378–79 (5th Cir. 2009) ("[E]ven if an increase in a sentence [is] seen as inevitably 'substantial' . . . it does not inevitably affect the fairness, integrity, or public reputation of judicial process and proceedings."); United States v. Rodriguez, 406 F.3d 1261, 1281 (11th Cir. 2005) (rejecting the approach of the Second, D.C., and Seventh Circuits to plain error post-*Booker*, and noting that "[b]roadening that exception, or constructing ways to circumvent its restrictions on an issue-by-issue basis, lessens the effect of the rule and undermines the interests it serves.").

D. WAIVERS AND THE MISCARRIAGE OF JUSTICE EXCEPTION

Plea agreements commonly include provisions waiving the right to an appeal or postconviction review. Courts of appeals adopt a miscarriage of justice standard for excusing such waivers, linking refusal to enforce an appeal or postconviction waiver to a claim of innocence. What do courts mean by a miscarriage of justice in that context? Courts are conflicted. Several courts of appeals have held that sentences may be a miscarriage of justice, such that an appellate waiver should not be honored, if the sentence is unlawful because it is in excess of the maximum penalty provided by law.[110] Other courts of appeals also refuse to enforce the waiver if the agreement waives the right to appeal a sentence, not agreed on, but that a judge later determines is applicable.[111] Other courts have declined to identify what errors would be severe enough, but noting factors, such as the "clarity of the error, its gravity, [and] its character," "whether it concerns a fact issue," and its "impact."[112] Courts have also held waivers are invalid if

110. *See, e.g.*, United States v. Salas-Garcia, 698 F.3d 1242, 1255 (10th Cir. 2012) (describing miscarriage of justice exception, and noting one situation included is "where the sentence exceeds the statutory [maximum]" (quoting United States v. Elliott, 264 F.3d 1171, 1173 (10th Cir. 2001))); United States v. Guillen, 561 F.3d 527, 532 (D.C. Cir. 2009) ("[W]e will disregard a waiver agreement on account of a district court's procedural error only if the error results in a miscarriage of justice."); United States v. Lockwood, 416 F.3d 604, 608 (7th Cir. 2005) (noting that waivers are not enforced if they involved "sentences based on constitutionally impermissible criteria (such as race), sentences exceeding the statutory maximum, or ineffective assistance of counsel."); United States v. Andis, 333 F.3d 886, 891 (8th Cir. 2003) (en banc) ("Although we have not provided an exhaustive list of the circumstances that might constitute a miscarriage of justice, we recognize that these waivers are contractual agreements between a defendant and the Government and should not be easily voided by the courts. As such, we caution that this exception is a narrow one and will not be allowed to swallow the general rule that waivers of appellate rights are valid.").

111. *See* United States v. Goodman, 165 F.3d 169, 174–75 (2d Cir. 1999) (refusing to enforce a plea agreement with waiver of right to appeal any sentence imposed if within the statutory maximum); United States v. Attar, 38 F.3d 727, 731 (4th Cir. 1994) ("In this circuit, a waiver-of-appeal-rights provision in a valid plea agreement is enforceable against the defendant so long as it is 'the result of a knowing and intelligent decision to forgo the right to appeal.'" (quoting United States v. Wessells, 936 F.2d 165, 167 (4th Cir. 1991))). *But see* United States v. Montano, 472 F.3d 1202, 1205 (10th Cir. 2007) ("[I]n this Circuit we have consistently and repeatedly held that broad waivers are enforceable even where they are not contingent on the ultimate sentence falling within an identified sentencing range."); United States v. Williams, 184 F.3d 666, 671 (7th Cir. 1999) (declining to adopt *Goodman*); United States v. Atterberry, 144 F.3d 1299, 1300 (10th Cir. 1998) ("This court will hold a defendant to the terms of a lawful plea agreement."); United States v. Rosa, 123 F.3d 94, 97–102 (2d Cir. 1997) ("We have stated that '[i]n no circumstance . . . may a defendant, who has secured the benefits of a plea agreement and knowingly and voluntarily waived the right to appeal a certain sentence, then appeal the merits of a sentence conforming to the agreement. Such a remedy would render the plea bargaining process in the resulting agreement meaningless.'" (alteration and ellipses in original) (quoting United States v. Salcido-Contreras, 990 F.2d 51, 53 (2d Cir. 1993))).

112. United States v. Khattak, 273 F.3d 557, 563 (3d Cir. 2001) (quoting United States v. Teeter, 257 F.3d 14, 25–26 (1st Cir. 2001)). *See also id.* at 562–63 (surveying caselaw instead of earmarking situations that would constitute a miscarriage of justice); United States v. Castro, 704 F.3d 125, 136 (3d

based on a constitutionally impermissible factor, such as race, or ineffective assistance of counsel.[113]

Still additional courts have noted that since sentencing offers discretion to trial judges, "the same flexibility ought to pertain when the district court plainly errs in sentencing."[114] As the First Circuit explained, in this context, "the term 'miscarriage of justice' is more a concept than a constant."[115] However, any such remedy is "strong medicine," reserved for unusual cases, and post-*Booker*, not only have courts of appeals upheld waivers of a right to advisory sentencing, but also courts have held that "supposed misapprehension of the advisory nature of the sentencing guidelines," does not constitute a miscarriage of justice.[116]

The emerging miscarriage of justice law concerning appeals waivers implicates a combination of concerns with knowing and voluntary plea bargains, sentencing errors, access to appellate and postconviction remedies, effectiveness of counsel, and the power of prosecutors. Innocence plays a role in the analysis, and the exception is framed as an equitable miscarriage of justice exception. But as with the areas discussed next, innocence or error in sentencing is linked to other fairness concerns. Importantly, however, federal courts of appeals also highlight how although the type of error, such as a sentence in excess of a maximum otherwise applicable, may be the product of discretion and not relevant to guilt or innocence of the underlying crime, finality is also less of a concern. Resentencing is not burdensome to conduct, and if the judge errs, there

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Cir. 2013) (citing the *Teeter* factors listed in *Khattak* for determining miscarriage of justice based on waiver); United States v. Jennings, 662 F.3d 988, 991 (8th Cir. 2011) ("Although we have not provided an exhaustive list of the circumstances that might constitute a miscarriage of justice, we have recognized that a waiver of appellate rights does not prohibit the appeal of an illegal sentence, a sentence in violation of the terms of an agreement, and a claim asserting ineffective assistance of counsel." (citing *Andis*, 333 F.3d at 891)); *Teeter*, 257 F.3d at 25–26 ("[I]f denying a right of appeal would work a miscarriage of justice, the appellate court, in its sound discretion, may refuse to honor the waiver.").

113. *See* United States v. Brown, 232 F.3d 399, 403–04 (4th Cir. 2000) (nonconformance with sentencing guidelines); United States v. Schmidt, 47 F.3d 188, 190 (7th Cir. 1995) (race). Several courts adopt a test focusing on four "situations" constituting a miscarriage of justice: "[(1)] where the district court relied on an impermissible factor such as race, [(2)] where ineffective assistance of counsel in connection with the negotiation of the waiver renders the waiver invalid, [(3)] where the sentence exceeds the statutory maximum, or [(4)] where the waiver is otherwise unlawful." United States v. Hahn, 359 F.3d 1315, 1327 (10th Cir. 2004) (en banc) (quoting United States v. Elliott, 264 F.3d 1171, 1173 (10th Cir. 2001) (internal quotation marks omitted)).

114. *Teeter*, 257 F.3d at 25.

115. *Id.* at 26.

116. United States v. Chambers, 710 F.3d 23, 31 (1st Cir. 2013). *See also* United States v. Magouirk, 468 F.3d 943, 951 (6th Cir. 2006) (upholding a *Booker* waiver).

should be "the same flexibility" in correcting that error on appeal.[117] I argue that the same flexibility should animate approaches to types of sentencing errors discussed in the next section.

