THE WRONG KIND OF INNOCENCE: WHY *UNITED STATES V. BEGAY* WARRANTS THE EXTENSION OF "ACTUAL INNOCENCE" TO INCLUDE ERRONEOUS, NON-CAPITAL SENTENCES

I. INTRODUCTION

For many prisoners there is no greater fear, and perhaps there is no greater injustice, than serving a prison sentence beyond that authorized by law. At sentencing, a prisoner's sentence may be enhanced by two different mechanisms: the United States Sentencing Guidelines ("USSG") and the Armed Career Criminal Act ("ACCA"). The USSG imposes a sentence enhancement if a prisoner has committed a violent felony and has at least two prior felony convictions or controlled substance offenses.[1] The ACCA imposes a sentence enhancement if a prisoner has committed a felony weapons crime and also has at least three prior violent felony convictions.[2] A recent case decided by the United States Supreme Court, *Begay v. United States*,[3] narrowed the definition of "violent felony" under these two sentencing enhancement mechanisms.[4] Because of this reinterpretation, crimes once considered to be "violent felonies" are no longer, and should have never been, classified as such.[5] Accordingly, many prisoners sentenced pre-*Begay* were incorrectly determined to have committed violent felonies under the USSG or the ACCA and received the correlating sentence enhancement for crimes that the Supreme Court subsequently determined to be non-violent felonies. Consequently, many federal prisoners' sentences were erroneously enhanced—their sentences were increased above the maximum sentence they would have otherwise received had the erroneous enhancement not been applied.

In the wake of *Begay*, a number of federal prisoners have filed motions under 28 U.S.C. § 2255 or petitions under 28 U.S.C. § 2241 to correct their allegedly erroneous sentences.[6] To successfully obtain collateral relief through

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1 U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (2012).

2 18 U.S.C. § 924(e) (2012).

3 553 U.S. 137 (2008).

4 *Id.* at 142–43. *Begay* dealt solely with the Armed Career Criminal Act, but its holding also applies to "violent felonies" under the United States Sentencing Guidelines because the language is identical. *See infra* note 33 and accompanying text.

5 *Begay* has been interpreted to be retroactive. *See infra* note 34.

6 *See, e.g.*, Narvaez v. United States, 674 F.3d 621, 625 (7th Cir. 2011) (en banc); Sun Bear v. United States, 644 F.3d 700, 702 (8th Cir. 2011); Gilbert v. United States, 640 F.3d 1293,

§ 2255 or § 2241, the Supreme Court has held that a prisoner must show that the sentencing error is "a fundamental defect which inherently results in a complete miscarriage of justice."[7] This standard is met if the prisoner shows that he is "actually innocent."[8]

Circuits are split as to whether a prisoner can be "actually innocent" of his erroneously enhanced sentence. The United States Court of Appeals for the Eighth Circuit and the United States Court of Appeals for the Eleventh Circuit have concluded that "actual innocence" cannot be used to attack a sentence; it can be used to attack the underlying *crime* of conviction only.[9] Recently, the United States Court of Appeals for the Seventh Circuit suggested for the first time that the "actual innocence" exception applies to sentences, in certain circumstances.[10]

To better understand the seriousness of the distinction, consider an illustration:

You were convicted in either the Eighth or Eleventh Circuit of possession with intent to distribute crack cocaine in 2000. For that offense alone, you faced a sentence of 151 to 188 months imprisonment. However, you had two prior felony convictions: attempted burglary and carrying a concealed weapon. The sentencing judge determined that both of these prior felony convictions were considered "violent felonies" under Eight Circuit law at the time of your sentencing, which means that you were eligible to receive a career offender enhancement to your sentencing range. Based on this sentence enhancement, you faced an increased sentencing range of 292 to 365 months; the sentencing judge sentenced you to 292 months.

You then challenged your sentence on direct appeal, which was denied. You next collaterally attacked your sentence using 28 U.S.C. § 2255(a), arguing that the sentencing judge incorrectly determined that your prior felony convictions were "violent felonies" under Eighth Circuit law. Thus, you argued, you should not have received the enhanced sentencing range. Your § 2255 motion was then denied by the Eighth Circuit Court of Appeals because it concluded that the sentencing judge correctly determined that your prior felony convictions were considered "violent felonies" that warranted the career offender enhancement.

1302 (11th Cir. 2011). The differences between 28 U.S.C. § 2255 and 28 U.S.C. § 2241 are discussed in Part III.

7 United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States 368 U.S. 424, 428 (1962)).

8 Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (finding that the miscarriage of justice exception applies when a petitioner is actually innocent of the crime of which he was convicted or the penalty which was imposed).

9 *See infra* Parts IV.B.2, IV.C.2.

10 *See infra* Part V.A.

Eight years go by, and the Supreme Court decides a case called *Begay v. United States*, in which it holds that your two prior felony convictions are not, and should never have been, considered "violent felonies." Therefore, the sentencing judge made a mistake and you should never have received the sentence enhancement. The maximum sentence that you should have received was 188 months, but you are stuck with your 292-month sentence.

Your only avenue of relief is to file a habeas corpus petition under 28 U.S.C. § 2241. You successfully file your petition in federal court and argue that under the newly decided Supreme Court decision, you should never have been subject to the career offender enhancement and therefore the sentencing judge erroneously calculated your sentence. Thus, you claim that the miscalculation of your sentence is a miscarriage of justice, and you are "actually innocent" of your erroneous sentence.

The Eighth Circuit agrees that under the Supreme Court decision, your prior felony convictions are no longer, and should have never been, considered crimes of violence. The court also agrees that your sentence was miscalculated, and that you received a sentence far beyond the maximum that you would have otherwise received without the career offender enhancement. Nonetheless, the court determines that you cannot be actually innocent of a sentence; you can only be actually innocent of your underlying crime of conviction. And because you are not alleging innocence of a crime (only that your sentence was erroneously calculated), you cannot be resentenced.

And imagine that a prisoner in the Seventh Circuit was convicted for the exact same crime for which you were convicted, was sentenced at the exact same time, and had the exact same prior felony convictions that you had. And imagine that the Seventh Circuit prisoner took the exact same steps to obtain post-conviction relief that you took: his direct appeal was denied and he was forced to file for § 2241 relief after his § 2255 motion was denied. This prisoner argued that he is "actually innocent" of his erroneously enhanced sentence based on *Begay*'s reinterpretation of a "violent felony." However, the Seventh Circuit agrees that a prisoner *can* be "actually innocent" of his sentence, and agrees to resentence this prisoner. So, you are serving the remainder of your erroneous 292-month sentence in a federal prison while the Seventh Circuit prisoner gets to go free.

This Note will argue that the Seventh Circuit's approach should be adopted because it would eliminate the arbitrary distinction between innocence of a sentence and innocence of a crime for purposes of "actual innocence," and would allow all prisoners with illegal sentences to be resentenced. This approach would not destroy the finality interests of habeas corpus, nor would it open the floodgates to endless habeas corpus filings. Rather, the Seventh Circuit's approach is a narrow exception that would provide relief only to those prisoners who truly deserve it.

Part II provides background on two vehicles by which a federal prisoner's sentence can be enhanced: the USSG or the ACCA. Next, Part II

analyzes how *Begay* reinterpreted the ACCA and USSG, which left many prisoners with clearly erroneous sentences ("*Begay*-type" sentences).[11]

Part III examines the avenues of relief available to prisoners with *Begay*-type sentences: 28 U.S.C. § 2255 and 28 U.S.C. § 2241. This Part will explain the procedural obstacles through which a prisoner must pass to file a cognizable § 2255 motion, and the "actual innocence" exception that would allow an otherwise procedurally disqualified prisoner to file a cognizable *Begay*-type sentencing claim.

Part IV discusses the current view of the Eighth and Eleventh Circuits on the scope of "actual innocence." Part IV first discusses the case on which these circuits rely for their jurisprudence on this issue: *In re Davenport*.[12] Next, Part IV analyzes the decisions from these circuits with an emphasis on their reliance on *Davenport* as well as cases with identical holdings as *Davenport*.

Part V argues that the current majority interpretation of "actual innocence" should be reexamined. Part V.A discusses a recent case decided by the United States Court of Appeals for the Seventh Circuit, *Narvaez v. United States*,[13] that may have reinterpreted *Davenport* by extending the scope of the "actual innocence" exception to USSG sentencing errors. Part V.B discusses a subsequent Seventh Circuit case, *Hawkins v. United States*,[14] that narrowed the *Narvaez* holding. Part V.C argues that, in light of *Narvaez*, other circuits relying on *Davenport* or cases with identical holdings should reexamine their jurisprudence on the scope of "actual innocence." Finally, Part V.D argues that the holding of *Narvaez*—a USSG case—should extend to erroneously enhanced ACCA sentences because ACCA sentences present a stronger ground for claims of "actual innocence."

Finally, Part VI argues that the holding of *Narvaez* should be universally adopted. The Seventh Circuit's approach would provide relief to all types of innocence: prisoners who are innocent of their sentences and prisoners who are innocent of their underlying crime of conviction. This part will rebut the arguments—advanced by Eighth and Eleventh Circuits—that extending the scope of "actual innocence" to sentencing claims will destroy the finality interest of habeas corpus and would open the floodgates to endless filing of habeas corpus petitions.[15] *Narvaez* is a narrow exception that would provide relief to prisoners who deserve to be resentenced.

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11 The terms "*Begay*-type sentences" and "*Begay*-type errors" are taken from Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 85 (2012).

12 147 F.3d 605 (7th Cir. 1998).

13 674 F.3d 621 (7th Cir. 2011).

14 706 F.3d 820 (7th Cir. 2013).

15 *See* Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011); Gilbert v. United States, 640 F.3d 1293, 1311 (11th Cir. 2011).

In sum, this Note argues that other circuits should join the Seventh Circuit and allow prisoners to use "actual innocence" to challenge their erroneous sentences. If other circuits would adopt *Narvaez*, prisoners sentenced in those circuits might finally have a chance to correct their erroneous sentences. Stated another way, if *Narvaez* is not extended, a situation may very well arise in which a prisoner will be forced to serve out his erroneous sentence because of an obvious and indisputable error made by the sentencing court.

