COLLATERAL REVIEW OF CAREER OFFENDER SENTENCES: THE CASE FOR CORAM NOBIS

Douglas J. Bench, Jr.*

Occasionally, criminals correctly interpret the law while courts err. Litigation pursuant to the federal Armed Career Criminal Act (ACCA) includes numerous examples. The ACCA imposes harsher sentences upon felons in possession of firearms with prior "violent felony" convictions. Over time, courts defined "violent" so contrary to its common meaning that it eventually came to encompass driving under the influence, unwanted touching, and the failure to report to correctional facilities. However, in a series of recent decisions, the Supreme Court has attempted to clarify the meaning of violent in the context of the ACCA and, in the process, excluded such offenses. The ultimate definition of violent and resulting litigation also implicate career offender sentences imposed under the Sentencing Guidelines, because of similarities in the language of the Guidelines and the ACCA.

This Article is the first to examine the availability of collateral review of erroneously imposed career offender sentences resulting from the fluctuating definition of the term "violent." The following offers an overview of the two traditional methods of collateral review available to federal prisoners, motions to vacate and habeas corpus petitions, and assesses the viability of each method. This Article argues for use of the relatively obscure writ of error coram nobis, a safety valve for those who are unable to obtain relief through a motion to vacate or a traditional habeas proceeding. This Article concludes that, despite the writ's disfavored status, courts should dust off the 16th century remedy. This would alleviate both the injustice of telling prisoners who correctly interpreted the law that they were right, but are now without remedy, and the social waste associated with unnecessary incarceration.

INTRODUCTION

"The common law tradition of the 'Great Writ' cannot be so moribund, so shackled by the chains of procedural bars and rigid gatekeeping that this court is not authorized to grant relief to one who is in custody in violation of the Constitution or laws or treaties of the United States."[1]

* Death Penalty Law Clerk for the United States District Court for the Western District of Pennsylvania, Missouri and Pennsylvania Bar member, J.D., 2006, Cornell University, B.A., 2003 University of Pittsburgh. The author wishes to thank Honorable Keith A. Pesto, Rosalie J. Hornick, Tony F. Girard, Carol Wright-Burkett, and the editorial staff of the *University of Michigan Journal of Law Reform* for their insightful comments and assistance with this Article.

1. Gilbert v. United States, 609 F.3d 1159, 1163 (11th Cir. 2010), *vacated*, 625 F.3d 716 (11th Cir. 2010) (vacating panel decision pending outcome of en banc rehearing).

Ezell Gilbert pleaded guilty to possession with intent to distribute marijuana and crack cocaine.[2] Pursuant to the U.S. Sentencing Guidelines, he was classified as a career offender.[3] Because of this classification, his Guideline range sentence was between 292–365 months, as opposed to the 151–188 months applicable to defendants who are not career offenders.[4] At sentencing, Gilbert objected to his classification as a career offender, arguing that his prior conviction for carrying a concealed firearm was not a crime of violence.[5] The sentencing court agreed that Gilbert's sentence was too severe under this enhancement, but concluded that it could not impose a lesser sentence. "The fact that I think the sentence is too high is immaterial . . . . I don't see any authority under the law for me to downwardly depart.[6] So, counsel, I have given you reversible error if you can convince the Eleventh Circuit that I'm wrong."[7] Accordingly, the Court imposed a 292-months sentence.[8] Gilbert appealed, but the Eleventh Circuit concluded that carrying a concealed weapon is a crime of violence.[9] The U.S. Supreme Court denied Gilbert's petition for a writ of certiorari and his pro se motion to vacate pursuant to 28 U.S.C. § 2255 was denied.[10]

Eventually, the Eleventh Circuit abrogated its earlier decision in light of Supreme Court precedent, concluding that carrying a concealed firearm was not a violent felony.[11] Gilbert, with his position now vindicated by the Supreme Court and the Eleventh Circuit, again attempted to collaterally attack his sentence, but the Government argued that Gilbert could not file a second motion to vacate or seek a traditional writ of habeas corpus under 28 U.S.C. § 2241.[12] The District Court observed that:

> Unfortunately, Mr. Gilbert is in the unenviable position of having to remain in prison even though under the present interpretation of the law he is no longer deemed a career offender and has served the time that would be required of

2. *Gilbert*, 609 F.3d at 1160.
3. *Id.*
4. *Id.*
5. *Id.* at 1161.
6. Gilbert's sentencing preceded *Booker v. Washington*, 543 U.S. 220 (2005) (making the Federal Sentencing Guidelines advisory).
7. *Gilbert*, 609 F.3d at 1161.
8. *Id.*
9. *Id.* (citing United States v. Gilbert, 138 F.3d 1371, 1372 (11th Cir. 1998)).
10. *Id.*
11. *Id.* at 1162 (citing United States v. Archer, 531 F.3d 1347 (11th Cir. 2008)).
12. *Id.*

> him were he sentenced today. Salt to the wound is that he legally challenged the very issue that now incarcerates him—but lost. It is faint justice to tell him now that he was right but there is no legal remedy. Having exhausted all avenues known to the court, the Court determines that at this time it is unable to provide relief to Mr. Gilbert under the law as it currently exists.[13]

Joshua Lindsey pleaded guilty to possession of a firearm as a felon.[14] The District Court imposed a sentence of 77 months, based upon an enhanced sentence Guideline range of 77–96 months, because of his two prior violent felony convictions, one of which was for driving under the influence.[15] Following a Supreme Court decision holding that driving under the influence is not a violent felony, Lindsey filed a motion to vacate his sentence.[16] The District Court denied relief, and the Eighth Circuit affirmed on the basis that Lindsey procedurally defaulted on his claim by failing to raise it at sentencing or on direct appeal. However, at the time of sentencing, driving under the influence was clearly established as a violent felony in the Eighth Circuit.[17] The Court stated that it was "not unsympathetic to Lindsey's contention that he should be excused for failing to make an argument that, at the time, had no chance of success either at the district court or before this court."[18] However, the Court concluded that this "perceived futility" was not sufficient to excuse the default.[19] Finally, the Court concluded that Lindsey's default could not be excused based upon "actual innocence" of this sentencing enhancement, because he had not received a capital sentence.[20]

Gilbert's and Lindsey's problems illustrate the circumstances of many prisoners who challenged sentence enhancements based upon prior convictions that were obviously not violent, were ultimately vindicated by the Supreme Court or Court of Appeals, or who abstained from such challenges based upon the law of their circuits. These prisoners are left without collateral remedy because of the gatekeeping requirements imposed by 28 U.S.C. § 2255. Thus, an unknown number of federal prisoners are serving additional

---

13. *Id.*
14. Lindsey v. United States, 615 F.3d 998, 999 (8th Cir. 2010).
15. *Id.* at 1000.
16. *Id.*
17. *Id.* (citing United States v. McCall, 439 F.3d 967, 972 (8th Cir. 2006) (en banc)).
18. *Id.*
19. *Id.* at 1000–01 (quoting Smith v. Murray, 477 U.S. 527, 535 (1986)).
20. *Id.* at 1001.

years in prison due to errors made by their sentencing courts. However, because the errors do not fit neatly into either category of collateral remedy traditionally available to federal prisoners, they find themselves trapped in an absurd situation where they must serve additional years in prison that were erroneously imposed because they are without a remedy.

This Article begins in Part I and II by examining how the word "violent" has been defined in terms of the Armed Career Criminal Act and the U.S. Sentencing Guidelines. Having illustrated a significant problem, Part III articulates the costs of unnecessary incarceration. Part IV then examines the availability of motions to vacate and habeas corpus petitions, and points to a subset of prisoners who are left without collateral remedy to attack their erroneously enhanced sentences. The Article concludes by arguing in favor of the use of the writ of error *coram nobis* for those inmates with no other means of collateral review.

I. THE ARMED CAREER CRIMINAL ACT

The Armed Career Criminal Act (ACCA) imposes a mandatory minimum sentence of fifteen years on any felon possessing a firearm in violation of 18 U.S.C. § 922(g)[21] who has had three prior violent felony convictions or serious drug offenses.[22] The ACCA defines a violent felony as any crime punishable by imprisonment of greater than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another . . . or 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 . . . ."[23] The Act places no limits upon the number of years a sentencing court can look back to prior convictions[24] and explicitly provides for the inclusion of offenses committed while a defendant was a minor.[25] The ACCA

21. More specifically, 18 U.S.C. § 922(g) prohibits a felon, an illegal alien, an unlawful user of a controlled substance, or a fugitive from shipping, transporting, possessing, or receiving any firearm or ammunition in or affecting interstate or foreign commerce. This prohibition does not apply to state employees possessing firearms in the course of their employment. *See* Hyland v. Fukuda, 580 F.2d 977, 979 (9th Cir. 1978).

22. 18 U.S.C. § 924(e)(1) (2006).

23. *Id.* § 924(e)(2)(B)(i)–(ii). The last phrase is commonly referred to as the "otherwise" provision.

24. *See, e.g.*, United States v. McClinton, 815 F.2d 1242, 1245 (8th Cir. 1987) (affirming a sentence enhancement based upon three burglaries committed 22 years prior).

25. *See, e.g.*, United States v. Jones, 574 F.3d 546, 553 (8th Cir. 2009) (noting that the ACCA explicitly applies to acts of juvenile delinquency that involve the use or carrying of a

was passed in 1984 to reduce crimes attributable to repeat offenders. The Judiciary Committee Report quotes former Senator Arlen Specter who explained that "[m]ost robberies and burglaries are committed by career criminals . . . . In New York City, for example, studies showed that only 1,100 recidivists were probably responsible for most of the 100,000 robberies each year. Another study showed that only 49 imprisoned robbers admitted committing 10,000 felonies over 20 years."[26] This sentence enhancement was a compromise derived from earlier legislation seeking federal prosecution of repeat offenders who commit crimes that are traditionally non-federal and local.[27]

Although the ACCA, as originally passed, targeted only those criminals with prior robbery or burglary convictions, Congress expanded its scope in 1986 to include any violent felony or serious drug offense.[28] Because of this amendment, the meaning of "violent" has become a point of frequent litigation, often resulting in outcomes that defy the common usage of the term.[29] By interpreting "violent" felonies differently from common usage,[30] defendants are, to some degree, deprived of notice that their sentences could be enhanced.[31] Yet, as prisoners' more literal interpretations were

---

firearm, knife, or destructive device that would have been a felony had the juvenile been an adult based upon 18 U.S.C. § 924(e)(2)(a)).

26. H.R. REP. No. 98-1073, at 3 (1984).

27. 130 CONG. REC. 28,095 (1984) (statement of Rep. Hughes).