E. SECTION 2255 AND HABEAS CHALLENGES TO SENTENCING ERRORS

In 1948, Congress enacted 28 U.S.C. § 2255, a statute creating substitute procedures for habeas review, in order to require that applications be more conveniently filed in the court where the prisoner was originally convicted, and not where they were being held in custody.[118] Unlike § 2254, which provides for federal habeas review of state convictions, § 2255 provides that the inmate "may move the court which imposed the sentence to vacate, set aside[,] or correct the sentence."[119] The AEDPA also introduced a one year statute of limitations for federal prisoners seeking relief under § 2255, with limited exceptions, including subsequent discovery of a new "fact[]" or ability to take retroactive advantage of a new "right" recognized by the Supreme Court.[120] Despite the broad language of § 2255, which permits motions based on sentencing errors, the Supreme Court in *Hill v. United States* noted that nonconstitutional errors typically cannot be corrected using § 2255, where the error was not a "fundamental defect" that would "inherently" result in a "miscarriage of justice."[121] That ruling has made the question whether a sentencing error is also a claim of innocence highly relevant to the procedural ability of a federal court to remedy a sentencing error. However, the Court did not claim to define in *Hill*, or in subsequent cases, what types of sentencing errors might constitute a miscarriage of justice.

The same miscarriage of justice rule should apply in the context of federal habeas corpus § 2254 challenges to state convictions. However, the

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117. *Teeter*, 257 F.3d at 25.

118. United States v. Hayman, 342 U.S. 205, 219 (1952) ("[T]he sole purpose was to minimize the difficulties . . . by affording the same rights in another and more convenient forum.").

119. 28 U.S.C. § 2255(a) (2012).

120. *Id.* § 2255(f) (noting that the statute of limitations creates an exception for a "right" that was "newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review"). A vacatur of a state court conviction on which the federal sentence was based, constitutes a new "fact" under the AEDPA statute of limitations. Johnson v. United States, 544 U.S. 295, 307 (2005). However, the Supreme Court does not always make new sentencing legislation, much less rulings, fully retroactive. Dorsey v. United States, 132 S. Ct. 2321, 2335 (2012) ("[I]n federal sentencing the ordinary practice is to apply new penalties to defendants not yet sentenced, while withholding that change from defendants already sentenced.").

121. Hill v. United States, 368 U.S. 424, 428 (1962). *See also* United States v. Addonizio, 442 U.S. 178, 185 (1979) (repeating that a nonconstitutional error of law generally can form the basis for § 2255 relief only if the error constitutes a "fundamental defect which inherently results in a complete miscarriage of justice" (quoting *Hill*, 368 U.S. at 428) (internal quotation marks omitted)).

Court has not reached the issue, having declined in *Dretke* to address whether the actual innocence of sentence gateway exception to procedural default doctrines applies in a noncapital case under § 2254, for a challenge to a state court conviction.[122] As a result, what innocence means in the sentencing context remains particularly unsettled in § 2254 litigation. In cases involving federal convicts, questions remain regarding what should count as a miscarriage of justice under § 2255, particularly given the additional post-*Booker* sentencing discretion of the judge, with deferential and totality of the circumstances reasonableness review by appellate courts.[123]

Federal habeas cases brought using § 2254 permit a range of procedural barriers to habeas corpus relief to be excused if the convict can make a gateway showing of possible innocence. These miscarriage of justice exceptions to otherwise applicable procedural barriers include one recognized doctrine concerning sentencing. In *Sawyer*, the Court held that a death row inmate may obtain gateway relief, permitting consideration of an underlying constitutional claim despite procedural barriers that would otherwise apply, by making a showing of actual innocence of a capital sentence.[124] That standard permits only relief from certain (and not all) procedural bars,[125] and it is not a forgiving standard. A movant "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 under the applicable state law."[126] Where the applicable state

122. Dretke v. Haley, 541 U.S. 386, 393–94 (2004) ("[A] federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default.").

123. Gall v. United States, 552 U.S. 38, 51 (2007) (Appellate courts should "take into account the totality of the circumstances, including the extent of any variance from the [g]uidelines [r]ange"). For criticisms of the open ended quality of that standard of review, see D. Michael Fisher, *Still in Balance? Federal District Court Discretion and Appellate Review Six Years After* Booker, 49 DUQ. L. REV. 641, 652 (2011) ("The confusion over what reasonableness means . . . has led the courts of appeals to take an ad hoc approach to sentencing review . . . ."); Nancy Gertner, Essay, *On Competence, Legitimacy, and Proportionality*, 160 U. PA. L. REV. 1585, 1586 (2012) (stating the theme of "the federal appeals courts' inability to give meaning to substantive reasonableness sentencing review."); Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 2 (2008) ("[C]onfusion remains regarding appellate review of sentencing decisions.").

124. Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

125. The AEDPA contains language at the same time apparently cribbed in part from *Sawyer*, but also arguably inconsistent with *Sawyer* claims, both in sections dealing with evidentiary hearings and second or successive federal habeas petitions. *See* 28 U.S.C. § 2244(b) (discussing the finality of determinations). As a result, courts have divided in their treatment of such claims. For a discussion of this problem, see BRANDON L. GARRETT & LEE KOVARSKY, FEDERAL HABEAS CORPUS: EXECUTIVE DETENTION AND POST-CONVICTION LITIGATION 263 (Robert C. Clark et al. eds., 2013).

126. *Sawyer*, 505 U.S. at 336.

standards for death eligibility may be multifactored and flexible, the *Sawyer* standard is not easy to satisfy.

Gateway claims of innocence of a noncapital sentence hang in limbo. The miscarriage of justice doctrines had origins in pre-1996 federal statutes regarding excusing subsequent habeas applications if the "ends of justice" supported doing so (and indeed, the miscarriage of justice standard drew from an early decision that was a § 2255 case involving a federal convict, but emphasizing that the same standard should apply in § 2254 cases involving state convicts).[127] Despite the Court's emphasis in 2006 that a judge conduct a "holistic" inquiry into whether new evidence of innocence justifies excusing otherwise applicable procedural defaults,[128] the Court has not reached the question whether a claimed error in a noncapital sentence can be a claim of innocence that implicates the miscarriage of justice exception permitting procedural barriers to be excused postconviction. The Court did suggest in *Smith v. Murray* that the focus of the miscarriage of justice exception was not on the "nature of the penalty"[129] but rather on "any substantial claim that the alleged error undermined the accuracy of the guilt *or sentencing* determination."[130] There, the focus was on capital trials and whether a constitutional violation caused an actual error in determining guilt or eligibility for sentence, by "preclud[ing] the development of true facts [or] result[ing] in the admission of false ones."[131] However, as noted, in *Dretke*, the Court declined to address whether the actual innocence of sentence gateway exception to procedural barriers applies in a noncapital case.[132] Nevertheless, as I will develop, a range of innocence of sentence claims can be litigated, and have been endorsed by the Supreme Court.

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127. McCleskey v. Zant, 499 U.S. 467, 495 (1991). *See also id.* ("*Sanders* [*v. United States*] drew the phrase 'ends of justice' from the 1948 version of § 2244. . . . ([The] judge need not entertain subsequent application if he is satisfied that the ends of justice will not be served by such inquiry)." (citation omitted) (internal quotation marks omitted)); Sanders v. United States, 373 U.S. 1, 15 (1963) ("Since the motion procedure is the substantial equivalent of federal habeas corpus, we see no need to differentiate the two for present purposes.").

128. House v. Bell, 547 U.S. 518, 539 (2006). However, AEDPA has supplanted the miscarriage of justice exception for second or successive petitions. *See* 28 U.S.C. § 2244(b).

