

RUN-ON SENTENCE: REMEDIES FOR ERRONEOUS CAREER OFFENDER ENHANCEMENTS

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ABSTRACT

Guilty pleas have come to resolve all but a fraction of federal criminal cases. So for most federal defendants, sentencing is the criminal justice process's most important phase. That phase begins with the calculation of a recommended sentencing range based on the U.S. Sentencing Guidelines. If a defendant has previously committed two violent crimes or drug offenses, the Guidelines designate him a career offender and drastically enhance his recommended sentencing range. The range is only advisory, but judges must consult and account for the range, and it plays an unquestionably significant role in the defendant's ultimate sentence. What if the Supreme Court later clarifies that the defendant's crimes were not career offender predicates after all? What if the correct inputs would have yielded a shorter sentence?

This Note examines remedies for mistakes like erroneously applying the career offender enhancement. It begins by exploring the federal sentencing system's background and the available remedies for sentencing errors in general, including some remedies grounded in a due process right to be sentenced based on accurate information. It discusses sentencing and appellate-review practices since the Supreme Court made the Guidelines advisory, and observes how courts of appeals have treated those practices—erroneous career offender enhancements are generally curable on direct appeal, but recent appellate decisions have denied relief to prisoners who are subjected to the same errors but whose sentences had already become final. This discussion concludes by scrutinizing those cases and discussing them in the context of concerns for due process and fundamental fairness.

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INTRODUCTION

Guilty pleas resolve all but a fraction of federal criminal cases, so most defendants' prison time depends almost entirely on sentencing.¹ Broadly speaking, that process begins with a presentence report about the defendant and the offense² and with a Sentencing Guidelines range based on the crime's offense level and the defendant's criminal history.³ The range is intended to reflect the Sentencing Commission's expert assessment, based on congressional and judicial policy, of the appropriate punishment for particular defendants and their crimes.

The calculation's most crucial inflection point is whether defendants qualify for a "Criminal History Override"—that is, one of the Guidelines enhancements that increase defendants' recommended sentences more severely than anything else in the Guidelines.⁴ The most common override is the career offender enhancement: defendants with two prior felonies for drugs or violence see their offense level, criminal history, and downstream Guidelines range increase dramatically.⁵

But what if the judge makes a mistake? What if the judge counts a defendant's prior misdemeanor as a felony instead? Or what if the Supreme Court later clarifies that a career offender's predicates should not have counted toward an enhancement in the first place?⁶ In the 2015 term, the Supreme Court introduced even more uncertainty into the system by going beyond excluding certain crimes from the list of valid predicates and ruling that certain language

1. See *Figure C: Guilty Pleas and Trial Rates, 2014 Sourcebook of Federal Sentencing Statistics*, U.S. SENT'G COMM'N, <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2014/FigureC.pdf> [<http://perma.cc/Y2DY-X27F>] (demonstrating that pleas dispose of 97 percent of federal cases).

2. See FED. R. CRIM. P. 32(a)–(b) (providing for presentence investigation and report).

3. See U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM'N 2014) (detailing instructions for calculating and applying the U.S. Sentencing Guidelines).

4. U.S. Sentencing Comm'n, *Criminal History Outline* 9–12 (paper presented at the U.S. Sentencing Commission 2011 Annual National Seminar), http://www.ussc.gov/sites/default/files/pdf/training/annual-national-training-seminar/2011/004a_Criminal_History_Outline.pdf [<http://perma.cc/4HYP-HLQ5>]; see, e.g., U.S. SENTENCING GUIDELINES MANUAL §§ 3A1.4 ("Terrorism"), 4B1.1 ("Career Offender"), 4B1.4 ("Armed Career Criminal"), 4B1.5 ("Repeat and Dangerous Sex Offender Against Minors").

5. See U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (defining career offenders and setting forth the status's enhancements).

6. See, e.g., *Chambers v. United States*, 555 U.S. 122, 122 (2009) (holding that an escape conviction based on a failure to report is not a "violent felony"); *Begay v. United States*, 553 U.S. 137, 141 (2008) (holding that a drunk-driving conviction is not a "violent felony").

describing violent predicates for statutory minimums—language identical to the recidivist enhancements in the Guidelines—is unconstitutionally vague.⁷ Prisoners in such a predicament face the legal morass of sentence review that emerged after Congress remodeled sentencing into a mandatory-guidelines system, which the Supreme Court in turn upended in *United States v. Booker*⁸ by making that system advisory.⁹

This Note examines the remedies for those mistakes, in particular for mistaken career offender enhancements. Part I surveys the legislative–judicial tug-of-war that produced today’s advisory-Guidelines regime, including practices before and after the Sentencing Reform Act of 1984. In particular, this Part points out a collateral remedy for sentencing mistakes that emanates from a due process right to be sentenced based on accurate information.

Part II explores sentencing and appellate-review practices since *Booker*, including advisory sentencing and the “reasonableness” test for appellate review that the advisory system spawned. Part III examines how courts of appeals have implemented this test.

Part IV explores remedies on collateral review. Guilty pleas resolve cases quickly, but cases redefining enhancement predicates may come years after the appeal window has closed. Prisoners challenging career offender mistakes are likely to do so on collateral review. Unfortunately for them, courts of appeals have recently said that collateral review is too late. Applying a scantily developed standard that asks whether leaving the error uncorrected would amount to a “miscarriage of justice,” these courts have said it would not. Many of these decisions cite an interest in finality and the district judge’s discretion should the defendant be resentenced.¹⁰

But history reveals that the bar for collaterally correcting a mistaken sentence is even higher today than in the pre-reform era—an era in which sentencing judges had far more discretion, and even direct appeal offered little or no review. In the decades of change for

7. *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015) (holding that defining a predicate crime of violence—for purposes of a recidivist enhancement that entails a mandatory minimum sentence—as one that “otherwise involves conduct that presents a serious potential risk of physical injury to another” was void for vagueness).

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

9. *Id.* at 245 (holding that the Sixth Amendment rendered the mandatory Sentencing Guidelines unconstitutional and remedying that flaw by making the Guidelines advisory); see *infra* Part I.C.

10. See, e.g., *Hawkins v. United States*, 706 F.3d 820, 824 (7th Cir. 2013).

federal sentencing, courts of appeals—and even advocates for mistaken career offenders—have largely overlooked these due process rights, which historically guaranteed an accurate basis for federal prisoners' sentences. Part IV concludes by discussing the denial of collateral relief for mistaken career offenders in the context of due process in sentencing, particularly in a system in which sentencing is often all that matters.

I. THE MODERN SENTENCING SYSTEM'S EVOLUTION

A. *Sentencing Pre-Reform*

For most of the federal system's history, judges had near-limitless sentencing discretion as long as sentences were within statutory limits.¹¹ As the Supreme Court observed, appellate review began “with the general proposition that once it [was] determined that a sentence [was] within the limitations set forth in the statute under which it [was] imposed, appellate review [was] at an end.”¹²

Nonetheless, review was not entirely unavailable: Defendants could challenge sentences that were cruel and unusual¹³ or those based on constitutionally impermissible factors.¹⁴ Courts of appeals also corrected sentences with underlying evidentiary or procedural flaws.¹⁵ As the Seventh Circuit put it, “convicted defendants ha[d] a

11. *Koon v. United States*, 518 U.S. 81, 96 (1996) (“Before the Guidelines system, a federal criminal sentence within statutory limits was, for all practical purposes, not reviewable on appeal.”).

12. *Dorszynski v. United States*, 418 U.S. 424, 431 (1974).

13. *See Solem v. Helm*, 463 U.S. 277, 303 (1983) (concluding that life imprisonment for passing a bad check amounted to cruel and unusual punishment).

14. *See, e.g., United States v. Maples*, 501 F.2d 985, 987 (4th Cir. 1974) (holding that sex was an impermissible factor to justify a sentencing disparity between two codefendants).

15. *See United States ex rel. Welch v. Lane*, 738 F.2d 863, 863 (7th Cir. 1984) (concluding that a sentence violated due process when it was based on the mistaken belief that the defendant had previously been convicted of *armed* robbery instead of just robbery); *United States v. Ruster*, 712 F.2d 409, 412 (9th Cir. 1983) (“[Relying] on materially false or unreliable information in sentencing [violates] the defendant's due process rights.”); *United States v. Jones*, 640 F.2d 284, 286 (10th Cir. 1981) (“[Supreme Court] cases recognize a due process right to be sentenced only on information which is accurate.”); *United States v. DiRusso*, 548 F.2d 372, 374 (1st Cir. 1976) (“[Federal habeas relief] permits collateral attacks on sentences which were based upon fundamental errors in evaluating the criminal defendant.”); *Hess v. United States*, 496 F.2d 936, 940 (8th Cir. 1974) (“[A] sentence based upon materially false information . . . could not stand.”); *United States v. Espinoza*, 481 F.2d 553, 555 (5th Cir. 1973) (“[A] defendant retains the right not to be sentenced on the basis of invalid premises.”); *United States v. Malcolm*, 432 F.2d 809, 816 (2d Cir. 1970) (“Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts

due process right to be sentenced on the basis of accurate information.”¹⁶

This right provided a remedy of resentencing for sentences based on “materially false or unreliable” information.¹⁷ Courts of appeals generally relied on *Townsend v. Burke*¹⁸ and *United States v. Tucker*,¹⁹ cases in which judges sentenced uncounseled defendants based on misunderstood criminal histories²⁰ or constitutionally invalid prior convictions.²¹ Although both cases involved Sixth Amendment right-to-counsel concerns as well, these courts emphasized *Townsend*’s declaration that a sentence based on “assumptions concerning [a defendant’s] criminal record which were materially untrue, . . . whether caused by carelessness or design, is inconsistent with due process of law.”²² Indeed, the “pronouncement of [a] sentence on a foundation so extensively and materially false . . . renders the proceedings lacking in due process.”²³

B. *The Sentencing-Reform Movement*

Not only were sentences only reviewable on a limited basis,²⁴ but they were also indeterminate.²⁵ Judges were expected to hand down fairly long prison terms and, after prisoners served at least one-third

relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.”).

16. *Lane*, 738 F.2d at 864.

17. *See, e.g., Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) (“[A] sentence will be vacated on appeal if the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence.”).

18. *Townsend v. Burke*, 334 U.S. 736 (1948).

19. *United States v. Tucker*, 404 U.S. 443 (1972).

20. *Townsend*, 334 U.S. at 741. In *Townsend*, the judge sentenced Frank Townsend after referencing crimes for which Townsend was adjudged not guilty. *Id.* at 740.

21. *Tucker*, 404 U.S. at 444–45. In *Tucker*, the judge sentenced Forrest Tucker to twenty-five years in prison based partly on three prior felony convictions. *Id.* Years later, a court concluded that two of the felonies were constitutionally invalid under *Gideon v. Wainwright*, 372 U.S. 335 (1963), because Tucker was unrepresented by counsel when he pleaded guilty to them. *Tucker*, 404 U.S. at 445.

22. *Townsend*, 334 U.S. at 741.

23. *Id.*

24. *Dorszynski v. United States*, 418 U.S. 424, 443 (1974).

25. *See Nancy Gertner, A Short History of American Sentencing: Too Little Law, Too Much Law, or Just Right*, 100 J. CRIM. L. & CRIMINOLOGY 691, 696–97 (2010) (recounting the era of indeterminate sentencing).

of their term, the federal Parole Commission set a release date upon determining the prisoner was successfully rehabilitated.²⁶

By the 1980s, scholars, judges, lawmakers, and the public recognized the considerable flaws in the “‘lawless’ process[] of indeterminate sentencing.”²⁷ The federal system’s critics pointed to sentencing disparities for the same crime across courts, districts, and circuits.²⁸ Because of parole, judges often tried to predict the Parole Commission’s future decisions,²⁹ so sentences often bore little relation to real prison time.³⁰ Critics sought “truth in sentencing,” whereby the public could realistically discern a convicted criminal’s actual jail time.³¹ Federal statutes also failed to consistently reflect the relative seriousness of individual crimes.³²

This discontent produced “a remarkable burst of reform”³³ culminating in the Sentencing Reform Act of 1984 (SRA).³⁴ The SRA “revolutionized the manner in which district courts sentence[d] persons convicted of federal crimes.”³⁵ It created a determinate

26. *See* *Mistretta v. United States*, 488 U.S. 361, 363 (1989) (“Th[e] indeterminate-sentencing system was supplemented by the utilization of parole, by which an offender was returned to society under the ‘guidance and control’ of a parole officer.”); S. REP. NO. 98-225, at 40 (1983) (explaining the federal system of sentencing and parole that preceded the Sentencing Reform Act of 1984); *see also* 45 CONG. REC. 6374 (1910) (statement of Rep. Clayton) (“The defendant was eligible for release on parole after serving one-third of his term.”).

27. KEVIN R. REITZ, *Sentencing: Guidelines*, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE 1429, 1429 (Joshua Dressler et al. eds., 2d ed. 2002); *see also* MARVIN E. FRANKEL, *CRIMINAL SENTENCES: LAW WITHOUT ORDER* 49 (1973) (describing indeterminate sentencing as “the absence of rational ordering, the unbridled power of the sentencers to be arbitrary and discriminatory”).

28. *See* S. REP. NO. 98-225, at 41 (“The absence of a comprehensive Federal sentencing law . . . creates inevitable disparity in the sentences which courts impose on similarly situated defendants. This occurs in sentences handed down by judges in the same district and by judges from different districts and circuits in the Federal system.”).

29. *See id.* at 46 (“Sentencing judges . . . are tempted to sentence a defendant on the basis of when they believe the Parole Commission will release him.”).

30. *See id.* at 48 (“[J]udges need not specify the reasons for their sentencing decisions, and usually they do not indicate the length of time they expect an offender to spend in prison.”).

31. *See, e.g.*, Kenneth R. Feinberg, *Truth and Fairness in Sentencing*, N.Y. TIMES, Apr. 24, 1987, at A31 (advocating that the Sentencing Reform Act would bring transparency and clarity to federal sentencing).