28. H.R. REP. No. 99-849, at 6 (1986).

29. *See, e.g.*, United States v. Parks, 620 F.3d 911, 916 (8th Cir. 2010) (affirming the District Court's finding that an inmate's unimpeded escape through the open door of a correctional facility was "violent"); United States v. Hudson, 577 F.3d 883, 885 (8th Cir. 2009) (finding evasion of arrest to be "violent"); United States v. Spells, 537 F.3d 743, 745–46 (7th Cir. 2008) (same); United States v. Begay, 470 F.3d 964 (10th Cir. 2006) (finding driving under the influence to be "violent" in the context of the ACCA), *rev'd*, 553 U.S. 137 (2008). *But see* United States v. Herrick, 545 F.3d 53, 58 (1st Cir. 2008) (finding it to be "common sense" that driving under the influence is not violent).

30. *See generally* WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1961 (Merriam-Webster, Inc. 2002)(defining violence as "1a: an exertion of any physical force so as to injure or abuse (as in warfare or in effecting an entrance into a house) b: an instance of violent treatment or procedure . . . .").

31. It has long been considered unjust to punish individuals without first giving notice of the illegality of their actions. *See* Calder v. Bull, 3 U.S. 386, 390–91 (1798) ("Legislatures of the several states, shall not pass laws, after a fact done by a subject, or citizen, which shall have relation to such fact, and shall punish him for having done it . . . . All these, and similar laws, are manifestly unjust and oppressive."). Similarly, the Due Process Clause prohibits the enforcement of laws so vague as to deprive defendants of at least constructive notice of the illegality of their actions. United States v. Cardiff, 344 U.S. 174, 176 (1952) ("The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid may be as much a trap for the innocent as the ancient laws of Caligula.") (citations omitted). It is equally difficult to conceive of Larry Begay foreseeing a district court enhancing his sentence based upon DUI convictions.

vindicated in a series of Supreme Court decisions, they have often been left without remedy. However, before addressing the meaning of "violence," it was necessary for the Supreme Court to first determine how sentencing courts should evaluate prior convictions.

A. The Categorical Approach

The ACCA is silent on how a court should review a defendant's past convictions. One possibility would be for each court to conduct a factual inquiry to determine whether a defendant's conduct was violent. The obvious flaw with this approach is the potential waste of judicial resources associated with conducting mini-trials of stale crimes. Moreover, a defendant's conduct might have been violent, but the crime to which he or she pled guilty may not have required violent conduct, thus limiting the usefulness of any factual inquiry because the ACCA applies to convictions, not conduct. An alternative approach would examine the language of the operative statute. This approach eliminates inefficient factual inquiries, but creates unjust results in a small number of cases where a defendant acted non-violently while committing a crime typically characterized by violence.

The Supreme Court adopted the second option, known as the "categorical approach" to review prior convictions. In *Taylor v. United States*,[32] the defendant pleaded guilty to a violation of 18 U.S.C. § 922(g)(1), but reserved the right to challenge his designation as a career offender based, in part, upon two prior burglary convictions in violation of Missouri law.[33] In addressing whether burglary is a violent felony, the Supreme Court concluded that the ACCA's reference to three "convictions" required sentencing courts to look at the language of the statute a defendant was convicted of violating.[34] The Court further noted the inefficiency and unfairness of a factual approach:

> Would the Government be permitted to introduce the trial transcript before the sentencing court, or if no transcript is available, present the testimony of witnesses? . . . Also, in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser . . . offense was the

32. 495 U.S. 575 (1990).
33. *Id.* at 577.
34. *See id.* at 599.

> result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant has pleaded guilty to burglary.[35]

Yet, in implementing this "categorical approach," courts struggled with statutes that included elements of both violent and non-violent conduct. More specifically, courts diverged on the extent to which they would look beyond the statute to examine the charging documents in order to determine the specific subsection under which a defendant was convicted or had pleaded guilty.[36] The Supreme Court clarified this evaluation process through a series of decisions establishing the "modified categorical approach."[37] In *Shepard v. United States*, the Court stated that sentencing courts are not limited to charges and jury instructions, as the findings of fact and statements of factual basis for the charge would be the equivalent documents in bench trials and pleaded cases.[38] However, courts can only consider facts demonstrating that a defendant must have engaged in violent conduct to have been convicted of violating a given statute or subsection thereof.[39] Thus, when a defendant is convicted of violating a statute that could be violated with violent or non-violent conduct, courts can consider documents showing that a defendant's conviction was necessarily the result of violent conduct. As a result, courts cannot consider documents such as police reports or complaint applications that were not presented to a jury. The Court reaffirmed the *Shepard* description of reviewable documents in *Johnson v. United States*, but also cited *Shepard* in support of the proposition that sentencing courts must presume a defendant was convicted of violating the least violent subsection of

---

35. *Id.* at 601–02.

36. Some courts limit review to the actual charge and elements necessary to the conviction. *See, e.g.*, United States v. Bell, 966 F.2d 703, 704–06 (1st Cir. 1992); United States v. Fitzhugh, 954 F.2d 253, 255 (5th Cir. 1992); United States v. Gonzalez-Lopez, 911 F.2d 542, 547–48 (11th Cir. 1990). Other jurisdictions have examined the conduct in the indictment, even if it is not a necessary element of conviction. *See, e.g.*, United States v. Young, 469, 472 (9th Cir. 1993); United States v. Joshua, 976 F.2d 844, 856 (3d Cir. 1992); United States v. Johnson, 953 F.2d 110, 113 (4th Cir. 1991). Finally, some courts broadly examine the underlying facts to assess the risk posed by the defendant's conduct. *See, e.g.*, United States v. Chapple, 942 F.2d 439, 442 (7th Cir. 1991); United States v. Cornelius, 931 F.2d 490, 493 (8th Cir. 1991).

37. Johnson v. United States, 130 S. Ct. 1265, 1273 (2010).

38. Shepard v. United States, 544 U.S. 13, 26 (2005) (plurality opinion) ("We hold that enquiry under the ACCA to determine whether a plea of guilty to burglary defined by a nongeneric statute necessarily admitted elements of the generic offense is limited to the terms of the charging document, the terms of the plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information.").

39. *Id.* at 25–26.

a statute when the records do not clearly indicate which subsection a defendant violated.[40] As a result, a defendant with a prior conviction pursuant to a statute that prohibits both violent and nonviolent conduct is given the benefit of the doubt if the government is unable to demonstrate otherwise with acceptable documents. Courts then must apply this categorical approach to the Supreme Court's definition of a "violent felony."

B. Interpreting Decisions

1. Begay v. United States

Larry Begay was convicted of driving under the influence of alcohol in violation of section 66-8-102 of New Mexico's Code twelve times.[41] In New Mexico, a driver's fourth conviction for driving under the influence is a felony, as is each subsequent conviction.[42] Following Begay's guilty plea to possession of a firearm as a felon, the sentencing court enhanced Begay's sentence based upon his prior driving under the influence convictions, reasoning that the offense creates a substantial risk of injury.[43] On appeal, the United States Supreme Court held that driving under the influence was not a violent felony.[44] The Court explained that "the provision's listed examples . . . illustrate the kinds of crimes that fall within the statute's scope . . . . Their presence indicates that the statute covers only *similar* crimes . . . ."[45] The Court further reasoned that the listed crimes "all typically involve purposeful, 'violent', and 'aggressive' conduct."[46] The Court listed a series of felonies not typically associated with career offenders, namely, reckless pollution, negligent pollution, reckless tampering with consumer products, and inattention to duty of sailors resulting in shipwrecks.[47] Accordingly, the *Begay* test requires that an offense be similar in risk and in kind to the example offenses to qualify as a violent felony under subsection (ii) of the statute.[48] Further, the Court proceeded to imply a mens rea requirement, quoting *Leocal v. Ashcroft*[49] in support of the

40. *See Johnson*, 130 S. Ct. at 1269 (2010).
41. Begay v. United States, 553 U.S. 137, 142 (2008).
42. *Id.*
43. United States v. Begay, 377 F. Supp. 2d 1141, 1144 (D.N.M. 2005).
44. *Begay*, 553 U.S. at 148.
45. *Id.* at 142.
46. *Id.* at 144–45.
47. *Id.* at 143.
48. *Id.* at 144.
49. Leocal v. Ashcroft, 543 U.S. 1 (2004).

proposition that "the word 'use' . . . most naturally suggests a higher degree of intent than negligent or merely accidental conduct . . . ."[50] Based upon the lack of intent required to commit driving under the influence, the Court held that this offense is not sufficiently similar in kind to the example offenses, and as a result, not a violent felony within the meaning of 18 U.S.C. § 924(e)(2)(B)(ii).[51] The Court further explained that the ACCA was intended to target conduct that "makes it more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim."[52] The Court concluded that driving under the influence is not the type of behavior the ACCA was intended to target.[53]

2. Chambers v. United States

Following *Begay*, the Supreme Court addressed crimes of escape committed by failing to report to a correctional facility. In *Chambers v. United States*, Deondery Chambers pleaded guilty to possessing a firearm as a felon, but argued that one of his prior felonies, "fail[ing] to report to a penal institution," was not violent within the meaning of the ACCA.[54] The Seventh Circuit expressed doubt about the violent nature and risk of injury posed by those who fail to report, noting that one could violate the statute simply by showing up an hour late.[55] Despite its palpable distaste for this holding,

---

50. *Begay*, 553 U.S. at 145.

51. *Id.* at 147.

52. *Id.* at 145 ("By way of contrast, statutes that forbid driving under the influence . . . typically do not insist on purposeful, violent, and aggressive conduct; rather, they are, or are most nearly comparable to, crimes that impose strict liability, criminalizing conduct in respect to which the offender need not have any criminal intent at all.").

53. *Id.* at 145–46. Additionally, Courts of Appeals are divided on whether *Begay* established a mens rea requirement. *See, e.g.*, United States v. Crews, 621 F.3d 849, 857 (9th Cir. 2010) (finding recklessness level of intent insufficient); United States v. Fife, 624 F.3d 441, 448 (7th Cir. 2010) (same); United States v. Baker, 559 F.3d 443, 453 (6th Cir. 2009) (same); United States v. Gray, 535 F.3d 128, 132 (2d Cir. 2008) (same); United States v. Mendez-Casarez, 624 F.3d 233, 239 (5th Cir. 2010) (appearing to require intent to commit the crime); United States v. Herrick, 545 F.3d 53, 60 (1st Cir. 2008) (finding criminal negligence insufficient, recklessness not decided). *But see* United States v. Alexander, 609 F.3d 1250, 1258 (11th Cir. 2010) (finding no mens rea requirement).

