

5-1-2014

# Yes, We Were Wrong; No, We Will Not Make It Right: The Seventh Circuit Denies Post-Conviction Relief from an Undisputed Sentencing Error Because It Occurred in the Post- Booker, Advisory Guidelines Era

Gregory S. Dierdorf  
*IIT Chicago-Kent College of Law*

Follow this and additional works at: <http://scholarship.kentlaw.iit.edu/seventhcircuitreview>

 Part of the [Law Commons](#)

---

### Recommended Citation

Gregory S. Dierdorf, *Yes, We Were Wrong; No, We Will Not Make It Right: The Seventh Circuit Denies Post-Conviction Relief from an Undisputed Sentencing Error Because It Occurred in the Post- Booker, Advisory Guidelines Era*, 9 *Seventh Circuit Rev.* 301 (2014).  
Available at: <http://scholarship.kentlaw.iit.edu/seventhcircuitreview/vol9/iss2/5>

This Criminal Law is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in *Seventh Circuit Review* by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

**YES, WE WERE WRONG; NO, WE WILL NOT  
MAKE IT RIGHT: THE SEVENTH CIRCUIT DENIES  
POST-CONVICTION RELIEF FROM AN  
UNDISPUTED SENTENCING ERROR BECAUSE IT  
OCCURRED IN THE POST-*BOOKER*, ADVISORY  
GUIDELINES ERA**

GREGORY S. DIERDORF\*

Cite as: Gregory S. Dierdorf, *Yes, We Were Wrong; No, We Will Not Make It Right: The Seventh Circuit Denies Post-Conviction Relief From An Undisputed Sentencing Error Because It Occurred In The Post-Booker, Advisory Guidelines Era*, 9 SEVENTH CIRCUIT REV. 301 (2014) at [http://www.kentlaw.iit.edu/Documents/Academic Programs/7CR/v9-2/dierdorf.pdf](http://www.kentlaw.iit.edu/Documents/Academic%20Programs/7CR/v9-2/dierdorf.pdf).

INTRODUCTION

Finality in the criminal process is essential to the effective administration of justice,<sup>1</sup> but where an undisputed sentencing error amounts to a miscarriage of justice, a defendant may obtain post-conviction relief.<sup>2</sup>

The Seventh Circuit allowed such relief in *Narvaez v. United States*.<sup>3</sup> In *Narvaez*, the defendant was erroneously sentenced as a

---

\* J.D. candidate; expected graduation May 2014 from Chicago-Kent College of Law, Illinois Institute of Technology. Undergraduate degree from Minnesota State University, B.S. in History with a Political Science minor. I would like to thank my lovely wife, Anna, for her constant support, and dedicate this article to our son, Benson, whose arrival made the final year of law school sleepless and full of joy.

<sup>1</sup> See *United States v. Addonozio*, 442 U.S. 178, 184 n.11 (1979).

<sup>2</sup> See, e.g., *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011).

<sup>3</sup> See generally *id.*

career offender under the then-mandatory United States Sentencing Guidelines (the “Sentencing Guidelines” or “Guidelines”).<sup>4</sup> Two years later, in *Hawkins v. United States* (hereinafter *Hawkins I*), the Seventh Circuit denied relief under circumstances that were nearly identical to those that warranted relief in *Narvaez*.<sup>5</sup> The court distinguished *Hawkins I* from *Narvaez* because the *Hawkins I* defendant was sentenced at a time where the Sentencing Guidelines were advisory, rather than mandatory.<sup>6</sup> According to the court, a sentencing error under the advisory Guidelines was “less serious” because the sentencing judge had ample discretion to depart from the recommended sentencing range.<sup>7</sup>

Four months after the Seventh Circuit decided *Hawkins I*, the Supreme Court decided *Peugh v. United States*.<sup>8</sup> In *Peugh*, the Court held that a misapplication of the advisory Guidelines could give rise to an *Ex Post Facto* Clause violation.<sup>9</sup> In reaching this conclusion, the Court observed that, although the Guidelines are no longer binding on judges, the Guidelines still “exert controlling influence on the sentence that the court will impose”<sup>10</sup> and “achieve binding legal effect through a set of procedural rules and standards for appellate review that, in combination, encourage district courts to sentence within the guidelines.”<sup>11</sup>

In light of *Peugh*, *Hawkins* requested that the Seventh Circuit reconsider his plea for post-conviction relief.<sup>12</sup> *Peugh* arguably rejected the Seventh Circuit’s distinction between mandatory and

---

<sup>4</sup> See generally *id.*

<sup>5</sup> See generally, *Hawkins v. United States*, 706 F.3d 820 (7th Cir. 2013) [hereinafter *Hawkins I*].