32. S. REP. NO. 98-225, at 39 (“Current Federal law . . . specifies the maximum term of imprisonment and the maximum fine for each Federal offense . . . with little regard for the relative seriousness of the offense as compared to similar offenses.”).

33. SAMUEL WALKER, *TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE, 1950-1990*, at 112-13 (1993).

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

35. *Burns v. United States*, 501 U.S. 129, 132 (1991).

regime based on guidelines written by the U.S. Sentencing Commission.³⁶ Grounded in empirical research, the Guidelines were intended to address the seriousness of individual crimes, account for defendants' criminal history, and reduce unwarranted disparities.³⁷

Congress codified the Act's guiding principles in 18 U.S.C. § 3553.³⁸ By its terms, § 3553 directed courts to impose sentences "sufficient, but not greater than necessary" to further federal sentencing's purposes.³⁹ Those purposes included finding sentences that reflect the particular offense and offender and avoiding unwarranted disparities among similarly situated offenders.⁴⁰ Under the SRA as originally passed, sentencing judges calculated a mandatory-Guidelines range and chose an appropriate sentence within it.⁴¹

36. Sentencing Reform Act §§ 217–218.

37. *See* S. REP. NO. 98-225, at 50–60 (explaining the goals and reasoning behind the Sentencing Guidelines); *see also* 28 U.S.C. § 991(b) (2012) (outlining the purposes of the Sentencing Commission, including establishing federal sentencing policies and practices that "provide certainty and fairness . . . [and] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct").

38. *See* 18 U.S.C. § 3553 (2012) (providing the SRA's guiding principles).

39. *See id.* § 3553(a) ("The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes [of this provision].").

40. The full text of the provision details a list of the many factors courts should weigh when selecting a sentence. The text of 18 U.S.C. § 3553(a) reads,

(a) Factors to be considered in imposing a sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth [below]. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
 - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
 - (B) to afford adequate deterrence to criminal conduct;
 - (C) to protect the public from further crimes of the defendant; and
 - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;
- (3) the kinds of sentences available;
- (4) the kinds of sentence and the sentencing range [in the Sentencing Guidelines] . . .
- (5) any pertinent policy statement . . . issued by the Sentencing Commission . . .
- (6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and
- (7) the need to provide restitution to any victims of the offense.

41. *See id.* § 3553(a)(4) (mandating that reviewing courts consider the sentencing range as established by Sentencing Commission guidelines).

Together with meaningful appellate review, this determinate system sought to deliver consistent application of federal sentencing law and provide for punishment that accounted for specific offenses and individuals without disparately punishing similarly situated offenders.⁴²

C. *The Federal Guidelines and the Sixth Amendment*

The first version of the Guidelines went into effect in November 1987.⁴³ For more than a decade, the federal sentencing system operated as a mandatory regime⁴⁴ wherein the Sentencing Guidelines had “the force and effect of laws.”⁴⁵ Appellate courts had the authority to correct sentences if judges miscalculated the Guidelines or unreasonably departed from them.⁴⁶

In 2000, the Supreme Court’s decision in *Apprendi v. New Jersey*⁴⁷ marked the beginning of a string of Sixth Amendment cases that collided with the Guidelines and ultimately rendered them advisory.⁴⁸ In *Apprendi*, the Court considered a hate-crime enhancement that increased a firearm offense’s maximum sentence from ten to twenty years.⁴⁹ The Court held that any fact, other than a prior conviction, that increases a crime’s statutory maximum must be admitted or proven to a jury beyond a reasonable doubt.⁵⁰ Because a jury did not find the racial-motivation factor that increased the *Apprendi* defendant’s statutory maximum, New Jersey’s hate-crime statute was unconstitutional.⁵¹

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

43. *See id.* § 235 (outlining the procedures for when the first guidelines would take effect); U.S. SENTENCING GUIDELINES MANUAL § 1.1 (U.S. SENTENCING COMM’N 1987) (“[U]nder the present statute the[se guidelines] take effect automatically on November 1, 1987.”); *see also* Andrew von Hirsch, *Federal Sentencing Guidelines: Do They Provide Principled Guidance?*, 27 AM. CRIM. L. REV. 367, 367–69 (1989) (detailing the period leading up to the Sentencing Commission’s first Guidelines Manual).

44. *See Mistretta v. United States*, 488 U.S. 361, 367 (1989) (“[Congress] settl[ed] on a mandatory-guideline system . . .”).

45. *Id.* at 413 (Scalia, J. dissenting).

46. Sentencing Reform Act § 213(a).

47. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

48. *See United States v. Booker*, 543 U.S. 220, 248 (2005) (citing *Apprendi* and discussing subsequent advisories issued by the Department of Justice).

49. *Apprendi*, 530 U.S. at 469.

50. *Id.* at 490.

51. *Id.*

Four years later in *Blakely v. Washington*,⁵² the Court explained that under Washington’s mandatory sentencing regime, the top of the sentencing range was the effective statutory maximum.⁵³ Therefore, judge-found facts that increased a mandatory sentencing range violated the Sixth Amendment.⁵⁴

After *Apprendi* and *Blakely*, invalidating the mandatory federal Guidelines was only a short step away for the Court in *Booker*. On the facts of Freddie Booker’s federal crack-cocaine conviction, his Guidelines range was 210 to 262 months, but the sentencing judge found aggravating factors that increased that range to between 360 months and life imprisonment.⁵⁵ The judge sentenced Booker to 360 months.⁵⁶

Booker produced two majority opinions. Five Justices (“merits majority”) agreed that the mandatory Guidelines violated the Sixth Amendment because, like the state guidelines in *Blakely*, they increased authorized sentences based on judge-found facts.⁵⁷ A separate majority (“remedial majority”) held that the remedy for the Guidelines’ constitutional flaw was to make them advisory.⁵⁸ In an opinion by Justice Breyer, the remedial majority excised the portions of the SRA that made the Guidelines mandatory.⁵⁹ Sentencing judges should still calculate the “effectively advisory” range to consider in light of § 3553(a).⁶⁰ Rather than de novo review, courts of appeals would review for “unreasonableness” based on § 3553(a).⁶¹

52. *Blakely v. Washington*, 542 U.S. 296 (2004).

53. *Id.* at 303. Ralph Blakely pleaded guilty to kidnapping, for which the top end of his mandatory-guidelines range was 53 months. *Id.* at 298. The judge found that Blakely had acted with “deliberate cruelty,” which increased his sentencing range. *Id.* Based on this sentence enhancement, the judge sentenced him to 90 months, beyond the 53-month “maximum” he could have received based on a guilty plea alone. *Id.*

54. *Id.*

55. *United States v. Booker*, 543 U.S. 220, 235 (2005).

56. *Id.* Notably, the sentence was above the 262-month maximum based solely on the jury verdict. *Id.* at 227.

57. *Id.* at 244. Justice Ginsburg was the only common Justice, but did not write an opinion.

58. *Id.* at 245.

59. *Id.* The Court invalidated § 3553(b)(1), which required within-range sentences, and § 3742(e), which provided for de novo review, reasoning that without those provisions, the Guidelines were effectively advisory. *Id.*

60. *Id.*

61. *Id.* at 264.

II. SENTENCING AFTER *BOOKER*: ADVISORY GUIDELINES AND REASONABLENESS REVIEW

A. *Guidelines Calculation and Sentencing*

After a conviction or guilty plea, statutory provisions and the Federal Rules of Criminal Procedure govern a defendant's sentencing. Section 3553(d) provides that the court must give the parties notice, hear them on relevant matters, provide opportunities to address the court, and ultimately explain the sentence.⁶²

Rule 32 outlines the actual process.⁶³ Sentencing begins with an investigation into the circumstances of the crime and into the defendant's background, criminal history, and financial situation.⁶⁴ This investigation produces a presentence report (PSR),⁶⁵ which includes a calculation of the defendant's Guidelines range.⁶⁶ Defendants have an opportunity to object to errors after receiving the PSR and at sentencing.⁶⁷ In arriving at a sentence, judges can consider a wide variety of evidence not normally admissible at trial⁶⁸ and find facts based on a preponderance of the evidence.⁶⁹ The defendant,

62. See 18 U.S.C. 3553(d) (2012).

63. FED. R. CRIM. P. 32.

64. FED. R. CRIM. P. 32(c)–(d); see also 3 CHARLES ALAN WRIGHT, ANDREW D. LEIPOLD, PETER J. HENNING & SARAH N. WELLING, FEDERAL PRACTICE AND PROCEDURE § 522 (2d ed. 1982) (“Presentence reports are intended to provide the sentencing judge with objective and accurate information relating to the defendant.”).

65. FED. R. CRIM. P. 32(c)–(e).

66. FED. R. CRIM. P. 32(d)(1).

67. See FED. R. CRIM. P. 32(f)(1) (“Within 14 days after receiving the presentence report [(PSR)], the parties must state in writing any objections, including objections to material information, sentencing guideline ranges, and policy statements contained in or omitted from the report.”); FED. R. CRIM. P. 32(i) (providing an opportunity at sentencing hearings for defendants to object to their PSR’s material and provide evidence to support the objection).

68. See 18 U.S.C. § 3661 (2012) (“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.”); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (U.S. SENTENCING COMM’N 2014) (“In determining the relevant facts, sentencing judges are not restricted to information that would be admissible at trial.”); see also *United States v. Watts*, 519 U.S. 148, 154 (1997) (holding that a sentencing court can consider acquitted conduct); *Witte v. United States*, 515 U.S. 389, 399–401 (1995) (discussing the variety of relied-upon information).

69. See *Watts*, 519 U.S. at 156 (1997) (“[A]pplication of the preponderance standard at sentencing generally satisfies due process.”); *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986) (endorsing a preponderance-of-the-evidence standard at sentencing); see also U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (“The Commission believes that use of a preponderance of the evidence standard is appropriate to meet due process requirements . . .”).

attorneys, and any victims also have an opportunity to address the court.⁷⁰

After input from the parties, the judge formulates a sentence sufficient, but no greater than necessary, to further the goals enumerated by Congress in § 3553(a). The Supreme Court has explained this begins with consulting a properly calculated Guidelines range.⁷¹ Having consulted the Guidelines range, input from the parties, and any other relevant facts, the court considers the § 3553(a) factors and determines the appropriate sentence.⁷² A judge may choose an out-of-Guidelines sentence, but must ensure the facts justify the degree of variance.⁷³

1. *Calculation of the Guidelines.* The Guidelines calculation occupies a particularly important place in sentencing, and errors often translate into an inaccurate Guidelines range. Understanding the Guidelines' mechanics illuminates potential errors.⁷⁴ Any Guidelines calculation rests on the information in a jury verdict or guilty plea and the information gathered during the presentence investigation. Two factors produce the sentencing range: an offense level for the crime and a criminal history category for the defendant.⁷⁵ Offense levels range from one to forty-three.⁷⁶ Defendants receive criminal history points from zero to thirteen, which place them in a category of I to VI.⁷⁷ A Sentencing Table grid with axes for offense level and criminal history ultimately yields a range of months for the defendant's sentence.⁷⁸

The Guidelines Manual lays out a multistep process for calculating each crime's offense level and each defendant's criminal history category. The court first determines a crime's base offense

70. FED. R. CRIM. P. 32(i)(4).

71. *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[T]he Guidelines should be the starting point and the initial benchmark.”).

72. *Id.* at 49–50.

73. *Id.* at 50.

74. For a helpful roadmap of the Guidelines calculation, see U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 20–26 (1991).

75. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A (U.S. SENTENCING COMM'N 2014).

76. *Id.*

77. *Id.*

78. *See id.* (providing the parameters for such a Table).

level by referring to Chapter Two.⁷⁹ Chapter Two groups offenses by type and assigns base offense levels depending on the offense's seriousness.⁸⁰ The court also applies offense characteristics, which tailor the offense level to the seriousness of the crime.⁸¹ For example, the base level for obstruction-of-justice crimes is fourteen,⁸² which increases to twenty-two if the obstruction involved "causing or threatening to cause physical injury to a person, or property damage."⁸³

The court then applies adjustments in Chapter Three, which increase or decrease the offense level depending on the crime's circumstances.⁸⁴ These adjustments include victim-related factors,⁸⁵ the defendant's role in the offense,⁸⁶ and increases for certain circumstances relating to obstructing justice.⁸⁷

The Manual outlines a process for calculating the offense level for defendants with multiple counts.⁸⁸ This seeks to accurately account

79. See generally *id.* ch. 2.

80. *Id.* § 1B1.1(a)–(b); see also U.S. SENTENCING COMM'N, *supra* note 74, at 21 ("The starting point for sentencing an individual defendant under the guidelines system is the determination of the base offense level."). Each offense type in Chapter Two lists the statutory provisions to which it applies. For example, section 2K1.1 is titled "Failure to Report Theft of Explosive Materials; Improper Storage of Explosive Materials" and groups together the statutory offenses under 18 U.S.C. § 842(j) (violating explosives-storage regulations), § 842(k) (knowingly failing to report the theft or loss of explosives from one's stock), and § 844(b) (the penalty provision for the two preceding offenses). U.S. SENTENCING GUIDELINES MANUAL § 2K1.1. The Sentencing Manual also includes in an appendix an index of each statutory offense and its corresponding Chapter Two offense type. *Id.* app. A.

81. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(a)(2).

82. *Id.* § 2J1.2(a).

83. *Id.* § 2J1.2(b)(1)(B).

84. See *id.* ch. 3 (providing a list of adjustments based on aggravating and mitigating factors).

85. *Id.* ch. 3, pt. A ("Victim-Related Adjustments"); see, e.g., *id.* § 3A1.1 (providing for an increased offense level if the defendant had a hate-crime motivation or targeted a vulnerable victim).

86. *Id.* ch. 3, pt. B ("Role in the Offense"); see, e.g., *id.* § 3B1.1(b)(1) (increasing the offense level by four levels if the defendant was an organizer or leader of criminal activity that involved five or more people); *id.* § 3B1.2(a) (decreasing the offense level by four levels for minimal participants).