II. BACKGROUND

This Note concerns two mechanisms that sentencing courts use to enhance a prisoner's sentence: the USSG and the ACCA. A prisoner's sentence may be eligible for an increase under either the USSG or ACCA if, in addition to his current conviction, he has certain types of prior "violent felony" convictions.[16] A recent Supreme Court case, *Begay v. United States*,[17] narrowed the definition of "violent felony" under these two mechanisms. The effect of this reinterpretation is that crimes once thought to be "violent felonies" are no longer, and should have never been, classified as such.[18] Consequently, a prisoner whose sentence was enhanced due to his conviction of what was once a "violent felony"—but is no longer considered a "violent felony" in light of *Begay*—may have received an erroneously enhanced sentence. Part II.A explains the USSG and the ACCA, and Part II.B examines the Supreme Court decision that reinterpreted these two sentencing enhancement mechanisms.

A. United States Sentencing Guidelines and Armed Career Criminal Act

The USSG require an increase in the sentencing guideline range for defendants convicted of a "crime of violence" or a "controlled substance offense" who also have at least two prior convictions of either "crimes of violence" or "controlled substances offenses."[19] Defendants who meet this criteria are designated as "career offenders" under the USSG and are subject to a substantial enhancement.[20] In 2005, the Supreme Court held in *United States v. Booker*[21] that the sentencing guidelines are now advisory: the sentencing judge has the discretion to sentence a career offender outside of his applicable

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16 *See supra* notes 1–2 and accompanying text.

17 553 U.S. 137 (2008).

18 *Begay* has been interpreted to be retroactive. *See infra* note 34.

19 U.S. SENTENCING GUIDELINES MANUAL § 4B1.1.

20 *Id.* The amount by which a defendant's guideline range is increased varies in every case because the guideline calculations are based on several factors unique to the defendant being sentenced.

21 543 U.S. 220 (2005).

guideline range.[22] Pre-*Booker*, the sentencing guidelines were mandatory: a federal sentencing judge was required to hand down a sentence *within* the prisoner's guideline range.[23] A prisoner subject to the career offender enhancement who was sentenced pre-*Booker* was therefore guaranteed to receive a sentence within the enhanced guidelines range. Now that the USSG are advisory, a prisoner subject to the career offender enhancement who was sentenced post-*Booker* may receive a sentence above or below the enhanced guideline range.

The ACCA imposes a mandatory fifteen year prison sentence upon defendants convicted of a felony weapons offense and who also have three or more prior convictions for committing drug crimes or "violent felon[ies]."[24] *Booker* is not applicable to sentences enhanced under the ACCA, as the ACCA is statutory. Accordingly, unlike an enhancement under the USSG, the sentencing judge does not have discretion to deviate from the applicable sentencing range if the defendant is eligible for such an increase. Therein lies the significant difference between the ACCA and the USSG.[25]

B. Begay v. United States

In *Begay v. United States*,[26] the Supreme Court of the United States held that drunk driving is not a violent felony under the ACCA.[27] The ACCA defines a violent felony as "any crime punishable by imprisonment for a term exceeding one year" that "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another."[28]

The Supreme Court explained that crimes listed in the ACCA—burglary, arson, extortion, or crimes involving the use of explosives—"involve purposeful, violent, and aggressive conduct,"[29] and so the term "violent felony" applies only to crimes that are "roughly similar, in kind as well as in degree of risk posed, to the examples [listed in the ACCA] themselves."[30] The Court

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22 *Id.* at 245.

23 The significance of *Booker*'s relationship to "actual innocence" is discussed in Part V.C.

24 18 U.S.C. § 924(e) (2012).

25 The difference between *Booker*'s applicability to the USSG versus the ACCA is discussed in Part V.D.

26 553 U.S. 137 (2008).

27 *Id.* at 148.

28 18 U.S.C. § 924(e)(2)(B).

29 *Begay*, 553 U.S. at 144–45.

30 *Id.* at 143.

concluded that "their presence indicates that the statute covers only *similar* crimes, rather than *every* crime that 'presents a serious potential risk of physical injury to another.'"[31] The Court found that if Congress would have intended for a "violent felony" to encompass all crimes that pose a risk of physical injury to another person, then it would not have listed examples at all.[32]

Although *Begay* specifically involved the ACCA, several circuits have noted that the language defining "violent felon[ies]" in the ACCA and USSG § 4B1.2 is identical, and therefore interchangeable.[33] Further, *Begay* has been interpreted to be retroactive.[34] The result of *Begay* is that sentencing courts have been misinterpreting the sentence enhancement provisions: certain crimes once thought to constitute violent felonies under the ACCA and USSG for sentence enhancement purposes are not, and should not have been, classified as such at the prisoner's original sentencing. As a result, many prisoners have erroneous sentences—if *Begay* had been in effect at the original sentencing, then many prisoners would not have been subject to the enhancement. Thus, if a sentencing judge enhanced a prisoner's sentence based on a crime no longer considered "violent," then that prisoner's sentence may have been erroneously calculated. A prisoner whose sentence may be affected by the *Begay* ruling would therefore need a post-conviction remedy to challenge the validity of his sentence.

III. OBSTACLES TO COLLATERAL REVIEW

A federal prisoner seeking to collaterally attack his erroneous sentence will generally be forced to file a motion under 28 U.S.C. § 2255.[35] A § 2255 motion is used to "vacate, set aside, or correct" a sentence imposed "in excess

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31 *Id.* at 142.

32 *Id.*

33 *See, e.g.*, United States v. Mobley, 687 F.3d 625, 628 (4th Cir. 2012); United States v. Mason, 435 Fed. App'x 726, 730 n.2 (10th Cir. 2011); United States v. Woods, 576 F.3d 400, 403–04 (7th Cir. 2009); United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008); United States v. Williams, 537 F.3d 969, 971 (8th Cir. 2008) (quoting United States v. Johnson, 417 F.3d 990, 996 (8th Cir. 2005)); United States v. Ladwig, 432 F.3d 1001, 1005 n.9 (9th Cir. 2005); United States v. Sawyers, 409 F.3d 732, 740 n.9 (6th Cir. 2005) (using the USSG to interpret the ACCA).

34 Jones v. United States, 689 F.3d 621, 626 (6th Cir. 2012) ("Because *Begay* is a new, substantive rule, we hold that *Begay* applies retroactively."); Sun Bear v. U.S., 644 F.3d 700, 703 (8th Cir. 2011) (en banc) ("The government has conceded . . . that *Begay* announced a new substantive rule that should be applied retroactively if the application of § 924(e)(1) at issue increased the defendant's statutory maximum sentence."); Welch v. United States, 604 F.3d 408, 415 (7th Cir. 2010) (Because the *Begay* rule is substantive, "it is retroactively applicable on collateral review"). The United States Court of Appeals for the First Circuit is the only circuit that has held that *Begay* is not retroactive. United States v. Giggey, 551 F.3d 27, 36 n.3 (1st Cir. 2008).

35 BRIAN R. MEANS, POST CONVICTION REMEDIES § 5:6 (2013 ed.).

of the maximum authorized by law, or is otherwise subject to collateral attack."[36] Before a prisoner can file a cognizable § 2255 motion alleging "actual innocence" of his *Begay*-type sentence, there are some procedural obstacles through which he must pass before a federal court will review his claim on the merits.

In 1996, Congress passed the Antiterrorism and Effective Death Penalty Act ("AEDPA"), which restricted the scope of habeas corpus relief for federal prisoners.[37] AEDPA amended § 2255 by imposing some new procedural restrictions, including a requirement that a prisoner obtain a certificate of appealability before he can appeal the district court's decision, a one year statute of limitations period, and a bar on filing second or successive § 2255 motions.[38] This Part discusses these procedural hurdles through which a prisoner bringing a *Begay*-type sentencing error must travel before bringing a cognizable § 2255 motion.

A. Procedural Default

A prisoner seeking to challenge his *Begay*-type claim is required to raise his claim on direct appeal before he raises the claim on collateral review.[39] The procedural default rule is a judicially created barrier created to "respect the law's important interest in the finality of judgments."[40] If a federal prisoner fails to challenge his conviction or sentence on direct appeal, then his subsequent habeas claim will be dismissed.

B. Statute of Limitations

The AEDPA imposes a strict one-year time limit to file a § 2255 motion.[41] Section 2255(f) provides that the one-year time limit begins to run from the latest of four possible dates.[42] In the context of this Note, only two are relevant: a prisoner must file a § 2255 motion within one year of the date on

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36 28 U.S.C. § 2255(a) (2012).

37 Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 101, 110 Stat. 1214, 1217 (codified as amended at 28 U.S.C. §§ 2244, 2253–2255 (2012)).

38 28 U.S.C. §§ 2253, 2255(f), (h) (2012). The certificate of appealability requirement was met in every case discussed in this Note and does not need to be discussed at length.

39 Massaro v. United States, 538 U.S. 500, 504 (2003). *See also* United States v. Frady, 456 U.S. 152, 167–68 (1982). There is an exception to the procedural default rule. Also judicially created, this exception is known as the cause and prejudice standard. The cause and prejudice standard is inapplicable in circumstances in which a prisoner is challenging his sentence based on a post-conviction change in the law, as opposed to his underlying crime of conviction. The cause and prejudice standard is therefore outside the scope of this Note.

40 *Massaro*, 538 U.S. at 504.

41 28 U.S.C. § 2255(f) (2012).

42 *Id.*

which the judgment of conviction became final, or within one year of the date on which a newly asserted right became recognizable on collateral review, whichever is later.[43] Thus, if a prisoner fails to file his § 2255 motion to attack his *Begay*-type claim within the one-year time period, his claim will be dismissed.[44]

C. Second or Successive Motions

The AEDPA also prohibits prisoners from filing second or successive § 2255 motions. If a prisoner has already filed a § 2255 motion, then he is barred from filing a second or successive § 2255 motion[45]—which means that a prisoner cannot file a § 2255 motion after his previous § 2255 motion has been denied. The only exceptions to § 2255(h)'s ban on second or successive motions is if there is (1) newly discovered evidence that establishes the prisoner's innocence, or (2) a new rule of constitutional law was announced after the prisoner was convicted and was previously unavailable to the prisoner.[46] Prisoners bringing *Begay* claims, however, are neither attempting to introduce new evidence, nor arguing that *Begay* represents a new rule of constitutional law.[47] Thus, the AEDPA's bar on second or successive petitions severely restricts their access to collateral review under § 2255.