54. Chambers v. United States, 129 S. Ct. 687, 690 (2009).

55. In *United States v. Chambers*, 473 F.3d 724, 726–27 (7th Cir. 2007), Judge Posner, writing for the appellate panel, stated that:

> We shall adhere to the precedents for now. But it is an embarrassment to the law when judges base decisions of consequence on conjectures, in this case a conjecture as to the possible danger of physical injury posed by criminals who fail to show up to begin serving their sentences or fail to return from furloughs or to halfway houses.

the Court upheld the sentence enhancement out of deference to precedent.[56] However, the Supreme Court reversed, concluding that a "failure to report" was not a "violent felony" within the meaning of the ACCA.[57] The Court reasoned that the crime was a form of inaction, "a far cry from the 'purposeful, violent, and aggressive conduct' potentially at issue when an offender uses explosives against property, commits arson, burgles a dwelling or residence, or engages in certain forms of extortion."[58] The Court rejected the Government's argument that failing to report demonstrates a defendant's "strong aversion to penal custody."[59]

3. Johnson v. United States

Recently, the Supreme Court has also addressed simple battery. In *Johnson v. United States*, Curtis Johnson pleaded guilty to possessing ammunition as a felon.[60] Johnson argued that his prior battery conviction, under section 784.03(1)(a) of the Florida Code, was not a "violent felony" for purposes of the ACCA.[61] The Code provides that an individual commits battery by: "[a]ctually and intentionally touch[ing] or strik[ing] another person against the will of the other or [by] intentionally caus[ing] bodily harm to another person."[62] This offense is generally a misdemeanor; however, it be-

---

The head of the line of cases that lump all escapes together, *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994), states in colorful language quoted in many of the subsequent cases that 'every escape scenario is a powder keg, which may or may not explode into violence and result in physical injury to someone at any given time, but which always has the serious *potential* to do so . . . . A defendant who escapes from a jail is likely to possess a variety of supercharged emotions, and in evading those trying to recapture him, may feel threatened by police officers, ordinary citizens, or even fellow escapees . . . . [E]ven in a case where a defendant escapes from a jail by stealth and injures no one in the process, there is still a serious risk that injury will result when officers find the defendant and attempt to place him in custody.' (Emphasis in original.) This is conjecture floating well free of any facts—even the facts of *Gosling*. The opinion says nothing about the nature of Goslin's escape, but the reference to escaping from a jail suggests that the court wasn't thinking about walkaway escapes, or failures to return or report, but about jail breaks (most jail breaks are stealthy). Its ruminations should not be treated as authoritative in a case that does not involve a jail break.

56. *Id.* at 726.
57. *Chambers*, 129 S. Ct. at 691–92.
58. *Id.* at 692.
59. *Id.*
60. Johnson v. United States, 130 S. Ct. 1265, 1268–69 (2010).
61. *Id.*
62. FLA. STAT. § 784.03(1)(a) (2011).

comes a third degree felony[63] if a defendant has a prior battery conviction.[64] The Eleventh Circuit upheld the sentence enhancement, deferring to prior panel decisions.[65] Reviewing the case, the Supreme Court applied the modified categorical approach, but noted that "nothing in the record of Johnson's 2003 battery conviction permitted the District Court to conclude that it rested upon anything more than the least of these acts . . . [thus] his conviction was . . . a 'violent felony' . . . only if 'actually and intentionally touching' another person constitutes the use of 'physical force' . . . ."[66] In determining whether mere unwanted touching constituting battery is a violent felony, the Court adopted the Seventh Circuit's definition of force, to wit, "physical force" means *violent* force—that is, force capable of causing physical pain or injury to another person.[67] Accordingly, the Court concluded that the mere unwanted touching of another individual was not a sufficient use of physical force to constitute a violent felony.[68]

Though the definition of "violent felony" remains nebulous, it is evident after *Begay*, *Chambers*, and *Johnson* that strict liability felonies, felonies characterized by inaction, and felonies susceptible to violation with levels of force not capable of causing physical pain or injury are not violent. As a result, a portion of defendants who received enhanced sentences under the ACCA before these decisions will serve additional years because of sentencing court errors if they are unable to effectively collaterally attack their sentences.

II. APPLICATION TO U.S. SENTENCING GUIDELINES

The scope of these decisions has ramifications beyond the approximately ten percent of federal sentences that are for firearms violations[69] each year.[70] The U.S. Sentencing Guidelines recommend

63. In *United States v. Rodriguez*, 553 U.S. 377 (2008), a defendant who received an enhanced sentence pursuant to the ACCA argued that a prior felony drug conviction should not count, as the underlying offense was a misdemeanor that was elevated to a felony based upon prior convictions. The Court rejected this argument, stating that "an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment." *Id.* at 385.

64. *See* FLA. STAT. § 784.03(2).

65. United States v. Johnson, 528 F.3d 1318, 1320–21 (11th Cir. 2008).

66. *Johnson*, 130 S. Ct. at 1269 (citations omitted).

67. *Id.* at 1271 (citing Flores v. Ashcroft, 350 F.3d 666, 672 (7th Cir. 2003)).

68. *Id.* at 1273.

69. *See* U.S. Sentencing Commission, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, Figure A (2009).

70. Prior convictions for violent felonies are typically a factor in all federal firearms offenses, as those offenses not covered by the ACCA are encompassed by U.S.S.G. § 2K2.1(a)(2) (two prior convictions) or U.S.S.G. § 2K2.1(a)(4)(A) (one prior conviction).

harsher sentences for "career offenders." A defendant is a "career offender" if he or she was at least eighteen years old at the time of the current federal offense, the current offense is a felony arising from either a crime of violence or a controlled substance offense, and "the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense."[71] A "crime of violence" is any offense under federal or state law punishable by imprisonment in excess of one year that "has an element of use, attempted use, or threatened use of physical force against the person of another" or is "burglary of a dwelling, arson, or extortion, involves the use of explosives, or otherwise involves conduct that presents a serious potential risk of injury to another."[72] This definition is very similar to the ACCA definition of a "violent felony" as any crime punishable by imprisonment of greater than one year that "has as an element the use, attempted use, or threatened use of physical force against the person of another; or 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 . . . ."[73] The similarity between the terms "crime of violence" as used in the Guidelines and "violent felony" in the ACCA typically leads them to be used interchangeably. As a result, courts apply decisions clarifying "violent felony" under the ACCA to sentences enhanced pursuant to the Guidelines.[74]

71. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2011).

72. *Id.*

73. 18 U.S.C. § 924(e)(2)(B)(i)–(ii) (2006).

74. *See, e.g.*, United States v. Peterson, 629 F.3d 432, 439 (4th Cir. 2011) (applying *Begay* to Sentencing Guidelines case); United States v. Terrell, 621 F.3d 1154, 1160 (9th Cir. 2010) (applying definitions in a "parallel manner"); United States v. Lee, 612 F.3d 170, 196 n.33 (3d Cir. 2010) (applying *Begay* to Sentencing Guidelines case); United States v. Womack, 610 F.3d 427, 433 (7th Cir. 2010) (applying same interpretation to both definitions); United States v. Hennecke, 590 F.3d 619, 621 n.2 (8th Cir. 2010) ("Given their nearly identical definitions, we construe the statutory term 'violent felony' and the Guidelines term 'crime of violence' as interchangeable."); United States v. Harris, 586 F.3d 1283, 1285 (11th Cir. 2009) (applying *James*, *Begay*, and *Chambers* to a Sentencing Guidelines case); United States v. LaCasse, 567 F.3d 763, 765 (6th Cir. 2009) (citing United States v. Ford, 560 F.3d 420, 421 (6th Cir. 2009) in support of applying ACCA analysis to Guidelines case); United States v. Tiger, 538 F.3d 1297, 1298 (10th Cir. 2008) (applying *Begay* to Sentencing Guidelines case); United States v. Parnell, 524 F.3d 166, 170 (2d Cir. 2008) (finding authority interpreting one phrase to be persuasive to interpreting the other); United States v. Holloway, 499 F.3d 114, 118 (1st Cir. 2007); United States v. Andrews, 479 F.3d 894, 897 (D.C. Cir. 2007) (applying *Shepard* and *Taylor* to Sentencing Guidelines case); United States v. Montgomery, 402 F.3d 482, 488 n.28 (5th Cir. 2005) (finding the language to be identical).

III. THE COST OF ERRONEOUSLY ENHANCED SENTENCES

In the five years prior to the *Begay* decision, the U.S. Sentencing Commission estimates that District Courts imposed 12,731 enhanced sentences pursuant to section 4B1.1 of the U.S. Sentencing Guidelines and the ACCA.[75] As a result, at considerable human and social cost, an unknown number of inmates are serving additional years beyond the sentences district courts would have imposed had they reached proper violent felony determinations.

Prisoners impose at least two types of costs upon society: (1) the direct costs of incarceration, including expenses such as prison staff, prison facility operations, food, clothing, medical care, etc., and (2) opportunity costs, the wages those prisoners would have generated absent incarceration. Not only would such wages likely have been taxable income, they also could have been sources of support for family members dependent upon those now incarcerated, whose family members may have now be more dependent on social welfare programs. Regardless of the tax revenue generated from these wages or the level of support they would have provided to inmate families, the wages would have been spent, contributing to GDP. In a 2004 study of prison expenditures, the Department of Justice noted that it costs the Federal Bureau of Prisons an average of $22,632 a year to house one inmate.[76] Those incarcerated in private prisons appear to impose only slightly lower direct incarceration costs upon society.[77] A 1999 study by David Anderson, attempting to establish the true aggregate cost of crime, estimated that the opportunity cost of each individual incarcerated was $23,286, based upon the average wages earned by persons with the levels of education, age, and experience of the average prisoner,

---

75. *See* U.S. Sentencing Commission, 2007 ANNUAL REPORT SOURCEBOOK, Table 22 (2007) (2,290 career offender sentences, 656 ACCA sentences); U.S. Sentencing Commission, 2006 ANNUAL REPORT SOURCEBOOK, Table 22 (2006) (2,124 career offender sentences, 575 ACCA sentences); U.S. Sentencing Commission, 2005 ANNUAL REPORT SOURCEBOOK, Table 22 (2005) (407 career offender sentences pre-*Booker*, 1574 career offender sentences, post-*Booker*, 160 ACCA sentences pre-*Booker*, 466 ACCA sentences, post-*Booker*); U.S. Sentencing Commission, 2004 ANNUAL REPORT SOURCEBOOK, Table 22 (2004) (1,349 career offender sentences, pre-*Blakely*, 415 career offender sentences, post-*Blakely*, 411 ACCA sentences, pre-*Blakely*, 130 ACCA sentences, post-*Blakely*); U.S. Sentencing Commission, 2003 ANNUAL REPORT SOURCEBOOK, Table 22 (2003) (1,713 career offender sentences, 461 ACCA sentences).

76. BUREAU OF JUSTICE STATISTICS SPECIAL REPORT, STATE PRISON EXPENDITURES 1 (2001), *available at* http://bjs.ojp.usdoj.gov/index.cfm?ty=pbdetail&iid=1174.

77. *See* Dina Perrone & Travis C. Pratt, *Comparing the Quality of Confinement and Cost-Effectiveness of Public Versus Private Prisons: How We Know, Why We Do Not Know More, and Where to Go from Here*, 83 PRISON J. 301, 313 (2003).

subtracting the value of any goods produced while in prison.[78] However, this calculation assumes prisoners do not return to criminal activity as a means of support.[79] Anderson notes that the opportunity cost of incarceration could be as low as $5,700 per year, when accounting for the possibility that a portion of prisoners may rely upon illicit means of obtaining income.[80]

As a result, it is reasonable to estimate the cost of each year of unnecessary incarceration resulting from erroneous career offender designations to be at least $28,332, the direct cost of incarceration combined with the low estimate of opportunity costs, and as much as $45,918, the direct cost of incarceration combined with the high estimate of opportunity costs, per inmate. These estimates do not take into account other possible costs, such as litigation expenses resulting from prisoner civil rights cases that utilize scarce judicial resources.[81] Unless courts utilize a variant of habeas corpus, *coram nobis*, or a combination thereof, prisoners will endure unduly harsh sentences while forfeiting wages and imposing direct incarceration costs on society.