87. *Id.* ch. 3, pt. C ("Obstruction and Related Adjustments"); see, e.g., *id.* § 3C1.2 (increasing the offense level by two levels if the defendant recklessly endangered others during flight).

88. *Id.* ch. 3, pt. D ("Multiple Counts").

for the harm caused without disproportionately stacking punishment⁸⁹ or adding up punishments when they do not reflect multiple harms.⁹⁰ The court may decrease a defendant's offense level by two levels if he "clearly demonstrates acceptance of responsibility for his offense."⁹¹

Next is criminal history. The Guidelines determine criminal history by adding up points for any prior offenses, the total of which places the defendant in a particular category. Several enhancements punish defendants who exhibit criminal patterns by increasing their criminal history category and offense level.⁹² Called "Criminal History Overrides" in some Commission materials,⁹³ these are the enhancement sections "Career Offender,"⁹⁴ "Armed Career Criminal,"⁹⁵ and "Repeat and Dangerous Sex Offender Against Minors."⁹⁶

The career offender enhancement is the most common.⁹⁷ It applies to felony defendants with at least two convictions for a crime of violence⁹⁸ or a controlled-substance offense.⁹⁹ If applied, a

89. See *id.* ch. 1, pt. A, introductory cmt. ("A defendant who assaults others during a fight, for example, may warrant more punishment if he injures ten people than if he injures one, but his conduct does not necessarily warrant ten times the punishment.").

90. See U.S. SENTENCING COMM'N, *supra* note 74, at 23 ("Some offenses . . . are so closely related that they result in essentially the same harm. . . . [T]he guidelines group the offenses and apply the offense level for the most serious offense without adding levels for the closely-related offenses.").

91. U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 ("Acceptance of Responsibility").

92. See, e.g., *id.* §§ 4B1.1 ("Career Offender"), 4B1.4 ("Armed Career Criminal"), 4B1.5 ("Repeat and Dangerous Sex Offender Against Minors").

93. U.S. Sentencing Comm'n, *supra* note 4, at 9.

94. *Id.* at 10.

95. *Id.*

96. *Id.*

97. Table 20: *Offenders Receiving Chapter Four Criminal History Points, 2013 Sourcebook of Federal Sentencing Statistics*, U.S. SENT'G COMM'N (2013), <http://www.ussc.gov/sites/default/files/pdf/research-and-publications/annual-reports-and-sourcebooks/2013/Table20.pdf> [<http://perma.cc/P8T9-E4Q5>].

98. The Guidelines define "crime of violence" as any federal or state offense punishable by more than one year in prison that "(1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S. SENTENCING GUIDELINES MANUAL § 4B1.2(a) (U.S. SENTENCING COMM'N 2014).

99. *Id.* § 4B1.1(a). The Guidelines define "controlled substance offense" as any federal or state offense punishable by more than one year in prison that "prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." *Id.* § 4B1.2(b).

defendant's criminal history increases to the highest category and his offense level rises proportionally to the crime's statutory maximum.¹⁰⁰ For the average career offender, the recommended range more than doubles.¹⁰¹ Other than acceptance of responsibility, it also renders Chapter Three adjustments inapplicable.¹⁰²

After progressing through the calculation of offense level and criminal history, the court matches the two on the Sentencing Table in Chapter Five to find the recommended range.¹⁰³

Booker afforded courts the discretion to go outside this range, but sentences have not changed much.¹⁰⁴ The Guidelines remain the "essential starting point," with slightly more below-range sentences in general,¹⁰⁵ particularly for fraud and child pornography.¹⁰⁶ Sentences for drugs, firearms, and immigration have remained stable.¹⁰⁷ The law governing sentences' review on appeal, however, has developed dynamically.

100. See *id.* § 4B1.1(b) ("A career offender's criminal history category in every case under this subsection shall be Category VI."); *id.* ch. 5, pt. A (showing Category VI as the highest criminal history category). For example, if the instant offense has a statutory maximum of life, the defendant's offense level would increase to thirty-seven. *Id.* § 4B1.1(b). Absent any other adjustments, his Guidelines range would be 360 months to life imprisonment. *Id.* ch. 5, pt. A.

101. For the average career offender who faces an increase in the final offense level and criminal history category, the enhancement increases the offense level from twenty-four to thirty-one and the criminal history from IV to VI. U.S. SENTENCING COMM'N, QUICK FACTS: CAREER OFFENDERS 1 (2014). This increases the range's low end from 77 months to 188 (an increase of 144 percent equal to an additional 9.25 years) and the high end from 96 months up to 235 (an increase of 145 percent equal to an additional 11.58 years). U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

102. See *United States v. Johnson*, 155 F.3d 682, 684 (3d Cir. 1998) ("Other adjustments are thus effectively overwritten by the magnitude of the career offender upward adjustment."); *United States v. Beltran*, 122 F.3d 1156, 1160 (8th Cir. 1997) (holding that reductions for a mitigating role did not apply because "[t]he career offender guideline trumps all other offense level adjustments . . . except[] . . . acceptance of responsibility"); U.S. SENTENCING COMM'N, CRIMINAL HISTORY PRIMER 8 (2013) ("A career offender may receive a reduction for acceptance of responsibility . . . [but] other Chapter 3 adjustments may not apply.").

103. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A.

104. For an in-depth examination of *Booker*'s effect on federal sentencing, see U.S. SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 28–50, 59 (2012). See also Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 30–41 (2010) (reviewing interjudge disparity in sentencing pre-*Booker*, post-*Booker*, and during the *Kimbrough/Gall* period).

105. U.S. SENTENCING COMM'N, *supra* note 104, at 60.

106. *Id.* at 67–68.

107. *Id.* at 62–66.

B. Appellate Review Post-Booker: Reasonableness

Appellate review has evolved as courts try to implement *Booker*'s "reasonableness" review. In *Rita v. United States*,¹⁰⁸ the Supreme Court held that appellate courts may presume a within-Guidelines sentence is reasonable.¹⁰⁹ The Guidelines "seek to embody the § 3553(a) considerations, both in principle and in practice,"¹¹⁰ and "reflect a rough approximation of sentences that might achieve § 3553(a)'s objectives."¹¹¹

The Court explained "reasonableness" in greater detail in *Gall v. United States*¹¹² and *Kimbrough v. United States*.¹¹³ Despite a range of 30 to 37 months, Brian Gall received probation because the judge found his intervening behavior made prison unnecessary to meet § 3553(a)'s goals.¹¹⁴ The Eighth Circuit held that such large variances required "extraordinary circumstances," and reversed.¹¹⁵

The Supreme Court rejected this approach,¹¹⁶ emphasizing that all sentences should be reviewed for reasonableness "whether inside or outside the Guidelines range."¹¹⁷ The test involves a two-step inquiry into procedural and substantive reasonableness.¹¹⁸ Procedural review looks for "significant procedural error[s]" like miscalculating or failing to calculate the Guidelines, ignoring the § 3553(a) factors, relying on "clearly erroneous facts," or inadequately explaining the

108. *Rita v. United States*, 551 U.S. 338 (2007).

109. *Id.* at 347.

110. *Id.* at 350.

111. *Id.*

112. *Gall v. United States*, 552 U.S. 38 (2007).

113. *Kimbrough v. United States*, 552 U.S. 85 (2007).

114. *Gall*, 552 U.S. at 43–45. Brian Gall pleaded guilty to his involvement in an Iowa ecstasy-trafficking conspiracy. *Id.* at 41–42. Gall eventually stopped using drugs, withdrew from the conspiracy, graduated from college, moved to Arizona, and, to all observers, became a rehabilitated, productive member of society. *Id.* Gall was eventually indicted, pleaded guilty, and cooperated with authorities—although he did not have information to offer investigators to qualify for a substantial-assistance motion. *Id.* at 42–43.

115. *Id.* at 45.

116. The Court noted that proportional or mathematical tests of outside-range sentences came too close to making the Guidelines mandatory. *Id.* at 47.

117. *Id.* at 49.

118. *Id.* at 51.

sentence.¹¹⁹ If a sentence is procedurally sound, appellate courts assess substantive reasonableness, looking for “abuse of discretion.”¹²⁰

In *Kimbrough*, the judge sentenced a crack-cocaine defendant below his Guidelines range,¹²¹ citing the “disproportionate and unjust effect” of differing crack- and powder-cocaine Guidelines.¹²² The Fourth Circuit held that outside-range sentences based on policy disagreements were per se unreasonable.¹²³ The Supreme Court reversed, holding that a judge may determine that the disparity yields a greater sentence than necessary to achieve § 3553(a)’s goals.¹²⁴

III. CHALLENGING ERRORS ON DIRECT APPEAL

Defendants challenge sentencing errors within the framework of *Gall*’s reasonableness test. This Note concerns mistakes about the facts, law, or process that underpin a sentence rather than attacking the reasonableness of sentences based on accurate factual and legal premises. Correcting these underlying mistakes falls under *Gall*’s procedural prong. Grave procedural errors can render the sentence substantively unreasonable,¹²⁵ but substantive reasonableness turns on weighing the facts and law rather than the *reliability* of the facts, law, and process.¹²⁶

Procedural errors fall loosely into factual and legal errors. Factual errors include findings relied on for the Guidelines range or

119. *Id.*

120. *Id.* This deferential inquiry accounts for the totality of the circumstances, considering the extent of any deviation from the Guidelines range but giving due deference to the district court’s decision to deviate. *Id.*

121. At sentencing, the defendant’s Guidelines range was 228 to 270 months, but the judge sentenced him to 180 months in prison and 60 months of probation. *Kimrough v. United States*, 552 U.S. 85, 93 (2007).

122. *Id.* Under the Guidelines in place during *Kimrough*’s sentencing, a drug dealer selling crack cocaine faced the same sentence as one selling 100 times more powder cocaine. *Id.* at 94.

123. *Id.* at 93.

124. *Id.* at 110.

125. *See, e.g., United States v. Lychock*, 578 F.3d 214, 218 (3d Cir. 2009) (“[Procedural flaws] resulted in a substantively unreasonable sentence.”); *United States v. Cutler*, 520 F.3d 136, 176 (2d Cir. 2008) (determining a sentence substantively unreasonable “[g]iven the procedural errors, the clear factual errors, and the misinterpretations of the § 3553(a) factors”).

126. *See United States v. Cavera*, 550 F.3d 180, 191 (2d Cir. 2008) (“[Substantive reasonableness is] whether a factor relied on by a sentencing court can bear the weight assigned to it.”).

§ 3355(a) evaluation, such as factually inaccurate drug quantities.¹²⁷ Legal errors include incorrect Guidelines interpretations and procedural flaws, such as inaccurately treating a conviction as a crime of violence¹²⁸ or wrongly counting victims for the fraud guideline.¹²⁹ These also include oversights in the sentencing process, like a judge misunderstanding her authority,¹³⁰ relying on improper premises,¹³¹ or providing insufficient reasons for a departure from the recommended range.¹³²

Other than at sentencing, direct appeal is a defendant's main avenue for alleging errors. *Booker* excised the portion of § 3742 that based appellate review on the Guidelines' mandatory nature but left the remaining provisions intact, including those providing for appeal of sentences.¹³³ And in addition to the reasonableness standard (refined in *Gall*), unpreserved objections face plain-error analysis and preserved objections are still analyzed for harmless error.¹³⁴

A. Preserved Error—Harmless-Error Analysis

When appellate courts review preserved objections, a combination of standards apply depending on the nature of the error. Courts review factual determinations for clear error and legal

127. See, e.g., *United States v. Galloway*, 509 F.3d 1246, 1252 (10th Cir. 2007) (remanding where the record showed no basis for the district court's loss estimate for sentencing enhancement).

128. See, e.g., *United States v. Diaz-Sanchez*, 307 F. App'x 797, 798 (5th Cir. 2009) (remanding where nothing in the record supported the determination that the prior offenses were violent crimes).

129. See, e.g., *United States v. Armstead*, 552 F.3d 769, 774 (9th Cir. 2008) (remanding where the district court misinterpreted which individuals counted as victims for enhancement within the fraud guideline).

130. See, e.g., *United States v. Vandewege*, 561 F.3d 608, 610 (6th Cir. 2009) (finding reversible error where the sentencing judge did not recognize that he had the authority to depart from the Guidelines based on disagreement with the ratio between crack and powder cocaine).

131. See, e.g., *United States v. Cossey*, 632 F.3d 82, 88 (2d Cir. 2011) (finding plain error necessitating remand when the judge sentenced a sex offender, in part, based on an improper apparent belief that the sex offender was genetically predisposed to commit sex crimes).

132. See, e.g., *United States v. Bradley*, 675 F.3d 1021, 1026 (7th Cir. 2012) (remanding where the sentencing judge failed to justify a sentence 169 months above the Guidelines range).

133. *Id.* at 260–61; see also 18 U.S.C. § 3742(a) (2012) (providing for the appeal of sentences “imposed in violation of the law,” “imposed as a result of an incorrect application of the sentencing guidelines,” or “imposed for an offense for which there is no sentencing guideline and is plainly unreasonable”).

134. *United States v. Booker*, 543 U.S. 220, 268 (2005).

conclusions *de novo*.¹³⁵ Sentencing courts find facts by a preponderance of the evidence.¹³⁶ Because relying on “clearly erroneous facts” is a significant procedural error,¹³⁷ courts of appeals review factual findings for clear error.¹³⁸ Legal conclusions, including Guidelines interpretations¹³⁹ and procedures,¹⁴⁰ are reviewed *de novo*.