129. Smith v. Murray, 477 U.S. 527, 538 (1986).

130. *Id.* at 539 (emphasis added). *See also* Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 170–71 (2d Cir. 2000) ("When transporting the concept of actual innocence to the sentencing phase of capital trials, the Supreme Court has required that the legal error the defendant raises (his constitutional claim) must have caused an actual error in determining guilt or eligibility for sentence . . . ." (internal quotation marks omitted)).

131. *Smith*, 477 U.S. at 538.

132. Dretke v. Haley, 541 U.S. 386, 393–94 (2004) ("[A] federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default.").

Where the Supreme Court has not yet reached the question under § 2254, and has not provided clear guidance as to what constitutes a miscarriage of justice under § 2255, lower courts have had to struggle in § 2255 cases with what raises something out of the "ordinary," making it a cognizable error of law, or the type of error that fits within the miscarriage of justice exception permitting § 2255 relief. As the Tenth Circuit described it in 1998, "very few cases have had any occasion to determine which sentencing errors are 'fundamental' and therefore correctable under § 2255, and which are not."[133] There has been more development in the caselaw in the years since, but the caselaw is highly confused, with divided rulings and splits in the circuits. Courts of appeals, even those that more narrowly interpret the miscarriage of justice exception for § 2255, permit claims challenging guidelines application errors in which the alleged error resulted in a sentence above the statutory maximum, in the context of the career offender or other habitual offender guideline provisions.[134] The Eighth Circuit emphasized in a divided en banc decision that a challenge to an erroneous career offender sentence was not cognizable under § 2255, agreeing that "[a]n unlawful or illegal sentence is one imposed without, or in excess of, statutory authority,"[135] and such an error would be cognizable, but in contrast, a "misapplication of the [U.S.] Sentencing Guidelines" is not cognizable.[136] The dissent retorted that a serious sentencing error constitutes a miscarriage of justice, and called the majority approach "nothing more than a judicial 'gotcha.'"[137]

In contrast, the Eleventh Circuit emphasized, in a case raising the career offender guideline, that the error was "not ordinary [g]uideline error,"[138] and that "a sentencing error like the one here can amount to a fundamental defect that inherently creates a complete miscarriage of justice."[139] The Court noted the costs of such errors to the U.S. Treasury alone: "[E]rroneously labeling [petitioner] a career offender results in an

133. United States v. Talk, 158 F.3d 1064, 1070 (10th Cir. 1998), *abrogated by* United States v. Harms, 371 F.3d 1208 (10th Cir. 2004). For an excellent overview of caselaw concerning post-*Bailey* litigation under § 2255, see Entzeroth, *supra* note 44, at 93–102.

134. *See* Haley v. Cockrell, 306 F.3d 257, 266 (5th Cir. 2002) ("[T]he granting of habeas relief is appropriate where the State has failed to produce sufficient evidence of the petitioner's habitual offender status."); United States v. Mikalajunas, 186 F.3d 490, 494–95 (4th Cir. 1999) (citing cases).

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

136. *Id.* at 704. *See also id.* at 704–05 (analogizing to the appellate waiver miscarriage of justice exception context).

137. *Id.* at 707 (Melloy, J., dissenting) (quoting Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (en banc) (Hill, J., dissenting)).

138. Spencer v. United States, 727 F.3d 1076, 1091 (11th Cir. 2013), *reh'g en banc granted, opinion vacated*, 2014 U.S. App. LEXIS 4315.

139. *Id.* at 1088.

annual taxpayer outlay of $28,893.40 for an extra 6 1/4 years. We do not know how many instances there are of defendants like [the petitioner]."[140] Such rulings extend the concept of an innocence of sentence claim from a vacated underlying conviction, to sentences above a statutory maximum, and then to the harm identified by the Court in the *Apprendi* line of decisions: the harm of erroneously sentencing an inmate to a punishment that exceeds the otherwise applicable maximum. Nevertheless, courts remain reluctant to permit § 2255 challenges to "ordinary" or "run-of-the-mill" guidelines errors. Whether courts will rule similarly regarding facts that increase a mandatory minimum sentence, contrary to the Court's ruling in *Alleyne v. United States*, remains to be seen.[141] Lower courts should heed the command of the Court post-*Booker* to extend reasonableness review to sentences, whether imposed within or without the guidelines. With appellate review broadly extending to the reasonableness of sentences, limiting the miscarriage of justice exception to certain narrowly defined situations seems far less supported.

The Seventh Circuit permitted a § 2255 challenge to a career offender criminal enhancement,[142] and in an en banc ruling concluded the Supreme Court's interpretation should be applied retroactively, since it resulted in a sentence that "exceeds that permitted by law and constitutes a miscarriage of justice."[143] However, the Seventh Circuit has since backed away from its ruling in *Narvaez v. United States* and in its 2013 en banc decision in *Hawkins v. United States* held that "now that the guidelines, including the career offender guideline . . . are merely advisory" there may be no error and a sentence would be reasonable with or without a career offender enhancement.[144] After all, in an advisory guidelines world, the judge might make a "mistake" in sentencing a convict, but the error would not be cognizable since the mistake relates to discretion, and is no longer a question of a sentence not authorized by law, but rather a question of "erroneous interpretation of the guidelines."[145] The bottom line: "An error

140. *Id.* at 1091.

141. *See* Alleyne v. United States, 133 S. Ct. 2151, 2153 (2013) (plurality opinion) (finding a Sixth Amendment violation of the defendant's rights during sentencing); Woods v. Coakley, No. 4:13 CV 1388, 2013 U.S. Dist. LEXIS 101990, at *11 (N.D. Ohio July 22, 2013) ("Contrary to [the defendant]'s suggestion, however, *Alleyne* does not support his actual innocence claim because that decision is not an intervening change in the law that decriminalized the acts that form the basis of his conviction.").

142. Narvaez v. United States, 641 F.3d 877, 878 (7th Cir. 2011).

143. Narvaez v. United States, 674 F.3d 621, 623 (7th Cir. 2011) (en banc).

144. Hawkins v. United States, 706 F.3d 820, 822–23 (7th Cir. 2013).

145. *Id.* at 823.

in the interpretation of a merely advisory guideline is less serious."[146] The Seventh Circuit denied rehearing in *Hawkins* with a dissenter noting that "the Supreme Court has never set forth a per se rule that a sentencing error could never rise to the level of a miscarriage of justice."[147]

Questions of interpretation of merely advisory guidelines may have a dramatic impact on convicts. For example, a drug sentence may be many orders of magnitude larger depending on whether the drug quantity is based on the amount of drugs found on the defendant's person and property at the time of arrest, or the total amount of drugs allegedly sold over many years.[148] Questions of interpretation of what counts as the intended loss to victims in a fraud scheme have divided lower courts, but will continue to provide a starting place for sentencing and account for vast differences in possible sentences.[149] For that reason, the Eleventh Circuit disagreed with the Seventh and Eighth Circuits and emphasized how the Supreme Court has said post-*Booker* that sentencing decisions continue to be very much "anchored" by the guidelines.[150]

Appellate courts also discuss finality and floodgates concerns. As the Fourth Circuit characterized it, if the actual innocence gateway "is available anytime a guideline is misapplied [then] . . . the actual innocence exception would swallow the rule that issues not raised on appeal cannot be considered in a § 2255 motion absent a showing of cause and prejudice to excuse the default."[151] In contrast, the Eleventh Circuit stated, "we acknowledge the perennial concern about the justice system's need for finality," but noted that

> as for manageability, as commentators have observed, collateral reviews of sentencing cases deal generally only with paper records, and they usually return to the same judge who sentenced the defendant initially. No trial or sentencing judge likes to repeat what he or she has done before, but those factors assuage the burden.[152]

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146. *Id.* at 824.

