ERRORS RACKING UP TIME: BEGAY ERROR AND ITS ROLE IN THE FIGHT OVER SENTENCING REFORM

ABSTRACT

The United States' and the state of Iowa's overflowing prison populations cost billions of dollars in the respective correctional department's budget each fiscal year. Much of this cost goes to housing nonviolent drug offenders and repeat offenders. After the U.S. Supreme Court rulings of Booker *and* Begay*, many of these sentenced individuals were found to have had their sentences improperly enhanced under the Armed Career Criminal Act (ACCA) and the Federal Sentencing Guidelines (Guidelines). These improper enhancements under the ACCA and the Guidelines occurred when the sentenced individuals were placed into the wrong sentencing category, meaning sentencing terms for those individuals were calculated using that label and were likely wrong. These individuals have since petitioned for retroactive relief. This retroactive application corrects the individuals' improper categorizations and sentence terms.*

This Note proposes a solution already in play in the Seventh Circuit. Reliability, fairness, and justice should outweigh the competing interests of finality and expediency when sentencing nonviolent offenders. While still narrow, retroactively granting relief to those who were improperly sentenced creates an opportunity to solve the overflow and financial crises that plague our prisons on the state and federal levels. This Note encourages the Supreme Court to address the cognizability issue that has split the circuit courts.

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I. INTRODUCTION

The issue of sentencing in our criminal justice system has remained a highly discussed and hotly contested issue in the past decade. This complex issue receiving bipartisan attention has continued to keep the nation's attention because of the issues created by sentencing schemes.[1] Congress created these Guidelines starting in the 1980s to make sentencing less discretionary for judges; however, the schemes and their progeny have left many federal judges feeling like their "hands are tied."[2] Frustrated judges have found long prison sentences stemming from the War on Drugs needless and too harsh for some of the drug crimes committed.[3] This issue for judges has gradually improved over times as the Federal Sentencing Guidelines (Guidelines) were no longer considered mandatory after the Supreme Court's ruling in *United States v. Booker*.[4] This more discretionary approach allows a sentencing judge to deviate from the Guidelines range so long as the sentence imposed is not "higher than the maximum authorized solely by the jury's verdict."[5] However, many judges are still dissatisfied with the Guidelines results,[6] and even further, some prosecutors are lobbying against judges' desires for potential reform due to their concern over the inability to use the threat of a harsh sentence as leverage.[7]

Disagreement over how to solve the problem has created an

1. *See infra* Part V.

2. Eli Saslow, *Against His Better Judgment*, WASH. POST (June 6, 2015), http://www.washingtonpost.com/sf/national/2015/06/06/against-his-better-judgment/; *accord* Jessica Roth, *The "New" District Court Activism in Criminal Justice Reform* 195 (Cardozo Legal Studies, Research Paper No. 532, 2018) (footnote omitted), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103315.

3. *See, e.g.*, Saslow, *supra* note 2.

4. *See* United States v. Booker, 543 U.S. 220, 245 (2005).

5. *Id.* at 266–67.

6. *See, e.g.*, Saslow, *supra* note 2.

7. *See, e.g.*, Ann E. Marimow, *Softening Sentencings, Losing Leverage*, WASH. POST (Oct. 31, 2015), http://www.washingtonpost.com/sf/national/2015/10/31/leverage/.

unresolved split in the circuit courts.[8] Due to the *Begay* error, certain offenders were improperly classified under the previous definition of "violent felony"—also referred to under the Guidelines as a "crime of violence"—and then sentenced under those improper classifications.[9] This Note will take the approach of the Seventh Circuit in finding that improperly classifying someone under the mandatory version of the Guidelines "arguably violates the Due Process Clause by conferring a longer sentence than the law allows," but will only apply to those offenders sentenced under the pre-*Booker* version of the Guidelines.[10] Additionally, the Eighth Circuit should follow the Seventh Circuit's holding.[11] Improper classification errors under the once-mandatory Guidelines must be remedied with the same solutions found by the Seventh Circuit.[12] Granting relief to those improperly sentenced prioritizes the interest of justice over the competing interest of finality and potentially lessens the strain on the overflowing federal and state prisons.

This Note will discuss a brief history of the Federal Sentencing Guidelines in the United States and how they affected the Supreme Court in the ruling of *Begay v. United States* in Part II, analyze the split among the circuit courts in Part III, assess the impact of these decisions on the Eighth Circuit and Iowa in Part IV, and propose that the Eighth Circuit adopt the solution of the Seventh Circuit in Part V.

II. HISTORY OF FEDERAL SENTENCING LAWS AND THE SUPREME COURT

A. *Federal Sentencing Guidelines Meets the Armed Career Criminal Act*

Even prior to *Begay*, the United States had a complicated history of dealing with criminal sentencing. Many overlapping laws were originally created in an attempt to guide the sentencing practices for what the courts consider "career offenders" and to better fight the War on Drugs.[13] First, the

8. *See infra* Part III.

9. Greg Siepel, *The Wrong Kind of Innocence: Why* United States v. Begay *Warrants the Extension of "Actual Innocence" to Include Erroneous, Non-Capital Sentences*, 116 W. VA. L. REV. 665, 670–71 (2013).

10. *See* United States v. Doe, 810 F.3d 132, 146 (3d Cir. 2015) (citing Whiteside v. United States, 748 F.3d 541, 548, *rev'd en banc on other grounds*, 775 F.3d 180 (4th Cir. 2014); Narvaez v. United States, 674 F.3d 621, 627–28 (7th Cir. 2011)).

11. *See Doe*, 810 F.3d at 146.