<sup>6</sup> *Id.* at 822.

<sup>7</sup> See *id.* at 824.

<sup>8</sup> 133 S.Ct. 2072 (2013).

<sup>9</sup> *Id.* at 2083–84.

<sup>10</sup> *Id.* at 2085.

<sup>11</sup> *Id.* at 2086 (citing *Miller v. Florida*, 482 U.S. 423, 432–33 (1987) (internal quotation marks omitted)).

<sup>12</sup> See generally *Hawkins v. United States*, 724 F.3d 915 (7th Cir. 2013) [hereinafter *Hawkins II*].

advisory Guideline sentencing errors.<sup>13</sup> In *Hawkins v. United States* (hereinafter *Hawkins II*), the court found *Peugh* inapplicable to its analysis in *Hawkins I* on the basis that *Peugh* did not address a plea for post-conviction relief, and affirmed its decision to deny Hawkins's motion.<sup>14</sup> This Comment argues for a different result, taking the stance that *Peugh*'s broad analysis of the post-*Booker*, advisory Guideline regime undercut the Seventh Circuit's rationale for denying relief in *Hawkins I*.

First, this Comment provides relevant background information regarding the Sentencing Guidelines, the standards that govern post-conviction relief, and the Seventh Circuit's application of those standards in *Hawkins I*. Then, this Comment explains the *Peugh* decision and the Seventh Circuit's rationale behind its decision in *Hawkins II*. Finally, this Comment argues that, contrary to the court's holdings in *Hawkins II*, the *Peugh* decision illustrates the binding legal effect of advisory Sentencing Guidelines, and demonstrates that Hawkins's suffered a miscarriage of justice that entitles him to collateral relief.

## BACKGROUND

### A. *An Overview of the Federal Sentencing Scheme*

Until 1984, federal sentencing judges possessed nearly unbridled discretion to impose prison sentences under the then-indeterminate sentencing system,<sup>15</sup> which produced sentencing disparity across the federal courts.<sup>16</sup> Congress then determined that inconsistent criminal sentences were "a serious impediment to an evenhanded and effective

---

<sup>13</sup> *See id.* at 916.

<sup>14</sup> *Id.* at 916–17.

<sup>15</sup> *Mistretta v. U.S.*, 488 U.S. 361, 363 (1989) (noting "Statutes specified penalties for crimes but nearly always gave the sentencing judge wide discretion to decide whether the offender should be incarcerated and for how long.").

<sup>16</sup> *Id.* at 366.

operation of the criminal justice system.”<sup>17</sup> In response to this concern, Congress enacted the Sentencing Reform Act (“SRA”) of 1984.<sup>18</sup> The SRA brought uniformity to the sentencing process by establishing the United States Sentencing Commission (the “Commission”), which promulgates Sentencing Guidelines.<sup>19</sup> The Sentencing Guidelines serve as a rubric for calculating the appropriate sentencing range for “each category of offense and each category of defendant.”<sup>20</sup>

While the Guidelines were originally binding upon the sentencing judges,<sup>21</sup> in *Booker v. United States*, the Supreme Court converted the Guidelines to advisory in order to remedy a Sixth Amendment violation.<sup>22</sup> The sentencing process remained the same, but the sentencing court had greater discretion to impose an outside-the-Guidelines prison sentence.<sup>23</sup>

Under the current, post-*Booker* procedure, the sentencing court still calculates and considers the appropriate Guidelines sentencing range, but may depart from the sentencing range as warranted in accordance with the sentencing considerations set forth in 18 U.S.C. § 3553(a).<sup>24</sup> Should the sentencing court depart from the recommended sentencing range, the court must explain its rationale with reference to the § 3553(a) sentencing factors.<sup>25</sup> The Court has noted that “a major

---

<sup>17</sup> *Id.*

<sup>18</sup> 18 U.S.C. § 3551 et seq. (2013).