IV. COLLATERAL REVIEW

A. Retroactivity

As a general rule, new substantive rules apply retroactively, including decisions that narrow the scope of criminal statutes.[82] Constitutional decisions altering rules of criminal procedure, in contrast, are not retroactive to convictions that became final before the decisions were announced.[83] In *Teague v. Lane*, the Supreme Court held that new rules of criminal procedure are not applicable to cases that have become final before the new rule[84] is announced unless they fall within one of two exceptions: (1) rules making cer-

78. *See* David A. Anderson, *The Aggregate Burden of Crime*, 42 J.L. & ECON. 611, 623 (1999).

79. *See id.*

80. *See id.*

81. These estimates are drawn from empirical studies conducted by others and are intended to illustrate the social waste generated when individuals serve longer sentences because sentencing courts incorrectly imposed career offender sentences, not as definitive calculations of current incarceration costs.

82. *See* Schriro v. Summerlin, 542 U.S. 348, 352 (2004).

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

84. A rule is "new" if it was not "*dictated* by precedent existing at the time the defendant's conviction became final." Teague, 489 U.S. at 301 (1989).

tain conduct beyond the power of criminal law to prohibit, or (2) rules that are implicit in the concept of ordered liberty.[85]

It is not clear, however, whether *Begay* announced a new substantive rule, or whether the decision is more closely analogous to a procedural rule. For example, the Tenth Circuit has determined that *Chambers*, a progeny of *Begay* determining that "failure to report" escapes are not violent, applies retroactively.[86] In *United States v. Shipp*, the Court explained:

> In light of *Chambers*, Mr. Shipp does not constitute an "armed career criminal" for purposes of the ACCA and thus he received "a punishment that the law cannot impose upon him." Where, as here, Mr. Shipp was sentenced beyond the statutory maximum for his offense of conviction, his due process rights were violated.[87]

The Seventh Circuit reasoned that *Begay* did not narrow the elements of a criminal offense, but rather reduced the maximum allowable sentences for some defendants.[88] As a result, *Begay* is distinguishable from *United States v. Booker*, which made the Sentencing Guidelines advisory,[89] because *Booker* did not reduce any maximum sentences and, thus, was not given retroactive effect.[90] Nationally, district courts are divided on the issue.[91] In order

85. *Id.* at 310.

86. United States v. Shipp, 589 F.3d 1084, 1090 (10th Cir. 2009).

87. *Id.* at 1091.

88. Welch v. United States, 604 F.3d 408, 414–15 (7th Cir. 2010).

89. United States v. Booker, 543 U.S. 220, 244 (2005).

90. *Welch*, 604 F.3d at 415.

91. *Compare* Jackson v. United States, 1:10-cv-4\1:00-cr-23, 2011 U.S. Dist. LEXIS 4482, 2011 WL 144913 at *7 (E.D. Tenn. Jan. 18, 2011)(finding *Chambers* not to be retroactive, noting split in authority on retroactivity); United States v. McGowan, Cr. No. 6:06-989-HMH, 2010 U.S. Dist. LEXIS 117265, 2010 WL 4595809 at *6–*7 (D. S.C. Nov. 3, 2010) (not retroactive); Grant v. Pearson, 5:09-cv-149(DCB)(MTP), 2010 U.S. Dist. LEXIS 44744, 2010 WL 1860004 at *6 (W.D. Miss. May 7, 2010) (same); United States v. Ross, No. 09-cv-779-bbc, 2010 U.S. Dist. LEXIS 2980, 2010 WL 148397, at *4 (W.D. Wis. Jan. 12, 2010) (same); United States v. Jones, No. 6:09-7082-DCR, 2010 U.S. Dist. LEXIS 160, 2010 WL 55930, at *3–*6 (E.D. Ky. Jan. 4, 2010) (same); Kirkland v. United States, No. 3:09-CV-335 RLM, 2009 U.S. Dist. LEXIS 99620, 2009 WL 3526185, at *8 (N.D. Ind. Oct. 22, 2009) (same); United States v. Johnson, No. 04-269 (MJD/AJB), 2009 U.S. Dist. LEXIS 74946, 2009 WL 2611279, at *3–*4 (D. Minn. Aug. 24, 2009) (same); Sun Bear v. United States, No. CIV 08-3021, 2009 U.S. Dist. LEXIS 60188, 2009 WL 2033028, at *3–*4 (D. S.D. July 9, 2009) (same); United States v. Narvaez, No. 09-cv-222-bbc, 2009 U.S. Dist. LEXIS 41141, 2009 WL 1351811, at *1 (W.D. Wis. May 12, 2009) (same); Lindsey v. United States, No. 09-0249-CV-W-ODS, 2009 U.S. Dist. LEXIS 65621, 2009 WL 2337120, at *2 (W.D. Mo. July 29, 2009) (same); *and* United States v. Campbell, No. 6:06-812-HMH, 2009 U.S. Dist. LEXIS 37542, 2009 WL 1254287, at *1 (D. S.C. May 1, 2009) (same), *with* United States v. Dean, 10 C 50301, 2011 U.S. Dist. LEXIS 1878, 2011 WL 62132 at *2 (N.D. Ill. Jan. 7, 2011) (retroactive, citing *Welch*); United States v. Nelson, 10-cv-61-bbc,03-cr-175-bbc, 2010 U.S. Dist LEXIS 123799, 2010 WL 4806976 at *4

to obtain collateral relief, *Begay* and similar cases must be applied retroactively. Collateral attacks before district courts or in circuits that do not apply these decisions retroactively cannot succeed. Because *Begay* and its progeny do not place certain conduct beyond the scope of the power of criminal law to prohibit and because these decisions are not implicit in the concept of ordered liberty, courts applying these decisions retroactively must have concluded that *Begay* established a new substantive rule.

B. Common Law Habeas Corpus

For centuries, the writ of habeas corpus has been the subject of historical debate and, on occasion, euphoric praise. Early twentieth century English legal historian William Holdsworth regarded the writ as "the most efficient protection ever invented for the liberty of the subject."[92] Although often thought to be related to the Magna Carta,[93] the writ was used as a procedural device in 1199, sixteen years prior to the enactment of the Magna Carta.[94] *Darnel's Case*, a dispute arising from the King's forced loan policy whereby

(W.D. Wis. Nov. 22, 2010) (citing *Welch*) (same); Zollicoffer v. Rios, Case No. 10-cv-1238, 2010 U.S. Dist. LEXIS 82916, 2010 WL 3211061 at *5 (C.D. Ill. Aug. 13, 2010) (citing *Welch*) (same); United States v. Lillard, 8:02CR374, 2010 U.S. Dist. LEXIS 82142, 2010 WL 3171504 at *7 (D. Neb. Aug. 10, 2010) (retroactive); Brown v. United States, 1:09-CV-2770-TWT-CCH, 2010 U.S. Dist. LEXIS 74379, 2010 WL 2927339 at *5 (N.D. Ga. June 30, 2010) (Report and Recommendation adopted by District Court on July 23, 2010) (same); United States v. Fondren, No. 4:06-CR-22 CEJ, 2009 U.S. Dist. LEXIS 93102, 2009 WL 3246906, at *1 (E.D. Mo. Oct. 6, 2009) (same); Kendrick v. United States, No. 5:08-cv-447-Oc-10GRJ, 2009 U.S. Dist. LEXIS 88291, 2009 WL 2958976, at *2 (E.D. Fla. Sept. 15, 2009) (same); United States v. Blue, No. 09-1108, 2009 U.S. Dist. LEXIS 74331, 2009 WL 2581284, at *3–*4 (D. Kan. Aug. 20, 2009) (finding *Chambers* to be retroactive); Frederick v. United States, No. 08-22143-CV, 2009 U.S. Dist. LEXIS 72071, 2009 WL 2488965, at *8 (S.D. Fla. Aug. 12, 2009) (retroactive) (adopting magistrate judge's report finding *Begay* to be retroactive); McCarty v. United States, No. 8:08-cv-1619-T-24TBM, 2009 U.S. Dist. LEXIS 125518, 2009 WL 1456386, at *2 (M.D. Fla. May 22, 2009) (retroactive); George v. United States, 650 F. Supp. 2d 1196, 1200 (M.D. Fla. 2009) (same); United States v. McElroy, No. 09-CV-0040-CVE-PJC, 2009 U.S. Dist. LEXIS 42059, 2009 WL 1372908, at *2–*3 (N.D. Okla. May 14, 2009) (same); United States v. Radabaugh, No. 08-CV-762-CVE-TLW, 2009 U.S. Dist. LEXIS 17239, 2009 WL 565065, at *5 (N.D. Okla. Mar. 5, 2009) (same); United States v. Leonard, No. 08-CV-0389-CVE-FHM, 2009 U.S. Dist. LEXIS 15957, 2009 WL 499357, at *3–*4 (N.D. Okla. Feb. 27, 2009) (same); *and* United States v. Glover, No. 08-CV-0261-CVE-FHM, 2008 U.S. Dist. LEXIS 56889, 2008 WL 2951085, at *4 (N.D. Okla. July 28, 2008) (same).

92. 1 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 227 (4th ed. 1931).

93. *See* Darnel's Case (Five Knights Case) 3 How. St. Tr. 1, 8, 18 (K.B. 1627) (arguing in early habeas case that the Magna Carta dictates that a person cannot lawfully be imprisoned without due process).

94. DANIEL JOHN MEADOR, HABEAS CORPUS AND THE MAGNA CARTA: DUALISM OF POWER AND LIBERTY 8 (1966); *see also Fay v. Noia*, 372 U.S. 391, 400 (1963) (stating that habeas is of "immemorial antiquity," deriving its roots from the thirty-third year of King Edward I, indicating possible usage in 1305).

those refusing to loan funds to the Crown were imprisoned, is often cited as an early example of the modern writ. However, the Lord Chief Justice noted that in all past precedents, those attempting to utilize the writ as a means of relief were denied once it was demonstrated that they were being held under the orders of the King.[95] As a result, Darnel and the other knights were unsuccessful.[96] Perhaps a better first instance of the use of a predecessor to the modern writ can be found in an unnamed case before the Court of Chancery in 1341.[97] In this case, the defendant sued for his release from prison, after having been arrested by the sheriff upon the allegation of a woman that he and two other persons failed to satisfy a statute merchant[98] made to her.[99] The prisoner obtained his release by producing a general and special acquittance.[100]

The modern writ most closely and directly originates from the English Habeas Corpus Act of 1679.[101] Following the enactment of the Habeas Corpus Act, English courts interpreted that the intent of the writ was to "provide against any restraint of the party's liberty."[102] In U.S. jurisprudence, the writ quickly took on Sir. Edward Coke's moniker as the "great writ of liberty."[103] It has, on occasion, received almost unrealistically favorable praise:

> It is not denied that the great function of the writ of habeas corpus is the liberation of those who may be imprisoned without just authority of law . . . . [H]abeas corpus, which has been often characterized as the great writ of liberty, and may be regarded, not less than the right of trial by jury, as one of the chief corner-stones in the structure of our judiciary system.[104]

---

95. *Darnel's Case*, 3 How. St. Tr. at 57.