12. *See id.*

13. *See* MARC MAUER & RYAN S. KING, A 25-YEAR QUAGMIRE: THE WAR ON

Armed Career Criminal Act (ACCA) imposes a 15-year minimum prison term on previously convicted felons who unlawfully possess a firearm and have three or more violent felonies or serious drug offenses, or both.[14] This is similar to the Guidelines, under which harsher sentences are proposed for those dubbed career offenders.[15] Additionally, the Guidelines label individuals as career offenders if, at the age of 18, the individual committed an offense considered a "crime of violence or a controlled substance offense."[16] The U.S. Sentencing Commission (USSC) eventually amended its definition of crime of violence in the Guidelines to essentially repeat the ACCA definition of violent felony.[17] This narrower definition has since changed how sentencing occurs for those previously considered career offenders.[18]

B. *The Lead-Up from* United States v. Booker *to the Ruling in* Begay v. United States

The Guidelines continued to cause conflict for the courts when they were brought into the spotlight in *United States v. Booker*.[19] In *Booker*, the two defendants were convicted at the district court level for similar cocaine-related crimes.[20] Based on the defendant Booker's criminal history and the amount of drugs found at arrest, the jury found him guilty of possession, and Booker's base sentence under the Guidelines was to range between 210 and 262 months in prison.[21] However, at his sentencing hearing, the judge found additional factors that would mandate selection of an increased sentencing range of 360 months to life—forcing the judge to give the defendant a sentence nine years greater than the sentence warranted by the jury's factual

DRUGS AND ITS IMPACT ON AMERICAN SOCIETY 7 (2007), https://www.sentencingproject.org/publications/a-25-year-quagmire-the-war-on-drugs-and-its-impact-on-american-society/ (follow "Download PDF").

14. 18 U.S.C. § 924 (e)(1) (2012), *invalidated by* United States v. Ebron, No. 2:12-cr-00072-APG-CWH-2, 2017 WL 3337260 (D. Nev. Aug. 3, 2017).

15. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1 (U.S. SENTENCING COMM'N 2016).

16. *Id.* § 4B1.1(a).

17. Amy Baron-Evans et al., *Litigating Challenges to the Amended Definition of "Crime of Violence" in § 4B1.2(A)*, CHAMPION, Aug. 2016, at 40, 40–41.

18. *See, e.g.*, Begay v. United States, 553 U.S. 137, 144–46 (2008), *abrogated by* Johnson v. United States, 135 S. Ct. 2551 (2015).

19. *See* United States v. Booker, 543 U.S. 220, 226 (2005).

20. *Id.* at 227–28.

21. *Id.* at 227.

findings.[22]

When decided on appeal, the Supreme Court concluded the sentence violated the Sixth Amendment, relying upon *Blakely v. Washington*.[23] The Court concluded that both Sixth Amendment principles and the Court's holding in *Blakely* applied to the Guidelines.[24] In this ruling, the Court found that 18 U.S.C. § 3553(b)(1), which made the Guidelines mandatory for judges, was entirely incompatible with the requirements of the Sixth Amendment and, for this reason, made the Guidelines advisory instead of mandatory for judges.[25]

In making this decision, the Court stated that the interests of reliability and fairness found in the Sixth Amendment for defendants outweighed any "expedient and efficient sentencing" efforts.[26] This ruling now allows federal judges to alter or tailor sentences according to other factors when sentencing a defendant.[27] For example, a judge may adjust the sentence by taking the difference between the higher range of a potential sentence and the lower range of a potential sentence in order to determine the appropriate sentence length for the offender's crime.[28] Although the Court changed the statutory provision making the Guidelines mandatory, it rationalized that this holding still remained consistent with the congressional intent behind the Guidelines.[29] At the time of drafting, the USSC focused on its primary concern—that the Guidelines were certain, proportional, and fair.[30] Even

22. *Id.*

23. *Id.* at 226–27, 235 (citing Blakely v. Washington, 542 U.S. 296, 305 (2004)). The Court in *Blakely* found that a state criminal statute that had penalty enhancements for sentencing was required to be submitted to the jury and proven beyond a reasonable doubt, or it would violate the defendant's Sixth Amendment rights; however, the majority of the Court did not comment on the Guidelines. *Blakely*, 542 U.S. at 313–14.

24. *Booker*, 543 U.S. at 235 (citing *Blakely*, 542 U.S. at 305).

25. *Id.* at 264 (citing 18 U.S.C. § 3553(b)(1) (2012), *invalidated by Booker*, 543 U.S. 220). While other aspects of the Guidelines changed after the *Booker* ruling, the focus here is that the mandatory provisions of the Guidelines became advisory. *See id.* This mandatory-versus-advisory distinction will be labeled appropriately throughout this Note. Other than the shift from mandatory to advisory, these Guidelines are generally the same Guidelines referred to in Part II.A.

26. *See id.* at 243–44; Kimbrough v. United States, 552 U.S. 85, 100–01 (2007) (citing *Booker*, 543 U.S. at 226–27).

27. *Booker*, 543 U.S. at 245–46.

28. *Id.*

29. *Id.* at 259–60.

30. *Id.* at 264 (citing U.S. SENTENCING GUIDELINES MANUAL § 1A1.1 n.3 (U.S. SENTENCING COMM'N 2016)).

with the mandatory feature of the Guidelines removed, the Court reasoned that the features of most concern to Congress remained intact.[31]

Following the ruling in *Booker*, the Court continued to hear cases that fought over the soul of misclassification issues. One of these cases was *Begay v. United States*.[32] In *Begay*, the defendant was convicted at the district court level in New Mexico for being a felon in possession of a firearm after he threatened his aunt and sister with a rifle.[33] Under the ACCA he was found to be an individual convicted of three or more felony crimes that fit the ACCA standard and, as a result, he received a special mandatory minimum of a 15-year prison sentence.[34]