D. Savings Clause

There is an escape hatch that may allow otherwise ineligible petitioners to seek habeas relief. Section 2255(e) allows a prisoner to file a § 2241 petition if their § 2255 motion would be "inadequate or ineffective" to provide them with a remedy.[48] In other words, if § 2255 is inadequate or ineffective to provide the prisoner with a remedy, then he may use this "savings clause" to bring a habeas corpus petition under § 2241. A § 2255 motion is not inadequate or ineffective merely because a prisoner is procedurally defaulted (per the

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43 *Id.* There are also two other exceptions listed in § 2255(f), but neither will arise in *Begay*-type sentencing claims.

44 *Id.*

45 *Id.* § 2255(h).

46 *Id.* §§ 2255(h)(1)–(2).

47 *See* United States v. Wyatt, 672 F.3d 519, 522 (7th Cir. 2012); United States v. Quintero, 451 Fed. App'x 408, 409–10 (5th Cir. 2011); Gilbert v. United States, 640 F.3d 1293, 1321–22 (11th Cir. 2011); United States v. Kenney, 391 Fed. App'x 169, 172 (3d Cir. 2010) (dismissing prisoner's claim that *Begay* announced a new rule of constitutional law for purposes of § 2255(h) because *Begay* decided a question of statutory interpretation); United States v. Williams, 363 Fed. App'x 576, 578 (10th Cir. 2010).

48 28 U.S.C. § 2255(e). A prisoner bringing a *Begay*-type sentencing claim for the first time in a § 2255 motion would not have to resort to the savings clause, as his first § 2255 motion would not be subject to the bar on second or successive motions. *Id.*

AEDPA limitations) from bringing a § 2255 motion.[49] As the Eleventh Circuit noted: "[t]he existence of the statutory bar on second and successive motions cannot mean that § 2255 is 'inadequate or ineffective' to test the legality of [a petitioner]'s detention within the meaning of the savings clause. If it did, the savings clause would eviscerate the second or successive motions bar."[50]

Section 2241, the habeas corpus petition, may be available to an otherwise procedurally disqualified prisoner, however, if he can show that the sentencing error is "a fundamental defect which inherently results in a complete miscarriage of justice."[51] This standard is met if the prisoner shows that he is actually innocent.[52] This "actual innocence" exception to § 2255's procedural barriers may be the last resort for prisoners who have been procedurally disqualified from obtaining § 2255 relief[53] and are seeking to challenge their *Begay*-type sentence based on a post-conviction change in law. In sum, if a prisoner would be otherwise procedurally barred from filing a § 2255 motion, then he may be able to bring his claim in a § 2241 habeas petition if he can show that he is "actually innocent."[54]

IV. MAJORITY VIEW OF "ACTUAL INNOCENCE" OF GUIDELINE'S SENTENCES POST *BEGAY*

What constitutes "actual innocence" is a contentious and unsettled question among the circuits. It is to that question that this Note now turns. The Eighth and Eleventh Circuits have interpreted the "actual innocence" exception in § 2255(e) to encompass only claims alleging innocence of the underlying *crime* of conviction.[55] In support of this interpretation, the Eleventh Circuit derived its jurisprudence, in part, from a Seventh Circuit case, *In re*

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[49] *See* Gilbert, 640 F.3d at 1307–08; Prost v. Anderson, 636 F.3d 578, 586 (10th Cir. 2011); United States v. Peterman, 249 F.3d 458, 461 (6th Cir. 2001); United States v. Barrett, 178 F.3d 34, 50 (1st Cir. 1999); *In re* Davenport, 147 F.3d 605, 608 (7th Cir. 1998); Triestman v. United States, 124 F.3d 361, 376 (2d Cir. 1997).

[50] *Gilbert*, 640 F.3d at 1308; *see also In re Davenport*, 147 F.3d at 608.

[51] United States v. Addonizio, 442 U.S. 178, 185 (1979) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

[52] Sawyer v. Whitley, 505 U.S. 333, 339 (1992) (finding that the miscarriage of justice exception applies when a petitioner is actually innocent of the crime of which he was convicted or the penalty which was imposed).

[53] The "actual innocence" exception available in § 2255(e)'s savings clause is a gateway through the rule against successive § 2255 motions, Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986); second, or "abusive" petitions, McClesky v. Zant, 499 U.S. 467, 494–95 (1991); the procedural default rule, Murray v. Carrier, 477 U.S. 478, 495–96 (1986); and the one year statute of limitations, McQuiggin v. Perkins, 133 S. Ct. 1924, 1932 (2013).

[54] *McQuiggin*, 133 S. Ct. at 1932 (the "actual innocence" exception has survived AEDPA's passage).

[55] *See supra* Parts III.B–D.

Davenport.[56] Similarly, the Eighth Circuit derived its jurisprudence on this issue from a case factually similar to *Davenport* with an identical holding.[57] To understand why the Eighth and Eleventh Circuits should adopt the approach taken by the Seventh Circuit—that prisoners can be "actually innocent" of their erroneously enhanced sentences—the reasoning behind the current approach taken by the Eighth and Eleventh Circuits must be explained. This Part begins by discussing the facts and holding of *Davenport*, and then discusses how the Eighth and the Eleventh Circuits relied on *Davenport* and similar cases to interpret the "actual innocence" exception.

A. In re Davenport

Davenport involved two prisoners, both of whom were attacking their sentence. Davenport was convicted in 1991 of being a felon in possession of a firearm, and his sentence was enhanced under the ACCA due to prior weapons convictions.[58] Nichols was convicted of the use of a firearm in the commission of a drug offense in violation of 18 U.S.C. § 924(e).[59] Both prisoners sought relief: Davenport filed a § 2255 motion, attacking his enhancement under the ACCA, and Nichols filed a habeas corpus petition under § 2241 (using § 2255(e)) attacking his conviction under 18 U.S.C. § 924(c).[60] Davenport claimed that one of his predicate felonies (burglary) was not within the scope of the ACCA (i.e., not a violent felony).[61] Nichols argued that his conviction for "use" of a firearm in violation of § 924(c) was illegal in light of a subsequently decided Supreme Court case that held that "use" of a firearm required more than "mere possession.[62] Both petitioners were arguing actual innocence: Davenport was arguing innocence of his sentence, Nichols was arguing innocence of his crime of conviction.

The Seventh Circuit found that Nichols brought a legitimate claim of actual innocence because he was alleging that he was innocent of his crime of conviction.[63] Because the Supreme Court eliminated the crime from the statute under which Nichols was convicted, Nichols "ha[d] a claim that he [was] indeed being held in prison for a nonexistent crime."[64] Davenport on the other hand, was "attacking his sentence rather than his conviction, for the armed

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56 *In re* Davenport, 147 F.3d 605, 605 (7th Cir. 1998).

57 Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011); *see also* Part IV.C.2.

58 *Sun Bear*, 644 F.3d at 607.

59 *Id.*

60 *Id.*

61 *Id.*

62 *Id.*

63 *Id.* at 610.

64 *Id.*

career criminal act is a sentence-enhancement statute."[65] Davenport's actual innocence claim was therefore inefficient because being "innocent" of the armed career criminal status was not the same thing as claiming "actual innocence" of the *crime* of conviction.[66] The rule of *Davenport* was that sentence enhancement errors cannot be grounds for "actual innocence" claims; a prisoner can only be "actually innocent" of his underlying crime of conviction, not a sentence.[67] This holding was used as support for the Eighth and Eleventh Circuit decisions that follow.

B. The Eleventh Circuit's View of "Actual Innocence": Gilbert v. United States

In *Gilbert v. United States*,[68] the petitioner was indicted in 1995 for one count of possession of crack cocaine with intent to distribute and one count of possession of marijuana with intent to distribute.[69] The petitioner also had three prior drug convictions.[70] Based on these prior drug convictions, the government had a right to insist on a mandatory life sentence under 21 U.S.C. § 841(b)(1)(A).[71] However, the government waived this right to do so as a part of the plea agreement in return for Gilbert pleading guilty to the indictment.[72]

Gilbert was sentenced as a career offender under the USSG based on two prior convictions: possession of cocaine with intent to sell (a "controlled substance offense") and carrying a concealed weapon (a "crime of violence").[73] As a result of the career offender enhancement, Gilbert's guideline range was 292 to 365 months; without the enhancement, the guideline range would have been 151 to 188 months.[74] Gilbert ultimately received a sentence of 292 months imprisonment for possession with intent to distribute crack cocaine.[75]

Years later, in *United States v. Archer*,[76] the United States Court of Appeals for the Eleventh Circuit concluded that, in light of *Begay*, carrying a

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65 *Id.* at 609.

66 *Id.* at 609–10.

67 *Id.* at 611–12.

68 640 F.3d 1293 (11th Cir. 2011).

69 *Id.* at 1298.

70 *Id.* (noting that his prior drug convictions included a March 1990 conviction for possession of cocaine, a June 1990 conviction for possession of cocaine with intent to distribute, and a January 1992 conviction for possession of marijuana).

71 *Id.*

72 *Id.*

73 *Id.* at 1299.

74 *Id.* at 1299–1300.

75 *Id.* at 1300.

76 531 F.3d 1347 (11th Cir. 2008).

concealed firearm was not a "violent felony" under the ACCA.[77] Gilbert filed a habeas petition pursuant to 28 U.S.C. § 2241,[78] arguing that, because his conviction for carrying a concealed firearm is no longer a "violent felony," he was not a career offender under the USSG and should not have received the corresponding guideline enhancement.[79] The Eleventh Circuit Court of Appeals, sitting en banc, disagreed with Gilbert and denied his § 2241 petition.[80]

1. Gilbert's Enhanced USSG Sentence

The first ground on which the court relied was that Gilbert's sentence was erroneously increased *within* the maximum sentencing guideline range, for two reasons. First, Gilbert would not have been guaranteed a lower sentence at his original sentencing if *Begay* and *Archer* were in effect at his original sentencing.[81] The Eleventh Circuit explained that "Gilbert would have had a lower guidelines range in that pre-*Booker*, mandatory guidelines era and would have received a lower sentence if we assume that the government still would have waived its statutory right to have a mandatory life sentence imposed upon him. But that is a big assumption."[82] The court explained:

> If the *Begay* decision had been on the books when Gilbert was facing these charges, the government would have known that the guidelines range he faced was 151 to 188 months [instead of 292 to 365 months]. Given a minimum sentence that was 141 months lower, the government might well have decided not to waive the § 851 notice and the mandatory life sentence it had an absolute right to insist on under § 841(b)(1)(A). It is one thing not to insist on a life sentence when the defendant is facing at least 292 months without the enhancement, and quite another to forgo it if he might be sentenced to less than half that much time . . . . [T]he record does not establish that it

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77 *Id.* at 1352.