Harmless errors “do[] not affect substantial rights.”¹⁴¹ An error is harmless unless the sentence’s proponent shows that the sentencing court would impose the same sentence without the error.¹⁴² Courts

135. *United States v. McManus*, 734 F.3d 315, 317 (4th Cir. 2013) (“We review the district court’s factual findings for clear error and its legal conclusions *de novo*.”); *United States v. Tavares*, 705 F.3d 4, 24 (1st Cir. 2013) (“We review the district court’s interpretation and application of the sentencing guidelines *de novo* and factual findings for clear error.”); *United States v. Kieffer*, 681 F.3d 1143, 1164 (10th Cir. 2012) (“Within th[e] milieu [of reasonableness review], we review factual findings for clear error and legal determinations *de novo*.”); *United States v. Bates*, 584 F.3d 1105, 1108 (8th Cir. 2009) (“We review . . . interpretation . . . of the guidelines *de novo* and . . . factual findings for clear error.”); *United States v. Lemus-Gonzalez*, 563 F.3d 88, 92 (5th Cir. 2009) (“[W]e review the district court’s factual findings for clear error and its interpretation of the Sentencing Guidelines *de novo*.”); *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008) (“We review the district court’s interpretation of the Sentencing Guidelines *de novo*, the district court’s application of the Guidelines to the facts for abuse of discretion, and the district court’s factual findings for clear error.”).

136. *United States v. Watts*, 519 U.S. 148, 156 (1997) (“[A]pplication of the preponderance standard at sentencing generally satisfies due process.”); *see also* U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (U.S. SENTENCING COMM’N 2014) (“[P]reponderance of the evidence . . . meet[s] due process requirements.”).

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

138. *See, e.g., United States v. Grigsby*, 692 F.3d 778, 787 (7th Cir. 2012) (“Sentencing findings are reviewed for clear error.”); *United States v. Brockenborough*, 575 F.3d 726, 739 (D.C. Cir. 2009) (applying the clear-error standard to sentencing findings); *United States v. Armstead*, 552 F.3d 769, 776 (9th Cir. 2008) (same).

139. *See, e.g., McManus*, 734 F.3d at 318 (“Interpretation of the Sentencing Guidelines is a question of law that we review *de novo*.”).

140. *See, e.g., United States v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009) (“We review the procedures followed by the district court *de novo*.”).

141. FED. R. CRIM. P. 52(a); *see also United States v. Grissom*, 525 F.3d 691, 696 (9th Cir. 2008) (explaining that courts of appeals “will remand non-harmless procedural errors”); *United States v. Weems*, 517 F.3d 1027, 1030 (8th Cir. 2008) (“A nonharmless error in the calculation of the applicable guidelines range requires a reviewing court to vacate the sentence and remand the case for resentencing.”); *United States v. Langford*, 516 F.3d 205, 215 (3d Cir. 2008) (explaining that “use of an erroneous Guidelines range will typically require reversal . . . [but] under certain, limited circumstances, miscalculation of the Guidelines may be harmless”).

142. *See Williams v. United States*, 503 U.S. 193, 203 (1992) (explaining that remand is unnecessary if “the district court would have imposed the same sentence absent the erroneous factor”); *United States v. McGhee*, 651 F.3d 153, 158 (1st Cir. 2011) (“[A] remand is appropriate unless the reviewing court concludes . . . that the error did not affect the district court’s selection of the sentence imposed.”); *United States v. Cruz-Gramajo*, 570 F.3d 1162, 1167 (9th Cir. 2009) (“Remand is not necessary if . . . the error did not affect the district court’s selection of the sentence imposed.”); *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009) (“A

have found errors harmless if they would not have impacted a defendant's Guidelines range.¹⁴³ Some circuits have treated as harmless a judge's acknowledgment of the potential error and explanation she would impose the same sentence regardless.¹⁴⁴

In practice, given clear-error review's deferential nature, challenges to factual findings are difficult.¹⁴⁵ But defendants have

procedural error during sentencing is harmless if the error did not affect the district court's selection of the sentence imposed . . . [and] we must remand unless the proponent of the sentence establishes that the error did not affect the district court's selection of the sentence imposed."); *United States v. Smith*, 562 F.3d 866, 879 (7th Cir. 2009) ("An error is harmless if . . . [it] did not affect the district court's selection of the sentence imposed. An error that changed the court's basic framework for determining the sentence cannot be called harmless." (citation omitted)); *United States v. Cerno*, 529 F.3d 926, 939 (10th Cir. 2008) ("Harmlessness must be proven by a preponderance of the evidence, and the burden of making this showing falls on the beneficiary of the error."); *United States v. Anderson*, 526 F.3d 319, 330 (6th Cir. 2008) ("[T]he party who wishes to defend the sentence [must] persuade the court of appeals that the district court would have imposed the same sentence absent the erroneous factor."); *United States v. Sanchez*, 517 F.3d 651, 665 (2d Cir. 2008) ("We would not remand, . . . if the record indicated clearly that the district court would have imposed the same sentence had it had an accurate understanding of its authority."); *Langford*, 516 F.3d at 215 ("For the error to be harmless, it must be clear that the error did not affect the district court's selection of the sentence imposed.").

143. See, e.g., *United States v. Larios*, 593 F.3d 82, 91 (1st Cir. 2010) (holding that reliance on inadmissible evidence at sentencing for purposes of denying the defendant's safety-valve motion was harmless because ample evidence supported denial); see also *United States v. Easley*, 306 F. App'x 993, 997 (6th Cir. 2009) (declining to rule if the district court erred on drug quantity because the amount based on reliable evidence exceeded the threshold for the highest tier of the drug table).

144. See *United States v. Barner*, 572 F.3d 1239, 1248 (11th Cir. 2009) ("Where a district judge clearly states that he would impose the same sentence, even if he erred in calculating the guidelines, then any error in the calculation is harmless."); *United States v. O'Georgia*, 569 F.3d 281, 296 (6th Cir. 2009) ("Where a Guidelines departure provision has been erroneously applied, the resulting sentence may still be procedurally reasonable if the district court has adequately explained it by reference to the 18 U.S.C. § 3553(a) factors."); *United States v. Abbas*, 560 F.3d 660, 667 (7th Cir. 2009) (finding a judge's erroneous application of the extortion-under-color-of-official-right enhancement harmless because she would have so enhanced the sentence based on § 3553(a) factors without the enhancement); *United States v. Anderson*, 517 F.3d 953, 965–66 (7th Cir. 2008) (upholding a sentence where the trial judge explained his belief that the sentence was appropriate even if he had gotten the calculations wrong). But see *United States v. Wright*, 642 F.3d 148, 154 (3d Cir. 2011) (finding nonharmless error and remanding for resentencing a case in which the district court erroneously applied an eight-level intended loss enhancement for a counterfeit-money offense, even though the sentencing court stated it would have selected the same sentence without the enhancement); *United States v. Bah*, 439 F.3d 423, 432 (8th Cir. 2006) ("[T]he district court cannot preemptively announce an alternative sentence under the § 3553(a) factors without first having determined the correct advisory guidelines range.").

145. See *United States v. Statham*, 581 F.3d 548, 550–51 (7th Cir. 2009) (affirming the district court's sentencing enhancements while noting that, although the defendant's arguments might

obtained relief based on factual errors in instances where their drug quantity was based on unreliable evidence,¹⁴⁶ when the sentencing judge relied on an inaccurate record of the defendant's previous deportations,¹⁴⁷ and when the evidence did not sufficiently support¹⁴⁸ or plainly contradicted¹⁴⁹ the sentencing court's factual findings.

For legal errors, mistaken criminal history¹⁵⁰ and offense-level¹⁵¹ enhancements have consistently amounted to reversible error, as

be persuasive before a sentencing judge, the defendant could not meet the burden of showing clear error).

146. *See* *United States v. Claybrooks*, 729 F.3d 699, 707 (7th Cir. 2013) (remanding a drug defendant's case where the district court explicitly pointed out the unreliability of the drug quantity evidence in the PSR, but then relied on a Guidelines range based on that evidence); *United States v. David*, 681 F.3d 45, 49 (2d Cir. 2012) (remanding a drug defendant's sentence where, among other things, the sentencing court did not have a lab report suggesting that the pills the defendant possessed were likely diluted with substances that would have decreased the quantity of drugs he possessed).

147. *See* *United States v. Cruz-Pallares*, 396 F. App'x 170, 172 (5th Cir. 2010) (remanding for resentencing a case in which the district court relied on clearly erroneous conclusions that the illegal-reentry defendant had been previously deported).

148. *See* *United States v. Skys*, 637 F.3d 146, 155–56 (2d Cir. 2011) (remanding for resentencing a case in which the evidence did not support the district court's finding that the defendant defrauded ten or more victims, which carried with it a two-point offense-level increase); *United States v. Delgado-Martinez*, 564 F.3d 750, 753 (5th Cir. 2009) (finding nonharmless error and remanding for resentencing a case in which the sentencing court applied an erroneous two-level enhancement that increased the defendant's range from a span of 24 to 30 months to a span of 30 to 57 months, even though the ultimate sentence fell within the properly calculated range).

149. *See* *United States v. Smalley*, 517 F.3d 208, 212 (3d Cir. 2008) (finding nonharmless error and remanding for resentencing a case in which the district court applied a four-level enhancement although evidence only supported a three-level enhancement); *see also* *United States v. Ceballos-Amaya*, 470 F. App'x 254, 265 (5th Cir. 2012) (finding nonharmless error where the district court based an obstruction-of-justice enhancement on the government's misstatement at sentencing that the defendant's wife had provided a false alibi for him at trial, although the defendant's wife actually offered no such testimony).

150. *See* *United States v. McManus*, 734 F.3d 315, 323 (4th Cir. 2013) (remanding for resentencing a case in which the district court erroneously applied a five-level pornography-distribution-offense enhancement, producing a Guidelines range of 135 to 168 months instead of the correct range of 97 to 120 months, even though the defendant's 72-month sentence fell "well below the bottom of th[e] corrected range"); *United States v. Viezcas-Soto*, 562 F.3d 903, 908 (8th Cir. 2009) (remanding for resentencing a case in which the district court erred in its determination of felony status for one of the defendant's prior convictions, and applied a sixteen-level criminal history enhancement because the defendant illegally reentered the United States having previously committed a purported felony crime of violence); *United States v. Calderon Espinosa*, 569 F.3d 1005, 1009 (9th Cir. 2009) (finding reversible error where the sentencing court erroneously added an additional criminal history point for the defendant's state loitering offense); *United States v. Langford*, 516 F.3d 205, 219 (3d Cir. 2008) (finding reversible error and remanding for resentencing a case in which the district court erroneously added an extra point to the defendant's criminal history score).

have erroneous career offender enhancements.¹⁵² Legal errors do not necessarily require resentencing; a number of courts have found them harmless—that is, where the record indicates the judge would have selected the same sentence without the error.¹⁵³ But procedural errors that potentially subject defendants to higher sentences are not harmless.¹⁵⁴

B. Unpreserved Error—Plain-Error Analysis

If a defendant does not challenge an error at sentencing, correcting that error becomes more difficult on appeal. These claims,

151. See *United States v. Barner*, 572 F.3d 1239, 1253 (11th Cir. 2009) (finding reversible error and remanding for resentencing a case in which the district court improperly denied the defendant a three-point offense-level reduction for acceptance of responsibility).

152. See *United States v. Robinson*, 639 F.3d 489, 497–98 (8th Cir. 2011) (finding reversible error and remanding for resentencing a case in which the defendant’s prior felony conviction did not qualify as a “controlled substance” conviction for purposes of the career offender enhancement); *United States v. Wynn*, 579 F.3d 567, 577 (6th Cir. 2009) (finding reversible error and remanding for resentencing a case in which the defendant’s generic state sexual-battery conviction was not categorically a crime of violence within the meaning of the career offender enhancement); *United States v. Miles*, 340 F. App’x 982, 985 (5th Cir. 2009) (finding reversible error and remanding for resentencing a case in which the district court inaccurately treated the defendant’s prior escape conviction as a crime of violence for the purposes of the career offender enhancement).

153. See *United States v. Kapordelis*, 569 F.3d 1291, 1314 (11th Cir. 2009) (finding that the sentencing court’s erroneous application of the child-pornography Guidelines for 2003, instead of 2002, was a harmless error because the record indicated that the court would have imposed the same 420-month sentence under the 2002 Guidelines); *United States v. Bonilla*, 524 F.3d 647, 657 (5th Cir. 2008) (finding that the district court erred in applying a sixteen-level criminal history enhancement, but stating that resentencing was not warranted because the judge stated that he would have imposed the same sentence without the enhancement).

154. See *United States v. Bradley*, 628 F.3d 394, 400–01 (7th Cir. 2010) (per curiam) (finding reversible error and remanding for resentencing a case in which the sentencing judge based an above-Guidelines sentence for a sex offense with a minor on speculation about the defendant’s past crimes and an improper prediction about a propensity for recidivism); *United States v. Gibbs*, 578 F.3d 694, 695 (7th Cir. 2009) (finding reversible error and remanding for sentencing a case in which the sentencing court failed to calculate a Guidelines range for supervised release); *United States v. Dhafir*, 577 F.3d 411, 412 (2d Cir. 2009) (finding reversible error and remanding for resentencing a case in which the sentencing court erroneously thought that it could not calculate the Guidelines ranges under multiple provisions when an ambiguous set of facts made it unclear which Guidelines provision applied); *United States v. Cerno*, 529 F.3d 926, 939 (10th Cir. 2008) (finding nonharmless error where the sentencing court failed to consider the relative force used by a sexual-assault defendant); *United States v. Peña-Hermosillo*, 522 F.3d 1108, 1109 (10th Cir. 2008) (finding reversible error where the sentencing court failed to respond to a defendant’s objection to two disputed enhancements); *United States v. Peters*, 512 F.3d 787, 788–89 (6th Cir. 2008) (finding nonharmless error where the sentencing court failed to rule on the defendant’s assertion that he should be given a particular sentence that credited him for time served).

like unpreserved objections at trial, face plain-error analysis.¹⁵⁵ To preserve a claim of error, a party must object when the court rules or issues an order and provide the reasons for her objection.¹⁵⁶ Parties generally forfeit unpreserved claims of error on appeal.¹⁵⁷ Rule 52(b) provides a limited exception: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”¹⁵⁸

In *United States v. Olano*,¹⁵⁹ the Supreme Court laid out the now well-known four-pronged test for plain-error review¹⁶⁰: (1) there must have been an error that the objecting party did not affirmatively waive,¹⁶¹ (2) it must be “plain” at the time of appeal,¹⁶² and (3) it must affect substantial rights, by (4) prejudicing the proceedings’ outcome.¹⁶³ If the error meets these requirements, correcting it remains up to the judge’s discretion, exercised only when the error “seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.”¹⁶⁴

With regard to sentencing errors, unpreserved objections to factual and legal errors receive the same standard of review as preserved objections (that is, clear error for factual errors and de novo review for legal errors) and must affect substantial rights.¹⁶⁵ To show prejudice from sentencing errors, some courts have required defendants to show they would have otherwise received a more lenient sentence.¹⁶⁶ Where harmless-error analysis places the burden

155. See *Puckett v. United States*, 556 U.S. 129, 133–34 (2009) (confirming the appropriateness of applying plain-error analysis when the government violates its plea-agreement obligations, but the defendant objects for the first time on appeal).