Begay's previous felony offenses in the state of New Mexico were for driving under the influence (DUI).[35] He had been convicted of DUI in the state of New Mexico a "dozen" times before his arrest in September 2004 for being a felon in possession of a firearm.[36] With these previous felony DUI charges, the sentencing judge concluded that Begay met the requirements for the 15-year mandatory minimum.[37] On appeal, Begay argued that his previous felony DUI convictions did not qualify as "violent felonies" under the ACCA.[38]

Although the Court conceded the district and circuit courts were correct in their assessment of DUI as a felony in New Mexico and drunk driving as behavior that has the potential to cause physical injury, DUI was "simply too unlike the [ACCA's] listed examples for [the Court] to believe that Congress intended the provision to cover it."[39] The examples given in the ACCA (burglary, arson, extortion, and crimes involving the use of explosives) indicated Congress intended to limit the types of crimes that qualify as violent felonies to those involving "purposeful, 'violent,' and 'aggressive' conduct" when carrying out the crime.[40]

31. *Id.* at 263–64.

32. Begay v. United States, 553 U.S. 137, 159–61 (2008), *abrogated by* Johnson v. United States, 135 S. Ct. 2551 (2015).

33. *Id.* at 140.

34. *Id.* at 139–40 (citing 18 U.S.C. § 924 (e)(1) (2012), *invalidated by* United States v. Ebron, No. 2:12-cr-00072-APG-CWH-2, 2017 WL 3337260 (D. Nev. Aug. 3, 2017)).

35. *Id.* at 140.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.* at 141–42.

40. *Id.* at 144–45 (citing United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006)

Congress's use of the word *otherwise*, which was stated just after the specific examples in the statutes, exemplifies that these factors were more important than merely examining the degree of risk produced by the crime.[41] The Court analyzed the statute as focusing on the "way or manner" in which the crime would produce these risky situations.[42] By looking at the intent of Congress in forming the ACCA, the Court determined the real inquiry was whether the individual was a career criminal who would be a danger if he or she were to possess a gun.[43]

While DUI crimes will almost always have a knowing nature to them—because the drunk driver more than likely drank purposefully—the Court found the importance of the distinction between this purposeful behavior and those behaviors described by the ACCA was that the offenders in DUI cases needed no criminal intent to prove their guilt.[44] The sentiment that a convicted drunk driver's actions "need not be purposeful or deliberate" was shared by the Tenth Circuit as well.[45] For these reasons, New Mexico's felony offense of DUI fell outside of the scope of the ACCA's definition of violent felony.[46] While there is a clear and serious danger associated with driving drunk, there is also a clear difference between the crime of DUI when compared to the violent crimes Congress defined in the ACCA.[47]

(McConnell, J., dissenting), *vacated in part and reinstated in part*, 282 Fed. App'x 656 (10th Cir. 2008)).

41. *Id.* at 144–48 (citing 18 USC § 924(e)(2)(B)(ii) (2012), *invalidated by* United States v. Ebron, No. 2:12-cr-00072-APG-CWH-2, 2017 WL 3337260 (D. Nev. Aug. 3, 2017) (defining a violent felony as "any crime punishable by imprisonment for a term exceeding one year" and committed by adult that included "burglary, arson, or extortion, involves the use of explosives, or *otherwise* involves conduct that presents a serious potential risk of physical injury to another") (emphasis added); WEBSTER'S THIRD NEW INT'L DICTIONARY 1598 (1961)).

42. *Begay*, 553 U.S. at 144 (quoting WEBSTER'S THIRD NEW INT'L DICTIONARY, *supra* note 41, at 1598).

43. *Id.* at 146.

44. *Id.* at 145–46.

45. *Id.* The Court felt the distinction between a DUI offense's negligent conduct versus the intentionally criminal conduct of the crimes given in examples in the ACCA was important in imposing the 15-year mandatory minimum sentence. *Id.* (quoting United States v. Begay, 470 F.3d 964, 980 (10th Cir. 2006) (McConnell, J., dissenting in part) ("[D]runk driving is a crime of negligence or recklessness, rather than violence or aggression[.]"(alteration in original)).

46. *Id.* at 147–48.

47. *Id.*

III. THE DUELING PERSPECTIVES OF THE COURTS: THE CIRCUIT SPLIT INTERPRETING *BEGAY*

After the Supreme Court's ruling in *Begay*, the circuit courts began to see an influx of appeals from individuals who argued they had been improperly sentenced because they were improperly classified as a career criminal under the ACCA or a career offender under the Guidelines.[48] This improper classification for criminal sentencing enhancements—where the individual had been improperly defined as having committed a violent felony like Begay's DUI convictions—became known as the "*Begay* error."[49] This created the issue of appealability that produced this circuit split today. The major divide is over whether the *Begay* error is a constitutional issue or if it is cognizable for collateral attack as a nonconstitutional error.[50] If viewed as a constitutional issue, then this would result in an error that would allow offenders to collaterally attack their sentences.[51]

Under 28 U.S.C. § 2255, a federal prisoner may move to set aside a sentence imposed "in violation of the Constitution or laws of the United States."[52] Section 2255 may be used when "the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice.'"[53] If a *Begay* error sentence is regarded as a "miscarriage of justice," it would allow those sentenced to collaterally attack their criminal conviction on a nonconstitutional error.[54] This collateral attack is a procedure whereby criminally sentenced individuals file for habeas corpus in federal court.[55]

48. *See, e.g.*, United States v. Doe, 810 F.3d 132, 138 (3d Cir. 2015); Sun Bear v. United States, 644 F.3d 700, 702 (8th Cir. 2011).

49. *See, e.g.*, *Doe*, 810 F.3d at 142.

50. *See, e.g.*, *id.*

51. *See* Kirby J. Sabra, Note, *Miscarriage of Justice: Post-*Booker *Collateral Review of Erroneous Career Offender Sentence Enhancements*, 96 B.U. L. REV. 261, 271–72, 285–86 (2016).