96. *Id.* at 59.

97. Case 12 (1341) Y.B. 14 Edw. 3, Rolls Series, p. 204 (translated by Luke Owen Pike, 1888). This case is listed as having been decided in 1340, but is typically cited as 1341, likely because it appears in Year Book 14 of King Edward's reign, which started in 1327, making this the year book for 1341 and, hence, 1341 the "publication date."

98. A thirteenth century statute establishing procedures to secure and recover debts, providing for a commercial bond that, if not paid, resulted in the execution on the lands, goods, and body of the debtor. BLACK'S LAW DICTIONARY 1421 (7th ed. 1999).

99. *Case 12*, Y.B. 14 Edw. 3, at 204.

100. *Id.*

101. The writ was promptly introduced to the colonies in the New York Charter of Liberties of 1683. H.D. Hazelton, *The Influence of Magna Carta on American Constitutional Development*, 17 COLUM. L. REV. 1, 12 (1917).

102. King v. Smith, 27 Eng. Rep. 787 (1736).

103. Prigg v. Pennsylvania, 41 U.S. 539, 619 (1842).

104. *In re* Mohr, 73 Ala. 503, 508–16 (1883).

Yet, despite the praise, habeas corpus is frequently an ineffective or unavailable remedy to prisoners who have been erroneously sentenced as career offenders or armed career criminals.

C. Section 2255 vs. Section 2241

Federal inmates generally challenge their convictions and sentences through motions to vacate under 28 U.S.C. § 2255. If prisoners raised challenges to their enhanced sentences in their initial § 2255 motions, this remedy would be efficient and effective. Many inmates, however, had already challenged their sentences via § 2255 motion by the time favorable Supreme Court decisions rendered their prior convictions non-violent. A portion of these inmates, most likely those who have served more than the statutory maximum sentence for non-career criminals, will be able to obtain relief with traditional 28 U.S.C. § 2241 habeas petitions.

The remaining inmates, however, have become impaled with a "Morton's Fork,"[105] as a review of recent decisions reveals they can pursue relief via § 2255, only to have their successive petitions denied because *Begay* is not a new decision of constitutional law, or they can pursue relief via § 2241, but have their petitions denied, as most courts consider a § 2255 motion an adequate remedy (just impossible for prisoners to utilize). The result is that prisoners who have not committed the requisite number of violent felonies to receive the sentences imposed upon them are left without a collateral remedy. Such a result constitutes not only an injustice to those prisoners caught between alternative, but equally unavailable remedies, but also a considerable social waste, in light of the expenses associated with each year of unnecessary incarceration.

1. Section 2255

Although a habeas remedy has generally been available to federal prisoners since the Judiciary Act of 1789, prisoners typically challenge their sentences and convictions with 28 U.S.C. § 2255 motions before their sentencing courts. This statute specifically

105. The term is derived from the practices of John Morton, Lord Chancellor of England, who, in 1487 devised a tax collection policy whereby subjects with affluent lifestyles were deemed able to contribute to the King based upon their ability to spend lavishly while those living modest lifestyles were also deemed able to contribute, as they were presumed to be hoarding their wealth. *See* Kohorst v. Van Wert Cnty. Hosp., No. 3:09CV2031, 2010 WL 4883784, at *5 & n.2. (N.D. Ohio Nov. 24, 2010).

prohibits the use of habeas corpus to obtain relief available by § 2255 motion.

> An application for a writ of habeas corpus on behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.[106]

The Supreme Court explained that this motion replaced traditional habeas corpus for federal prisoners (at least in the first instance) with a process that allowed the prisoner to file a motion with the sentencing court on the ground that his sentence was, inter alia, "imposed in violation of the Constitution or laws of the United States."[107] In creating this alternative to a traditional habeas petition, Congress was attempting to resolve "practical difficulties" arising from the administration of habeas petitions, namely that courts with territorial jurisdictions encompassing large prisons were overwhelmed with petitions, but not to reduce the collateral review rights typically afforded prisoners.[108] As a result, federal prisoners must typically challenge their sentences with § 2255 motions.[109]

a. Time Limits

Prisoners seeking relief via a § 2255 motion must act within the statutory one-year time limit. This one-year period begins on:

> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

106. 28 U.S.C. § 2255 (2006).

107. Boumediene v. Bush, 553 U.S. 723, 774–75 (2008) (quoting United States v. Hayman, 342 U.S. 205, 207 n.1 (1952)).

108. Hayman, 342 U.S. at 219.

109. *Cf.* Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001); Bishop v. Reno, 210 F.3d 1295, 1304 n.14 (11th Cir. 2000); Hernandez v. Campbell, 204 F.3d 861, 864 (9th Cir. 2000) (per curium).

> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.[110]

Accordingly, prisoners seeking § 2255 relief based upon the *Begay* decision must have filed their motions within one year of the April 16, 2008 decision date, or within one year of their convictions becoming final, whichever is later. The decision dates for *Chambers* and *Johnson* are January 13, 2009, and March 2, 2010, respectively. Prisoners who have missed this deadline, perhaps due to their relatively limited ability to conduct legal research, are left to argue for equitable tolling.

b. Equitable Tolling

Equitable tolling is not amenable to bright line rules.[111] Since the Supreme Court has not addressed the availability of equitable tolling, it has never had cause to establish a standard.[112] It is not entirely clear that equitable tolling is permissible under § 2255. The Supreme Court has refused to apply equitable tolling to other schemes where the statutes included time limitations that were plain, specific, and detailed.[113] Courts applying equitable tolling to § 2255 motions after the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) presume that Congress "legislates against the background of existing jurisprudence unless it specifically negates that jurisprudence."[114] Because equitable tolling

110. 28 U.S.C. § 2255(f).

111. Fisher v. Johnson, 174 F.3d 710, 713 (5th Cir. 1999).

112. *See* Lawrence v. Florida, 549 U.S. 327, 336 (2007) ("We have not decided whether § 2244(d) allows for equitable tolling. Because the parties agree that equitable tolling is available, we assume without deciding that it is.") (citations omitted); Pace v. DiGuglielmo, 544 U.S. 408, 418 n.8 (2005) ("We have never squarely addressed the question of whether equitable tolling is applicable to the AEDPA's statute of limitations. Because respondent assumes that equitable tolling applies and because petitioner is not entitled to equitable tolling under any standard, we assume without deciding its application for purposes of this case.") (citations omitted).

113. *See, e.g.*, United States v. Beggerly, 524 U.S. 38, 48 (1998) (finding the Quiet Title Act statute of limitations was not subject to equitable tolling because "[e]quitable tolling is not permissible where it is inconsistent with the text of the relevant statute").

114. Souter v. Jones, 395 F.3d 577, 598 (6th Cir. 2005).

applied to § 2255 motions before the passage of AEDPA, the doctrine continues to apply afterward. Assuming equitable tolling is available, prisoners must satisfy the "extraordinary circumstances" test, namely, that they have been pursuing their rights diligently and some extraordinary circumstances prevented prisoners from filing their petitions on time.[115] Courts make the test difficult to satisfy in order to prevent the exception from swallowing the rule.[116] Thus, courts have concluded that ignorance of the law,[117] even among pro se prisoners with limited legal research capabilities,[118] is not a sufficient basis for equitable tolling. Because many prisoners who have missed their respective filing deadlines will have done so out of ignorance or for other reasons that will not satisfy the "extraordinary circumstances" test, they must attempt to fit within the narrow "manifest injustice exception."

c. Manifest Injustice Exception

The "manifest injustice exception," also known as the "miscarriage of justice exception," applies to prisoners who are actually innocent.[119] This exception is the most appropriate argument for incorrectly sentenced prisoners, especially if other circuits adopt the Eleventh Circuit's reasoning in *Gilbert v. United States*: namely, that prisoners who do not fit within the scope of the "savings clause"[120] can obtain relief through traditional 28 U.S.C. § 2241 petitions where they are actually innocent of being career

115. *Pace*, 544 U.S. at 417.

116. *See* Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting United States v. Marcello, 212 F.3d 1005, 1010 (7th Cir. 2000)); Harris v. Hutchinson, 209 F.3d 325, 330 (4th Cir. 2000) ("[A]ny invocation of equity to relieve the strict application of a statute of limitations must be guarded and infrequent, lest circumstances of individualized hardship supplant the rules of clearly drafted statutes. To apply equity generously would loose the rule of law to whims about the adequacy of excuses, divergent responses to claims of hardship, and subjective notions of fair accommodation.").

117. *See* Shoemate v. Norris, 390 F.3d 595, 598 (8th Cir. 2004) (finding petitioner's lack of knowledge of state procedural law insufficient for equitable tolling); Marsh v. Saores, 223 F.3d 1217, 1220 (10th Cir. 2000) (finding ignorance of the law, including passage of the AEDPA, to be insufficient); Turner v. Johnson, 177 F.3d 390, 391–92 (5th Cir. 1999).

118. *See* Gibson v. Klinger, 232 F.3d 799, 808 (10th Cir. 2000) (finding the inability to obtain a copy of AEDPA from library to be insufficient basis for equitable tolling).

119. *See* Murray v. Carrier, 477 U.S. 478, 495–96 (1986) ("'[I]n appropriate cases' the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration' . . . where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.") (quoting Engle v. Isaac, 456 U.S. 107, 135 (1982)).

120. See *infra* Part IV.C.2.

offenders.[121] One district court noted the absurd result that prisoners who were innocent of their career offender designations, but had defaulted on their claims, and had filed a § 2255 motion would be able to obtain relief under a traditional § 2241 habeas petition because they could not file a successive § 2255 motion, while those who had never filed a § 2255 motion would not be able to obtain relief.[122] The Court equated such a conclusion as "tantamount to surrendering to mere happenstance this Court's power to provide adequate protection to victims of . . . fundamental miscarriages of justice."[123] The Court further inquired: "Should an individual be required to serve the portion of a sentence attributable to his status as a career offender, when he is actually innocent of being a career offender? The answer must surely be no."[124] Based upon the absurdity of the particular prisoner's circumstances, and the Court's answer to its own query, the Court applied the "manifest injustice exception" to the prisoner's procedural default. Far more frequently, however, district courts have concluded that it is not possible to be innocent of a career offender status,[125] and Circuit Courts of Appeals have held that it is not possible to be actually innocent of a sentence in the slightly different § 2255 "savings clause" context.[126] Such an approach offers promise for resolving similar cases where prisoners have failed to file their § 2255 motions within the one year time limit; however, notions of justice and judicial economy suggest that prisoners should not be required to serve career offender sentences when they are not, in fact, career offenders.