78 *Gilbert*, 640 F.3d at 1301. Gilbert had filed an unsuccessful § 2255 motion five years earlier, forcing him to resort to a § 2241 petition to avoid the ban on second or successive petitions. *Id.*

79 *Id.*

80 *Id.* at 1302. Gilbert properly obtained a Certificate of Appealability from the District Court, as required by 28 U.S.C. § 2253(c)(1) to appeal the sentencing court's judgment in a habeas corpus case. *Id.* On appeal, a panel of the Eleventh Circuit originally agreed with Gilbert's argument, finding that the savings clause in § 2255(e) authorized Gilbert to bring his *Begay* sentencing claim in a § 2241 petition. *Id.* The Eleventh Circuit, sitting en banc, vacated the panel decision for the reasons that follow. *Id.*

81 *Id.* at 1303.

82 *Id.*

> would have [waived its right to insist on a mandatory life sentence] if it could not have counted on the career offender enhancement to double the sentence that Gilbert would receive.[83]

In other words, if Gilbert's guideline range would have been 151 to 188 months, the government might not have felt that his was a sufficient sentencing range and waived its right to a mandatory life sentence.[84] In fact, the court speculated that given Gilbert's extensive criminal background, he might have received an even longer sentence if the government would not have made the plea agreement.[85]

Second, the court noted that Gilbert could receive the same or an even longer sentence upon resentencing if he were awarded the § 2241 relief he was seeking.[86] The court noted that even if Gilbert would have received the lower guideline range of 151 to 188 months, there was "no guarantee that his new sentence under the post-*Booker* advisory guidelines system [would] be shorter than 292 months."[87] There are several sentencing factors that a sentencing judge, upon rehearing, could have used to impose a sentence equal to or greater than his original sentence of 292 months.[88] In a six-year period, Gilbert was convicted of five drug felonies and three weapons felonies.[89] He was an eight-time drug and weapons felon, every time he received probation he violated it, and he took his six year old daughter along with him to several drug deals.[90] Based on this extensive criminal history, the court found that "[a] sentencing judge could easily decide to vary [significantly] upwards from the advisory guidelines range in view of: 'the nature and circumstances of the offense and the history and characteristics of the defendant.'"[91]

2. "Actual Innocence"

The second ground upon which the *Gilbert* court relied was that the "actual innocence" exception includes only those claims that allege innocence of the underlying *crime* of conviction, and does not include sentencing claims.[92] In reaching this conclusion, the court relied heavily on finality interests. The

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83 *Id.*

84 *Id.*

85 *Id.*

86 *Id.*

87 *Id.* at 1304.

88 *Id.*

89 *Id.*

90 *Id.*

91 *Id.* (quoting 18 U.S.C. § 3553(a)(1) (2012)).

92 *Id.* at 1319–20.

court noted that "one of the principal functions of AEDPA was to ensure a greater degree of finality for convictions."[93] Because Gilbert's erroneous sentence did not exceed the maximum authorized by the USSG, the court concluded that "[t]he exception that Gilbert would have us write into § 2255[] using the savings clause as our pen would wreak havoc on the finality interests that Congress worked so hard to protect with the AEDPA provisions."[94]

To further this interest in finality, the Eleventh Circuit concluded that § 2255's savings clause was meant to apply only to situations in which a retroactive Supreme Court decision eliminates the *crime* for which a prisoner was convicted.[95] In such a situation, the prisoner would be innocent of his underlying crime, and would have therefore been convicted of a nonexistent offense.[96]

In this case, the court reasoned that the "crimes for which [Gilbert] was convicted, possessing crack cocaine with intent to distribute and possessing marijuana with intent to distribute, *do exist*."[97] Gilbert was not convicted of being a career offender: he was convicted of his drug crimes, and then had the enhancement applied to calculate his sentence.[98] In other words, *Begay* did not affect Gilbert's underlying crime of conviction; it (possibly) affected the length of his sentence that he was serving for those still-existing crimes. The court explained that "[i]f guidelines enhancements were crimes, they would have to be charged in the indictment and proven to the jury beyond a reasonable doubt."[99] The court concluded that "Gilbert's position turns on treating sentences as convictions."[100]

In support of this conclusion—that "actual innocence" does not encompass a USSG sentencing error—the Eleventh Circuit relied heavily on *Davenport*.[101] The court emphasized that "Davenport [was] attacking his sentence rather than his conviction, for the armed career criminal act is a sentence-enhancement statute; he is 'innocent' (if his claim has merit) only in a technical sense."[102] The court pointed out that "Nichols, unlike Gilbert and

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93 *Id.* at 1310 (citing Johnson v. United States, 340 F.3d 1219, 1224 (11th Cir. 2003)).

94 *Id.*

95 *Id.* at 1319–20.

96 *Id.*

97 *Id.* (emphasis added).

98 *Id.* at 1320.

99 *Id.*

100 *Id.*

101 The court also cited cases from other circuits, but all of those other cases were factually similar to *Davenport* and reached an identical conclusion. The Eleventh Circuit placed a special emphasis on *Davenport* because one of the dissenting opinions interpreted *Davenport* as support for Gilbert's claim. *See id.* at 1335–36 (Martin, J., dissenting).

102 *Id.* at 1314 (quoting *In re* Davenport, 147 F.3d 605, 609–10 (7th Cir. 1998)).

[unlike] Davenport, 'ha[d] a claim that he [was] indeed being held in prison for a nonexistent *crime* . . . . The Seventh Circuit's position on the issue before us could not be clearer: Section 2255(e)'s savings clause does not apply to sentencing claims.'"[103] The court concluded that "the *Davenport* decision rejects" Gilbert's position "in this case that the savings clause extends to sentencing claims."[104]

3. Unresolved Issues

The *Gilbert* court expressly left two important issues open. First, the court did not decide whether the actual innocence exception could be utilized by prisoners whose sentences were erroneously increased *above the maximum* authorized by the USSG.[105] Second, the court did not decide whether the "actual innocence" exception extends to prisoners filing a first time § 2255 motion.[106] Gilbert had already filed a § 2255 motion after his original conviction, and was forced to use § 2241 after the *Begay* decision in order to avoid AEDPA's ban on second or successive motions. The court stated: "We do not decide whether a claim that the sentencing guidelines were misapplied may be brought in a first time § 2255 motion. Nor do we decide if the savings clause in § 2255(e) would permit a prisoner to bring a § 2241 petition claiming that [his sentence exceeded] the statutory maximum."[107]

C. *The Eighth Circuit's View of "Actual Innocence":* Sun Bear v. United States

In *Sun Bear v. United States*,[108] the petitioner plead guilty to second-degree murder.[109] At his sentencing, the court held that "Sun Bear's prior felony convictions for attempted escape, attempted theft of a vehicle, and attempted burglary of a commercial building were 'crimes of violence'" under the sentencing guidelines.[110] Accordingly, Sun Bear was determined to be a career offender, and his sentence was enhanced to 360 months to life under the pre-*Booker* mandatory sentencing scheme.[111] Without the USSG enhancement,

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103 *Id.* at 1314–15 (quoting *In re* Davenport, 147 F.3d 605, 610 (7th Cir. 1998) (emphasis added)).

104 *Id.* at 1314.

105 *Id.* at 1323.

106 *Id.*

107 *Id.*

108 644 F.3d 700 (8th Cir. 2011).

109 *Id.* at 701.

110 *Id.*

111 *Id.*

his guidelines range would have been 292 to 365 months.[112] After the Supreme Court decided *Begay*, Sun Bear filed a first time motion to vacate his sentence under § 2255.[113] He had not previously filed for § 2255 relief, so unlike Gilbert, he was not forced to resort to filing a habeas petition under § 2241. He asserted that the application of his USSG enhancement was illegal because his three prior felony convictions are no longer crimes of violence under the Sentencing Guidelines in light of *Begay*.[114] The district court denied Sun Bear's petition, but a panel of the Eighth Circuit Court of Appeals reversed.[115] On appeal, the Eighth Circuit, sitting en banc, vacated the panel decision and denied Sun Bear's § 2241 petition.[116]

1. Sun Bear's Enhanced USSG Sentence

The first ground upon which the Eighth Circuit relied to deny Sun Bear's § 2255 petition was that Sun Bear's erroneous sentence was increased *within* the maximum guideline range for two reasons.[117] First, if *Begay* were in effect at his original hearing, and he did not receive the career offender enhancement, his sentence of 360 months would have been within the applicable guideline range for second degree murder.[118] Therefore, Sun Bear's "360–month sentence [was] lawful, both at the time of his conviction and sentencing, and now."[119] Secondly, Sun Bear could receive the same sentence upon resentencing if he were granted the § 2255 relief he requests.[120] Sun Bear's sentence of 360 months is within the applicable guideline range of months for second degree murder,[121] even without the enhancement.[122]

2. "Actual Innocence"

The court also discussed the "actual innocence" exception, but its interpretation was not as clear as the Eleventh Circuit's interpretation on this

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112 *Id.*

113 *Id.*

114 *Id.*

115 *Id.* at 703–04.

116 *Id.* at 704.

117 *Id.* at 705.

118 *Id.*

119 *Id.*

120 *Id.*

121 The federal statute governing the sentencing range for second degree murder states that "[w]hoever is guilty of murder in the second degree, shall be imprisoned for any term of years or for life." 18 U.S.C. § 1111(b) (2012).

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

issue. The court stated that a § 2255 collateral attack on a sentence only applies to "a fundamental defect which inherently results in a complete miscarriage of justice."[123] In the Eighth Circuit, it is a "basic principal that, in sentencing, a miscarriage of justice cognizable under § 2255 occurs when the sentence is in excess of that authorized by law":[124] one that exceeds the maximum for the offense of conviction.[125] Because Sun Bear's sentence was increased within the statutory maximum authorized for second degree murder, and because he could receive the same sentence upon resentencing, "no miscarriage of justice [was] at issue."[126]

The court also stated that in the Eighth Circuit, "the miscarriage-of-justice exception . . . applies 'only when petitioners have produced convincing new evidence of actual innocence'; new evidence that defendant was 'actually innocent of the sentence imposed' would not be sufficient because the 'actual-innocence exception does not apply to noncapital sentences.'"[127] This statement indicates that even if the erroneous enhancement resulted in a sentence above the maximum, a § 2255 claim would be denied because a prisoner cannot be innocent of his *sentence*. The court was quoting another Eighth Circuit case: *United States v. Wiley*.[128] *Wiley*, in turn, derived this holding from a prior Eighth Circuit case, *Embrey v. Hershberger*,[129] in which the Eighth Circuit set this precedent.[130]

In *Embrey*, the petitioner brought a § 2255 claim alleging that he was innocent of his sentence enhancement.[131] The petitioner had been convicted of armed bank robbery in violation of the Federal Bank Robbery Act,[132] and of kidnapping, in violation of the Federal Kidnapping Act.[133] He was sentenced to two consecutive terms of twenty years, one for each conviction.[134] He argued that his sentence was erroneous because his conviction fell under the Federal Bank Robbery Act, which was a comprehensive statute that provided punishment to the exclusion of all other applicable federal statutes.[135] In denying petitioner's relief, the court stated:

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123 *Id.* at 710.