52. 28 U.S.C. § 2255(a) (2012).

53. 28 U.S.C. § 2255 (2012); Davis v. United States, 417 U.S. 333, 346 (1974) (quoting Hill v. United States, 368 U.S. 424, 428 (1962), *superseded by statute*, FED. R. CRIM. P. 32, *as recognized in* United States v. Weichert, 836 F.2d 769 (2d Cir. 1988)), *superseded by statute*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, *as recognized in* Magwood v. Jones, 472 F. Supp. 2d 1333 (M.D. Ala. 2007)).

54. Douglas J. Bench, Jr., *Collateral Review of Career Offender Sentences: The Case for Coram Nobis*, 45 U. MICH. J.L. REFORM 155, 175–77 (2011); *see Davis*, 417 U.S. at 346 (quoting *Hill*, 368 U.S. at 428).

55. 28 U.S.C. § 2255(a); James Bickford, *Opinion Recap: All Judicial Review Is*

Congress's purpose behind § 2255 was "to create a streamlined procedure for filing petitions for sentencing review in the court in which the petitioner was originally convicted as opposed to the jurisdiction in which they are currently held in custody."[56] Collateral review is the only vehicle many offenders misclassified under *Begay* error can utilize to have their sentences corrected.[57]

Now—because of the ability for those sentenced under the ACCA to attack under *Begay* error—prisoners sentenced under the then-mandatory Guidelines as career offenders for having prior convictions for crimes of violence are also using the Supreme Court's *Begay* holding to argue that their career offender enhancements under the Guidelines are improper.[58] Three of the circuit courts have found that *Begay* error is an arguably constitutional issue under the Due Process Clause because the improper classification results in a complete miscarriage of justice.[59] The opposing circuits have found that these petitions are collateral attacks on the career offender provision of the Guidelines and do not accept this as an error in the law that reaches the level of miscarriage of justice.[60]

A. Begay *Error as a Cognizable Issue*

One of the appeals described above came from the Third Circuit in

Either Direct or Collateral, SCOTUSBLOG (Mar. 9, 2011, 2:42 PM), http://www.scotusblog.com/2011/03/opinion-summary-all-judicial-review-is-either-direct-or-collateral/.

56. Sabra, *supra* note 51, at 265 (footnote omitted).

57. John Patrick Bailey, Note, *Run-on Sentence: Remedies for Erroneous Career Offender Enhancements*, 65 DUKE L.J. 1477, 1516 (2016).

58. *See, e.g.*, Narvaez v. United States, 674 F.3d 621, 624–25 (7th Cir. 2011).

59. United States v. Doe, 810 F.3d 132, 146 (3d Cir. 2015) ("Debate is currently fervid across the circuits on whether *Begay* is a constitutional decision. . . ."); Whiteside v. United States, 748 F.3d 541, 555, *rev'd en banc on other grounds*, 775 F.3d 180 (4th Cir. 2014) ("[I]t is at least debatable that erroneous application of the career offender enhancement deprived Whiteside of his liberty in violation of his due process rights."); *Narvaez*, 674 F.3d at 626–27 ("Certainly, as the district court acknowledged, 'jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right.'" (quoting Slack v. McDaniel, 529 U.S. 473, 484 (2000))). The Third, Fourth, and Seventh Circuits found this is an arguably constitutional issue. *Doe*, 810 F.3d at 146; *Whiteside*, 748 F.3d at 555; *Narvaez*, 674 F.3d at 626–27. The Eighth and Eleventh Circuits took the opposite approach and found this was not a cognizable issue. Sun Bear v. United States, 644 F.3d 700, 705 (8th Cir. 2011); Gilbert v. United States, 640 F.3d 1293, 1336–37 (11th Cir. 2011) (en banc); *see* Siepel, *supra* note 9, at 683.

60. *See, e.g.*, *Sun Bear*, 644 F.3d at 704; *Gilbert*, 640 F.3d at 1336–37.

United States v. Doe.[61] In *Doe*, the offender was sentenced to prison under the then-mandatory, now-advisory, Guidelines as a career offender because of his two prior convictions of simple assault.[62] In an "unusually complex" case—according to the Third Circuit panel—the offender previously brought a § 2255 petition contesting his sentencing enhancement in 2004, claiming his simple assault convictions did not meet the definition laid out for a crime of violence.[63] If the two simple assault convictions did not meet the definition of the Guidelines, then Doe would have been improperly classified and improperly sentenced.[64] While Doe's § 2255 petition arose under the Guidelines, he argued—and the Third Circuit agreed—that the "words and structure of the career-offender Sentencing Guideline are similar to the ACCA's."[65] In a narrow ruling, the court ultimately held that Doe's claim was cognizable under the then-mandatory Guidelines because misclassification should be considered a serious error that is "cognizable where the mistake prejudices the defendant."[66]

A similar argument was posed in the Seventh Circuit in *Narvaez v. United States*.[67] In *Narvaez*, the court also found that the individual improperly sentenced as a career offender under the Guidelines had a period of incarceration that exceeded what it should have been due to the improper sentencing enhancements.[68] Because this unfair prejudice was placed on the offender, the offender was entitled to relief under 28 U.S.C. § 2255.[69] This meant he was entitled to be resentenced without the improper status as a career offender.[70] Again, although *Begay* involved the ACCA and *Narvaez* involved the Guidelines, the Seventh Circuit reasoned that "the definition of a violent felony under the ACCA was 'repeated verbatim' by the Sentencing Commission in defining a 'crime of violence.'"[71] The court in *Narvaez* found that, because the language in the ACCA defining a violent felony and the language in the Guidelines defining a crime of violence were