<sup>19</sup> *Mistretta*, 488 U.S. at 366–67; see *United States v. Booker*, 543 U.S. 220, 253 (2005) (“Congress’ basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.”).

<sup>20</sup> 28 U.S.C. § 994(b)(1) (2006).

<sup>21</sup> Sarah French Russel, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 90 (2012) (While the courts were authorized to depart from the sentencing range under limited circumstances, “courts viewed the Sentencing Guidelines as mandatory”).

<sup>22</sup> *Booker*, 543 U.S. at 226.

<sup>23</sup> See *Hawkins v. United States*, 706 F.3d 820, 826–27 (7th Cir. 2013) (Rovner, J. dissenting).

<sup>24</sup> *Booker*, 543 U.S. at 245.

<sup>25</sup> *Nelson v. U.S.*, 555 U.S. 350, 351 (2009).

departure should be supported by a more significant justification than a minor one.”<sup>26</sup> On appeal, sentences are reviewed for abuse of direction.<sup>27</sup>

Sentencing errors, including miscalculating the sentencing range, are generally reversible on direct appeal.<sup>28</sup> Once a defendant has exhausted his appeals, the sentence becomes final.<sup>29</sup> At this point, a defendant’s ability to obtain relief from the sentencing error is far more limited.<sup>30</sup>

### *B. Post-conviction Relief under 28 U.S.C. § 2255*

Once a conviction becomes final, a defendant may seek post-conviction relief under 28 U.S.C. § 2255.<sup>31</sup> Pursuant to § 2255, a prisoner may request that the court vacate, set aside, or correct the sentence

upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack.<sup>32</sup>

The remedy that is available to a prisoner under § 2255 is identical to that which is available by habeas corpus.<sup>33</sup> Section 2255 was simply enacted to ensure that prisoners could seek post-conviction relief in a convenient forum; the forum in which the prisoner is confined.<sup>34</sup>

<sup>26</sup> Gall v. United States, 552 U.S. 38, 50 (2007).

<sup>27</sup> *Id.* at 51.

<sup>28</sup> *See id.*

<sup>29</sup> *See* Schiro v. Summerlin, 542 U.S. 348, 351 (2004) (a case becomes final when it is no longer pending on direct review).

<sup>30</sup> *See* United States v. Addonozio, 442 U.S. 178, 184 (1979).

<sup>31</sup> 28 U.S.C. § 2255 (2008).

<sup>32</sup> *Id.*

<sup>33</sup> Hill v. United States, 368 U.S. 424, 427 (1962) (citation omitted).

<sup>34</sup> *Id.* at 427–28 (citation omitted).

Just as habeas corpus is reserved for exceptional circumstances, the availability of post-conviction relief under § 2255 relief is similarly limited.<sup>35</sup> Courts generally disfavor collateral review of final judgment because such review (1) undermines the public's confidence in the accuracy of judicial decisions; (2) places administrative burdens on the court system that interferes with the timely administration of justice; and (3) may create evidentiary issues on remand when a substantial amount of time has passed since matter was initially adjudicated.<sup>36</sup> For these reasons, the scope of collateral review under § 2255 is more limited than direct appeal, meaning that collateral relief is not always available even though the claimed error may have warranted reversal on direct appeal.<sup>37</sup>

If a claimed error is neither jurisdictional nor constitutional, § 2255 relief is only available if the error constitutes “a fundamental defect which inherently results in a complete miscarriage of justice, [or] an omission inconsistent with rudimentary demands of fair procedure.”<sup>38</sup> An error constitutes a miscarriage of justice where it is so fundamental as to “[render] the entire proceeding irregular and invalid.”<sup>39</sup> For example, the Court has held that a miscarriage of justice occurs where an individual is imprisoned for “an act that the law does not make criminal.”<sup>40</sup> Beyond that, the contours of this standard remain largely undefined.<sup>41</sup>

Circuit courts generally agree that post-conviction relief could be granted for a sentencing error, but are reluctant to actually find that a

---

<sup>35</sup> *Id.* at 428.