147. Hawkins v. United States, 724 F.3d 915, 921–22 (7th Cir. 2013) (Rovner, J, dissenting from the denial of rehearing).

148. *See* United States v. Quinn, 472 F. Supp. 2d 104, 105–09 (D. Mass. 2007) (describing the defendant's drug offense and corresponding U.S. Sentencing Guidelines).

149. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2012).

150. Spencer v. United States, 727 F.3d 1076, 1088 (11th Cir. 2013) (emphasis omitted), *reh'g en banc granted, opinion vacated*, 2014 U.S. App. LEXIS 4315.

151. United States v. Mikalajunas, 186 F.3d 490, 494 (4th Cir. 1999).

152. *Spencer*, 727 F.3d at 1091 (footnote omitted).

F. SECOND OR SUCCESSIVE PETITIONS

One area in which Congress may have sought to eliminate merits review of a sentencing error claim is in the context of second or successive postconviction petitions or motions filed in federal court. For state court convicts, § 2244(b) requires either a new rule of constitutional law made retroactive by the Supreme Court, or alternatively, "clear and convincing" evidence that could not have been found through due diligence, such that "no reasonable factfinder would have found the applicant guilty of the underlying offense," to permit filing a second or successive § 2254 habeas petition motion.[153] Section 2255 contains the same restriction, requiring "clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense."[154] These restrictions, adopted as part of AEDPA, on second or successive petitions could be interpreted to exclude sentencing errors that are not related to the jury's determination of guilt. Some courts have held that this language bars challenges to a sentence, given the language about whether the factfinder would have found guilt; others have permitted challenges to death sentences despite that language.[155] Perhaps an equitable exception to the second or successive petition rule could be recognized by courts, but so far, that has not occurred. Following the Supreme Court's reasoning in *McQuiggin v. Perkins*, courts should not lightly assume that Congress meant to eliminate the traditional miscarriage of justice exception; the Court emphasized that "[t]he miscarriage of justice exception, our decisions bear out, survived AEDPA's passage."[156] On the other hand, the *McQuiggin* Court emphasized that the AEDPA second or successive petition provisions "constrained the application of the exception," and how the analysis would

153. 28 U.S.C. § 2244(b)(2)(B)(ii) (2012).

154. *Id.* § 2255(h)(1). That restriction does not require that "new evidence be rooted in constitutional error at trial." Case v. Hatch, No. 11-2094, 2013 U.S. App. LEXIS 7742, at *48 (10th Cir. Apr. 12, 2013).

155. Some courts have held § 2255(h)(1) "does not encompass challenges to a sentence." *In re* Webster, 605 F.3d 256, 257 (5th Cir. 2010). *See also* Hope v. United States, 108 F.3d 119, 120 (7th Cir. 1997) ("We conclude that a successive motion under 28 U.S.C. § 2255 . . . may not be filed on the basis of newly discovered evidence unless the motion challenges the conviction and not merely the sentence."). For examples of rulings in § 2254 cases interpreting § 2244(b)(2)(B), see *In re* Dean, 341 F.3d 1247, 1248 (11th Cir. 2003) (citing cases); *In re* Vial, 115 F.3d 1192, 1198 (4th Cir. 1997) (en banc) ("Under the AEDPA, an individual may not file a second or successive § 2254 petition for a writ of habeas corpus or § 2255 motion to vacate sentence without first receiving permission to do so from the appropriate circuit court of appeals."). *Cf.* LaFevers v. Gibson, 238 F.3d 1263, 1267 (10th Cir. 2001) (noting circuit split but not reaching the issue). *But see* Babbitt v. Woodford, 177 F.3d 744, 746 (9th Cir. 1999) (per curiam) (noting that § 2244(b)(2)(B) permits second or successive challenge to death sentence); Thompson v. Calderon, 151 F.3d 918, 923–24 (9th Cir. 1998) (en banc) (same).

156. McQuiggin v. Perkins, 133 S. Ct. 1924, 1932 (2013).

proceed for sentencing error claims is unclear.[157]

The Eleventh Circuit in its en banc decision in *Gilbert v. United States*, which addressed whether to recognize a miscarriage of justice exception to the second or successive petition provisions, emphasized finality: "Sentencing guidelines provisions are many and complex, the English language and those who use it are imperfect, and the case law about what various and sundry guidelines mean and whether they apply in different factual situations is in a constant state of flux."[158] The court explained:

> Consider just a few examples of enhancement terms which lend themselves to litigation about their extent and scope, and thereby open up the possibility of clarifying case law years after sentences are imposed: "physical contact," "bodily injury," "substantial bodily injury," "permanent or life-threatening bodily injury," "reckless conduct," "custody, care[,] or supervisory control of the defendant," "uncontrollable circumstances," "substantial disruption of public, governmental, or business functions or services," "a pattern of activity," "a substantial part of a fraudulent scheme," "personal information," and "abuse of a position of trust." Those terms, and many others like them, form a seed bed from which decisions can sprout, undermining sentencing calculations that were made years before.[159]

That court also highlighted how, by enacting AEDPA revisions to § 2255, Congress tried to impose finality on postconviction challenges by including a statute of limitations provision.[160] Indeed, it is also an open question whether an outright error in the interpretation of a guideline can be an issue of actual innocence that might permit equitable tolling of that statute of limitations provision. Courts have applied the miscarriage of

157. *Id.* at 1933. While the Court described how the second or successive petition provisions in the AEDPA require a higher standard of proof, whether they should be interpreted to include or exclude sentencing error claims raises a very different interpretive question.

158. Gilbert v. United States, 640 F.3d 1293, 1309 (11th Cir. 2011) (en banc). In contrast, the Eleventh Circuit has highlighted for the purposes of a first § 2255 motion, that for the career offender designation, "a sentencing error like the one here can amount to a fundamental defect that inherently creates a complete miscarriage of justice." Spencer v. United States, 727 F.3d 1076, 1088 (11th Cir. 2013), *reh'g en banc granted, opinion vacated*, 2014 U.S. App. LEXIS 4315. The Eleventh Circuit has since added that for a sentencing error claim to be brought using the Savings Clause, "the claim must be based upon a retroactively applicable Supreme Court decision," and "the Supreme Court decision must have overturned a circuit precedent that squarely resolved the claim so that the petitioner had no genuine opportunity to raise it at trial, on appeal, or in his first § 2255 motion." Williams v. Warden, 713 F.3d 1332, 1343 (11th Cir. 2013).

159. *Gilbert*, 640 F.3d at 1310 (footnote omitted).

160. *Id. See also* 28 U.S.C. § 2255(h) (noting that second or successive motions must either contain new evidence or new constitutional rules).

justice exception to procedural default analysis under § 2255 as well.[161] Other circuits suggest that the § 2255 "Savings Clause," which permits a habeas petition to be filed should that § 2255 remedy not be adequate or effective as a substitute for habeas corpus,[162] might permit an inmate to use habeas corpus to pursue late filed sentencing challenges for a claim of actual innocence of sentence.[163] Indeed, in a development typical of the convoluted case law in this area, the Seventh Circuit takes the more expansive approach on this Savings Clause question than the Eleventh Circuit, disagreeing with *Gilbert* and concluding that "a petitioner may utilize the savings clause to challenge the misapplication of the career offender [g]uideline," at least for a prisoner sentenced pre-*Booker*.[164] To be sure, claims of constitutionally ineffective assistance of counsel can also supply a separate basis to indirectly attack a sentencing error.