124 *Id.* at 706 (citing United States v. Addonizio, 442 U.S. 178, 184 (1979)).

125 *Id.* at 705–06 (citing United States v. Stobaugh, 420 F.3d 796, 804 (8th Cir. 2005)).

126 *Id.* at 706.

127 *Id.* (quoting United States v. Wiley, 245 F.3d 750, 752 (8th Cir. 2001)).

128 245 F.3d 750 (8th Cir. 2001).

129 131 F.3d 739 (8th Cir. 1997).

130 *Id.* at 740–41.

131 *Id.* at 740.

132 18 U.S.C. § 2113(a), (d) (2012).

133 *Id.* § 1201(a)(1); *Embrey*, 131 F.3d at 739.

134 *Embrey*, 131 F.3d at 739.

135 *Id.* at 739–40.

> [A] court ought to correct a plain forfeited error that causes the conviction or sentencing of a defendant who is actually innocent, but such cases usually, if not always, involve defendants who were innocent in the sense that they did not commit the acts with which they were charged. That is not our case . . . [I]n noncapital cases the concept of actual innocence is 'easy to grasp,' because 'it simply means the person didn't commit the crime.'"[136]

Although *Sun Bear* did not explicitly rely on *Davenport*, it derived its jurisprudence on this issue from *Embrey*, which stands for the exact same rule as *Davenport*: the "actual innocence" exception includes the underlying crime of conviction only, and does not extend to noncapital sentences.[137]

3. Unresolved Issues

Although the court ultimately concluded that Sun Bear's sentence was legal, the Court left two important issues open. First, it is unclear whether the "actual innocence" exception extends to sentencing in any scenario in the Eighth Circuit. Although the court indicates that the "actual innocence" exception does not apply to noncapital sentencing at all,[138] another statement can be interpreted to mean that an erroneous sentence increased *above the maximum* may be a miscarriage of justice warranting § 2255 relief.[139] Second, the Court didn't decide whether the "actual innocence" exception applies to § 2241 petitions. The court discussed only first time § 2255 motions.[140]

V. ANOTHER INTERPRETATION OF "ACTUAL INNOCENCE"

A recent Seventh Circuit case may have reinterpreted the traditional view of "actual innocence" by nullifying the rule of *Davenport*. As discussed in Part IV, *Davenport* has been interpreted to stand for the proposition that "actual innocence" extends to claims alleging innocence of the underlying *crime* of conviction, and does not extend to noncapital USSG sentences.[141] Further, other circuits have used this interpretation as support to develop a similar meaning of the "actual innocence" exception in § 2255.[142] But in *Narvaez v. United*

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136 *Id.* at 740–41 (citing United States v. Richards, 5 F.3d 1369, 1371 (10th Cir. 1993)).

137 Relying on a case that has an identical holding as *Davenport*, rather than relying on *Davenport* itself, is also significant. *See infra* Part V.A.

138 Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011).

139 *Id.*

140 *Id.* at 702–03.

141 *See supra* Part IV.A.

142 *See supra* Part IV.

States,[143] decided after *Gilbert* and *Sun Bear*, the Seventh Circuit granted relief to a prisoner who alleged "actual innocence" of his erroneously enhanced sentence.[144] In its analysis, *Narvaez* suggests that the scope of *Davenport*—that the "actual innocence" exception of § 2255 encompasses the underlying *crime* of conviction only—may no longer be so narrow.

This Part first argues that *Narvaez* did in fact fundamentally reinterpret *Davenport*, and therefore *Davenport* is no longer good law. Next, this Part argues that *Narvaez* should have a profound effect on the other circuits that have faced "actual innocence" challenges to *Begay* sentencing errors. This Part will then discuss a possible limitation on the holding of *Narvaez*: a Supreme Court case that may affect the legality of *Begay*-type sentences. Finally, this Part argues that *Narvaez*—a USSG case—should extend to erroneously enhanced ACCA sentences.

A. The Seventh Circuit's View of "Actual Innocence": Narvaez v. United States

In *Narvaez*,[145] the petitioner pleaded guilty in 2003 to bank robbery in violation of 18 U.S.C. § 2113(a).[146] Narvaez was sentenced as a career offender under § 4B1.1 of the United States Sentencing Guidelines because he had previously been convicted twice of escape (involving failure to return to confinement),[147] which was a violent felony pre-*Begay*.[148] As a result of the § 4B1.1 enhancement, Narvaez's then-mandatory sentencing range was increased from 100–125 months to 151–188 months.[149] Narvaez received 170 months,[150] a sentence higher than the maximum he could have received had the sentence enhancement not been applied.

Subsequently, the Supreme Court held in *Begay* that escape was no longer a violent felony within the meaning of the United States Sentencing Guidelines.[151] Narvaez filed a motion to vacate his sentence pursuant to § 2255.[152] He argued that his § 4B1.1 sentence enhancement was illegal in light of *Begay* and *Chambers* because his prior escape convictions are no longer

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143 674 F.3d 621 (7th Cir. 2011).

144 *Id.* at 630.

145 674 F.3d 621 (7th Cir. 2011).

146 *Id.* at 623.

147 *Id.* at 623–24.

148 *Id.* at 624 n.4.

149 *Id.* at 624.

150 *Id.*

151 Begay v. United States, 553 U.S. 137, 148 (2008).

152 *Narvaez*, 674 F.3d at 625.

crimes of violence.[153] The district court dismissed his motion.[154] The Seventh Circuit reversed the lower court's decision, granted Narvaez's § 2255 motion, and ordered Narvaez to be resentenced.[155]

1. *Narvaez*'s Enhanced USSG Sentence

One ground upon which the Seventh Circuit relied was that Narvaez's sentence, unlike those of Gilbert and Sun Bear, was erroneously increased *above* the maximum guideline range.[156] If *Begay* had been in effect at his original sentencing, then he could not have received his 170-month sentence. The Seventh Circuit concluded that although "sentencing errors are generally not cognizable on collateral review . . . Mr. Narvaez's case, however, does not come within this general rule. It presents a special and very narrow exception: A post conviction [sic] clarification in the law has rendered the sentencing court's decision unlawful."[157] The court further reasoned that "Mr. Narvaez never should have been subjected to the enhanced punishment reserved for such repetitive *and* violent offenders,"[158] because "[t]he career offender status illegally increased Mr. Narvaez's sentence *approximately five years beyond that authorized by the sentencing scheme*.[159] Therefore, Mr. Narvaez's claim goes to the fundamental legality of his sentence and asserts an error that constitutes a miscarriage of justice, entitling him to relief."[160] The Seventh Circuit ordered the district court to resentence Narvaez without the erroneous career offender enhancement.[161]

2. *Narvaez* Broadened the Scope of "Actual Innocence"

One of the most significant aspects of *Narvaez* lies in its reinterpretation of *Davenport*.[162] In *Davenport*, two petitioners sought relief: Davenport for his enhancement under the ACCA, and Nichols for his conviction under 18 U.S.C. § 924(c) for "use" of a firearm during a drug

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153 *Id.* The government conceded that Narvaez's prior convictions of escape (on which his sentence enhancement was based) are no longer crimes of violence under the career offender guidelines of § 4B1.1. *Id.*

154 *Id.*

155 *Id.* at 630.

156 *Id.* at 626–27.

157 *Id.* at 627 (internal citations omitted).

158 *Id.*

159 *Id.* at 630 (emphasis added).

160 *Id.*

161 *Id.*

162 *In re* Davenport, 147 F.3d 605, 605 (7th Cir. 1998).

offense.[163] Davenport claimed that one of his predicate felonies—burglary—was no longer within the scope of the ACCA (i.e., not a violent felony).[164] Nichols, on the other hand, argued that his conviction for "use" of a firearm was illegal in light of a subsequent Supreme Court case that held that "use" of a firearm requires more than mere possession.[165]

Both petitioners were arguing "actual innocence": Davenport, innocence of his sentence and Nichols, the crime of conviction. The Seventh Circuit found that Nichols was "actually innocent" of the crime of conviction,[166] but Davenport's claim failed because being "innocent" of the armed career criminal status was not the same thing as arguing "actual innocence" of the crime of conviction.[167] Thus, the rule of *Davenport* was that sentence enhancements cannot be grounds for "actual innocence" claims; a prisoner can only be "actually innocent" of a conviction, not sentence.

But *Narvaez* appears to interpret *Davenport* differently. In *Narvaez*, the Seventh Circuit analogized Narvaez's position to that of Nichols, not Davenport:

> In *In re Davenport*, a federal prisoner filed a motion to vacate, in which he claimed that his conviction under 18 U.S.C. § 924(c) for "use" of a firearm during the commission of a drug offense was illegal in light of the Supreme Court's decision in *Bailey v. United States* . . . We held in *Davenport* that, in light of the Court's *Bailey* decision, the prisoner was "being held in prison for a nonexistent crime," and, therefore, may be entitled to collateral relief based upon his *Bailey* claim . . . *Although* [Davenport] *provide[s] collateral relief when a defendant is innocent of the underlying crime, we believe that reasoning extends to this case, where a post-conviction Supreme Court ruling made clear that Mr. Narvaez was not eligible for the categorization of violent offender wrongfully imposed upon him*.[168]

Narvaez seems to suggest that serving an erroneously enhanced sentence is equivalent to being punished for a non-existent crime. *Narvaez*'s reinterpretation of *Davenport* further suggests that the innocence claimed by prisoners who were given sentences like Narvaez's—sentences that were erroneously enhanced above the statutory maximum—is more analogous to the

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163 *Id.* at 607.

164 *Id.*

165 *Id.*

166 *Id.* at 612.

167 *Id.* at 609–10.