<sup>36</sup> *See Addonozio*, 442 U.S. at 184 n.11 (citations omitted).

<sup>37</sup> *Id.* at 184.

<sup>38</sup> *Hill*, 368 U.S. at 428.

<sup>39</sup> *Addonozio*, 442 U.S. at 186.

<sup>40</sup> *Davis v. United States*, 417 U.S. 333, 347 (1974).

<sup>41</sup> *See Russel*, *supra* note 21, at 127-28 (Based on limited instruction from the Supreme Court, lower courts have “considerable flexibility” to determine whether a miscarriage of justice has occurred).

sentencing error ever rises to the level of miscarriage of justice.<sup>42</sup> In the Seventh Circuit, a sentencing error constitutes a miscarriage of justice where “a change in the law reduces the defendant’s statutory maximum sentence below the imposed sentence.”<sup>43</sup> In such a case, post-conviction relief is available.<sup>44</sup>

*C. The Seventh Circuit Grants Post-Conviction Relief from a Sentencing Error after an Intervening Change in the Law Demonstrates that the Defendant Should Not Have Been Classified as a Career Offender*

1. The Career Offender Sentencing Enhancement

Under the SRA, the Commission is tasked with promulgating the Sentencing Guidelines.<sup>45</sup> While Congress granted the Commission some discretion in determining the categories of offenses and categories of defendants,<sup>46</sup> Congress specifically required that the Commission establish higher sentencing ranges for repeat offenders who commit crimes of violence.<sup>47</sup> In response to this Congressional directive, the Commission promulgated U.S.S.G. § 4B1.1, which is commonly known as the career offender enhancement.<sup>48</sup>

Under § 4B1.1, a defendant who has at least two prior felony convictions for a “crime of violence” is subject to an enhanced sentencing range.<sup>49</sup> A “crime of violence” means

---

<sup>42</sup> See *Sun Bear v. United States*, 644 F.3d 700, 704–05 (8th Cir. 2011) (citing cases demonstrating the courts’ reluctance to hold that a sentencing error constitutes a miscarriage of justice).

<sup>43</sup> *Welch v. U.S.*, 604 F.3d 408, 412-13 (7th Cir. 2010).

<sup>44</sup> *Id.*

<sup>45</sup> 28 U.S.C. § 994(a)(1).

<sup>46</sup> See *id.* § 994(c)–(d) (listing various factors to consider for each category).

<sup>47</sup> *Id.* § 994(h).

<sup>48</sup> *Hawkins v. United States*, 706 F.3d 820, 823 (7th Cir. 2013).

<sup>49</sup> *Id.* at 821; see U.S.S.G. § 4B1.1.



any offense under federal or state law, punishable by imprisonment for a term exceeding one year, that (1) has as an element the use, attempted use, or threatened use of physical force against the person of another, or (2) [ . . . ] otherwise involves conduct that presents a serious potential risk of physical injury to another.<sup>50</sup>

The Supreme Court has observed that career offenders are “a category of offender [that is] subject to particularly severe punishment.”<sup>51</sup> On average, a career offender will face a prison sentence at least twice as long as he would face absent the career offender enhancement.<sup>52</sup> To determine whether an offense is a “crime of violence,” courts will consider “the statutory elements of the crime, rather than the particular facts underlying the conviction.”<sup>53</sup> This is called the “categorical approach.”<sup>54</sup>

Until 2009, most circuit courts, including the Seventh Circuit, considered all felony escape convictions to be violent crimes in the context of the career offender enhancement.<sup>55</sup> Meaning that every escape conviction was treated as a crime of violence, regardless of whether the escape was a violent, forcible escape<sup>56</sup> or a non-violent, walkaway escape.<sup>57</sup> This philosophy was premised on the notion that, even if the escape itself did not involve violence, there exists a

---

<sup>50</sup> U.S.S.G. § 4B1.2(a).

<sup>51</sup> *Buford v. United States*, 532 U.S. 59, 60 (2001).

<sup>52</sup> *See Russel supra* note 21, at 99 (the career offender enhancement “can double, triple, or even quadruple a defendant’s sentence”).