61. *Doe*, 810 F.3d at 139.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *See id.* at 159.
67. Narvaez v. United States, 674 F.3d 621, 625 (7th Cir. 2011).
68. *Id.* at 629–30.
69. *Id.* at 623.
70. *Id.*
71. *Id.* at 624 (quoting United States v. Templeton, 543 F.3d 378, 380 (7th Cir. 2008)).

almost identical, the terms violent felony and crime of violence should be used interchangeably.[72] In erasing this distinction, the court allowed Narvaez to be resentenced without the label of a career offender.[73] Although Narvaez did not "have an absolute right to a lower sentence," the career offender label improperly imposed on him by the court was an error that constituted a miscarriage of justice, and the court would not entertain the government's speculative argument that Narvaez may walk out of his resentencing hearing with the same sentence even though he would no longer be labeled as a career offender.[74]

However, the Seventh Circuit limited cognizability to erroneous pre-*Booker* career offender enhancements.[75] When Narvaez was sentenced with his enhancement, it was in the pre-*Booker* age when the Guidelines were mandatory, not advisory.[76] The Seventh Circuit has since emphasized in *Hawkins v. United States* that sentence enhancements for career offenders made under the advisory Guidelines are not cognizable on collateral review unless the sentence "exceeds the statutory maximum sentence for his crime" or a has a guideline ceiling a judge may not exceed.[77] For this reason, post-*Booker* discretionary errors are viewed as less serious when compared with the criminal justice system's interest in finality.[78]

The Fourth Circuit also concluded that the *Begay* error retroactively applied to the pre-*Booker* sentencing Guidelines and was a debatably constitutional issue in *Whiteside v. United States*.[79] Just like the Seventh Circuit, the Fourth Circuit found that the sentence imposed was improperly enhanced because of the offender's misclassification as a career offender.[80] The *Whiteside* court found that the individual could potentially use 28 U.S.C. § 2255 to challenge his sentence based on the Guidelines because his improper classification resulted "in a fundamental miscarriage of justice that

72. *Id.* at 628–29 (quoting *Templeton*, 543 F.3d at 380).

73. *Id.* at 623.

74. *Id.* at 629–30.

75. *Id.* at 628–29; Hawkins v. United States, 706 F.3d 820, 824 (7th Cir. 2013); Bailey, *supra* note 57, at 1511.

76. *Narvaez*, 674 F.3d at 623; Bailey, *supra* note 57, at 1511.

77. *Hawkins*, 706 F.3d at 824.

78. *Id.*

79. Whiteside v. United States, 748 F.3d 541, 555, *rev'd en banc on other grounds*, 775 F.3d 180 (4th Cir. 2014).

80. *Compare id.* at 544, *with Narvaez*, 674 F.3d at 623.

is cognizable on collateral review."[81]

This argument, once dubbed a "loser" prior to the ruling in *Begay*, allowed the defendant relief in a post-*Begay* world.[82] As previously described, the Seventh and Fourth Circuits found that the defendant's claims were cognizable under the mandatory Guidelines because the misclassification of an individual as a career offender should be considered a serious error.[83] Improperly classifying someone as a career offender under the mandatory Guidelines "arguably violates the Due Process Clause by conferring a longer sentence than the law allows."[84] Furthermore, these circuits consider the denial of review to an individual who has been erroneously placed in the career offender category to be "a fundamental miscarriage of justice" because the label itself is considered such a serious error.[85]

Like the Seventh Circuit, the Fourth Circuit agrees that a miscarriage of justice cannot take place within the post-*Booker* advisory version of the Guidelines scheme as long as the sentencing judge uses the sentencing factors available.[86] In *United States v. Foote*, the Fourth Circuit rationalized that "[u]nlike a statute, the career offender provision is one part of a series of guidelines meant to *guide* the district court to the proper sentence."[87] For this reason, the Fourth Circuit reaffirmed that district courts may vary from the sentencing range.[88]

Although each of the cases with pre-*Booker* sentences were brought after the *Begay* decision, the circuit courts that fall into this category—and the government arguing against the petitioners—have conceded that *Begay* applies retroactively.[89] Under this line of case law, there is no question as to whether § 2255 petitioners who were classified as career offenders under the then-mandatory Guidelines can benefit from the ruling in *Begay*.[90]

81. *Whiteside*, 748 F.3d at 543.

82. *E.g.*, United States v. Doe, 810 F.3d 132, 142 (3d Cir. 2015).

83. *Whiteside*, 748 F.3d at 543; *Narvaez*, 674 F.3d at 623.

84. *Doe*, 810 F.3d at 146 (citing *Narvaez*, 674 F.3d at 629); *accord Whiteside*, 748 F.3d at 555.

85. *Doe*, 810 F.3d at 159; *Whiteside*, 748 F.3d at 555.

86. *Compare* United States v. Foote, 784 F.3d 931, 941–42 (4th Cir. 2015), *with* Hawkins v. United States, 706 F.3d 820, 824 (7th Cir. 2013).

87. *Foote*, 784 F.3d at 941 (emphasis in original).

88. *Id.*

89. *See, e.g.*, *Doe*, 810 F.3d at 142; *Narvaez*, 674 F.3d at 625.

90. *See Doe*, 810 F.3d at 142; *Narvaez*, 674 F.3d at 625.