A § 2255 motion to vacate is the most effective mechanism for resolving erroneously enhanced career offender sentences. However, it is limited in application to those prisoners who filed their

121. 609 F.3d 1159, 1162–63 (11th Cir. 2010), *vacated*, 625 F.3d 716 (11th Cir. 2010) (vacating panel decision pending outcome of en banc rehearing).

122 *See* Scott v. United States, 740 F. Supp. 2d 1317, 1331 (S.D. Fla. 2010).

123. *Id.*

124. *Id.*

125. *See, e.g.*, Dyer v. Holland, No. 10-122-HRW, 2011 U.S. Dist. LEXIS 5011, at *6–7 (E.D. Ky. Jan. 19, 2011) ("Many factors other than 'career offender' status—such as prior criminal history, victim impact, obstruction of justice, and refusal to accept responsibility—may increase a criminal defendant's sentence, but the mere lengthening of a prison term does not transform each such factor into an independent 'offense' subject to collateral review in habeas under traditionally-defined circumstances."); Pryce v. Scism, No. 1:10-CV-1680, 2011 U.S. Dist. LEXIS 1171 at *10–11 (E.D. Pa. Jan. 6, 2011) ("[O]ne is not convicted of being an 'armed career criminal.' Rather, this status is utilized as a basis to enhance a federal sentence.").

126. *See* Kindler v. Purdy, 222 F.3d 209, 213–14 (5th Cir. 2000); Triestman v. United States, 124 F.3d 361 (2d Cir. 1997); *see also* Littles v. United States, 142 F. App'x. 103 (3d Cir. 2005) (finding petitioner unable to demonstrate that § 2255 was ineffective where petitioner argued career offender enhancement was improper).

motions within the one-year statute of limitations, can fit within the very unusual equitable tolling circumstance, or can effectively argue in favor of the "manifest injustice" exception based upon actual innocence of their career offender designations. Those prisoners who previously sought relief under § 2255, however, are effectively barred from remedying their erroneous career offender enhancements with second or successive motions.

Once prisoners have exhausted their first § 2255 motions, they must satisfy the following test before the Court of Appeals in order to receive a certification permitting a second § 2255 motion, premised upon the existence of:

> (1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or
>
> (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.[127]

Since *Begay* and its progeny do not announce new rules of constitutional law, prisoners are unable to obtain certification for second or successive motions under § 2255.[128] As a result, it is practically impossible for federal prisoners, who erroneously received career offender sentences based upon convictions for crimes that were not violent felonies, to obtain relief under § 2255 if they have ever previously filed § 2255 motions.

2. Section 2241

Federal prisoners generally utilize 28 U.S.C. § 2241 to challenge the execution of their sentences, not the imposition thereof or their convictions.[129] Section 2255 prohibits a prisoner

---

127. 28 § U.S.C. 2255(h) (2006).

128. *See, e.g.*, *In re* Zemba, No. 10-1876, 2010 U.S. App. LEXIS 10475 at *1 (3d Cir. May 17, 2010) (declining to certify second or successive § 2255 motion based upon *Chambers* and *Begay*, as petitioner failed to make a "prima facie showing that these decisions state new rules of constitutional law").

129. The Third Circuit succinctly explained that:

> [f]ederal prisoners challenging some aspect of the execution of their sentence, such as denial of parole, may proceed under Section 2241. This difference arises from the fact that Section 2255, which like Section 2241 confers habeas corpus jurisdiction

who is authorized to proceed under the statute from obtaining relief under a traditional § 2241 habeas petition unless it "appears" that the § 2255 motion remedy "is inadequate or ineffective to test the legality of" a prisoner's detention. This provision is commonly referred to as the "savings clause" because it enables § 2255 to survive judicial review since it does not suspend the writ of habeas corpus.[130] Courts have deemed the § 2255 motion inadequate or ineffective in "extremely limited circumstances."[131] A prior unsuccessful § 2255 motion[132] or a procedural bar[133] do not render the motion inadequate or ineffective.[134] Courts have generally deemed a § 2255 motion to be inadequate or ineffective where the Supreme Court has effected a change in statutory interpretation, made retroactively applicable, that renders previously illicit conduct non-criminal because such decisions are not changes in constitutional law that could form the basis for second or successive § 2255 motions.[135]

The Supreme Court decision *Bailey v. United States*[136] led to a number of these rare "savings clause" petitions. The *Bailey* decision limited the meaning of the term "use," as it appears in a statute prohibiting the use of a firearm in connection with a drug offense.[137] The Court concluded that the term "use" cannot include the mere possession of a firearm; rather, a defendant must have actively employed the firearm in some manner.[138] As a result, those who had previously been convicted of violating 18 U.S.C. § 924(c)(1) based upon the mere possession of a firearm could now argue that a Supreme Court decision rendered their conduct lawful, but a second or successive § 2255 motion is inadequate or ineffective because *Bailey* did not establish a new rule of constitu-

---

> over petitions from federal prisoners, is expressly limited to challenges to the validity of the petitioner's sentence. Thus, Section 2241 is the only statute that confers habeas jurisdiction to hear the petition of a federal prisoner who is challenging not the validity but the execution of his sentence.

Coady v. Vaughn, 251 F.3d 480, 485 (3d Cir. 2001).

130. 28 U.S.C. § 2255.

131. Pack v. Yusuff, 218 F.3d 448, 452 (5th Cir. 2000).

132. *Id.* Charles v. Chandler, 180 F.3d 753, 756 (6th Cir. 1999); Bradshaw v. Story, 86 F.3d 164, 166 (10th Cir. 1996).

133. *See, e.g.*, *Pack*, 218 F.3d at 452–53 (collecting cases).

134. For an interesting relic from an era before electronic filing and video conferencing, see *Stidham v. Swope*, 82 F. Supp. 931, 932 (N.D. Cal. 1949) (finding motion inadequate due to the distance between petitioner's place of confinement, Alcatraz, and the sentencing court in Missouri).

135. *In re* Dorsainvil, 119 F.3d 245, 251 (3d Cir. 1997).

136. 516 U.S. 137 (1995).

137. *Id.* at 141.

138. *Id.* at 143.

tional law.[139] A concise example of this fact pattern is stated in *In re Dorsainvil*, a Third Circuit case utilizing the "savings clause" in light of the *Bailey* decision.[140] In *Dorsainvil*, the Court noted that "[t]here was a gun in an open paper bag next to the driver's seat, in the center of the pickup truck . . . . Dorsainvil did not touch the gun, and was arrested without incident."[141] Thus, similar to the defendant in *Bailey*, Dorsainvil was merely in possession of a firearm, which is not sufficient to constitute "use" after *Bailey*. Other circuits have permitted the use of § 2241 petitions through the narrow "savings clause" in similar cases.[142] Prior to *Gilbert*, the Eleventh Circuit noted that it never had cause to address whether a sentence claim could fit within the savings clause.[143]

Resolving many of these *Begay* career offender sentencing errors via § 2241 petitions would increase efficiency. These petitions are often resolved through the reports and recommendations prepared by magistrate judges who not only are compensated at a low-lower rate than district judges,[144] but who also can be added as needed without congressional action, presidential appointments, or life tenure.[145] As a result, the judiciary would have greater flexibility in allocating judicial resources, namely additional magistrate judges and accompanying law clerks, if a portion of such petitions are initially addressable with report and recommendations.

Yet, these efficiencies and the history of habeas corpus as the "great writ of liberty," notwithstanding, most courts that have addressed the availability of § 2241 for prisoners whose sentences

---

139. *See* Triestman v. United States, 124 F.3d 361, 369 (2d Cir. 1997); *In re* Vial, 115 F.3d 1192, 1194–95 (4th Cir. 1997); Coleman v. United States, 106 F.3d 339, 341–42 (10th Cir. 1997) (per curiam); United States v. Lorensten, 106 F.3d 278, 279 (9th Cir. 1997) (per curiam); *In re* Blackshire, 98 F.3d 1293, 1294 (7th Cir. 1996).

140. 119 F.3d 245, 251 (3d Cir. 1997).

141. *Id.* at 246.

142. *See, e.g.*, *In re* Davenport, 147 F.3d 605, 607, 610 (7th Cir. 1998) (holding that *Bailey* effected a material change in the law because the circuit previously held that possession was sufficient to establish "use"); *Triestman*, 124 F.3d at 380 ("Triestman may be innocent of the crime of which he was convicted. Prior to bringing this petition, he had no effective opportunity to raise his claim of actual innocence. While we find that § 2255 is not available to him, we do not believe that, in enacting the AEDPA, Congress intended to deny Triestman a forum in which to have his claim heard. Indeed, to assume that Congress did so intend would be to imperil the constitutional validity of the AEDPA. We hold that, in such circumstances, § 2255 is inadequate and/or ineffective to test the legality of Triestman's detention, and that Triestman is therefore entitled to raise his claim of actual innocence in a petition for a writ of habeas corpus.").

143. *See* Flint v. Jordon, 514 F.3d 1165, 1167 (11th Cir. 2008).

144. According to the U.S. Courts web site, available at http://www.uscourts.gov/Viewer.aspx?doc=/uscourts/JudgesJudgeships/docs/JudicialSalarieschart.pdf, the 2010 district judge salary was $174,000. U.S. Magistrate Judges are compensated at 92 percent of the U.S. District Judge rate, making their 2010 salary $160,080. *See* 28 U.S.C. § 634(a) (2006).

145. *See* 28 U.S.C. § 633(c).

were erroneously enhanced based upon an incorrect definition of "violent" have concluded that the traditional remedy is unavailable. They have either decided that § 2255 is adequate or,[146] when inadequate, determined that they do not possess the authority to alter sentences imposed in other jurisdictions.[147]

The strongest case for use of § 2241 is where prisoners have already served more time than courts could have imposed in absence of the career offender enhancements, as the appropriate remedy would be immediate release without the need for re-sentencing or second-guessing what sentences other courts would have imposed in lieu of career offender enhancements.[148] The U.S. Solicitor General appears to have conceded § 2241 jurisdiction pursuant to the "savings clause" in such cases.[149] In a Virginia § 2241 habeas case, the Respondent filed a Memorandum announcing the following change:

> The United States now asserts that district courts, through § 2255(e), possess jurisdiction over § 2241 habeas petitions that challenge *certain* alleged sentencing errors . . . . Put simply, the United States posits that resort to § 2241 is only available for those sentences that (because of newly-available Supreme Court authority) were erroneously enhanced as a result of ACCA such that a prisoner is serving a sentence that exceeds the congressionally-mandated *maximum* punishment for the particular offense . . . ACCA serves as more than a

146. *See, e.g.*, United States v. Pettiford, 612 F.3d 270, 284 (4th Cir. 2010) (holding that "actual innocence applies in the context of habitual offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes"); *see also* McElhaney v. United States, No. 1:93-cr-146/1:99-cv-226, 2011 U.S. Dist. LEXIS 18468 at *5–6 (E.D. Tenn. Feb. 23, 2011); Carter v. Cross, No. 10-cv-639-DRH, 2011 U.S. Dist. LEXIS 9894 at *5 (S.D. Ill. February 2, 2011); Brown v. Fisher, No. 10-3230, 2011 U.S. Dist. LEXIS at *2 (Jan. 19, 2011)(finding no available remedy for petitioner).