<sup>53</sup> *See United States v. Franklin*, 302 F.3d 722, 723 (7th Cir. 2002).

<sup>54</sup> *Id.*

<sup>55</sup> *See United States v. Chambers*, 473 F.3d 724, 726 (7th Cir. 2009), *reversed*, *Chambers v. United States*, 555 U.S. 122 (2009) (collecting cases).

<sup>56</sup> *See id.* (examples of forcible escapes are breaking out of a building and wrestling free of guards).

<sup>57</sup> *See id.* (examples of walkaway escapes are leaving a halfway house, failing to report for confinement, and failing to return to confinement).

potential for violence while the escapee attempts to avoid recapture.<sup>58</sup> Accordingly, courts reasoned, a felony escape conviction “presents a serious potential risk for physical injury to another,” which classifies all felony escapes as “crimes of violence” under § 4B1.1.<sup>59</sup>

## 2. The Supreme Court Implements a Change in the Law by Distinguishing Between Violent and Non-violent Escapes in the Context of Sentencing Enhancements

In January 2009, the Supreme Court decided *Chambers v. United States*, in which the Court considered whether the Illinois crime of “failure to report for weekend confinement” is a “violent felony” in the context of the Armed Career Criminal Act (“ACCA”).<sup>60</sup> Under the ACCA, an individual who has “three previous convictions . . . for a violent felony or a serious drug offense” and is subsequently convicted of being a felon in possession of a firearm faces a mandatory fifteen (15) year prison sentence.<sup>61</sup> The ACCA defines “violent felony” as a “crime punishable by imprisonment for a term exceeding one year” that “involves conduct that presents a serious potential risk of physical injury to another.”<sup>62</sup> The definitions of a “violent felony” under the ACCA and a “crime of violence” under the Sentencing Guidelines are identical, and, in the Seventh Circuit, judicial interpretations of either definition apply to both.<sup>63</sup>

In *Chambers*, the petitioner pleaded guilty to a charge of being a felon unlawfully in possession of a firearm in violation of 18 U.S.C. § 922(g).<sup>64</sup> At sentencing, the Government sought the application of the

<sup>58</sup> *Franklin*, 302 F.3d at 724 (citing *United States v. Gosling*, 39 F.3d 1140, 1142 (10th Cir. 1994) “[E]very 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.”).

<sup>59</sup> *See Chambers*, 473 F.3d at 726; U.S.S.G. § 4B1.1.

<sup>60</sup> *Chambers v. U.S.*, 555 U.S. 122, 124–25 (2009).

<sup>61</sup> *Id.* at 124 (citing 18 U.S.C. 924(e)).

<sup>62</sup> *Id.*

<sup>63</sup> *See Narvaez v. United States*, 674 F.3d 621, 624 (7th Cir. 2011).

<sup>64</sup> *Chambers*, 555 U.S. at 124.

ACCA's fifteen (15) year minimum sentence on the basis of the petitioner's prior criminal convictions.<sup>65</sup> The petitioner agreed that two of his prior convictions fell within the ACCA's "violent felony" definition, but disputed that a third conviction, for "failing to report to a penal institution," was a "violent felony" that triggered the mandatory minimum sentence.<sup>66</sup>

In resolving this question, the Court first determined that, for purposes of the ACCA, the crime of failure to report is separate and distinguishable from the crime of escape from custody.<sup>67</sup> The Court observed that a failure to report is premised on inaction, which is less aggressive and less likely to cause bodily harm than the behavior that underlies an escape from physical custody.<sup>68</sup> The Court then held that the crime of failure to report is not a "violent felony" as defined by the ACCA because, based on the available empirical evidence, it did not "[present] a serious potential risk of physical injury to another."<sup>69</sup> Thus, *Chambers* rejected the categorical treatment of felony escapes as crimes of violence regardless of whether the offense actually involved a violent act.<sup>70</sup>

### 3. The Seventh Circuit Grants Post-Conviction Relief in Light of *Chambers* Where the Defendant Was Sentenced under the Pre-*Booker*, Mandatory Sentencing Guidelines

In light of *Chambers*, the Seventh Circuit, in *Narvaez v. United States*, granted post-conviction relief from a prison sentence that was premised on a misapplication of the career offender enhancement.<sup>71</sup> In

---

<sup>65</sup> *Id.*

<sup>66</sup> Following his conviction for robbery and battery, the petitioner was required to report to a local prison for eleven (11) weekends of incarceration. He failed to report for weekend confinement on four occasions, which led to the conviction that was at issue in this case. *Id.* at 124-25.