156. FED. R. CRIM. P. 51(b).

157. See *United States v. Young*, 470 U.S. 1, 15 (1985) (discussing the history and application of the contemporaneous-objection rule).

158. FED. R. CRIM. P. 52(b).

159. *United States v. Olano*, 506 U.S. 725 (1993).

160. For an elaboration on *Olano*’s four-pronged test, see *Johnson v. United States*, 520 U.S. 461, 466, 468 (1997).

161. *Olano*, 506 U.S. at 733.

162. *Id.* at 734.

163. *Id.*

164. *Id.* at 726 (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

165. See *United States v. Ortiz*, 741 F.3d 288, 293–94 (1st Cir. 2014) (“[T]he plain error standard imposes upon the appealing defendant the burden of showing a reasonable likelihood that, but for the error, the district court would have imposed a different, more favorable sentence.”).

166. See *United States v. Durham*, 645 F.3d 883, 900 (7th Cir. 2011) (“[An] error affected [the defendant’s] substantial rights [if it] result[ed] in a different sentence than he otherwise

on the sentence's proponent,¹⁶⁷ plain error places it on the sentence's challenger.¹⁶⁸

In this context, factual errors that impact a defendant's sentence still merit correction. Courts of appeals have granted relief where a PSR included a conviction that had been dismissed,¹⁶⁹ where the record contradicted a judge's view of the defendant's prior criminal activity,¹⁷⁰ and where a third party's criminal activity was attributed to the defendant.¹⁷¹ Relief has also been warranted where facts cited at sentencing simply lack enough evidentiary support.¹⁷²

Under plain-error analysis, courts of appeals have also corrected legal errors that contributed to an inaccurate Guidelines range. The Ninth Circuit remanded a sentence that, without explanation, did not

would have received.”); *United States v. Meacham*, 567 F.3d 1184, 1190 (10th Cir. 2009) (stating that a defendant must show a “strong possibility of receiving a significantly lower sentence” in order to meet the fourth prong); *United States v. Burnette*, 518 F.3d 942, 947 (8th Cir. 2008) (“In sentencing, an error is prejudicial if there is a reasonable probability the defendant would have received a lighter sentence but for the error.”).

167. See *supra* note 142 and accompanying text.

168. See *supra* note 166 and accompanying text.

169. See *Ortiz*, 741 F.3d at 293–94 (finding plain error where the sentencing judge sentenced a felon-in-possession defendant based on the belief he had previously been convicted of contempt, but the contempt charge had in fact been dismissed).

170. *United States v. Desrosiers*, 568 F. App'x 163, 167 (3d Cir. 2014) (finding plain error where the sentencing judge mentioned that the defendant aided in preparing more than 2000 fraudulent tax returns, when the PSR and the defendant's own admissions only indicated that he had prepared seventy-nine, even though the factual error would not have altered the defendant's advisory sentencing range); *United States v. Griffiths*, 504 F. App'x 122, 126–27 (3d Cir. 2012) (finding plain error where the sentencing court gave a fraud defendant an eight-level substantial-assistance reduction because she thought that was the greatest departure that she had granted in similar cases, when in reality the greatest substantial-assistance reduction she had given was ten levels); *United States v. Gonzalez-Castillo*, 562 F.3d 80, 84 (1st Cir. 2009) (finding plain error where a district judge sentenced an unlawful-entry defendant on the belief that the defendant had twice before entered the country illegally, but the record indicated that he had only once before entered the country, and had done so legally).

171. *United States v. Wilson*, 614 F.3d 219, 225 (6th Cir. 2010) (finding plain error where the sentencing judge imposed an above-Guidelines sentence based on the belief that a misapprehension-fraud defendant had stolen checks from a bank when, in fact, the record showed a third party had stolen the checks).

172. *United States v. Figueroa-Labrada*, 720 F.3d 1258, 1266 (10th Cir. 2013) (finding plain error where the sentencing court had failed to make factual findings about the scope of a defendant's jointly undertaken criminal activity to determine the correct amount of drugs to attribute to him); *United States v. Johnson*, 694 F.3d 1192, 1198–99 (11th Cir. 2012) (finding plain error and remanding for resentencing a case in which the sentencing court failed to make sufficient factual findings to support a two-level offense enhancement for reckless endangerment during flight); *United States v. Halliday*, 672 F.3d 462, 475 (7th Cir. 2012) (finding plain error where the sentencing judge cited the defendant's belief that the crime was “victimless,” but the record did not support that the defendant held such a belief).

credit a defendant for time served even though the error made only a 5-month difference in a 210-month sentence.¹⁷³ Reviewing courts have also remanded where the sentencing court simply miscalculated the Guidelines range by inputting the incorrect offense level¹⁷⁴ or relying on bad math.¹⁷⁵ In the context of sentencing enhancements, courts of appeals have granted resentencing where a sentencing judge erroneously treats a defendant's prior conviction as crime of violence,¹⁷⁶ where a court treats prior misdemeanors as felonies,¹⁷⁷ or where the Guidelines calculation includes prior offenses that should have been excluded altogether.¹⁷⁸ In particular, courts of appeals have granted relief under plain-error review of erroneous application of

173. *United States v. Armstead*, 552 F.3d 769, 785 (9th Cir. 2008). Guidelines section 5G1.3(b)(1) provides for credit against a defendant's sentence for time served on a state conviction if the conduct that resulted in that conviction contributed to the calculation of the defendant's Guidelines range. *Id.* at 784; U.S. SENTENCING GUIDELINES MANUAL § 5G1.3(b)(1) (U.S. SENTENCING COMM'N 2014).

174. *See, e.g., United States v. Monghan*, 409 F. App'x 872, 879 (6th Cir. 2011) (finding plain error where the sentencing court miscalculated the Guidelines by erroneously using an offense level of twenty-eight instead of twenty-five, causing the range to be 110 to 137 months instead of 84 to 105 months); *United States v. Ysassi*, 282 F. App'x 588, 589 (9th Cir. 2008) (finding plain error where the sentencing court input an offense level of twenty-seven rather than twenty-six, resulting in a Guidelines range of 100 to 125 months, instead of 92 to 115 months).

175. *See United States v. Lee*, 288 F. App'x 264, 272 (6th Cir. 2008) (remanding a case for resentencing after plain-error review because the Probation Office multiplied by the incorrect number of checks when calculating the total loss from a fraud defendant's crime).

176. *See United States v. Andino-Ortega*, 608 F.3d 305, 311 (5th Cir. 2010) (concluding that the sentencing judge committed plain error by erroneously treating an illegal-reentry defendant's prior state conviction as a crime of violence, which subjected him to a sixteen-point criminal history enhancement); *United States v. Ortuno-Santana*, 372 F. App'x 533, 534 (5th Cir. 2010) (remanding a case in which the judge added offense-level points for a previous drug conviction that should not have been counted); *United States v. Elliott*, 313 F. App'x 919, 920 (8th Cir. 2009) (finding plain error where the sentencing judge enhanced the defendant's sentence based on case law treating his state conviction as a crime of violence, which an intervening Supreme Court decision made clear was incorrect); *United States v. Gamez*, 577 F.3d 394, 401 (2d Cir. 2009) (concluding that the sentencing court plainly erred by mistakenly treating the defendant's prior conviction as a crime of violence); *United States v. Diaz-Sanchez*, 307 F. App'x 797, 798 (5th Cir. 2009) (remanding a case in which the judge increased the defendant's criminal history by sixteen levels based on two prior crimes of violence, although nothing in the record supported the determination that they were violent crimes).

177. *See United States v. Rosales-Miranda*, 755 F.3d 1253, 1265 (10th Cir. 2014) (finding plain error where the sentencing court erroneously treated the defendant's prior misdemeanors as felonies); *United States v. Burge*, 683 F.3d 829, 835 (7th Cir. 2012) (remanding a case in which the sentencing court erroneously treated the defendant's animal-cruelty offense as a felony).

178. *See United States v. Garrett*, 528 F.3d 525, 530 (7th Cir. 2008) (finding plain error where the sentencing court erroneously added a criminal history point for a bail-jumping conviction).

the criminal history overrides—that is, the career offender enhancement,¹⁷⁹ the armed career criminal enhancement,¹⁸⁰ and the enhancement for repeat and dangerous sex offenses against minors.¹⁸¹

Courts of appeals have granted relief for procedural errors, at least where defendants have been able show that it impacted their sentencing.¹⁸² Reversible procedural errors include overlooking the Guidelines' concurrent sentencing instructions,¹⁸³ failing to calculate the Guidelines,¹⁸⁴ considering improper factors,¹⁸⁵ failing to consider the § 3553(a) factors,¹⁸⁶ and misapprehending discretion to deviate from the Guidelines.¹⁸⁷

179. *See* United States v. Baker, 559 F.3d 443, 453 (6th Cir. 2009) (remanding a case in which the evidence was insufficient to determine that the defendant's reckless-endangerment conviction was a crime of violence); United States v. Davidson, 551 F.3d 807, 808 (8th Cir. 2008) (remanding a case in which the court erroneously applied a career offender enhancement based, in part, on inaccurately treating the defendant's "auto tampering by operation" offense as a crime of violence); United States v. Vasquez, 287 F. App'x 610, 611–12 (9th Cir. 2008) (finding plain error in the application of a career offender enhancement where criminal history information in the PSR "was not supported by judicially noticeable documentation").

180. *See* United States v. Heikes, 525 F.3d 662, 664 (8th Cir. 2008) (applying erroneously an armed career criminal enhancement based on inaccurate treatment of drunk-driving offenses).

181. *See* United States v. Sebolt, 554 F. App'x 200, 207 (4th Cir. 2014) (remanding a case because the court applied a repeat-and-dangerous-sex-offender-against-minors enhancement based on a predicate offense that did not qualify); United States v. Jeffries, 569 F.3d 873, 877 (8th Cir. 2009) (finding that the sentencing court plainly erred by erroneously treating a prior sexual offense as a predicate crime).

182. *See, e.g.,* United States v. Highgate, 521 F.3d 590, 595–96 (6th Cir. 2008) (finding plain error where the sentencing court effectively treated the Guidelines as mandatory and the record reflected the judge's apparent desire to give the defendant a more lenient sentence).

183. *See* United States v. Dooley, 688 F.3d 318, 321 (7th Cir. 2012) (holding that it amounted to reversible plain error when a judge imposed consecutive sentences for identity theft but failed to consider the Guidelines' note regarding concurrent versus consecutive sentences).

184. *See* United States v. Dulay, 505 F. App'x 679, 680 (9th Cir. 2013) (finding sentencing court's failure to calculate the sentencing range was a plain error that required resentencing).

185. *See* United States v. Cordery, 656 F.3d 1103, 1108 (10th Cir. 2011) (finding that the sentencing court committed plain error by extending the defendant's sentence an extra 5 months so he could complete a rehabilitation program while in prison); United States v. Cossey, 632 F.3d 82, 88–89 (2d Cir. 2011) (finding that the sentencing court plainly erred when it sentenced a possession-of-child-pornography offender, and citing the judge's unproven beliefs about the genetics of sex offenders and consumers of child pornography); *In re Sealed Case*, 573 F.3d 844, 853 (D.C. Cir. 2009) (finding plain error where drug rehabilitation served as the sentencing judge's reason for extending the prison term).

186. *See* United States v. Waknine, 543 F.3d 546, 554 (9th Cir. 2008) (finding plain error, in light of *Gall*, where the sentencing judge did not discuss § 3553(a) factors at sentencing or in the statement of reasons).

187. *See* United States v. Van Putten, 282 F. App'x 950, 953 (2d Cir. 2008) ("[T]he district court did not fully appreciate the extent of its discretion to deviate from the Guidelines." (quoting United States v. Regalado, 518 F.3d 143, 148 (2d Cir. 2008))).

C. *Correcting Sentences Based on Due Process Claims*

A separate group of post-*Booker* cases correct sentencing errors based on due process violations reviewed for harmless or plain error. In *United States v. Corona-Gonzalez*,¹⁸⁸ a sentencing judge plainly erred by relying on an inaccurate record of the defendant's previous deportations.¹⁸⁹ The sentencing judge cited deterring future violations as a "salient factor" in the high Guidelines range.¹⁹⁰

After finding plain error, the Ninth Circuit underscored that the error affected the defendant's substantial rights because of its due process implications:

It is established firmly that 'convicted defendants have a due process right to be sentenced on the basis of accurate and reliable information.' If the district court did indeed sentence Mr. Corona-Gonzalez based on a fact not supported by the record, it would deprive Mr. Corona-Gonzalez of this right.¹⁹¹

In *United States v. Ortiz*,¹⁹² the First Circuit recently reviewed a sentence for which the defendant's criminal history category included two points for a contempt conviction that was previously dismissed.¹⁹³ The court remanded for resentencing because "[d]ue process 'guarantees every defendant a right to be sentenced upon information which is not false or materially incorrect,'" and allowing "such erroneous information [to] materially influence[] the sentencing calculus" would undermine the integrity of that process.¹⁹⁴

The Sixth Circuit recently used similar reasoning in *United States v. Wilson*,¹⁹⁵ where the sentencing court stated that a bank-fraud defendant's theft of money orders and bank checks was an important factor in the sentence, but the record showed that a third party stole

188. *United States v. Corona-Gonzalez*, 628 F.3d 336 (7th Cir. 2010).