147. *See, e.g.*, Marshal v. Yost, No. 09-62J, 2010 U.S. Dist. LEXIS 128405 at *27 (W.D. Pa. Dec. 3, 2010) ("This Court cannot engage in speculation as to what sentence *would* have been delivered by the sentencing court *if* it had known what is now known. This Court does not have the power to order the sentencing court to re-sentence Petitioner."); Fort v. Deboo, No. 5:08cv6, 2008 WL 4371398 at *5 (N.D. W. Va. Sept. 19, 2008) ("[T]his Court must consider if it is really the appropriate forum to grant such relief. Not only are all the pertinent records and people in the Eastern District of North Carolina, this Court has concerns that if relief is available, it is authorized to vacate a Judgment Order issued by another Court.").

148. *See* Supplemental Mem. of Law Regarding Resp'ts Mot. to Dismiss at 2–4, Gallimore v. Stansberry, 2011 U.S. Dist. LEXIS 20554 (E.D. Va. Mar. 1, 2011) (No. 1:10cv138) (noting that Respondent has conceded § 2241 jurisdiction and granting petition where petitioner had served more time than the ACCA would have imposed had petitioner not been incorrectly designated an armed career criminal).

149. *See* Gilmore v. Stansberry, No. 1:10cv138(AJT/IDD), docket no 15, Supplemental Memorandum of Law Regarding Respondent's Motion to Dismiss (E.D. Va. Sept. 13, 2010).

> mere sentencing enhancement provision—it requires a district court to ignore the otherwise-applicable statutory maximum penalty. An individual who has been erroneously sentenced under ACCA is thus necessarily serving a sentence that is in excess of the *maximum* punishment that Congress prescribed for the particular crime.[150]

Although this concession likely improves the position of inmates attempting to utilize § 2241, courts could decide they lack jurisdiction if they are not persuaded by the Solicitor's position.[151] If, however, courts do not agree that § 2241 subject matter jurisdiction exists where the Solicitor concedes that it does, the government could use Rule 48[152] to dismiss the original indictment, resulting in a petitioner's immediate release.[153]

Unlike those sentenced under the ACCA, those incorrectly sentenced under the Guidelines, technically, are not serving sentences that the "law cannot impose upon"[154] them, as sentencing courts are not bound by the Guidelines.[155] Although merely advisory, in practice, courts infrequently depart above the Guideline sentence recommendations;[156] thus, many prisoners incorrectly sentenced as career offenders likely would have received lesser sentences had their sentencing courts not erred. Yet, due to the advisory status of the Guidelines, courts appear considerably less likely to expand § 2241 to encompass such claims.[157]

---

150. *Id.* at 12–13. Respondent proceeds to distinguish ACCA sentences from Guideline sentences. "An individual erroneously sentenced as a 'career offender' for purposes of the Sentencing Guidelines, however, is not similarly-situated. The 'career offender' provisions of the Sentencing Guidelines do not allow a sentencing court to ignore a statutory maximum punishment; to the contrary, classification as a 'career offender' simply exposes the individual to a greater range of possible sentences for purposes of the Guidelines." *Id.* at 13.

151. FED. R. CIV. P. 12(h)(3) (no waiver of a lack of subject matter jurisdiction is possible).

152. Rule 48 of the Federal Rules of Criminal Procedure states that "the government may, with leave of court, dismiss an indictment, information, or complaint. The government may not dismiss the prosecution during trial without the defendant's consent."

153. *See* FED. R. CRIM. P. 48; Rice v. Rivera 617 F.3d 802, 811–12 (4th Cir. 2010) (approving Rule 48 motion after conviction where defendant had not "used" a firearm in light of *Bailey* because the motion was not contrary to the "manifest public interest" and because the government could seek a new trial under Rule 33, then file the same Rule 48 motion).

154. Schriro v. Summerlin, 542 U.S. 348, 352 (2003).

155. Booker v. Washington, 543 U.S. 220 (2004).

156. U.S. Sentencing Commission, 2009 ANNUAL REPORT, 38 (finding an upward departure from guideline range in 2 percent of 81,374 individual sentences imposed in 2009 for which they received data).

157. *See* United States v. Nelson, No. 10-cv-61-bbc,03-cr-175-bbc, 2010 WL 4806976 at *5 (W.D. Wisc. Nov. 22, 2010) ("When challenging a *sentence*, as defendant is doing, the prisoner must be able to show that his sentence imposes a punishment that the law cannot impose upon him.") (citing Welch v. United States, 604 F.3d 408, 413 (2009)).

The disconnect between these collateral remedies creates three groups among those prisoners who have been incorrectly sentenced as career offenders. Among the first, and most fortunate group, are those prisoners who have not filed their § 2255 motions and are still within their applicable statute of limitations to do so. Without question, this is the appropriate mechanism for these prisoners.[158] However, due to the stringent requirements for obtaining equitable tolling and the hesitance of courts to treat actual innocence, rather than the underlying offense, as a basis for the "manifest injustice exception" to procedural default, prisoners who failed to file within the statute of limitations are unlikely to obtain relief under § 2255.

Among the second group of prisoners are those who have previously filed § 2255 motions and, thus, are unable to file second or successive motions. In light of the Solicitor's current position, a portion of these cases can be effectively resolved through § 2241 petitions, namely those petitioners who have already served longer sentences than the courts could have statutorily imposed upon them in absence of improper career offender enhancements. Additional prisoners may fall into this category as *Gilbert*, if reinstated, and various district court decisions have applied § 2241 more broadly than the Solicitor's current concession. Nevertheless, a third group will remain, prisoners who received lengthier sentences based upon erroneous career offender designations, previously filed § 2255 motions, but are also are unable to obtain relief via § 2241. The writ of error *coram nobis* is a viable mechanism for resolving this limited set of claims.

V. CORAM NOBIS

Unlike its more heralded habeas counterpart, the writ of *coram nobis* has been referred to as "the wild ass of the law which the courts cannot control"[159] and likened to a cancer.[160] Despite the relative disfavor of this remedy, it appears to be the only mechanism

158. *See generally* Vaughn v. Rios, No. 11-cv-1001, 2011 U.S. Dist. LEXIS 3663 at *2 (C.D. Ill. Jan. 14, 2011) (dismissing § 2241 petition without prejudice in career offender case where petitioner has not yet filed his initial § 2255 motion).

159. Anderson v. Buchanan, 168 S.W.2d 48, 55 (Ky. 1943). In an opinion filled with such metaphors and literary flourishes, the Court further stated that the writ "was hoary with age and even obsolete in England before the time of Blackstone, and courts who attempt to deal with it become lost in the mist and fog of the ancient common law." *Id.* (quoting Mitchell v. State, 176 So. 743, 747 (Miss. 1937)).

160. Richard B. Amandes, *Coram Nobis—Panacea or Carcinoma*, 7 HASTINGS L.J. 48 (1955).

whereby this third group of prisoners' claims could be resolved. This writ presents none of the comity concerns that prevent courts from granting § 2241 petitions to this third group of prisoners. To the contrary, it is uniquely suited to correct these types of errors, and a review of the relevant case law reveals that courts very likely have the power to do so.

The writ originated as a mechanism for correcting clerical or factual errors, and it would have been granted by the court that delivered the original decision at issue.[161] It was known as either "*coram nobis*" or "*coram vobis*," depending upon whether it was filed before the Court of Common Pleas or the King's Bench.[162] Blackstone explained the writ as a "proceeding to reverse a judgment by writ of error in the same court, where the error complained of is *in fact* and not in law, and where of course no fault is imputed to the court in pronouncing its judgment."[163] Blackstone offered as an example the factual error as to the age of a party, relevant as to whether that party is an adult to be represented by an attorney or an infant to be represented by a guardian.[164] A district court's authority to issue the writ emanates from the All Writs Act.[165] Both because the Act is not an independent source of jurisdiction[166] and because the Federal Rules of Civil Procedure have eliminated the writ in civil cases,[167] these writs must be sought before, and issued by, the courts that imposed the original sentences and treated as part of the original criminal cases.

The Supreme Court established the availability of this remedy in an early 19th century case, *Davis v. Packard*.[168] The factual error in *Davis* was that a trial court in New York permitted a suit to proceed to judgment against Davis, who, as a diplomat, was immune to suit.[169] Following the enactment of § 2255, the Supreme Court reasserted the availability of *coram nobis* in *United States v. Morgan*. The Court explained that "[t]he writ of *coram nobis* was available at common law to correct errors of fact. It was allowed without limitation of time for facts that affect the 'validity and regularity' of the judgment . . . .

161. HOLDSWORTH, *supra* note 92, at 226.

162. *Id.*

163. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND: IN FOUR BOOKS, 411–12, n.12 (George Sharswood ed., J.B. Lippincott & Co. 1879).

164. *Id.*

165. *See* 28 U.S.C. § 1651 (2006).

166. *See* Clinton v. Goldsmith, 526 U.S. 529, 534–35 (1999) ("[T]he express terms of the Act confine the power . . . to issuing process 'in aid of' . . . existing statutory jurisdiction; the Act does not enlarge that jurisdiction.") (citations omitted).

167. *See* FED. R. CIV. P. 60(e).

168. 33 U.S. 312, 321–22 (1834).

169. *Id.*

While the occasions for its use were infrequent, no one doubts its availability at common law."[170] The Court further noted state courts' continuous usage of the writ.[171] Because § 2255 only affords relief to persons in custody, the Court determined that this motion was unavailable to Morgan, who was no longer in custody, having completed his federal sentence.[172] Accordingly, the Court expressly held that § 2255 had not eliminated the writ.[173]

Some courts have interpreted *Morgan* as applying only to those prisoners who are no longer in custody.[174] With an amusing declaration in *Melton v. United States*, the Seventh Circuit has taken the position that all attempts by prisoners in custody to obtain writs of error *coram nobis* are to be automatically treated as § 2255 motions: "Any motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255 ¶ 1 *is* a motion under § 2255 . . . ."[175] The Court continued: "[c]all it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus . . . writ of error, or an application for a Get-Out-of-Jail Card; the name makes no difference."[176] The Circuits have offered differing standards for granting relief. However, common among all standards is that some other remedy must not be available, it must not be defendant's "fault" for not having sought relief at some earlier date, the continued existence of a case or controversy, and a serious nature to, or injustice resulting from, the error.[177] Unsurprising, in

170. United States v. Morgan, 346 U.S. 502, 507 (1954).

171. *Id.*

172. *Id.* Interestingly, Morgan's case was also one of sentence enhancement, in the opposite direction; he was attacking a prior federal conviction in order to reduce a New York state sentence enhanced based upon his prior federal conviction. *Id.* at 510.