III. RETHINKING THE ROLE OF ACCURACY IN SENTENCING

A. A SINGLE INNOCENCE OF SENTENCE GATEWAY STANDARD

While ostensibly applying the same miscarriage of justice standard, courts have sometimes been unwilling to entertain otherwise barred sentencing error claims based on a range of interpretations of what a miscarriage of justice means in the sentencing context. The approaches toward cognizably and procedurally available challenges to sentencing errors vary depending on the court's concept of what innocence means, the type of sentencing error asserted, and the procedural posture of the claim. As described, courts define their concept of cognizable error using the statutory maximum sentences (and perhaps they will extend it to statutory minimums), to the sentencing guidelines, to notions of retroactivity drawn from postconviction law, and to a lesser extent, relying on language from Supreme Court decisions describing innocence gateways in the context of postconviction review of state convictions. An error of the same gravity, in terms of its effect on the sentence, may be treated differently depending on

161. *Spencer*, 727 F.3d at 1090 n.27 ("Confusingly, the phrase 'miscarriage of justice' is used in determining both whether a claim is cognizable under § 2255 and whether a claim can be reviewed in spite of procedural default.").

162. 28 U.S.C. § 2255(e).

163. *See* Jones v. Castillo, 489 F. App'x 864, 866 (6th Cir. 2012) ("Claims alleging 'actual innocence' of a sentencing enhancement cannot be raised under § 2241."), *cert. denied*, 133 S. Ct. 1632, *reh'g denied*, 133 S. Ct. 2387 (2013) (per curiam) (unpublished table decision); *In re* Bradford, 660 F.3d 226, 230 (5th Cir. 2011) (same). *But see* Chaplin v. Hickey, 458 F. App'x 827, 827 (11th Cir. 2012) (per curiam) (allowing a petition for writ of habeas corpus if prospective petitioner was sentenced to a prison term longer than the statutory maximum applicable to the crime).

164. Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).

whether the error arose from an erroneous interpretation of a guidelines provision, an element of a sentence enhancing offense, a guidelines provision using language borrowed from an element of a crime, or a guidelines provision based on a prior conviction since vacated. Depending on the type of error, particular procedural posture, and how the particular federal court of appeals frames its definition of miscarriage of justice, relief may be possible despite a plea waiver or postappeal. These distinctions cannot support the weight placed upon them. All sentencing error claims should be cognizable, under a single miscarriage of justice standard across each type of sentencing error claim and each procedural context in which they may arise, creating a single miscarriage of justice gateway permitting sentencing error claims to be litigated.

A far simpler and consistent standard should be adopted. I propose an across the board more likely than not standard for defining and remedying sentencing errors. That is the Supreme Court's miscarriage of justice standard, defined in *Schlup* in the context of how a habeas judge reviews a state conviction.[165] However, for sentencing errors, the question is whether a reasonable judge, not factfinder, would more likely than not reach a different sentence. That standard is not necessarily an easy standard to meet. Making all sentencing error claims cognizable—even postappeal—despite otherwise applicable procedural bars under such a standard, would not open the floodgates too far.[166] Courts have noted in the various sentencing contexts in which they have applied it that it is not an everyday case in which it is more likely than not that no reasonable factfinder would reach the same sentence. The Supreme Court overstated this in its *McQuiggin* decision by calling the category of cases that satisfy the *Schlup* standard one that is "severely confined."[167] The Court in *House v. Bell* better described the appropriate analysis as "holistic," and considering "all the evidence," including evidence that was either excluded or unavailable at the time the lower court conducted sentencing.[168]

Consistent adoption of the miscarriage of justice standard avoids tangled questions of (1) whether the error in question implicates an element of the offense, or language drawn from an element; (2) whether the

165. Schlup v. Delo, 513 U.S. 298, 327 (1995) ("To establish the requisite probability, the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in the light of the new evidence.").

166. On when and whether floodgates arguments are themselves supported, see generally Marin K. Levy, *Judging the Flood of Litigation*, 80 U. CHI. L. REV. 1007 (2013).

167. McQuiggin v. Perkins, 133 S. Ct. 1924, 1933 (2013).

168. House v. Bell, 547 U.S. 518, 539 (2006) (citation omitted) (internal quotation marks omitted).

sentence was in excess of the maximum, or altered the minimum, or (3) whether the procedural context is whether to excuse a waiver, an unpreserved sentencing error, a procedural default, or the application of the § 2255 Savings Clause. Whether the Supreme Court will adopt such a clear and consistent standard across each of these areas is another question. On the one hand, in 2013 the Court in *McQuiggin* was reluctant to assume that Congress would mean to displace the availability of miscarriage of justice exceptions to procedural restrictions on judicial review. On the other hand, the Court has tended to keep the plain error doctrine vague, preserving discretion and splits among the lower courts that define a miscarriage of justice and the other factors that could permit granting relief on an unpreserved sentencing error. Lower courts could add some sense to these confused areas of sentencing law by adopting a single consistent standard for when a sentencing error constitutes a miscarriage of justice.

Should the Court return to the issue left open in *Dretke*, an innocence gateway for sentencing should be recognized. An actual innocence of sentence gateway exception should apply in both § 2255 and § 2254 litigation. In § 2255, to be sure, if a claim passes through the gateway, relief may follow, since § 2255 permits outright relief for erroneous sentences. Similarly, in federal appeals, having satisfied the plain error standard, the error may be outright corrected. In contrast, in § 2254 cases, having passed through the gateway, a court must then consider the merits of the underlying claim, most likely a claim that counsel was ineffective for failing to assure that the error was corrected at the time of sentencing. There is one area less amenable to the proposed "fix": a *Schlup*-type standard does not as readily apply to the AEDPA restrictions on second or successive petitions and motions.

While § 2254 litigation raises very different federalism concerns, the concern with upsetting state court judgments, or finality, is much reduced when the remedy is an order for resentencing. Indeed, capital sentencing errors are already cognizable in § 2254 litigation, and complex death penalty phase sentencing is a far more burdensome (although more critically important) hearing to redo than the typical sentencing, which might not require a hearing at all. To be sure, there is a separate comity concern with having federal judges reviewing errors in state court sentencing determinations under state law schemes. However, the quite demanding miscarriage of justice standard would limit gateway relief to cases involving significant errors. In § 2254 cases, moreover, having satisfied a sentence gateway exception, the prisoner would still have to prevail on the underlying constitutional claim.

To the extent that the lower courts' varying approaches toward the cognoscibility of sentencing error claims display a concern for finality, that concern is partially misplaced. Reversing a sentence does not involve the outright vacating of a conviction. As noted, the burden of simply resentencing is far slighter than a retrial. Of course, there is a separate burden caused by the increased collateral litigation that would result with an expansion of the options available to challenge sentencing errors. Again, the demanding miscarriage of justice standard, as well as the need to prevail on an underlying claim in § 2254 cases, can make the litigation far more manageable.

Moreover, there is not the same tension between accuracy and finality in the context of sentencing as in the context of guilt determinations. Although accuracy may have been less traditionally valued during sentencing, so has finality. It is always far more difficult to revisit criminal cases after a conviction. After a conviction, a person "does not come before the Court as one who is 'innocent,' but, on the contrary, as one who has been convicted by due process of law."[169] However, after a judge imposed sentence, there is not the same justification for strict adherence to rules of finality. There is no need to do over a criminal trial; as Sarah Russell has detailed, the burden of a resentencing is slight, and "at a resentencing, the court, unlike a jury at trial, can rely on evidence presented and findings made at the initial sentencing proceeding."[170] The new sentencing hearing may produce far more accurate results than the first, and it is not time consuming to conduct, particularly since some of the sentencing analysis conducted initially may be quite correct and unnecessary to duplicate.