189. *Id.* at 340–41. During sentencing, the judge referred three times to the fact that the defendant had been previously deported, a fact which was untrue and unsupported in the record. *Id.* at 341.

190. *Id.* at 342.

191. *Id.* at 343 (quoting *United States v. Kovic*, 830 F.2d 680, 684 (7th Cir. 1987)).

192. *United States v. Ortiz*, 741 F.3d 288 (1st Cir. 2014).

193. *Id.* at 291. The erroneous inclusion of the two criminal history points caused the defendant's Guidelines range to be 21 to 27 months, when it should have been 15 to 21 months. *Id.* After stating that the defendant's actions—a felon-in-possession conviction—warranted a small upward variance, the judge sentenced him to 36 months in prison. *Id.* at 290–91.

194. *Id.* at 295 (quoting *United States v. Tavano*, 12 F.3d 301, 305 (1st Cir. 1993)).

195. *United States v. Wilson*, 614 F.3d 219 (6th Cir. 2010).

the items rather than the defendant.¹⁹⁶ The court exercised its discretion to correct plain error given “the general rule that a violation of due process exists when a sentencing judge relies upon erroneous information.”¹⁹⁷

Finally, the Ninth Circuit recently applied a similar approach to a sentence that relied on tenuous facts.¹⁹⁸ At former prison guard Brian McGowan’s sentencing for assaulting inmates, the judge considered unreliable out-of-court remarks claiming McGowan sold and used drugs.¹⁹⁹ The judge’s comments indicated the evidence materially impacted McGowan’s sentence.²⁰⁰ The Ninth Circuit applied a two-pronged test to determine whether the proceedings violated McGowan’s due process rights.²⁰¹ McGowan could show a violation if the drug allegations were “(1) false or unreliable, and (2) demonstrably made the basis for the sentence.”²⁰² The court found the allegations insufficiently reliable because nothing in the record supported them and the sentencing judge made no attempt to verify them.²⁰³ Upon finding that the sentence was materially impacted, the Ninth Circuit remanded the case for resentencing.²⁰⁴

These cases show how inaccurate or unreliable information that serves as an input for a sentence or the sentence’s Guidelines range can infect the proceedings so as to amount to a violation of due process.

IV. CHALLENGING ERRORS ON COLLATERAL REVIEW

After the appeals process runs its course, a defendant’s conviction and sentence ultimately become final. At that point, if a federal prisoner wants to bring a sentencing-error claim, the vehicle is 28 U.S.C. § 2255. Congress created the provision to provide a habeas remedy for federal prisoners in the district court that convicted and sentenced them.²⁰⁵ Claims brought under § 2255 face different

196. *Id.* at 223–24.

197. *Id.* at 225 (quoting *Arnett v. Jackson*, 393 F.3d 681, 686 (6th Cir. 2005)).

198. *United States v. McGowan*, 668 F.3d 601, 606–09 (9th Cir. 2012).

199. *Id.* at 603–04.

200. *Id.* at 608 (noting that the judge said the drug issues were “unforgivable”).

201. *Id.* at 606.

202. *Id.* (quoting *United States v. Vanderwerfhorst*, 576 F.3d 929, 935–36 (9th Cir. 2009)).

203. *Id.* at 606–08.

204. *Id.* at 609.

205. For a discussion of the history and purpose of § 2255, see *United States v. Hayman*, 342 U.S. 205, 210–19 (1952). The *Hayman* Court explained that § 2255 affords federal prisoners a

standards from *Gall* claims on direct appeal. Under § 2255, federal prisoners may move to vacate, set aside, or correct their sentence for (1) sentences “imposed in violation of the Constitution or laws of the United States,” (2) when the trial court lacked jurisdiction, (3) sentences exceeding the statutory maximum authorized, and (4) sentences otherwise subject to collateral attack.²⁰⁶

Section 2255 also includes several important limitations. First, there are several procedural barriers, mostly creations of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA).²⁰⁷ With AEDPA, Congress amended § 2255 to include a one-year limitations period, with several narrow exceptions,²⁰⁸ and to include limits on second or successive § 2255 petitions.²⁰⁹ The Supreme Court has also limited “cognizable” nonconstitutional claims to those alleging “a fundamental defect which inherently results in a complete miscarriage of justice” or “an omission inconsistent with the rudimentary demands of fair procedure.”²¹⁰

A. *The “Miscarriage of Justice” Gateway*

Before examining appellate courts’ treatment of errors, a more in-depth understanding of the Supreme Court’s discussion of the “miscarriage of justice” standard is useful to put sentencing errors on collateral review in context. The Court has not extensively defined

habeas remedy in the sentencing court because, until that point, federal prisoners directed their habeas petitions to courts that happened to be in districts in which federal prisons were located. *Id.* at 217 n.25 (citing a Statement, prepared by then-Circuit Judge Stone, submitted to Congress on behalf of the Judicial Conference Committee on Habeas Corpus Procedure). This resulted in an overwhelming volume of habeas petitions in those courts, *id.*, leading Congress to provide for habeas consideration in the trial and sentencing court so as “to meet practical difficulties that had arisen in administering the habeas corpus jurisdiction of the federal courts,” *id.* at 219.

206. 28 U.S.C. § 2255(a) (2012).

207. Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 105, 110 Stat. 1214, 1220 (codified as amended at 28 U.S.C. § 2255 (2012)).

208. The limitations period, codified at 28 U.S.C. § 2255(f), runs from the latest date of (1) the date a prisoner’s judgment becomes final; (2) the date on which an illegal or unconstitutional government impediment to the prisoner making the motion is removed; (3) the prisoner’s assertion of a right newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or (4) the subsequent discovery of supporting facts that were otherwise undiscoverable through due diligence. 28 U.S.C. § 2255(f)(2)–(4).

209. *See id.* § 2255(h) (allowing successive motions only if they are certified by the court of appeals and either contain newly discovered evidence likely to prove innocence by clear and convincing evidence, or rely on a new, previously unavailable constitutional rule made retroactive on collateral review by the Supreme Court).

210. *Hill v. United States*, 368 U.S. 424, 428 (1962).

the contours of what amounts to a miscarriage of justice in general, much less in the context of sentencing errors, but its cases addressing § 2255 provide some guidance. In *Hill v. United States*,²¹¹ the Court held that failure to inform a defendant of his allocution rights at sentencing was not cognizable.²¹² The Court emphasized that the defendant was not affirmatively denied an opportunity to speak at the sentencing hearing, that there was no suggestion the judge was “misinformed or uninformed as to any relevant circumstance[,]” and that the defendant did not claim he necessarily would have had something to say if given the opportunity.²¹³

An intervening change in substantive law that renders conduct no longer criminal is cognizable.²¹⁴ In *Davis v. United States*,²¹⁵ a California court convicted Joseph Davis of failure to report for induction to the armed forces following several unanswered orders by a local draft board.²¹⁶ Intervening decisions in the Ninth Circuit and the Supreme Court showed that the draft board was not statutorily authorized to declare Davis delinquent in the first place.²¹⁷ Without elaborating, the Court reasoned that if a prisoner’s punishment is for something the law does not make criminal, “[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice and presents exceptional circumstances that justify [§ 2255] collateral relief.”²¹⁸ Although an intervening change in substantive law that changes the criminality of a defendant’s initial conduct is cognizable, the Court has not decided whether errors that substantively affect the defendant’s sentence are.

Since *Davis*, the Court has ruled that violations of certain procedural rules generally do not merit relief. In *United States v. Timmreck*,²¹⁹ a judge’s acceptance of a defendant’s guilty plea failed to inform the defendant of a special-parole term that he was entitled to know under Rule 11 of the Federal Rules of Criminal Procedure, but

211. *Hill v. United States*, 368 U.S. 424 (1962).

212. In *Hill*, the defendant moved to vacate his sentence, claiming § 2255 entitled him to a new sentence because the sentencing judge denied him the right to speak on his own behalf at sentencing, a violation of Rule 32(a) of the Federal Rules of Criminal Procedure. *Id.* at 426.

213. *Id.* at 429.

214. *Davis v. United States*, 417 U.S. 333, 346–47 (1974).

215. *Davis v. United States*, 417 U.S. 333 (1974).

216. *Id.* at 336.

217. *Id.* at 337–40.

218. *Id.* at 346–47.

219. *United States v. Timmreck*, 441 U.S. 780 (1979).

the Court ruled the oversight was not cognizable.²²⁰ The defendant's allegation of a "technical violation" did not claim "he was actually unaware of the special parole term or that . . . he would not have pleaded guilty."²²¹ But the Court noted relief might be available "in the context of other aggravating circumstances."²²²

In *United States v. Addonizio*,²²³ the Court held that a federal prisoner's claim was not cognizable when he argued that changes to federal parole policies that came after the judge sentenced him prolonged the sentence beyond what the judge intended.²²⁴ The change in parole policies did not "infect [the sentence] with any error of fact or law of the 'fundamental' character that renders the entire proceeding irregular and invalid," nor was the sentence "based on 'misinformation of constitutional magnitude.'"²²⁵ The error was "based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge."²²⁶

The Court also declined to recognize a claim when authorities did not charge a federal defendant within the period set forth in a federal-state prisoner-transfer agreement.²²⁷ In *Reed v. Farley*,²²⁸ the Court held that the defendant, Orrin Scott Reed, did not have a cognizable claim because he "registered no objection . . . and suffered no prejudice."²²⁹ Like *Hill* and *Timmreck*, the case lacked the "aggravating circumstances [that] render[] the need for the remedy afforded by the writ of *habeas corpus* apparent."²³⁰

220. *Id.* at 782–83.

221. *Id.* at 784.

222. *Id.* at 784–85.

223. *United States v. Addonizio*, 442 U.S. 178 (1979).

224. *Id.* at 190.

225. *Id.* at 186–87.

226. *Id.* at 187.

227. *Reed v. Farley*, 512 U.S. 339 (1994). In *Reed*, authorities transferred a federal prisoner, Orrin Scott Reed, from federal to state custody. *Id.* at 342. Authorities executed his transfer under the Interstate Agreement on Detainers Act (IAD), 18 U.S.C. App. § 2, a compact among forty-eight states and the federal government for transferring prisoners facing charges in another jurisdiction. *Id.* at 341. Among other things, the IAD included a speedy-trial provision requiring prisoners be tried within 120 days, and that charges be dismissed with prejudice if a trial did not occur within that time period. *Id.* at 341–42. Reed brought his challenge under 28 U.S.C. § 2254, the federal habeas remedy for state prisoners, *id.* at 342, which the Court noted involves the same "fundamental defect" test as § 2255, *id.* at 353–54.

228. *Reed v. Farley*, 512 U.S. 339 (1994).

229. *Id.* at 342.

230. *Id.* at 350 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962) (internal quotation marks and alterations omitted)).

Finally, failure to inform a defendant of his right to appeal his sentence is not cognizable if the defendant already knows of his appeal rights and suffers no prejudice from the oversight.²³¹ In *Peguero v. United States*,²³² the petitioner argued his sentencing violated Rule 32(a)'s requirement that the court advise defendants of "any right to appeal the sentence."²³³ The Court held that the violation was not cognizable because an evidentiary hearing revealed Peguero "knew of his right and hence suffered no prejudice from the [sentencing court's] omission."²³⁴

B. Error Correction on Collateral Review

Dating back to before *Booker*, courts of appeals generally held that ordinary Guidelines misapplications were not cognizable.²³⁵ Ordinary factual and legal errors correctable on direct appeal no longer merited resentencing once a sentence has become final.

The courts of appeals appear to agree, however, that claims pass the cognizability test if an erroneous sentencing enhancement caused a prisoner to be sentenced above the maximum sentence otherwise authorized by statute.²³⁶ The Supreme Court has also made clear that

231. *Peguero v. United States*, 526 U.S. 23, 24 (1999).

232. *Peguero v. United States*, 526 U.S. 23 (1999).

233. *Id.* at 26 (citing FED. R. CRIM. P. 32(a)).

234. *Id.* at 24.

235. *See* *Burke v. United States*, 152 F.3d 1329, 1331–32 (11th Cir. 1998) (holding cognizable on collateral review a challenge by a prisoner whose Guidelines rested on an obstruction-of-justice enhancement that a subsequent Guidelines amendment made clear was wrong); *United States v. Payne*, 99 F.3d 1273, 1281–82 (5th Cir. 1996) (concluding that a prisoner's claim that the sentencing court inappropriately denied him an acceptance-of-responsibility reduction and erred calculating his drug quantity was not cognizable, because an improper application of the Guidelines is a nonconstitutional issue that could have been raised on direct appeal and is not cognizable on collateral review); *Graziano v. United States*, 83 F.3d 587, 589–90 (2d Cir. 1996) (*per curiam*) (concluding that a fine imposed in excess of the Guidelines' allowable maximum was not cognizable on collateral review when the defendant failed to raise it on direct appeal); *Auman v. United States*, 67 F.3d 157, 161 (8th Cir. 1995) ("[O]rdinary questions of guideline interpretation falling short of the 'miscarriage of justice' standard do not present a proper section 2255 claim."); *Knight v. United States*, 37 F.3d 769, 773 (1st Cir. 1994) (concluding that the sentencing court's erroneous addition of two criminal history points did not amount to a "miscarriage of justice" because the defendant's sentence fell within corrected Guidelines range and defendant had ample opportunity to raise the issue of direct appeal); *United States v. Vaughn*, 955 F.2d 367, 368 (5th Cir. 1992) ("Nonconstitutional claims that could have been raised on direct appeal, but were not, may not be asserted in a collateral proceeding.").