168 Narvaez v. United States, 674 F.3d 621, 628 & n.12 (7th Cir. 2011) (emphasis added) (citations omitted).

type of innocence asserted by Nichols in *Davenport*. In sum, *Narvaez* adopts the view that a prisoner could file a § 2255 petition asserting "actual innocence" of his illegally-enhanced USSG sentence.[169]

Although *Narvaez* dealt exclusively with § 2255 motions, the Seventh Circuit recently held in *Brown v. Caraway*[170] that a *Begay*-type sentence is corrigible in a § 2241 proceeding.[171] In *Caraway*, the petitioner attacked his erroneously enhanced sentence in a § 2241 petition, claiming that the sentencing court's miscalculation of his sentence (in light of *Begay*) was a miscarriage of justice and he was therefore "actually innocent of being a career offender."[172] The Seventh Circuit stated that "[a]lthough *Narvaez* arose in a distinct procedural context (there, the § 2255 motion was petitioner's first), its reasoning regarding the nature of the error applies here."[173] Interestingly, the Seventh Circuit noted that it disagreed with the interpretation of the savings clause advanced by the Eighth and Eleventh Circuits.[174] The court stated that "[t]he text of the clause focuses on the legality of the prisoner's detention . . . it does not limit its scope to testing the legality of the underlying criminal conviction."[175] Thus, the court concluded "that a [prisoner] may utilize the savings clause to challenge the misapplication of the career offender Guideline."[176]

Therefore, the Seventh Circuit extended the *Narvaez* holding to include § 2241 petitions. As it stands in the Seventh Circuit, a misapplication of the USSG is a fundamental miscarriage of justice corrigible in a § 2255 or a § 2241 proceeding.[177] Stated another way, a prisoner can be actually innocent of his erroneously enhanced sentence in both a § 2255 and a § 2241 proceeding.[178] And, if a miscarriage of justice occurs when a prisoner's sentence is

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169 *Id.* at 629.

170 719 F.3d 583 (7th Cir. 2013).

171 *Id.* at 587–88.

172 *Id.* at 586.

173 *Id.* at 587.

174 *Id.* at 588.

175 *Id.*

176 *Id.* The court limited this holding to sentences that were imposed before the Supreme Court decided *United States v. Booker*. *Id.* The significance of *Booker*'s relation to "actual innocence" is discussed in Part V.A.

177 Although the Seventh Circuit did not make this explicit holding in *Narvaez*, it did so in *Caraway*. The court stated in *Caraway*, "*Narvaez* concluded that a misapplication of the mandatory career offender Guideline presented a cognizable non-constitutional claim for initial collateral relief because the error resulted in a miscarriage of justice." *Caraway*, 719 F.3d at 587; *see also* Brown v. Rios, 696 F.3d 638, 640 (7th Cir. 2012) (stating that *Narvaez* held that a miscarriage of justice occurred when a prisoner's sentence was erroneously increased above the maximum authorized by the USSG).

178 *See supra* note 177.

erroneously enhanced above the maximum, as *Narvaez* suggests,[179] then it is unlikely that *Davenport* survives *Narvaez* and *Caraway*.

B. The Narvaez *Holding Has Been Limited*

Although *Narvaez* held that the "actual innocence" exception applies to USSG sentences that are erroneously enhanced above the maximum authorized by the USSG, this holding[180] has recently been complicated by a subsequent decision. In *Hawkins v. United States*,[181] the Seventh Circuit narrowed the circumstances in which *Narvaez* can be utilized by prisoners.[182] This Part discusses the case that limited *Narvaez*; then this part rejects the argument that *Hawkins* overrules *Narvaez* completely.

1. The Availability of the *Narvaez* Rule Is Dependent Upon When a Prisoner Was Originally Sentenced

In light of *Hawkins*, the availability of *Narvaez* is dependent upon *when* a prisoner was originally sentenced.[183] Specifically, *Hawkins* suggests that *Narvaez* and *Caraway* are available only to prisoners sentenced before *Booker*,[184] a case in which the Supreme Court of the United States held that the USSG are now advisory.[185]

In *Hawkins*, the petitioner pleaded guilty to assault which translated to a guideline range of either 15 to 21 months or 21 to 24 months imprisonment.[186] The petitioner had two prior convictions of "walkaway escape," which was a violent felony under the USSG in the Seventh Circuit at the time he was sentenced.[187] Accordingly, petitioner was a career offender

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

180 Hereinafter the *Narvaez* rule includes the addition of *Caraway*, that a misapplication of the USSG is a fundamental miscarriage of justice corrigible in a § 2241 proceeding in addition to a § 2255 proceeding.

181 706 F.3d 820 (7th Cir. 2013).

182 *Id.* at 824; *see also infra* Part V.C.

183 *See Hawkins*, 706 F.3d at 821.

184 United States v. Booker, 543 U.S. 220, 259 (2005); *Hawkins*, 706 F.3d at 822.

185 *Booker*, 543 U.S. at 259; *see also* Cunningham v. California, 549 U.S. 270, 271 (2007) ("[T]he Court [in *Booker*] concluded that rendering the Guidelines advisory came closest to what Congress would have intended had it known that the Guidelines were vulnerable to Sixth Amendment challenge. Under the advisory Guidelines system described in *Booker*, judges would no longer be confined to the sentencing range dictated by the Guidelines, but would be obligated to 'take account' of that range.").

186 *Hawkins*, 706 F.3d at 821. The sentencing judge did not decide which was applicable because petitioner was eligible for a career offender enhancement in light of his prior violent felony convictions. *Id.*

187 *Id.*

under the USSG and his correlating guideline range was 151–188 months; he received 151 months.[188] Three years later, the Supreme Court concluded that escape was not a violent felony under the ACCA and the USSG.[189] Petitioner then filed a motion under § 2255 to vacate his sentence.[190]

In denying petitioner's motion, the Court distinguished petitioner's case from *Narvaez*. Hawkins argued that this case was analogous to *Narvaez* because his sentence was erroneously increased above the maximum authorized by the USSG.[191] But the court pointed out that Narvaez, unlike Hawkins, had been sentenced pre-*Booker* when the guidelines were mandatory and "were the practical equivalent of a statute."[192] Therefore, it was arguable that Hawkins's sentence "exceeded the maximum authorized by 'law.'"[193] In the post-*Booker* sentencing scheme, the court pointed out, "the guidelines no longer bind the sentencing judge."[194] Thus, an erroneous calculation of a post-*Booker* sentence cannot be said to exceed the maximum authorized by "law."[195]

Hawkins thus limits *Narvaez* significantly: if a prisoner was sentenced pre-*Booker*, then he could be "actually innocent" of his sentence under *Narvaez*.[196] If he were sentenced post-*Booker*, then *Narvaez* would be unavailable.[197] After *Hawkins*, there is now a dichotomy of erroneously enhanced USSG sentences: those imposed pre-*Booker* and those imposed post-*Booker*. Although *Hawkins* limits *Narvaez*, it does not completely overrule *Narvaez*, as the subsequent section will explain.

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188 *Id.* Petitioner was originally sentenced two years before *Booker*, and his appeal was pending when *Booker* was decided. *Id.* at 822. The Seventh Circuit remanded his case so that the sentencing court could resentence him in light of *Booker*. *Id.* The sentencing court imposed the exact same sentence on remand, with *Booker* in effect. *Id.*

189 United States v. Chambers, 555 U.S. 122, 127–30 (2009). *Chambers* held that escape was not a violent felony under the ACCA, *id.*, but this holding applies to the USSG because the language of these two sentence enhancing mechanisms is identical. *See Hawkins*, 706 F.3d at 822; *see also* cases cited *supra* note 33.

190 *Hawkins*, 706 F.3d at 822.

191 *Id.*

192 *Id.*

193 *Id.*

194 *Id.* In *Caraway*, the Seventh Circuit affirmed the holding of *Hawkins* and applied it to § 2241 petitions: "the misapplication of the guidelines, at least where (as here) the defendant was sentenced in the pre-*Booker* era, represents a fundamental defect that constitutes a miscarriage of justice corrigible in a § 2241 proceeding." Brown v. Caraway, 719 F.3d 583, 588 (7th Cir. 2013).

195 *See Hawkins*, 706 F.3d at 823–25.

196 *See id.* at 825.

197 *Id.*

2. *Narvaez* Was Not Overruled

In *Hawkins*, the Seventh Circuit held that prisoners sentenced post-*Booker* cannot be resentenced because their *Begay*-type sentences would not have been increased above the maximum authorized by law.[198] Accordingly, an argument can be made that *Hawkins* completely destroys *Narvaez*. Under this view, prisoners sentenced pre-*Booker*, who would be resentenced post-*Booker*, would similarly be unable to show that his sentence was increased above the maximum authorized by law. After all, in the post-*Booker* sentencing scheme, the sentencing court has discretion to deviate from the guideline range and impose the exact same erroneous sentence as the one imposed pre-*Booker*.[199] If a prisoner could receive the same sentence upon resentencing, this argument goes, then his sentence would not "exceed the maximum authorized by law" and therefore is not a miscarriage of justice.[200]

The Seventh Circuit did not address this issue in *Hawkins*, but it did reject this argument in *Narvaez*. The government made this exact assertion in an attempt to dissuade the Court from resentencing Narvaez. The government argued that "because Mr. Narvaez would be exposed to the full range of punishment authorized by Congress for his crime at resentencing, and would remain eligible for the identical . . . sentence under the advisory guidelines, his claim does not present a fundamental defect."[201] The court rejected this argument, concluding that it would be pure speculation to assume that a prisoner sentenced pre-*Booker* (with the erroneous enhancement) would receive the same sentence at his post-*Booker* resentencing (without the erroneous enhancement):

> Speculation that the district court today might impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, Mr. Narvaez was sentenced based on the equivalent of a nonexistent offense. As the Supreme Court put it in *Hicks v. Oklahoma*, to assume that the same sentence would have been imposed in the absence of the career offender

198 *Id.*

199 *See* United States v. Booker, 543 U.S. 220, 259 (2005); *see also* Cunningham v. California, 549 U.S. 270, 271 (2007) ("[T]he Court [in *Booker*] concluded that rendering the Guidelines advisory came closest to what Congress would have it intended had it known that the Guidelines were vulnerable to Sixth Amendment challenge. Under the advisory Guidelines system described in *Booker*, judges would no longer be confined to the sentencing range dictated by the Guidelines, but would be obligated to 'take account' of that range.").