In other respects, finality in sentencing is already given much less weight. Revisions to sentencing guidelines may be made retroactive.[171] Appeals courts may reconsider sentences; finality-based interpretations stand on weaker ground post-*Booker*. Yet, as described, courts are generally quite reluctant to revisit sentencing, and their reasoning typically draws on inapposite standards from habeas corpus that emphasizes finality for reasons of federalism and reluctance to overturn state trial convictions,

169. Herrera v. Collins, 506 U.S. 390, 399–400 (1993).

170. Russell, *supra* note 60, at 83.

171. *See* Dorsey v. United States, 132 S. Ct. 2321, 2335 (2012) (finding that the Fair Sentencing Act is retroactive to cases in which sentencing occurred after enactment of legislation reducing mandatory minimums); U.S. SENTENCING COMM'N, PRELIMINARY CRACK COCAINE RETROACTIVITY DATA REPORT tbl.3 (2011), http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Crack_Cocaine_Amendment/20110600_USSC_Crack_Cocaine_Retroactivity_Data_Report.pdf (finding that over 25,000 reduction requests have been made, in response to retroactive 2007 amendments to guidelines reducing the crack-to-powder ratio, and over 64 percent were granted).

or deference to trial court discretion. Reflexive repetition of the mantra of finality merely calls attention to the relative lack of justification for avoiding the correction of sentencing errors.

Postconviction statutes do not themselves constrain judicial review of sentencing errors. Section 2254 refers broadly to claims challenging custody, and § 2255 permits relief for sentencing errors. The Savings Clause in § 2255(e) also permits resort to habeas corpus should remedies under § 2255 prove inadequate or ineffective. Federal courts have developed an intricate jurisprudence—drawing on postconviction miscarriage of justice exception standards, constitutional retroactivity standards, changes in sentencing standards on appeal, and policy interests in finality—to permit some postappeal sentencing challenges and not others. The Supreme Court, to the extent it has said anything about this problem, noted § 2255 remains available for sentencing errors implicating a miscarriage of justice. Adopting a version of *Schlup*'s more likely than not miscarriage of justice exception would not significantly burden lower courts. It also fits better with the broad directive that appellate courts review sentences for their reasonableness post-*Booker*, and it would avoid some of the confusion and inconsistency in applying miscarriage of justice concepts to the sentencing error context.

B. CONSTITUTIONAL REGULATION OF SENTENCING ERRORS

The Supreme Court has recognized Due Process Clause and Sixth Amendment constitutional criminal procedure claims that can permit, indirectly, a challenge to a sentencing error. Having passed through an innocence of sentence gateway, in a § 2254 case, the prisoner would have to then obtain relief on such a claim. Scholars have tended to focus on Confrontation Clause rights at sentencing, but there are other recognized due process rights that may enhance accuracy at sentencing to some degree.[172] One due process claim remains undeveloped: the Court has highlighted, without identifying any such circumstances, that "extreme circumstances" might require clear and convincing evidence at sentencing as a matter of due process.[173] Second, *Brady v. Maryland* applies at sentencing, and due process also prevents a judge from sentencing a

172. *See* Sara Sun Beale, *Procedural Issues Raised by Guidelines Sentencing: The Constitutional Significance of the "Elements of the Sentence,"* 35 WM. & MARY L. REV. 147, 157 (1993) (discussing general due process claims); John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967, 1972 (2005) (arguing "for a unified theory of Sixth Amendment rights" in capital cases and sentencing).

173. United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam).

defendant based on confidential information not disclosed to the defense.[174] However, *Brady* violations may arise (or come to light) infrequently.

More important, in a series of Sixth Amendment and Due Process Clause decisions the Supreme Court has held that *Strickland* applies to the sentencing phase of capital trials, obliging defense counsel to adequately develop factual evidence supporting a defendant's mitigation case.[175] The Court also assumed in *Glover v. United States* that the *Strickland* ineffective assistance of counsel test applies at sentencing in a noncapital case.[176] Of course, an inmate would have to show counsel was ineffective in a way that prejudiced the sentence. Given the judge's substantial discretion, that may be difficult to do where the judge also has access to information from prosecutors and from the presentence report.[177] However, information uniquely in the control of the defense includes mitigation evidence concerning the defendant's background, information that the defense may have to investigate, and which has been the subject of a series of rulings by the Court in the death penalty context. Although in a nondeath penalty case such mitigation evidence might play a far milder role, a complete failure to present the judge with such evidence might support an ineffective assistance claim. A failure to challenge an outright error in applying sentencing guidelines, or in the calculation of the sentence itself, would raise an ineffective assistance of counsel claim.

Ineffective assistance of counsel claims are not easy to win. Showing prejudice is particularly difficult. While in the trial context there may be a difficult question whether "trial strategies, in retrospect, might be

174. Brady v. Maryland, 373 U.S. 83, 87 (1963). *See also* Gardner v. Florida, 430 U.S. 349, 351 (1977) (finding due process violation when defendant sentenced to death based on nondisclosed information in presentence report); United States v. Nash, 29 F.3d 1195, 1202 (7th Cir. 1994) (finding that the defendant has the burden of demonstrating withholding of information by showing more than "pure speculation"); United States v. Severson, 3 F.3d 1005, 1012–13 (7th Cir. 1993) (remanding the case to reconsider evidence previously disclosed to defendant but without disclosing its significance); United States v. Weintraub, 871 F.2d 1257, 1265 (5th Cir. 1989) (vacating the defendant's sentence and remanding the case for a new sentencing hearing based on material "withheld impeachment evidence").

175. *See* Rompilla v. Beard, 545 U.S. 374, 380–81 (2005) ("This case, like some others recently, looks to norms of adequate investigation in preparing for the sentencing phase of a capital trial, when defense counsel's job is to counter the State's evidence of aggravated culpability with evidence in mitigation."); Wiggins v. Smith, 539 U.S. 510, 523 (2003) (holding that a court must ask "whether the investigation supporting counsel's decision not to introduce mitigating evidence of [the defendant's] background *was itself reasonable*").

176. Glover v. United States, 531 U.S. 198, 202–04 (2001). *See also* Mempa v. Rhay, 389 U.S. 128, 137 (1967) (requiring right to counsel at deferred sentencing).

177. *See, e.g.*, Spaziano v. Singletary, 36 F.3d 1028, 1039 (11th Cir. 1994) ("We have held many times that [r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop." (alteration in original) (quoting Elledge v. Dugger, 823 F.2d 1439, 1443 (11th Cir. 1987) (internal quotation marks omitted)).

criticized," in the sentencing context, as the Court outlined in *Glover*, a judge considers "the sentencing calculation itself," an error that "would have been correctable on appeal."[178] Under that reasoning, federal courts should be more willing to correct sentencing errors, where prejudice is relatively straightforward to assess, than errors affecting a trial. That said, assessing prejudice in the context of sentencing, given substantial discretion in application of sentencing guidelines, often may not be straightforward, and in other rulings the Court has suggested less openness to correcting sentencing errors.[179]

The Supreme Court's plea bargaining rulings in 2012, *Lafler v. Cooper*[180] and *Missouri v. Frye*,[181] requiring counsel to affectively advise a client concerning the sentencing implications of a plea bargain, may impact the degree to which a lawyer informs a client that certain facts should or should not be conceded for purposes of a guilty plea. Whether ineffective assistance claims can provide a vehicle to later correct sentencing errors, and not just failure to communicate during plea bargaining, or failure to advise a client of disastrous choices made during plea bargaining, remains a difficult question. Indeed, courts have struggled with the question when and whether resentencing is the remedy for ineffective assistance of counsel during sentencing.

C. ENHANCING ACCURACY OF FACTFINDING AT SENTENCING

What does sentencing error, a complicated and unsettled concept, have to do with the problem of wrongful convictions? Sentencing traditionally is animated by concerns of (1) just or proportional punishment in light of the seriousness of the offense, and (2) recidivism concerns, including by considering the offender's criminal history, risk of future offending, any cooperation, and deterrence goals. However, sentencing guidelines include

178. *Glover*, 531 U.S. at 204. *See also id.* ("We express no opinion on the ultimate merits of Glover's claim because the question of deficient performance is not before us, but it is clear that prejudice flowed from the asserted error in sentencing.").