236. *See* *Bryant v. Warden*, 738 F.3d 1253, 1278 (11th Cir. 2013) (granting relief where *Begay* error led defendant to be sentenced above what would otherwise have been the statutory maximum without his armed career criminal enhancement); *Jones v. United States*, 689 F.3d 621, 627–28 (6th Cir. 2012) (granting § 2255 relief where *Begay* made clear prisoner's prior

vacatur of an enhancement's predicate offense warrants resentencing.²³⁷

1. *Erroneous Career Offender Enhancements.* What if a judge sentences a defendant as a career offender, and a subsequent Supreme Court decision makes clear that the predicate crimes no longer count? Several recent cases have rejected such claims. These cases generally derive from decisions that narrow the scope of offenses qualifying as “violent felonies” for sentencing purposes: the Supreme Court excluded driving under the influence, escape based on failure to report, and battery based on mere offensive touching from the list of violent felonies.²³⁸ The Fourth Circuit also recently reinterpreted the way courts treat state drug crimes,²³⁹ leading some prisoners sentenced as career offenders to face sentences that they would not face today.²⁴⁰ And the uncertainty shows no signs of stopping. In the 2015 case *Johnson v. United States*,²⁴¹ the Court struck down a statutory enhancement provision of the Armed Career Criminal Act of 1984 (ACCA), which imposes mandatory minimums for recidivists with certain enumerated violent felonies or felonies covered by the so-called residual clause—those that “otherwise involve[] conduct that presents a serious potential risk of physical injury to another.”²⁴² The Court struck down the residual clause’s

offenses were not violent felonies, and his sentence exceeded the statutory maximum he would have faced without the armed career criminal enhancement that relied on those prior offenses); *United States v. Williams*, 396 F. App’x 951, 952 (4th Cir. 2010) (per curiam) (granting § 2255 relief when *Begay* made prisoner’s sentence as armed career criminal sentence above the statutory maximum without the enhancement).

237. *Johnson v. United States*, 544 U.S. 295, 302 (2005) (holding that vacatur of a state conviction is grounds for challenging an enhanced sentence, and that it tolls the statute of limitations in § 2255 so long as the prisoner has diligently pursued his rights).

238. See *Johnson v. United States*, 559 U.S. 133, 138 (2010) (holding that element of “actually and intentionally touching” under Florida’s battery law did not necessarily make the offense a “violent felony”); *Chambers v. United States*, 555 U.S. 122, 123 (2009) (holding that an escape conviction based on a failure to report is not a “violent felony”); *Begay v. United States*, 553 U.S. 137, 139 (2008) (holding that a drunk-driving conviction is not a “violent felony”).

239. See *United States v. Simmons*, 649 F.3d 237, 248 (4th Cir. 2011) (en banc) (holding that defendant’s first-time marijuana possession did not qualify as a predicate-felony conviction for purposes of Controlled Substances Act).

240. See *Whiteside v. United States*, 775 F.3d 180, 181 (4th Cir. 2014) (en banc) (declining to address petitioner’s arguments that his sentence should be vacated post-*Simmons* because prior drug offenses would not qualify as predicate-felony convictions).

241. *Johnson v. United States*, 135 S. Ct. 2551 (2015).

242. 18 U.S.C. § 924(e)(2)(B)(ii) (2012).

language as unconstitutionally vague because “[i]nvolving so shapeless a provision to condemn someone to prison for 15 years to life does not comport with the Constitution’s guarantee of due process.”²⁴³ Violent predicates for the career offender enhancement include a provision identical to the one struck down in *Johnson*.²⁴⁴ The Court’s decision introduces even greater uncertainty for prisoners sentenced as career offenders whose enhancement may be based on unconstitutionally vague language.

For prisoners claiming their sentences rest on legally mistaken designations as career offenders, the courts of appeals have generally denied these prisoners collateral relief. In *Sun Bear v. United States*,²⁴⁵ defendant Marlon Dale Sun Bear received a 360-month sentence based on a Guidelines range of 360 months to life.²⁴⁶ Based partially on a prior conviction for attempted auto theft, Sun Bear’s Guidelines included a career offender enhancement based on an attempted-auto-theft conviction that he unsuccessfully challenged on direct appeal.²⁴⁷ Six years later, the Supreme Court’s decision in *Begay v. United States*²⁴⁸ led the Eighth Circuit to conclude that auto theft was not a “crime of violence”²⁴⁹ and Sun Bear challenged his sentence in a § 2255 motion. An en banc Eighth Circuit reasoned that Sun Bear’s claim was not cognizable because the erroneous career offender designation did not entail “a fundamental defect which inherently results in a complete miscarriage of justice.”²⁵⁰ In reaching that conclusion, the court emphasized Sun Bear’s sentence was within the statutory maximum authorized by statute,²⁵¹ and he could receive the

243. *Johnson*, 135 S. Ct. at 2560.

244. See U.S. SENTENCING MANUAL § 4B1.2(a) (U.S. SENTENCING COMM’N 2014) (“The term ‘crime of violence’ means any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that . . . otherwise involves conduct that presents a serious potential risk of physical injury to another.”).

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

246. *Id.* at 702.

247. *Id.* Without the career offender enhancement, his range would have been 292 to 365 months.

248. *Begay v. United States*, 553 U.S. 137 (2008).

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

250. *Sun Bear*, 644 F.3d at 704 (quoting *United States v. Addonizio*, 442 U.S. 178, 185 (1979)).

251. Sun Bear pleaded guilty to second-degree murder, for which the maximum punishment when Sun Bear faced sentencing was life imprisonment. See 18 U.S.C. § 1111(b) (2012) (“Whoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life.”).

same punishment were his case vacated for resentencing.²⁵² The court limited relief under the miscarriage-of-justice test to an intervening change in law that makes the prisoner's conduct lawful or new evidence suggesting the prisoner was actually innocent of the crime.²⁵³

The Eleventh Circuit has twice considered challenges to career offender enhancement based on subsequent reinterpretation of predicate offenses. In *Gilbert v. United States*,²⁵⁴ Ezell Gilbert pleaded guilty to crack-cocaine and marijuana trafficking, and was sentenced as a career offender.²⁵⁵ One of his predicate crimes was carrying a concealed weapon, which he unsuccessfully challenged at sentencing and on direct appeal.²⁵⁶ The next year he filed a § 2255 petition challenging other aspects of his sentence.²⁵⁷ After *Begay* led the Eleventh Circuit to exclude his crime from the violent-felony list, he brought another § 2255 challenge.²⁵⁸ The Eleventh Circuit denied Gilbert's petition based on § 2255(h)'s prohibition on successive motions.²⁵⁹

The Eleventh Circuit recently went further in *Spencer v. United States*²⁶⁰ and ruled that a prisoner in Gilbert's situation could not challenge an erroneous career offender enhancement even in a timely § 2255 petition.²⁶¹ In *Spencer*, defendant Kevin Spencer pleaded guilty to distributing cocaine and faced a career offender enhancement based on previous convictions for child abuse and selling cocaine.²⁶² He unsuccessfully challenged the designation of his conviction for child abuse as a crime of violence on direct appeal.²⁶³ Two weeks later, the Supreme Court decided *Begay*, causing Spencer to challenge his

252. *Sun Bear*, 644 F.3d at 705.

253. *Id.* at 706.

254. *Gilbert v. United States*, 640 F.3d 1293 (11th Cir. 2011).

255. *Id.* at 1299. Gilbert's Guidelines range was 292 to 365 months, but would have been 151 to 188 months without the career offender status. *Id.* at 1303.

256. *Id.* at 1300–01.

257. *Id.* at 1301.

258. *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008).

259. *Gilbert*, 640 F.3d at 1307–08. The court also held that Guidelines miscalculations cannot be challenged via § 2255's savings clause. *Id.*; see also 28 U.S.C. § 2255(e) (2012) (outlining provisions of the savings clause).

260. *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014).

261. *Id.* at 1135.

262. *Id.* The enhancement increased Spencer's Guidelines range from a span of 70 to 87 months to a span of 151 to 180 months, and the judge eventually sentenced him to 151 months in prison. *Id.* at 1148.

263. *Id.* at 1136.

sentence in a § 2255 motion.²⁶⁴ A panel initially granted Spencer's petition, but an en banc Eleventh Circuit reversed, ruling that § 2255 did not provide relief for sentencing errors unless a prisoner could prove innocence or vacatur of a predicate offense.²⁶⁵ The court reasoned that even if Spencer were not a career offender, his sentence fell below the statutory maximum and was lawful.²⁶⁶ The court also relied on the Guidelines' advisory nature, which allows the sentencing court to impose the same sentence on remand.²⁶⁷ The court also emphasized the importance of finality to deterrence and the efficient operation of the criminal justice system.²⁶⁸

The Seventh Circuit has wrestled with the cognizability of erroneous career offender enhancements as well. In *Narvaez v. United States*,²⁶⁹ the defendant was sentenced as a career offender based on two prior escape convictions for failure to return to confinement. Despite the defendant's sentence being within statutory limits, the Seventh Circuit reasoned that his career offender categorization was "the lodestar" to the court's Guidelines calculation.²⁷⁰ As a result, the court found the intervening clarification of law made Narvaez's sentence illegal and "constitute[d] a miscarriage of justice, entitling him to relief."²⁷¹

Narvaez was sentenced pre-*Booker*, when the Sentencing Guidelines were mandatory, and the Seventh Circuit went on to hold that claims by prisoners sentenced after *Booker* are not cognizable.²⁷² In *Hawkins v. United States*,²⁷³ the court reasoned that erroneous enhancements under the advisory regime are "less serious," and do not constitute a miscarriage of justice as long as the sentence was below the statutory maximum.²⁷⁴ The *Hawkins* court reasoned that the sentencing judge would likely have sentenced Hawkins similarly

264. *Id.*

265. *Spencer*, 773 F.3d at 1139 ("A prisoner may challenge a sentencing error as a 'fundamental defect' on collateral review when he can prove that he is either actually innocent of his crime or that a prior conviction used to enhance his sentence has been vacated, but Spencer's motion alleges nothing of the kind.").

266. *Id.* at 1139.

267. *Id.*

268. *Id.* at 1144.

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

270. *Id.* at 629.

271. *Id.* at 630.

272. *Hawkins v. United States*, 706 F.3d 820, 824 (7th Cir. 2013).

273. *Hawkins v. United States*, 706 F.3d 820 (7th Cir. 2013).

274. *Id.* at 824.

without the career offender enhancement.²⁷⁵ The *Hawkins* court also heavily emphasized finality, stating that the Supreme Court's miscarriage-of-justice cases strike a balance between finality and the injustice of a possibly mistaken sentence, which excludes relief for sentencing errors once a sentence is final.²⁷⁶

The story is the same in the Fourth Circuit. In a pair of cases, the Fourth Circuit has ruled that a mistaken designation as a career offender is not a sufficiently serious mistake to either toll § 2255's period of limitations²⁷⁷ or clear the seemingly insurmountable miscarriage-of-justice hurdle.²⁷⁸ In *Whiteside v. United States*,²⁷⁹ DeAngelo Whiteside's career offender enhancement relied on a state crime that the Fourth Circuit clarified in *United States v. Simmons*²⁸⁰ should have been treated as a misdemeanor.²⁸¹ Whiteside challenged his sentence in a § 2255 motion more than one year after his conviction became final.²⁸² The Fourth Circuit held his motion was not timely.²⁸³ The limitations period tolls if a petition relies on a new, previously undiscoverable fact, but, on the court's reasoning, *Simmons* was not a new fact for purposes of the limitations provision.²⁸⁴ The court also held that the limitations period should not be equitably tolled.²⁸⁵ The prospect that Whiteside's petition would be denied in a claim brought before *Simmons* did not rise to the "extraordinary circumstances" contemplated by the test for tolling.²⁸⁶

275. *Id.* at 823.

276. *Id.* at 825.

277. *Whiteside v. United States*, 775 F.3d 180, 186 (4th Cir. 2014).

278. *United States v. Foote*, 784 F.3d 931, 932 (4th Cir. 2015).

279. *Whiteside v. United States*, 775 F.3d 180 (4th Cir. 2014).

280. *United States v. Simmons*, 649 F.3d 237 (4th Cir. 2011) (en banc).

281. *Whiteside*, 775 F.3d at 182. Whiteside faced a Guidelines range of 262 to 327 months, which included a career offender enhancement based on two state drug crimes. *Id.* Following a government motion for a departure based on substantial assistance, the judge sentenced Whiteside to 210 months in prison. *Id.*

282. *Id.* Whiteside waived his right to appeal in his plea agreement. *Whiteside v. United States*, 748 F.3d 541, 545 (4th Cir. 2014), *rev'd on reh'g en banc*, 775 F.3d 180 (4th Cir. 2014).

283. *Whiteside*, 775 F.3d at 182.

284. *Id.* at 184; *see also* 28 U.S.C. § 2255(f)(4) (2012) ("A 1-year period of limitation shall apply to a motion under this section. . . . [It] shall run from the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.").

285. Under *Holland v. Florida*, 560 U.S. 631 (2010), the limitations period of § 2255 may be equitably tolled when "(1) [the prisoner] has been pursuing his rights diligently, and (2) . . . some extraordinary circumstance stood in his way and prevented timely filing." *Id.* at 649.

286. *Whiteside*, 775 F.3d at 185.

The court did not answer the question of whether such an error amounted to a miscarriage of justice.

The Fourth Circuit did answer that question in *United States v. Foote*,²⁸⁷ and its answer was no.²⁸⁸ In *Foote*, Wesley Foote appealed his 262-month sentence for distribution of crack cocaine.²⁸⁹ Because of a *Simmons* error, the sentencing court had mistakenly categorized Foote as a career offender, causing his Guidelines range to nearly double: from a span of 151 to 188 months to a span of 262 to 327 months.²⁹⁰ The Fourth Circuit nonetheless ruled that the error was not cognizable.²⁹¹ The court reasoned that the other instances amounting to a miscarriage of justice addressed claims of actual innocence,²⁹² that the Guidelines' advisory nature could render an equally harsh sentence on remand,²⁹³ and that deeming a Guidelines error cognizable would be unworkable without a clean limiting principle.