B. *Clashing Courts: Eighth and Eleventh Circuit Courts' Approach*

When it came to *Begay*, the Eighth and Eleventh Circuits took the opposite approach of the previously listed circuit courts and, ultimately, came to the incorrect conclusion. In the Eighth Circuit case *Sun Bear v. United States*, the court found the offender's sentencing prior to *Begay* was not unlawful because it was imposed with statutory authority.[91] The court explained that the "[offender]'s collateral attack on an application of the career offender guidelines provisions [was] not cognizable under § 2255."[92] The court did not find a cognizable § 2255 claim because "ordinary questions of guideline interpretation falling short of the 'miscarriage of justice' standard [did] not present a proper section 2255 claim."[93]

The Eleventh Circuit arrived at a similar result in *Gilbert v. United States*.[94] In *Gilbert*, the court denied the defendant's § 2255 claim because it was concerned that prisoners would file "an endless stream of § 2255 motions, none of which could be dismissed without a determination of the merits of the claims they raise."[95] The court reasoned that allowing offenders to undermine their sentence calculations in this way would "wreak havoc on the finality interests that Congress worked so hard to protect."[96]

The majority opinion was followed by a heated dissent, which echoed the rationale of the Seventh Circuit in *Narvaez*.[97] The concern raised by the dissenters focused on the unjust nature of the majority to promote finality over the justice of those prisoners who wanted relief from their improper sentencing under the Guidelines.[98] For example, in the Eighth Circuit, Judge Melloy focused on the *Narvaez* court specifically and stated, "The court in *Narvaez* and the dissenters in a recent, en banc Eleventh Circuit opinion correctly note that the present issue pits concerns of finality against justice."[99] The *Gilbert* dissenters reasoned, "Finality with justice is achieved only when the imprisoned has had a meaningful opportunity for a reliable

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

92. *Id.* at 704 (footnote omitted).

93. *Id.* at 708 (quoting Auman v. United States, 67 F.3d 157, 161 (8th Cir. 1995)).

94. Gilbert v. United States, 640 F.3d 1293, 1295 (11th Cir. 2011) (en banc).

95. *Id.* at 1308.

96. *Id.* at 1310.

97. *Compare Gilbert*, 640 F.3d at 1330 (Martin, J., dissenting), *with* Narvaez v. United States, 674 F.3d 621, 628–29 (7th Cir. 2011).

98. *Gilbert*, 640 F.3d at 1334.

99. Sun Bear v. United States, 644 F.3d 700, 711 (8th Cir. 2011) (Melloy, J., dissenting).

judicial determination of his claim."[100] In the dissenters' opinions, the offenders appealing their improper statuses and sentences never had that opportunity.[101]

IV. EFFECTS ON MANDATORY MINIMUMS FOR THE EIGHTH CIRCUIT AND THE STATE OF IOWA

A. *Harsher Sentencing in Iowa*

Like many other states, Iowa has continued to struggle with the issue of mandatory minimum sentences and the effect that these laws have on its citizens.[102] By following the analysis of the Seventh Circuit, state and federal courts may enjoy incidental benefits such as states trending away from the harshness of mandatory minimums and a potential decrease in prison populations when nonviolent offenders have lesser sentences.

Due to what Iowa lawmakers considered too harsh of sentencing in the Iowa courts, Iowa legislators enacted House File 2064.[103] House File 2064 took effect in Iowa on July 1, 2016, and "allows the Iowa Board of Parole to release nonviolent drug offenders who have served at least half of their mandatory minimum sentence."[104] This allows more discretion in determining how much of a sentence an offender must serve before parole eligibility.[105] Even further, House File 2064 now mandates the Iowa Board of Parole to "consider all pertinent information including the person's

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

101. *Id.*

102. Christine Smith, *Iowa Must Join Wave of Sentencing Reform*, DES MOINES REG. (Apr. 4, 2016), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2016/04/04/iowa-must-join-wave-sentencing-reform/82615066/. State and federal sentencing schemes are quite different. For example, Iowa has an indeterminate sentencing scheme with parole, where the federal system is a determinate scheme with no parole. *Compare* MICHAEL R. MULLINS & DRAKE UNIV. LAW SCH., IOWA CRIMINAL STATUTES SUMMARY CHART—2016, at 4 (2016), https://www.iowacourts.gov/media/cms/2016_chart1_097E79C501E5A.pdf, *with* Douglas A. Berman, *Reflecting on Parole's Abolition in the Federal Sentencing System*, FED. PROBATION, Sept. 2017, at 18, 19. However, the controversy surrounding federal sentencing and mandatory minimums still impacts the discussion of state sentencing and mandatory minimums.

103. *See* Kathy A. Bolten, *Branstad Signs Bill Allowing Early Release of Hundreds of Drug Felons*, DES MOINES REG. (May 13, 2016), https://www.desmoinesregister.com/story/news/politics/2016/05/12/branstad-signs-bill-freeing-hundreds-drug-felons/84260820/ [hereinafter Bolten, *Branstad Signs Bill*].

104. *Id.*

105. *Id.*

criminal record and the negative impact the offense has had on the victim or other persons" when deciding who may be eligible for parole or work release.[106] Similar to the discretion now afforded to judges following *Booker*, the Iowa Board of Parole now has the discretion to determine how much an offender must serve of his or her sentence before parole eligibility.[107] However, the Eighth Circuit does not entirely align with the retroactive sentencing moves being made in the state of Iowa, as these changes in sentencing would not promote the finality interests that the *Sun Bear* court appears to emphasize.[108]

B. *Overflowing Iowa Prisons*

Granting relief to nonviolent drug offenders creates the opportunity to solve other issues plaguing prisons, such as overcrowding and the issue of disproportionate racial impact at the state and national levels.[109] For example, House File 2064 was intended to alleviate those larger issues facing Iowa prisons, but by following the approaches of the Third, Fourth, and Seventh Circuits, this benefit could also be found for federal prisons.[110] As of March 10, 2018, the maximum capacity Iowa prisons could maintain was around 7,200 individuals.[111] However, as of the same date, the Iowa institutions had a total of 8,437 individuals, which means Iowa prisons are overcrowded by 17.18 percent.[112] Although Iowa prisons are overcrowded, the Iowa prison population from fiscal year 2013 was the lowest that Iowa had seen in the past 12 years.[113] Conversely, until recently, the national number of incarcerated individuals increased every year "at an average rate

106. H.F. 2064, 86th Gen. Assemb., Reg. Sess. (Iowa 2016).

107. *See* United States v. Booker, 543 U.S. 220, 243–44 (2005); Bolten, *Branstad Signs Bill*, *supra* note 103.