200 *See, e.g.*, Gilbert v. United States, 640 F.3d 1293, 1304 (11th Cir. 2011) ("There is, however, no guarantee that [Gilbert's] new sentence under the post-*Booker* advisory guidelines system will be shorter than [his original sentence]. It could be the same or even longer.").

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

> provision is 'frail conjecture that' evinces in itself 'an arbitrary disregard of the petitioner's right to liberty.'[202]

As *Hawkins* did not address this issue, this portion of *Narvaez* remains good law. *Hawkins* therefore limited *Narvaez*, but did not overrule it completely. As it stands, the rule of *Narvaez* seems to be that Seventh Circuit prisoners sentenced pre-*Booker*, whose sentences were erroneously increased above the maximum authorized by the then-mandatory USSG range, may be "actually innocent" of their erroneously enhanced sentences.

C. What Are the Implications of Narvaez *on Other Circuits?*

Although *Hawkins* recently limited the holding of *Narvaez*,[203] *Narvaez* nonetheless casts doubt on the validity of *Davenport*. If *Davenport* is no longer good law, it would follow that an interpretation based, in part, on *Davenport's* holding would be somewhat weakened. The Eleventh Circuit explicitly relied on *Davenport* in support of its conclusion that the "actual innocence" exception includes innocence of a prisoner's underlying noncapital crime only,[204] and the Eighth Circuit relied on a case with an identical holding.[205] As *Davenport* may no longer stand for that proposition, the reasoning of these circuits may be open to attack, or at the very least, called into question.

The true significance of *Narvaez*, however, is not merely that it weakens the reasoning of another case that relied on *Davenport* for support. Rather, *Narvaez* questions what was once a universally accepted definition of "actual innocence." *Narvaez* stands for the proposition that the scope of "actual innocence" needs to be reexamined and broadened in light of *Begay* and its progeny. The Seventh Circuit recognized that prisoners like Narvaez, whose sentences were erroneously enhanced because of a mistake by the sentencing court, deserve to be resentenced.[206] The court realized that the only way to provide relief to a prisoner like Narvaez was to extend the scope of the "actual innocence" exception to include noncapital sentencing errors in limited circumstances, even if doing so meant reinterpreting its own case that stood for the contrary view.[207]

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202 *Id.* (citations omitted).

203 *Narvaez* will hereinafter include the limitation placed on it by *Hawkins*. Thus, for the remainder of this Note, the rule of *Narvaez* is: a prisoner can use the "actual innocence" exception in § 2255 to attack his erroneously enhanced sentence, but only if he was sentenced pre-*Booker*.

204 *See Gilbert*, 640 F.3d at 1314; *supra* Part IV.B.2.

205 *See* Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011); *supra* Part IV.C.2.

206 *Narvaez*, 674 F.3d at 629.

207 *Id.* at 628–29.

Further, the rule of *Narvaez* should have a particularly significant impact on the Eighth and Eleventh Circuits because it addressed an issue that both of those circuits left open. In *Narvaez*, the petitioner's sentence was erroneously increased *above* the maximum authorized by the USSG.[208] Both the Eighth and Eleventh Circuits left open the issue of whether the "actual innocence" exception applies to a sentence that was erroneously enhanced above the maximum authorized by the USSG.[209]

If either of these Circuits would face the same factual scenario as *Narvaez*—a prisoner alleging "actual innocence" of his sentence that was erroneously increased *above* the maximum authorized by the USSG—it would be placed in a tough position. These circuits may be inclined to grant relief to such a prisoner, but would be hesitant to extend the scope of "actual innocence." If faced with such a scenario, however, these circuits should be persuaded by *Narvaez* because it addressed the issue left open in these circuits, and reinterpreted the definition of "actual innocence" upon which both of these circuits relied.

D. Narvaez *Should Apply to Erroneously Enhanced ACCA Sentences*

Every case previously discussed in this Note dealt exclusively with sentences that were erroneously enhanced under the USSG. Another type of sentencing error involves sentences that were erroneously enhanced under the ACCA. In this situation, a prisoner will use the same avenue of relief as a prisoner collaterally attacking his erroneously enhanced USSG sentence: 28 U.S.C. § 2255 or 28 U.S.C. § 2241. The issue is whether the "actual innocence" exception should extend to erroneously enhanced ACCA sentences.

There is a stark contrast between a sentence enhanced under the ACCA and a sentence enhanced under the USSG. A prisoner's erroneously enhanced USSG sentence may overlap with his original sentence, as can be seen in *Gilbert* and *Sun Bear*. [210] Thus, it is possible that a prisoner could receive the exact same sentence even though his *Begay*-type sentence was erroneously enhanced. There is no possibility of overlapping sentences with the ACCA. Under the ACCA, a defendant convicted of an unlawful weapons possession with three or more prior "violent felonies" or "serious drug offenses" will face a *mandatory minimum* sentence of fifteen years imprisonment and a maximum sentence of life imprisonment.[211] A defendant without these predicate convictions faces a statutory range of zero to ten years imprisonment.[212]

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208 *Id.* at 624.

209 *See supra* Parts IV.B.3, IV.C.3.

210 *See, e.g.*, Gilbert v. United States, 640 F.3d 1293, 1299–1300 (11th Cir. 2011); *Sun Bear*, 644 F.3d at 702.

211 18 U.S.C. § 924(e)(1) (2012).

212 *Id.*; § 924(e)(1), § 924(a)(2).

This difference should warrant the extension of *Narvaez* to erroneously enhanced ACCA sentences, for three reasons. First, such sentences necessarily exceed the maximum that would have otherwise been allowed *but-for* the erroneous enhancement at the time of sentencing. With the erroneous enhancement, a prisoner will receive a statutory minimum of fifteen years imprisonment;[213] without the enhancement, a prisoner will receive a statutory maximum of ten years in prison.[214] Second, if a prisoner who received an erroneously enhanced ACCA sentence is resentenced without the enhancement, the prisoner cannot receive a sentence longer than, or as long as, his original sentence.[215] Third, a prisoner who received an erroneously enhanced ACCA sentence could not receive the same sentence at his original sentencing.[216]

A recent case decided by the United States Court of Appeals for the Sixth Circuit extended the miscarriage of justice exception to erroneous ACCA sentences. In *Kirk v. United States*,[217] the petitioner was convicted of being a felon in possession of a firearm under the ACCA.[218] The maximum sentence for his crime under the ACCA was 120 months imprisonment.[219] Petitioner also had two prior violent felony convictions, and was eligible for a sentence enhancement under the ACCA; he received a sentenced of 190 months.[220]

Three years later, *Begay* was decided and, in light of that decision, one of Kirk's prior convictions, aggravated vehicular assault, no longer qualified as a "violent felony" under the ACCA.[221] The court granted Kirk's § 2255 motion to vacate his sentence, and remanded for resentencing.[222] The Court noted that Kirk's sentence of 190 months was "well above the 120–month *statutory* maximum that would otherwise apply."[223] Citing *Narvaez*, the court concluded that "[t]his sentence—one 'that the *law* cannot impose upon [Kirk]'—undoubtedly represents a miscarriage of justice, making relief under § 2255 appropriate."[224]

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213 18 U.S.C. § 924(e)(1).

214 *Id.*

215 *See id.*

216 *Id.*

217 481 Fed. App'x 249 (6th Cir. 2012).

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.* The government also conceded that Kirk had only two qualifying violent felonies under the ACCA in light of *Begay*. *Id.*

222 *Id.*

223 *Id.* (emphasis added).

224 *Id.* (emphasis added) (quoting United States v. Shipp, 589 F.3d 1084, 1091 (10th Cir. 2009) (citing Narvaez v. United States, 674 F.3d 621, 628–29 (7th Cir. 2011))).

The Seventh Circuit recently discussed the significance of the distinction between an erroneous ACCA sentence and an erroneous USSG sentence. In *United States v. Wyatt*,[225] the petitioner was convicted, post-*Booker*, of a drug offense under the USSG.[226] The maximum for his drug offense was 150 months imprisonment.[227] Petitioner also had a prior conviction of escape from a halfway house, which was a violent felony at the time he was sentenced.[228] Accordingly, petitioner was eligible for a sentence enhancement, and received 262 months.[229] Subsequently, *Begay* was decided and, in light of that decision, petitioner's conviction of escape no longer qualified as a violent felony under the USSG. Petitioner filed a § 2241 petition alleging that his erroneously enhanced USSG was "illegal" in light of *Begay*.[230]

The court noted that "Wyatt was sentenced at a time when the district court was aware the guidelines would be considered advisory. In an ACCA case, a defendant in Wyatt's circumstances could well be entitled to relief under section 2241."[231] The court concluded that "this is not a statutory case or an ACCA case; it is a sentencing guidelines case, and it does not appear that, at this stage, Wyatt is entitled to any relief on collateral review in these circumstances."[232]

Courts have recognized the difference between ACCA sentences and USSG sentences in the context of applying the "actual innocence" exception. Unlike USSG sentences, prisoners with erroneously enhanced ACCA sentences could not receive the same or a longer sentence upon resentencing because judges do not have the discretion when imposing ACCA sentences; they are statutorily imposed. Accordingly, a prisoner whose ACCA sentence was erroneously enhanced in light of *Begay* should be able to utilize the "actual innocence" exception because such a sentence necessarily exceeds the maximum authorized by law.

VI. *NARVAEZ* SHOULD BE UNIVERSALLY ADOPTED

The view taken by the Eighth and Eleventh Circuits—that "actual innocence" extends to crimes but not sentences—is predicated on the interests

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225 672 F.3d 519 (7th Cir. 2012).

226 *Id.*

227 *Id.* at 520.

228 *Id.* at 519–20.

229 *Id.* at 520.

230 *Id.* at 520–21.

231 *Id.* at 523–24.

232 *Id.* at 524. Wyatt's § 2255 petition was denied because the Seventh Circuit did not have jurisdiction over his claim. *Id.*

of finality.[233] These circuits are worried that if "actual innocence" could be used to attack erroneous sentences, then it would open the floodgates to endless filings of habeas petitions, which would destroy the finality interest of § 2255 that Congress intended to protect.[234]

The Seventh Circuit's approach to "actual innocence" in *Narvaez* should be adopted—and the approach taken by the Eighth and Eleventh Circuits should be rejected—for two important reasons. First, both types of innocence would be remedied; prisoners with *Begay*-type sentences would be able to correct their erroneous sentences, just as prisoners who are innocent of one of their underlying crimes of conviction are able to do. Second, the Seventh Circuit's approach would not destroy the finality interests of § 2255.