2. *Error Correction on Due Process Grounds.* The preceding cases imply there is no collateral remedy for sentencing errors other than for sentences that exceed statutory maximums and for vacatur of predicate convictions. But several appellate courts have granted resentencing for similar errors based on due process challenges dating back to the pre-reform era. In *United States v. Malcolm*,²⁹⁴ the Second Circuit granted § 2255 relief when the judge misapprehended the defendant's criminal record and refused to hear evidence of the defendant's cooperation.²⁹⁵ The court remanded based on the principle that “[m]isinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process.”²⁹⁶

287. *United States v. Foote*, 784 F.3d 931 (4th Cir. 2015).

288. *Id.* at 940.

289. *Id.* at 932.

290. *Id.* at 933.

291. *Id.* at 940.

292. *Id.* at 940–41.

293. *Id.* at 941–43.

294. *United States v. Malcolm*, 432 F.2d 809 (2d Cir. 1970).

295. *Id.* at 818. The sentencing judge thought a bank-robbery defendant had previously pleaded guilty to two of four state robbery indictments. *Id.* at 815. The defendant had pleaded guilty to one consolidated charge, and three others were dismissed. *Id.* at 815–16. His second guilty plea was to a fifth robbery charge that had been reduced to petty larceny. *Id.* at 816.

296. *Id.* at 816.

In *United States ex rel. Welch v. Lane*,²⁹⁷ the Seventh Circuit heard an appeal from a sentence in which the judge mistakenly believed the defendant had a previous conviction for armed robbery where the previous conviction was actually for robbery.²⁹⁸ Relying on *Townsend v. Burke* and *United States v. Tucker*, the court explained that “a sentence must be set aside where the defendant can show that false information was part of the basis for the sentence.”²⁹⁹

This same reasoning led courts to grant habeas relief after the SRA. In *Shukwit v. United States*,³⁰⁰ the Eleventh Circuit granted § 2255 relief to a defendant whose PSR inaccurately labeled him a principal in the drug scheme for which he had pleaded guilty.³⁰¹ At sentencing, he disputed the report, but the court never made a finding.³⁰² The Eleventh Circuit emphasized that “due process protects the right not to be sentenced on the basis of false information,” and confirmed that “Shukwit’s claim that he was sentenced on the basis of false information contained in the [PSR] is cognizable in this petition.”³⁰³

The Third Circuit most comprehensively engaged the intersection of habeas relief and defendants’ due process rights at sentencing. In *United States v. Eakman*,³⁰⁴ a defendant pleaded guilty to anabolic-steroids and money-laundering charges.³⁰⁵ The judge sentenced Eakman to one year and a day in prison, with a recommendation to the Bureau of Prisons that Eakman serve his sentence at a community corrections center (that is, a halfway house).³⁰⁶ A month into his sentence, a Justice Department memo concluded the Bureau lacked legal authority to assign prisoners to halfway houses while under a term of imprisonment and the Bureau accordingly transferred Eakman to prison.³⁰⁷ He brought a habeas motion under § 2255 claiming the sentencing judge did not accurately

297. *United States ex rel. Welch v. Lane*, 738 F.2d 863 (7th Cir. 1984).

298. *Id.* at 866.

299. *Lane*, 738 F.2d at 865.

300. *Shukwit v. United States*, 973 F.2d 903 (11th Cir. 1992) (per curiam).

301. *Id.* at 904.

302. *Id.*

303. *Id.*

304. *United States v. Eakman*, 378 F.3d 294 (3d Cir. 2004).

305. *Id.* at 296.

306. *Id.*

307. *Id.*

understand the law governing the Bureau's legal authority.³⁰⁸ The Third Circuit held that the circumstances Eakman alleged would, if true, violate due process, and if a hearing showed such circumstances existed Eakman deserved resentencing under an accurate understanding of the Bureau's legal authority.³⁰⁹

The court explained that “due process clearly guarantees all defendants the right to be sentenced under an accurate understanding of the law.”³¹⁰ Interpreting the Supreme Court's *Addonizio* decision as excluding sentencing errors that are not “objectively ascertainable” from collateral relief, the court applied a two-part test for correcting sentencing errors on collateral review that requires showing

- (1) the district court made an objectively ascertainable error (one that does not require courts to probe the mind of the sentencing judge) and (2) the district court materially relied on that error in determining the appropriate sentence.³¹¹

Applying this test, the Third Circuit concluded the judge's misperception of the Bureau of Prisons' authority was “objectively ascertainable.”³¹² The court ordered a hearing to determine the extent to which the judge's “legal misapprehension” impacted Eakman's sentence, and if it did, the court said, it amounted to a due process violation that merited resentencing.³¹³ In so ruling, the opinion emphasized that “it is hard to imagine how a sentence could ever be deemed fair when there is some way to verify the sentencing court's error externally (whether an error of fact or an error of law) and when that error caused the misguided sentence.”³¹⁴ *Eakman* holds particular significance, not only because it recognizes pre-SRA conceptions of due process rights to accurate sentencing, but also because it shows those principles survive AEDPA.

C. *Erroneous Career Offender Enhancements in Context*

Where does this leave federal inmates serving career offender enhanced sentences who would not face such severe Guidelines ranges today? The courts of appeals have been fairly clear that an

308. *Id.* at 300–01.

309. *Id.* at 296.

310. *Id.* at 302.

311. *Id.* at 301.

312. *Id.* at 303.

313. *Id.*

314. *Id.* at 300–01.

erroneous career offender enhancement is correctable on direct appeal under harmless and plain-error analysis.³¹⁵ But for the majority of career offenders, collateral attack is the only vehicle available to raise their claims unless the Supreme Court fortuitously takes a case reinterpreting predicate felonies before their sentence becomes final. Once it is final, the Seventh, Eighth, and Eleventh Circuits have held that the error simply lacks the severity required for § 2255 to recognize it. In the Eighth and Eleventh Circuits, that applies even if the defendant raised the argument on direct appeal. The Fourth Circuit left open the possibility that a timely claim could be cognizable, but held that claims brought after that period are untimely and are insufficiently extraordinary to merit tolling the limitations period.

The functional result of these decisions is a procedural quagmire for erroneously sentenced career offenders. In the cases of *Sun Bear* and *Spencer*, the defendants correctly asserted from the beginning that they were not career offenders.³¹⁶ In *Hawkins*, the Seventh Circuit said such errors are correctable on direct appeal,³¹⁷ but given the futility of direct appeal in *Sun Bear* and *Spencer* it would appear no remedy exists at any stage. And direct appeal is unavailable to the large group of defendants who waive appeal rights as part of plea agreements.³¹⁸

The reasoning in *Sun Bear*, *Hawkins*, and *Spencer* is difficult to reconcile with the principles emanating from caselaw on due process in sentencing. If due process does, as the *Eakman* court put it, “clearly guarantee[] all defendants the right to be sentenced under an accurate understanding of the law,”³¹⁹ it is hard to see how the federal system affords erroneously sentenced career offenders due process.

In fact, the *Eakman* court’s interpretation of Supreme Court § 2255 jurisprudence articulates a much more workable rule—one

315. See, e.g., *United States v. Robinson*, 639 F.3d 489, 497–98 (8th Cir. 2011) (finding reversible error); *United States v. Baker*, 559 F.3d 443, 453 (6th Cir. 2009) (finding plain error).

316. *Spencer v. United States*, 773 F.3d 1132, 1135 (11th Cir. 2014); *Sun Bear v. United States*, 644 F.3d 700, 701 (8th Cir. 2011).

317. *Hawkins v. United States*, 706 F.3d 820, 824 (2013) (“An erroneous computation of an advisory guidelines sentence is reversible (unless harmless) on direct appeal; it doesn’t follow that it’s reversible years later in a postconviction proceeding.”).

318. See Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L.Q. 127, 130 (1995) (discussing the rise in popularity of appeals waivers on the part of federal prosecutors).

319. *Eakman*, 378 F.3d at 302.

that bases relief on whether the error is (1) objectively ascertainable, and (2) materially relied upon at sentencing.³²⁰ This mirrors the test for due process violations dating back to the pre-reform era³²¹ and recently employed by the Ninth Circuit in *McGowan*.³²² The second prong also reflects the Supreme Court's own cognizability cases, which explain that lack of prejudice or "aggravating circumstances" is what undermines cognizability.³²³

The decisions denying relief to mistaken career offenders emphasize the interest in finality.³²⁴ Arguments favoring finality often cite preservation of judicial resources, concerns about stale evidence, and harm to victims of prolonged litigation.³²⁵ But these concerns hold less weight in the context of correcting sentencing errors.³²⁶ The Advisory Committee on Rules of Criminal Procedure has resolved to consider a possible amendment to Rule 52 to permit consideration of

320. *Id.* at 301.

321. *See* *United States v. Reme*, 738 F.2d 1156, 1167 (11th Cir. 1984) ("[A] defendant[s] . . . due process rights have been violated by the sentencing court's reliance on false or unreliable information, [if] he [can] make a showing of two elements: (1) that the challenged evidence is materially false or unreliable, and (2) that it actually served as the basis for the sentence."); *Farrow v. United States*, 580 F.2d 1339, 1359 (9th Cir. 1978) ("[A] sentence will be vacated on appeal if the challenged information is (1) false or unreliable, and (2) demonstrably made the basis for the sentence.").

322. *United States v. McGowan*, 668 F.3d 601, 606 (9th Cir. 2012) (explaining that due process is violated upon a showing that allegations relied upon by the sentencing judge were "(1) false or unreliable, and (2) demonstrably made the basis for the sentence").

323. *See* *Peguero v. United States*, 526 U.S. 23, 24 (1999) ("[Defendant] knew of his right [to appeal] and hence suffered no prejudice from the omission."); *Reed v. Farley*, 512 U.S. 339, 342 (1994) ("The defendant registered no objection to the trial date at the time it was set, and suffered no prejudice attributable to the delayed commencement."); *United States v. Timmreck*, 441 U.S. 780, 784 (1979) ("Respondent does not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty."); *Hill v. United States*, 368 U.S. 424, 429 (1962) (noting the lack of "aggravating circumstances" such as an affirmative denial of allocution rights, the judge being "misinformed or uninformed as to any relevant circumstances," or evidence of what defendant would have addressed given the chance).

324. *See, e.g., Spencer v. United States*, 773 F.3d 1132, 1144 (11th Cir. 2014) ("Finality 'is essential to the operation of our criminal justice system. Without finality, the criminal law is deprived of much of its deterrent effect.'" (quoting *Teague v. Lane*, 489 U.S. 288, 309 (1989))); *Hawkins v. United States*, 724 F.3d 915, 918 (7th Cir. 2013) ("[T]he social interest in a belated correction of the error outweighed by the social interest in the finality of judicial decisions, including sentences.").

325. *See* Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 145–56 (2012) (discussing the arguments in favor of finality and why they are less pronounced in the context of correcting sentencing errors).

326. *See* *United States v. Williams*, 399 F.3d 450, 456 (2d Cir. 2005) ("[T]he context of review of a sentencing error is fundamentally different[,] . . . [because] the cost of correcting a sentencing error is far less than the cost of a retrial.").

sentencing errors outside plain-error review because such errors are less burdensome to revisit than trial errors.³²⁷ In addition, forcing prisoners to serve longer sentences than the law contemplates only expends more resources on costly incarceration.

The decisions denying relief also stress the risk of opening the floodgates to more appeals.³²⁸ But career offenders comprise less than 3 percent of federal sentences.³²⁹ The career offender flood is probably less ominous than these appellate judges fear. What is more, the Guidelines themselves provide an intuitive limiting principle: courts could implement a rule that limits relief to defendants subject to erroneous criminal history overrides because of the overrides' drastic effect on a defendant's Guidelines range. And courts should weigh finality against interests in justice and fundamental fairness. After all, "without justice, finality is nothing more than a bureaucratic achievement."³³⁰ The Sentencing Commission, for example, voted to retroactively reduce base offense levels for certain drug crimes in the interest of fairness, and the multitude of federal sentences eligible for reconsideration dwarfs erroneous career offender sentences.³³¹ What is more, finality need not overwhelm the interest in fairly sentencing defendants the way the law accurately contemplates.

CONCLUSION

Whether stemming from concerns for due process or fundamental fairness, the availability of relief for sentences based on factual, legal, or procedural error rests on the principle that at sentencing judges should have an accurate picture of the defendant,

327. COMM. ON RULES OF PRACTICE & PROCEDURE OF THE JUDICIAL CONFERENCE OF THE U.S., AGENDA BOOK 487 (May 2014).

328. *Hawkins*, 706 F.3d at 824 (expressing concern about the toll on the courts' and Justice Department's resources if "every precedential decision interpreting the guidelines favorably to a prisoner were a ticket to being resentenced").

329. U.S. SENTENCING COMM'N, *supra* note 101, at 1 (stating that of the 84,173 cases reported to United States Sentencing Commission in 2014, only 2232 included career offender enhancements).

330. *Gilbert v. United States*, 640 F.3d 1293, 1337 (11th Cir. 2011) (en banc) (Hill, J., dissenting).

331. *See* Press Release, U.S. Sentencing Comm'n, U.S. Sentencing Commission Unanimously Votes to Allow Delayed Retroactive Reduction in Drug Trafficking Sentences (July 18, 2014), http://www.ussc.gov/sites/default/files/pdf/news/press-releases-and-news-advisories/press-releases/20140718_press_release.pdf [<http://perma.cc/XP9E-UEW5>] (projecting that more than 46,000 prisoners will be eligible for resentencing due to changes in the drug-quantity table).

the offense, and the law's treatment of both. Under today's advisory regime, judges retain significant discretion in imposing sentences. When a judge sits down to sentence a defendant, she ought to consider only accurate inputs. In the pre-Guidelines days when judges' discretion was even greater, flawed inputs meant a flawed sentence, and defendants had a due process right to a new one. Today, the Guidelines are a very significant input. Since Congress reformed the federal sentencing system, it has evolved in the context of uncertainty. Federal prosecutors, Congress, the Commission, and the courts are still resolving how to consistently and fairly execute that system. When that uncertainty leads to a prisoner serving a career offender sentence that he would not face if sentenced today, he should at least have a remedy for correcting it.