108. *Compare* Sun Bear v. United States, 644 F.3d 700, 707 (8th Cir. 2011) (Melloy, J., dissenting) (citing Gilbert v. United States, 640 F.3d 1293, 1336 (11th Cir. 2011) (en banc)), *with* Bolten, *Branstad Signs Bill*, *supra* note 103.

109. *See* Smith, *supra* note 102.

110. *See* Bolten, *Branstad Signs Bill*, *supra* note 103; *see also supra* Part III.A.

111. *Daily Statistics*, IOWA DEP'T CORRECTIONS, http://www.doc.state.ia.us/daily-statistics (last visited Mar. 10, 2018) (search in the search bar for "Data"; then follow "Daily Statistics" hyperlink).

112. *Id.*

113. JOAN RINGGENBERG, IOWA DEPARTMENT OF CORRECTIONS FY2017 ANNUAL REPORT 20 (2017), https://doc.iowa.gov/sites/default/files/documents/2017/12/idoc_annual_report_fy2017_0.pdf.

of about 2 percent per year."[114]

In addition to the fiscal irresponsibility of housing nonviolent drug offenders, concern has been raised that Iowa's mandatory minimum laws might have a disproportionate impact on African American men in the community.[115] Again, House File 2064 was created to combat the issue of disproportionate racial impact at a state level.[116] According to a study done by The Sentencing Project, Iowa had one of the highest rates of incarceration of African American men in the nation in 2016.[117] African American men in Iowa are imprisoned at a rate 10 times greater than that of white men, which is nearly double the national average.[118] This overcrowding and racial impact is precisely the reason that Iowa representatives, such as Democrat Mary Wolfe, pushed for further easing of Iowa's mandatory minimum laws.[119] However, despite former Governor Branstad's support of bills like House File 2064, Representative Wolfe has been met with serious opposition from Iowa Republican legislators.[120] Prior to Governor Branstad's signature, most Iowa Republican senators voted against these changes to the mandatory minimum laws.[121]

Not only are changes in mandatory minimum laws anticipated to alleviate overcrowding concerns and disproportionate racial impact, but

114. JUSTICE POLICY INST., PRUNING PRISONS: HOW CUTTING CORRECTIONS CAN SAVE MONEY AND PROTECT PUBLIC SAFETY 6 (2009), http://www.justicepolicy.org/images/upload/09_05_rep_pruningprisons_ac_ps.pdf. However, there has been a modest decline in the total number of prisoners over the past few years. E. ANN CARSON, PRISONERS IN 2016, at 1, 3 (2018), https://www.bjs.gov/content/pub/pdf/p16.pdf. From 2015 to 2016, the federal prison population declined by 4 percent, reflecting a 34 percent change in the total prison population in the United States. *Id.* at 1. The total state prison population decreased 1 percent from 2015 to 2016. *Id.* at 3.

115. *See, e.g.*, Bolten, *Branstad Signs Bill*, *supra* note 103.

116. *See id.*

117. Ashley Nellis, *The Color of Justice: Racial and Ethnic Disparity in State Prisons*, SENTENCING PROJECT (June 14, 2016), http://www.sentencingproject.org/publications/color-of-justice-racial-and-ethnic-disparity-in-state-prisons/#II.%20Overall%20Findings.

118. *Id.*

119. *See* Bolten, *Branstad Signs Bill*, *supra* note 103; Mary Wolfe, *Yay, the IA House Did Something Smart Today!!!*, IOWA HOUSE HAPPENINGS (Mar. 3, 2016), https://representativemarywolfe.com/2016/03/03/yay-the-ia-house-did-something-smart-today/.

120. Bolten, *Branstad Signs Bill*, *supra* note 103.

121. *Id.*

these laws have also been anticipated to save state money.[122] Prison costs in the state continue to trend upward.[123] According to a Legislative Services Agency report, it was estimated that the parole of 205 nonviolent drug offenders due to House Bill 2064 could save the state $227,000 by June 2017 and $757,000 in the next fiscal year, provided that the law stands and even more nonviolent prisoners are paroled.[124] However, the spending issues associated with prisoners are not unique to the state of Iowa. According to a Justice Policy Institute report, "The United States spends billions of dollars on incarceration each year."[125] In 2007, it was estimated that state governments spend $43 billion annually on correctional facilities and services.[126] If the Supreme Court were to address the narrow issue of collateral attack in the circuit split on sentencing errors, it may start to alleviate some of these financial burdens.

However, it is difficult to predict what will happen to the future of sentencing reform. With the confirmation of U.S. Attorney General Jeff Sessions, the future of state and federal criminal sentencing guidelines remain uncertain.[127] Attorney General Sessions has vocally opposed bills that may reduce prison sentences for lower-level drug offenders by dubbing them "criminal leniency bill[s]."[128] According to Sessions, this criminal justice reform is dangerous for America because he believes "cutting prison populations under the guise [of] saving money carries a significant cost—public safety."[129] The concern for public safety is why Mr. Sessions refuses to lessen the sentences imposed on low-level drug offenders.[130] As of May

122. *Id.*

123. Rod Boshart, *Iowa's Prison Costs Continue to Grow*, GAZETTE (Oct. 26, 2017), http://www.thegazette.com/subject/news/government/iowas-prison-costs-continue-to-grow-20171025.

124. Bolten, *Branstad Signs Bill*, *supra* note 103.

125. JUSTICE POLICY INST., *supra* note 114, at 1.

126. *Id.* at 3.