A. Narvaez *Would Remedy Both Types of Innocence*

The Eighth and Eleventh Circuits rely heavily on the distinction between a prisoner using "actual innocence" to attack his crime versus a prisoner using "actual innocence" to attack his sentence.[235] In those circuits, whether a prisoner's § 2255 or § 2241 claim is granted hinges largely upon this distinction: a claim alleging innocence of the underlying crime based on a post-conviction change in law may be cognizable on collateral review, but a claim alleging innocence of an erroneous sentence enhancement may not be.[236] Consider a statement made by the Eleventh Circuit: "If guidelines enhancements were crimes, they would have to be charged in the indictment and proven to the jury beyond a reasonable doubt. [Petitioner]'s position turns on treating sentences as convictions."[237]

But either way, a prisoner may be serving an erroneous sentence based on a post-conviction change in law. As the Supreme Court stated, "[t]he Framers viewed freedom from unlawful restraint as a fundamental precept of liberty, and they understood the writ of habeas corpus as a vital instrument to secure that freedom."[238] If prisoners can use habeas corpus to attack their crimes but not their sentences, are we conceding that habeas corpus is available to protect against unlawful restraints of liberty, unless it's a sentencing error? In an impassioned dissent in *Gilbert*, Circuit Judge James Hill thought so:

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233 Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011) (refusing to equate "miscarriage of justice" with every unfair sentence because it would be an "open-ended expansion" of "actual innocence"); Gilbert v. United States, 640 F.3d 1293, 1309–12 (11th Cir. 2011) (concluding that creating an "actual innocence" exception for sentencing errors would "wreak havoc on the finality interests that Congress worked so hard to protect").

234 *Sun Bear*, 644 F.3d at 706; *Gilbert*, 640 F.3d at 1309–12.

235 *See supra* Parts IV.B.2, C.2.

236 *See supra* Part IV.B.2, C.2.

237 *Gilbert*, 640 F.3d at 1320 (citations omitted).

238 Boumediene v. Bush, 553 U.S. 723, 739 (2008).

"[T]he majority appears not to understand that Gilbert's imprisonment—no matter how his sentence was calculated—is the act of the Sovereign, who is forbidden by our Constitution to deprive a citizen of his liberty in violation of the laws of the United States."[239] Circuit Judge Beverly Martin, also dissenting in *Gilbert*, similarly highlighted the arbitrary distinction between sentencing claims and claims alleging innocence of the underlying crime: "[T]here is no relief [in the Eleventh Circuit] for any person who is . . . wrongfully incarcerated on account of a sentencing error. This is so, even here, where that sentencing error leaves him incarcerated for a decade or more beyond what is called for by law."[240]

Judge Hill and Judge Martin correctly pointed out that habeas corpus should be available to prisoners who are innocent of their underlying crime of conviction *and* prisoners whose sentences were erroneously enhanced. In either situation, prisoners are serving sentences beyond that authorized by law. And in both situations, habeas corpus relief should be available. As the *Narvaez* court pointed out, "to increase, dramatically, the point of departure for [a] sentence is certainly as serious as the most grievous misinformation that has been the basis for granting habeas relief."[241]

B. Narvaez *Would Not Destroy the Finality Interests of § 2255*

The Eighth and Eleventh Circuits' distinction between crimes and sentences for purposes of "actual innocence" is predicated on the interests of finality.[242] Under this view, the scope of "actual innocence" is confined to crimes of conviction so that prisoners could not file an endless array of habeas petitions attacking their sentences.[243] After all, Congress passed AEDPA "to further principles of comity, finality, and federalism."[244] To ensure finality, AEDPA placed additional procedural hurdles on § 2255[245] that eliminated the possibility that prisoners could file an endless array of habeas corpus petitions.[246] Allowing prisoners to use "actual innocence" to challenge their sentences in addition to their crimes would, under this view, defeat AEDPA's purpose.[247] In sum, extending the "actual innocence" exception to include

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239 *Gilbert*, 640 F.3d at 1337 (Hill, J., dissenting).

240 *Id.* at 1332 (Martin, J., dissenting).

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

242 *See* cases cited *supra* note 233.

243 *Gilbert*, 640 F.3d at 1311.

244 Williams v. Taylor, 529 U.S. 420, 436 (2000).

245 These procedural hurdles include the one-year time limitation and the ban on second and successive motions. *See supra* Part III.

246 *See Gilbert*, 640 F.3d at 1311.

247 *Id.*

sentencing claims would allow prisoners to circumvent AEDPA's procedural hurdles by alleging they are "actually innocent" of their sentence.

First, this argument conflates the practicality of reviewing sentences and convictions. The concerns about comity, finality, and federalism are not as profound in the review of sentences as in the review of convictions.[248] Concerns about comity and federalism don't exist when federal courts review a sentence imposed by a federal district court in a § 2255 proceeding.[249] Also, a sentencing error that warrants resentencing is much less time consuming than conducting a new trial when the prisoner is found to be innocent of his crime.[250] The judge will need to read an update to the presentence report and any additional sentencing memoranda from the parties—the whole process takes no longer than the original sentencing, "usually less than one hour."[251] If the conviction is vacated, on the other hand, the entire process starts from the beginning.[252]

Second, as the Seventh Circuit Court of Appeals noted in *Narvaez*, such a situation is a "special and very narrow exception."[253] Such a "narrow exception" would probably not open up the floodgates to habeas corpus claims and destroy § 2255's finality interests. The rule of *Narvaez* would only apply in very limited circumstances. There must have been a post-conviction change in law that reinterprets a prisoner's predicate offense(s).[254] In light of the post-conviction change in law, the prisoner's sentence must have been erroneously increased above the maximum sentence he would have otherwise received.[255] Also, in a USSG case, the prisoner would probably have to be sentenced pre-*Booker*, when the sentencing judge did not have discretion to deviate from the guidelines range.[256] Such a narrow exception would not open the floodgates so that other prisoners could abuse the "actual innocence" exception. There may be more habeas filings, but as the dissent in *Gilbert* pointed out, "if there are others who are wrongfully detained without a remedy, [courts] should devote

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248 Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 146 (2012).

249 *Id.* Comity and federalism concerns arise when federal courts review the judgments of state courts. *Id.*; *see also Gilbert*, 640 F.3d at 1334 (Martin, J., dissenting) ("[T]his case does not raise comity concerns because we are asked to correct a mistake we ourselves made in federal court. We are not reviewing a state court conviction which would require our deference.").

250 Russell, *supra* note 248, at 149.

251 *Id.*

252 *Id.*

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

254 *See id.*

255 *Id.*

256 *See supra* Part V.B.

the time and incur the expense to hear their cases. What is the role of courts, if not this?"[257]

The finality argument advanced by the Eighth and Eleventh Circuits also prefers finality over justice. Prisoners with *Begay*-type sentences received their erroneous sentences due to the sentencing courts' incorrect interpretation of sentencing enhancement provisions. *Narvaez* would remedy this error while the approach taken by the Eighth and Eleventh Circuits would force these prisoners to serve out their erroneous sentences under the guise of finality. In an impassioned dissent, Judge Hill stated in *Gilbert* that "this court holds that we may not remedy such a sentence error. This shocking result . . . confirms what I have long feared. The Great Writ is dead in this country."[258] He observed that "[t]hrough our self-imposed limitations, we have found a way to deny virtually all sentencing claims. We do this, avowedly, in the pursuit of 'finality.' But in so doing, we cast a pall of unconstitutionality over the otherwise beneficial provisions of § 2255."[259] He concluded by asserting that finality is no reason to deny relief where the court is obligated to provide it:

> I recognize that without finality there can be no justice. But it is equally true that, without justice, finality is nothing more than a bureaucratic achievement. . . . Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliably judicial determination of his claim. . . . A judicial system that values finality over justice is morally bankrupt. That is why Congress provided in § 2255 an avenue to relief in circumstances just such as these. For this court to hold that it is without the power to provide relief to a citizen that the Sovereign seeks to confine illegally . . . is to adopt a posture of judicial impotency that is shocking in a country that has enshrined the Great Writ in its Constitution.[260]

Finality is essential to our justice system, but it should not be used to deny relief to prisoners who deserve to be resentenced. The Seventh Circuit's approach to "actual innocence" in *Narvaez* would address the finality concerns that Judge Hill articulates: it extends the scope of "actual innocence" so that prisoners with *Begay*-type sentences may have an avenue of relief. *Narvaez* also respects the finality interests that the Eighth and Eleventh Circuits value because it is a narrow exception that is available in limited circumstances. Whether a prisoner is innocent of his crime or has received an illegal sentence in light of a post-conviction change in law, under *Narvaez* he would have a shot at relief.

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257 Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (Martin, J., dissenting).

258 *Id.* (Hill, J., dissenting).

259 *Id.*

260 *Id.* at 1337.

VII. CONCLUSION

As a result of the Supreme Court's decision in *Begay*, many prisoners are serving sentences that are clearly erroneous. To remedy this error, a prisoner will likely have to file either a § 2255 motion or a habeas petition under § 2241 alleging "actual innocence" of his sentence. The scope of "actual innocence" in regard to noncapital sentencing is far from settled among the circuits. This uncertainty is likely to have a devastating effect on prisoners whose sentences are clearly erroneous and who therefore deserve to be resentenced. Until the Circuit Courts of Appeals, or the Supreme Court, develops a uniform approach to "actual innocence" in the noncapital sentencing context, many federal prisoners may be forced to serve out their clearly erroneous sentences.

This Note discussed two very different approaches to the scope of "actual innocence" in the noncapital sentencing context. One approach, taken by the Eighth and Eleventh Circuits, refuses to extend the "actual innocence" exception to noncapital sentences. This approach is troublesome because it uses finality as an excuse to deny relief to prisoners whose sentences were enhanced due to the sentencing court's error. This arbitrary distinction between sentences and crimes in the "actual innocence" context may force prisoners to serve the entirety of their erroneous sentences.

The other approach, taken by the Seventh Circuit, would value justice above finality. It recognizes that erroneously enhanced noncapital sentences should be remedied and the "actual innocence" exception may be the only instrument to do so. This approach would eliminate the arbitrary distinction between prisoners who are innocent of their illegal sentence and prisoners who are innocent of their crime in the "actual innocence" context, but would not open the floodgates to excessive habeas corpus appeals, because it is a narrow exception. The Seventh Circuit's approach would thus ensure that prisoners would not be punished for alleging the wrong type of innocence.

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