179. For an excellent explanation of the problem, with a proposed solution focusing on there being a "(1) reasonable probability of a second plea that is more favorable to the defendant; or (2) reasonable probability of a sentence that is more favorable with effective assistance than it was with ineffective assistance," see Jenny Roberts, *Proving Prejudice, Post*-Padilla, 54 HOW. L.J. 693, 733 (2011). One example in which the Court placed greater weight on finality in the sentencing context was in *Chaidez v. United States*, in which the Court held that its plea bargaining ruling in *Padilla v. Kentucky* was a new rule, despite being an application of the ineffective assistance of counsel standard, and would not be held retroactive. Chaidez v. United States, 133 S. Ct. 1103, 1105–06 (2013) (citing Padilla v. Kentucky, 559 U.S. 356, 369–73 (2010)).

180. Lafler v. Cooper, 132 S. Ct. 1376, 1384 (2012).

181. Missouri v. Frye, 132 S. Ct. 1399, 1405–06 (2012).

a range of specific provisions that may enhance punishment based on factfinding that, like all factfinding, potentially is fallible. As discussed, appellate and postconviction courts could be more open to revisiting claims of sentencing error, even where the error did not involve factual innocence of a predicate conviction. Perhaps executive officials and pardon boards could consider sentencing accuracy when considering pardons. As of 2013, the Department of Justice is adopting guidelines to encourage a more lenient exercise of charging discretion in low level drug cases, in part to avoid application of overly harsh mandatory minimum sentences.[182]

A separate question is whether appeals or postconviction rulings regarding sentencing errors create sufficient incentives to improve accuracy of sentencing outcomes. Much of the literature about causes of wrongful convictions has sensibly focused on producing more reliable evidence at the front end during criminal investigations. Sentencing might indirectly benefit from such improvements. Whether the accuracy of the sentencing process itself can be improved is a question beyond the scope of this Article.[183] I note that several reforms have been proposed by others. For example, J. J. Prescott and Sonja Starr have proposed a range of reforms that might address some of those challenges, including considering use of some evidentiary restrictions during sentencing, bifurcation of sentencing, and adoption of clearer sentencing instructions to the jury.[184] Another improvement could be to apply *Daubert v. Merrell Dow Pharmaceuticals*[185] at sentencing, and more rigorously in criminal cases generally, where lower courts have relied on expert evidence, such as ballistics, without conducting a *Daubert* inquiry into whether that evidence is valid and reliable.[186] More jury factfinding may play a role post-*Apprendi*, and in jurisdictions that use juries to sentence. As Andrew

182. Eric Holder, Att'y Gen., Dep't of Justice, Remarks at the Annual Meeting of the American Bar Association's House of Delegates (Aug. 12, 2013), *available at* http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-130812.html.

183. For more information, see Alan C. Michaels, *Trial Rights at Sentencing*, 81 N.C. L. REV. 1771, 1838–39 (2003) ("Indeed, the due process standard adopted by many courts of appeals seems to be more lenient than the statutory requirement of reliability for hearsay at sentencing imposed by the United States Sentencing Guidelines, which require that the information have 'sufficient indicia of reliability to support its probable accuracy.'"); Herman, *supra* note 90, at 312 (discussing modified real offense sentencing versus a charge-based system of sentencing).

184. J.J. Prescott & Sonja Starr, *Improving Criminal Jury Decision Making After the* Blakely *Revolution*, 2006 U. ILL. L. REV. 301, 355.

185. Daubert v. Merrell Dow Pharm., 509 U.S. 579, 595 (1993).

186. *See* United States v. Hart, 324 F.3d 740, 746–48 (D.C. Cir. 2003) (analyzing the defendant's evidentiary claims). Indeed, in federal death penalty cases, federal courts have concluded that *Daubert* does not apply, where "[n]o Circuit . . . has applied *Daubert* to sentencing." United States v. Fields, 483 F.3d 313, 342 (5th Cir. 2007).

Taslitz has explained, "Because the trial and sentencing phases both involve fact[finding], . . . lessons about how to get these facts right in one phase can illuminate how to do so in the other phase, even if each phase ultimately also involves some important differences."[187] Indeed, there may be some reasons to think jurors are less good at making certain factual findings important to sentencing. For juries in death penalty cases, some states have considered bringing in guilt phase considerations regarding the strength of the evidence. Maryland adopted such a regime by limiting death eligibility to cases with certain types of evidence deemed more accurate.[188] The statutory language was odd in several respects, but the concept was novel even if it is unused, since Maryland has abolished the death penalty.[189]

Generally, improving the sentencing process raises harder questions in connection with guidelines provisions that themselves do not make entirely clear what proof is demanded. For example, in white collar cases, judges rely on evidence concerning the size of the actual or intended "loss" or "gain," when applying one of the most commonly used guidelines provisions.[190] Judges have criticized vague language of that provision, calling the loss guidelines an "utter travesty of justice"[191] and "a black stain on common sense."[192] Stephen F. Smith argues overcriminalization should implicate not just the broad crime definition, but "sentencing problems that make a broad and deep criminal code so troubling in practice."[193] That is a still larger problem beyond the scope of this Article; I just note that we

187. Andrew E. Taslitz, *Sentencing Lessons from the Innocence Movement*, CRIM. JUST., Summer 2006, at 6, 7.

188. MD. CODE ANN., CRIM. LAW § 2-202(a)(3) (LexisNexis 2012).

189. Heightened accuracy has been a feature of other not adopted death penalty reform proposals, such as those of the Massachusetts Governor's Council on Capital Punishment, which proposed that during capital sentencing stage, the jury should be required to find evidence reaching the level of "conclusive scientific evidence" or "scientific certainty." JOSEPH L. HOFFMANN ET AL., GOVERNOR'S COUNCIL ON CAPITAL PUNISHMENT 20 (2004), http://www.lawlib.state.ma.us/docs/5-3-04governorsreportcapitalpunishment.pdf. *See also* Joseph L. Hoffmann, *Protecting the Innocent: The Massachusetts Governor's Council Report*, 95 J. CRIM. L. & CRIMINOLOGY 561, 570 (2005) (discussing possible jury requirements and instructions at sentencing hearings); Carol S. Steiker & Jordan M. Steiker, *Should Abolitionists Support Legislative "Reform" of the Death Penalty?*, 63 OHIO ST. L.J. 417, 423 (2002) (taking a skeptical view toward DNA testing as a potential legislative reform of the death penalty).

190. U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2012) (theft and fraud loss and gain guideline).

191. United States v. Parris, 573 F. Supp. 2d 744, 751 (E.D.N.Y. 2008) (quoting United States v. Adelson, 441 F. Supp. 2d 506, 512 (S.D.N.Y. 2006)) (internal quotation marks omitted).

192. *Id.* at 754.

193. Stephen F. Smith, *Overcoming Overcriminalization*, 102 J. CRIM. L. & CRIMINOLOGY 537, 539 (2012).

should continue to consider ways to improve standards of proof and evidentiary standards at sentencing to minimize errors.