173. *Id.* at 511 ("We do not think that the enactment of § 2255 is a bar to this motion, and we hold that the District Court has the power to grant such a motion.").

174. *See, e.g.*, United States v. Peter, 310 F.3d 709, 712 (11th Cir. 2002) ("A writ of error *coram nobis* is a remedy to vacate a conviction when the petitioner has served his sentence and is no longer in custody, as is required for post-conviction relief under 28 U.S.C. § 2255.").

175. 359 F.3d 855, 857 (7th Cir. 2004).

176. *Id.*

177. *See generally* United States v. Kwan, 407 F.3d 1005, 1011–18 (9th Cir. 2005) (finding that the following test must be satisfied to grant *coram nobis* relief: "(1) a more usual remedy is not available; (2) valid reasons exist for not attacking the conviction earlier; (3) adverse consequences exist from the conviction sufficient to satisfy the case or controversy requirement of Article III; and (4) the error is of the most fundamental character"); Fleming v. United States, 146 F.3d 88, 90 (2d Cir. 1998) ("[A] petitioner must demonstrate that 1) there are circumstances compelling such action to achieve justice, 2) sound reasons exist for failure to seek appropriate earlier relief, and 3) the petitioner continues to suffer legal consequences from his conviction that may be remedied by granting of the writ.") (per curiam); United States v. Barber, 881 F.2d 345, 348 (7th Cir. 1989) (finding that defendant must show that "(1) the claim could not have been raised on direct appeal; (2) the claimed error

light of the Court's comments in *Melton*, is that the Seventh Circuit's standard presumes that the individual seeking *coram nobis* relief is no longer in custody.[178] Recently, the Supreme Court has again reaffirmed the availability of *coram nobis* and provided some guidance as to when it should be issued.[179] The Court indicated that it must be necessary to (1) "redress a fundamental error" in (2) " 'extraordinary' cases presenting circumstances compelling its use 'to achieve justice' " where (3) "alternative remedies, such as habeas corpus, are [unavailable]."[180]

A careful review of the cases demonstrates that these sentencing cases are not beyond the scope of *coram nobis*. Though many courts presume that an individual must no longer be in custody to effectively pursue this writ, *Morgan* did not establish such a requirement. Rather, the fact that Morgan was no longer incarcerated was the reason why § 2255 was ineffective. At the time *Morgan* was decided, some courts were not yet able to foresee a circumstance in which a § 2255 motion would be ineffective for a person still in custody.[181] The Tenth Circuit, in *United States v. Dawes*, issued the writ to two defendants who were in custody at the time of issuance.[182] On direct appeal, the Court previously held that it was harmless error for the district court to fail in advising the defendants of the hazards of proceeding to trial pro se.[183] In a later decision, the Court determined that Supreme Court precedent precludes the application of harmless error in such cases.[184] As a result, the Court treated the defendants' most recent pleadings as seeking relief under *coram nobis*. The Court determined that § 2255 was inadequate because it permitted prisoners to challenge their sentences, but did not enable sentencing courts to set aside their convictions, and, as a result, *coram nobis* was appropriate.[185] The Third Circuit similarly noted that a petitioner who was still in custody may be able to obtain relief via *coram nobis* if transferred back to Virginia, as the Fourth Circuit had not issued a case similar to

---

is a defect of the type that 'sap[s] the proceeding of any validity'; (3) the conviction produced lingering and still extant collateral civil disabilities; and (4) the error is of a type that 'would have justified relief during the term of imprisonment").

178. *See Barber*, 881 F.2d at 348.

179. United States v. Denedo, 129 S.Ct. 2213, 2220 (2009).

180. *Id.*

181. *See, e.g.*, Amandes, *supra* note 160, at 58 ("Since the remedy by motion under 28 U.S.C. § 2255 is completely adequate for the entire period that a prisoner is in custody under a sentence, *coram nobis* jurisdiction was invoked in both instances for the purpose of attacking a sentence which had run its course.").

182. 895 F.2d 1581, 1582 (10th Cir. 1990).

183. *Id.*

184. *Id.*

185. *Id.*

the Third Circuit's *Dorsainvil* decision;[186] thus, leaving the petitioner without remedy under § 2255 or § 2241.[187] District courts have considered granting the writ for those who were still in custody, but declined to do so.[188] Accordingly, there is little basis for preventing the resolution of erroneous career offender sentences with *coram nobis* because the persons seeking relief remain in custody.

This third group of claims satisfies the *coram nobis* guidelines most recently offered by the Supreme Court. Other than an error resulting in the application of the death penalty to one not eligible for such a sentence, it is difficult to conceive of an error more fundamental than those resulting in serving additional years in prison. These prisoners, by definition, are the ones who are unable to obtain relief under § 2255 because they have previously filed § 2255 motions or § 2241 because they were sentenced under the advisory Guidelines, thus placing them outside the Solicitor's current concession and because many courts, in the interest of comity, are unwilling to reconsider a sentence imposed by another court, thus leaving them without any alternative remedy. Finally, these cases are the extraordinary result of a series of decisions creating collateral relief for some prisoners who were incorrectly sentenced as career offenders based upon past convictions later held by the Supreme Court to be non-violent. This is the unusual type of circumstance for which this remedy was intended. Finally, sentences are not beyond the scope of the type of error *coram nobis* can remedy. Whether or not a defendant has been convicted a given number of times for committing violent felonies is not different, in nature, from an error as to a litigant's age[189] at the time of trial. Such a factual[190] error was a sufficient basis for a state court to use

186. *Dorsainvil*, 119 F.3d at 245 (holding that the savings clause applies where subsequent Supreme Court decisions render previously illicit conduct lawful).

187. *In re* Nwanze, 242 F.3d 521, 526 (3d Cir. 2001).

188. Fort v. Deboo, No. 5:08CV6, 2008 U.S. Dist LEXIS 89581 at *10 (N.D. W.V. Nov. 4, 2008) (construing four counts of a § 2241 petition as petitions for writs of error *coram nobis* and transferring to the sentencing court because the § 2241 court did not think it had the authority to vacate the sentence of another court); United States v. Granmayeh, 31 F. Supp. 2d 529, 529–30 (D. Md. 1999) (considering petitioner in custody for *coram nobis*, but declining to grant relief on the facts of the case).

189. BLACKSTONE, *supra* note 163.

190. Tempting though it may be as a legal puzzle, it is not necessary for purposes of this Article to address whether a similar, but even less frequently addressed remedy, *audita querela*, might be even more fitting than *coram nobis*. This alternative writ is used to attack judgments that were correct at the time they were issued, but later became infirm. *See* United States v. Salazar, No. 04-20013, 2009 U.S. Dist. LEXIS 69851 at *1 (D. Ks. Aug. 10, 2009). One could argue that these erroneous sentences were correct at the time of imposition, but later became infirm due to intervening Supreme Court precedent. The contrary argument would be that the Supreme Court precedent are applied retroactively because these sentences and the Courts of Appeals decisions upon which they rely were erroneous at the time

coram nobis in 1882 to correct a defendant's sentence.[191] Moreover, the Supreme Court stated in *United States v. Denedo* that:

> Any rationale confining the writ to technical errors, however, has been superseded; for in its modern iteration, *coram nobis* is broader than its common-law predecessor. This is confirmed by our opinion in *Morgan*. In that case we found that a writ of *coram nobis* can issue to redress a fundamental error, there a deprivation of counsel . . . .[192]

Therefore, it appears that district courts may be able, if they are willing to overlook the unconventional nature of this writ, to resolve this third group of prisoner claims. Such resolutions would be especially efficient, as they would be performed by the sentencing courts, the courts in the best position to determine what sentences they would have imposed absent career offender enhancements. Use of the writ would also eliminate any comity concerns faced when prisoners challenge their sentences via § 2241.

CONCLUSION

"[I]njustice breeds injustice"[193]

—Charles Dickens

In the most literal sense of the words, for those inmates who were incorrectly designated as career offenders based upon nonviolent felonies, injustice has bred injustice. Not only was their layman's understanding of "violent" correct all along, but now they must serve their enhanced sentences anyway. Though the more traditional motions to vacate and habeas corpus petitions will be the appropriate remedy for some prisoners, those remaining will be left without remedy unless sentencing courts are willing to utilize *coram nobis*. Even if not moved by the plight of these less than model citizens, the costs of controlling this disfavored "wild ass"

---

they were decided. However, because *coram nobis* has evolved beyond its common law bounds of correcting technical factual errors that were infirm at the time of decision, see *United States v. Denedo*, 129 S. Ct. 2213, 2220 (2009), there is no reason to consider *audita querela* as a considerably less well established alternative.

191. *Ex parte* Gray, 77 Mo. 160, 161 (1882) (holding that lower court properly used *coram nobis* to release a minor defendant who had been improperly sentenced as an adult).

192. United States v. Dendeo, 129 S. Ct. 2213, 2220 (2009).

193. CHARLES DICKENS, BLEAK HOUSE 159 (Collier 1900) (1853).

seem minor in comparison to the social costs of unnecessary incarceration.

Without the use of this non-traditional remedy, the law, as it is currently written, appears to afford no remedy to inmates who were incorrectly sentenced as career offenders under the Guidelines based upon prior non-violent convictions, but who also previously litigated motions to vacate. The number of inmates who have fallen into the gap between § 2255 and § 2241 may continue to grow if the scope of "violent" felonies continues to narrow through future appellate and Supreme Court decisions. Because arguably non-violent crimes, such as failing to pull over for a police officer,[194] trespassing to a dwelling,[195] possessing a "sawed-off" shotgun,[196] and concealing a handgun without a permit[197] are deemed violent in at least one jurisdiction, future narrowing of the scope of the ACCA is possible, if not likely. Such narrowing would further increase the number of inmates who can claim to be serving additional time because of erroneous career offender designations. Thus, these claims may not simply fade away with the passage of time.

194. *See* United States v. Spells, 537 F.3d 743, 745–46 (7th Cir. 2008).

195. *See* United States v. Corner, 588 F.3d 1130, 1132 (7th Cir. 2009) *vacated on other grounds*, 598 F.3d 411 (7th Cir. 2010) (en banc).

196. *See* United States v. Lipscomb, 619 F.3d 474, 479 (5th Cir. 2010) (finding possession of a "sawed-off" shotgun to be a crime of violence under the Guidelines). *But see* United States v. McGill, 618 F.3d 1273, 1279 (11th Cir. 2010) (finding possession of a "sawed-off" shotgun not to be violent under the ACCA).

197. *See* Jeffrey C. Bright, *Violent Felonies Under the Residual Clause of the Armed Career Criminal Act: Whether Carrying a Concealed Handgun Without a Permit Should be Considered a Violent Felony*, 48 DUQ. L. REV. 601, 602–03 (2010) (noting split on issue, arguing in favor of inclusion as violent felony).