127. Eric Lichtblau & Matt Flegenheimer, *Jeff Sessions Confirmed as Attorney General, Capping Bitter Battle*, N.Y. TIMES (Feb. 8, 2017), https://www.nytimes.com/2017/02/08/us/politics/jeff-sessions-attorney-general-confirmation.html.

128. Jeff Sessions, *The Current Sentencing Reform and Corrections Act Is Dangerous for America*, MEDIUM (Feb. 9, 2016), https://medium.com/@SenatorSessions/the-current-sentencing-reform-and-corrections-act-is-dangerous-for-america-aa31e8c75083#.eujbr7f2j.

129. *Id.*

130. *See id.*; *Jeff Sessions as Attorney General: An Insult to Justice*, N.Y. TIMES (Nov. 18, 2016), https://www.nytimes.com/2016/11/19/opinion/jeff-sessions-as-attorney-general-an-insult-to-justice.html.

2017, Mr. Sessions ordered federal prosecutors to pursue the toughest possible charges and sentences against offenders, which is a sharp change in direction from former Attorney General Eric Holder's method of exercising discretion in charging drug crimes and of prosecuting nonviolent offenders.[131]

Unlike Attorney General Sessions, "More Iowans support reducing or eliminating mandatory minimum prison sentences for some felony charges than oppose doing so . . . ."[132] A poll conducted by Selzer & Co. in February 2016 revealed that 49 percent of Iowans believed lawmakers should reduce or eliminate mandatory minimum sentences.[133] This poll reflects a public opinion consistent with the notion that justice should prevail over finality.[134] As many circuit court judges have expressed, administrative efficiency should not be prioritized higher than justice.[135] Although there is a change in public attitude towards sentencing, Iowa prosecutors, such as Polk County Attorney John Sarcone, are not convinced that easing the mandatory minimum guidelines will solve the larger issues that Iowa prisons and prisoners face.[136]

V. PROPOSED SOLUTION UNDER THE MODEL OF THE SEVENTH CIRCUIT DECISIONS

Like the Seventh Circuit explained in *Narvaez*, those offenders sentenced pre-*Booker* were done so under the previously mandatory Guidelines provisions.[137] If this mandatory sentencing was a result of an improper classification of the individual as a career offender, then that individual's sentence may be subject to collateral review.[138] By allowing this

131. Rebecca R. Ruiz, *Attorney General Orders Tougher Sentences, Rolling Back Obama Policy*, N.Y. TIMES (May 12, 2017), https://www.nytimes.com/2017/05/12/us/politics/attorney-general-jeff-sessions-drug-offenses-penalties.html.

132. Kathy A. Bolten, *Blacks Hit Hard by Iowa's Mandatory Sentences*, DES MOINES REG. (Apr. 4, 2016), http://www.desmoinesregister.com/story/news/crime-and-courts/2016/04/03/mandatory-minimum-sentences-robbery/81832336/ [hereinafter Bolten, *Blacks Hit Hard*].

133. *Id.*

134. *See id.*

135. *See, e.g.*, Sun Bear v. United States, 644 F.3d 700, 711–23 (8th Cir. 2011) (Melloy, J., dissenting); Gilbert v. United States, 640 F.3d 1293, 1337 (11th Cir. 2011) (en banc) (Hill, J., dissenting).

136. Bolten, *Blacks Hit Hard*, *supra* note 132.

137. Narvaez v. United States, 674 F.3d 621, 628–29 (7th Cir. 2011).

138. *Id.* at 625.

limited number of offenders to file a § 2255 petition alleging *Begay* error, there is a possibility for an improperly sentenced offender to avoid the expired statute of limitations.[139] Without the opportunity for this retroactive sentencing relief, the *Begay*-error prisoner only had one year from the date *Begay* was decided to file a § 2255 petition for sentencing relief, which means the prisoner seeking retroactive relief only had until April 16, 2009, to file a petition.[140]

While there are equally important competing concerns of fairness and finality in our justice system, the concern of fairness for those who were improperly sentenced with enhancements as a career offender must be addressed.[141] With this current circuit split, the Supreme Court, or other circuits that find themselves facing this sentencing error issue, should find the improper classification as a career offender a cognizable issue under § 2255 because "allowing such injustices to go uncorrected would undermine the foundation upon which the justice system rests in favor of administrative convenience."[142]

VI. CONCLUSION

Prisoners who were improperly categorized as career offenders by the courts, and as a result are serving erroneous sentences, deserve relief in the form of a resentencing hearing. Many of these prisoners were sentenced for drug crimes under the mandatory minimum sentencing Guidelines. After the Court's ruling in *Booker*, the flexibility of discretionary sentencing has allowed sentencing judges to consider numerous factors when sentencing offenders.[143] The narrow Seventh Circuit solutions for those sentenced pre-*Booker* must be applied to provide relief for those improperly sentenced.[144]

In a post-mandatory-Guidelines world, providing relief to those wrongly sentenced under the mandatory Guidelines has the ability to alleviate the overflow and financial crises that plague our prisons on the state and national levels.[145] For this reason, each circuit must adopt the narrow solutions proposed by the Seventh Circuit. Given the significant concerns

139. Sabra, *supra* note 51, at 266–67.
140. *See* 28 U.S.C. § 2255(f) (2012); *Narvaez*, 674 F.3d at 625.
141. *See* Sabra, *supra* note 51, at 293–95.
142. *See id.* at 295.
143. *See supra* Part II.B.
144. *See supra* Part III.A.
145. *See supra* Part IV.

raised by each of the circuits that have addressed the issue on sentencing errors such as *Begay*,[146] it is time that the Eighth Circuit adopt this solution and that the Supreme Court address the § 2255 cognizability issue to resolve this split.

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146. *See supra* Part III.

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