D. EVIDENCE BASED SENTENCING

State sentencing statutes increasingly include provisions geared toward the accuracy of prediction of future violence, in part because, as Rachel Barkow has described, many state sentencing commissions are not focused on costs of incarceration.[194] In contrast, 18 U.S.C. § 3553 notoriously does not include rehabilitative potential as a relevant offender characteristic, noting such facts are not ordinarily relevant,[195] although the Supreme Court in *Gall* emphasized that "self-motivated rehabilitation" was very much relevant to the question of adequate deterrence.[196] A growing body of research supports use of empirically validated risk assessment to inform sentencing.[197] As more states seek to prioritize prison resources, they may increasingly ask judges to rely on empirically validated means to assess a convict's threat of recidivism, and calibrate sentences accordingly. Roger Warren of the National Center for State Courts, in a call for more "evidence-based" sentencing guidelines, explains:

> In light of the fact that so many crimes are committed by a small percentage of repeat offenders, and the fact that we are becoming increasingly knowledgeable about how to reduce recidivism among offenders who pose a moderate-to-high risk of re-offense, risk reduction and recidivism reduction should be principal goals of effective sentencing policy.[198]

Doing so raises questions regarding which risk factors should be considered (John Monahan has argued, for example, that only validated

194. Rachel E. Barkow, *Administering Crime*, 52 UCLA L. REV. 715, 808–09 (2005). For a critique of the focus on costs in sentencing, see generally Michael Tonry, Essay, *Making Peace, Not a Desert: Penal Reform Should Be About Values Not Justice Reinvestment*, 10 CRIMINOLOGY & PUB. POL'Y 637 (2011).

195. 18 U.S.C. § 3553(a) (2012).

196. Gall v. United States, 552 U.S. 38, 59 (2007).

197. *See* JOHN MONAHAN, HENRY J. STEADMAN & ERIC SILVER, RETHINKING RISK ASSESSMENT: THE MACARTHUR STUDY OF MENTAL DISORDER AND VIOLENCE 7–9 (2001) (discussing research strategies regarding violence risk assessment); John Monahan & Henry J. Steadman, *Violence Risk Assessment: A Quarter Century of Research*, *in* THE EVOLUTION OF MENTAL HEALTH LAW 195, 205 (Lynda E. Frost & Richard J. Bonnie eds., 2001) (discussing seven characteristics essential to violence prediction research); Jennifer L. Skeem & John Monahan, *Current Directions in Violence Risk Assessment*, 20 CURRENT DIRECTIONS PSYCHOL. SCI. 38, 38–39 (2011) (discussing the use of violence risk assessment in the legal context).

198. Roger K. Warren, *Evidence-Based Practices and State Sentencing Policy: Ten Policy Initiatives to Reduce Recidivism*, 82 IND. L.J. 1307, 1310 (2007).

risk factors should be used in the context of criminal sentencing[199]). Virginia's new Criminal Sentencing Commission developed a risk-based instrument to divert low risk offenders to nonprison sanctions,[200] and adopted the approach statewide in 2003.[201] As of 2008, Pennsylvania tasked its Commission on Sentencing to implement a sentence risk assessment instrument.[202] States may increasingly adopt such approaches, not just for sentencing, but to provide services to former convicts as they reenter society, and to assist in development of specialized courts and alternatives to punishment.[203]

CONCLUSION

Federal district judge John Gleeson has suggested that lawyers should create a "Mercy Project," modeled on the Innocence Project, to advocate for convicts sentenced to overly harsh sentences under the pre-*Booker* U.S. Sentencing Guidelines.[204] Should accuracy, even if not in the conventional sense of "another person did it," also play a role in such work? Perhaps the focus should properly be on eliminating sentencing disparities, or early release to prisoners whose conduct was not particularly aggravated, or who have been exemplary prisoners and have rehabilitated themselves. Some have criticized the primary focus of the "Innocence Movement" on factual innocence, and not claims of legal innocence or procedural unfairness, much less sentencing error.[205] A fairer criticism might begin with

199. John Monahan, *A Jurisprudence of Risk Assessment: Forecasting Harm Among Prisoners, Predators, and Patients*, 92 VA. L. REV. 391, 428, 435 (2006). *See also* Skeem & Monahan, *supra* note 197, at 40 (noting that relevant data suggest no significant difference between prediction performance of different validated instruments).

200. Richard P. Kern & Meredith Farrar-Owens, *Sentencing Guidelines with Integrated Offender Risk Assessment*, 16 FED. SENT'G REP. 165, 165 (2004).

201. Matthew Kleiman, Brian J. Ostrom & Neal B. Kauder, *Risk Assessment: A New Approach to Sentencing Non-Violent Offenders*, 10 CASELOAD HIGHLIGHTS 1, 12 (2004), *available at* http://cdm16501.contentdm.oclc.org/cdm/ref/collection/criminal/id/90. *See also id.* at 10–12 (discussing the Virginia approach in greater detail); BRIAN J. OSTROM ET AL., OFFENDER RISK ASSESSMENT IN VIRGINIA 1 (2002), http://www.vcsc.virginia.gov/risk_off_rpt.pdf (advocating statewide adoption of the approach).

202. 42 PA. CONS. STAT. § 2154.7(a)–(b) (2013). *See also Risk Assessment Project*, PA. COMM'N SENT'G, http://pcs.la.psu.edu/publications-and-research/research-and-evaluation-reports/risk-assessment (last updated Dec. 7, 2012) (reporting on the commission's progress).

203. *See, e.g.*, OR. REV. STAT. § 182.515(3) (2005) (defining evidence-based programs).

204. Ethan Bronner, *Long Prison Term Is Less So Thanks to Judge's Regrets*, N.Y. TIMES (Mar. 28, 2013), http://www.nytimes.com/2013/03/29/us/long-prison-term-shortened-by-judges-regrets.html?pagewanted=all. New York University's Center on the Administration of Criminal Justice has taken up that invitation. *See* Ctr. on the Admin. of Crim. Law, *The Mercy Project*, NYU LAW, http://www.law.nyu.edu/centers/adminofcriminallaw/mercyproject (last visited Feb. 19, 2014).

205. Emily Hughes, *Innocence Unmodified*, 89 N.C. L. REV. 1083, 1085 (2011).

legislators and judges who have, perhaps understandably, prioritized certain types of innocence claims. For example, it is a staple of modern federal habeas corpus that serious constitutional violations may go unremedied absent additional evidence of innocence allowing a federal judge to surmount otherwise applicable procedural bars.

Given ferment in federal appellate review of sentencing, perhaps it is no surprise that judges are divided in approaches toward claims of sentencing error that were waived in plea agreements, not preserved for appeal, or raised postconviction. Yet in precisely the federal context in which at least some sentencing errors are cognizable, § 2255, federal courts have hewed toward remedying only very limited categories of sentencing errors, such as those that involve vacatur of a predicate crime. Federal courts have reflexively relied on notions of finality that have far less relevance absent federalism and finality concerns that arise when reviewing a state trial conviction. Resentencing is comparatively less burdensome to conduct, and courts should construe miscarriage of justice exceptions to permit a wide range of sentencing errors to be considered on the merits postconviction. Already, federal courts adopt a more flexible view of a miscarriage of justice in the context of appeals waivers, recognizing that the burden of resentencing is not great, and any such concept must be flexible given the nature of discretionary sentencing, and the need to ensure serious errors are corrected. Some courts adopt a more flexible view of miscarriage of justice in the context of assessing plain error on appeal, noting sentencing errors raise different issues than guilt phase errors that might require a retrial.

The miscarriage of justice standard should consistently apply to excuse procedural bars otherwise applicable to all claims of sentencing error. If a reasonable judge would more likely than not reach a different sentence, then the sentencing error claim may be considered, and if the relevant underlying claim is granted, then the case may be remanded for a resentencing, among other remedies. Courts of appeals should apply the demanding but holistic innocence gateway standard that the Supreme Court has instructed them to apply in § 2255 and § 2254 contexts. Whatever one's view of the sufficiency of the process provided at sentencing, that process plays a far more crucial role than ever, driving plea bargains and results after trial. Sentencing errors are inevitable, and although claims of sentencing error can raise complex issues, the practical importance of addressing their merits is simple: convicts should not serve added time based on errors. A claim of innocence of a sentence is not like a claim of innocence of a conviction, but neither does finality play the same role,

given the relative ease of resentencing. The very ambiguity of the meaning of accuracy at sentencing may not be a weakness, but a great strength.