<sup>67</sup> *Id.* at 126-27.

<sup>68</sup> *Id.*

<sup>69</sup> *Chambers*, 555 U.S. at 128, 130.

<sup>70</sup> *See id.* at 127.

<sup>71</sup> *Narvaez v. United States*, 674 F.3d 621, 623 (7th Cir. 2011).

*Narvaez*, the defendant was sentenced as a career offender because he had two prior convictions for felony escape where he failed to return to confinement.<sup>72</sup> The defendant was sentenced in the pre-*Booker* era, and the career offender enhancement increased the defendant's then-mandatory sentencing range from 100-125 months to 151-188 months.<sup>73</sup> After calculating the sentencing range, the judge imposed a 170-month prison sentence.<sup>74</sup> While *Chambers* made clear that the sentencing judge erroneously applied the career offender enhancement,<sup>75</sup> the court could only grant post-conviction relief if it determined that this error constituted a miscarriage of justice.<sup>76</sup>

In concluding that a miscarriage of justice occurred, the court analogized this case to *Davis v. United States*.<sup>77</sup> In *Davis*, the Supreme Court held that miscarriage of justice occurs where a defendant is punished "for an act that the law does not make criminal."<sup>78</sup> The *Narvaez* court found this case analogous because the *Narvaez* defendant's "career offender" classification was premised on offenses that, according to *Chambers*, could not form the basis for this classification.<sup>79</sup> In essence, he was punished for offenses the law does make punishable.<sup>80</sup> The court noted that this error was amplified by the fact that the defendant was sentenced in the pre-*Booker* era, and the judge was required to impose a sentence within the erroneously

---

<sup>72</sup> *Id.* at 623–24.

<sup>73</sup> *Id.* at 624.

<sup>74</sup> *Id.*

<sup>75</sup> The court observed that the *Chambers* holding could be applied retroactively it presented a substantive rule of law that "[prohibits] a certain category of punishment for a class of defendants because of their status or offense." *Id.* at 626 (quoting *O'Dell v. Netherland*, 521 U.S. 151, 157 (1997)).

<sup>76</sup> See *Narvaez*, 674 F.3d at 627–28.

<sup>77</sup> *Id.*

<sup>78</sup> *Davis v. United States*, 417 U.S. 333, 346 (1974).

<sup>79</sup> See *Narvaez*, 674 F.3d at 628.

<sup>80</sup> See *id.*

enhanced sentencing range.<sup>81</sup> Accordingly, the court held that a miscarriage of justice occurred.<sup>82</sup>

In reaching this holding, the court rejected the government's argument that a miscarriage of justice could not have occurred because the defendant was sentenced below the statutory maximum and could receive the same sentence on remand.<sup>83</sup> The court recognized that by labeling the defendant as a career offender, the sentencing court "created a legal presumption that he was to be treated differently from other offenders because he belonged in a special category reserved for the violent and incorrigible."<sup>84</sup> According to the court, while the defendant does not have a right to a lower sentence, "he does have an absolute right not to stand before the court as a career offender when the law does not impose that label on him."<sup>85</sup>

#### 4. The Seventh Circuit Refuses to Grant Post-Conviction Relief Where the Defendant Was Sentenced under the Post-*Booker*, Advisory Sentencing Guidelines

Two years after *Narvaez*, the Seventh Circuit decided *Hawkins v. United States (Hawkins I)* in which the defendant, Bernard Hawkins, similarly sought post-conviction relief under § 2255.<sup>86</sup> *Hawkins I* presented a case that was nearly identical to *Narvaez* except for one detail: Hawkins was sentenced in the post-*Booker* era where the Sentencing Guidelines were advisory, while the *Narvaez* defendant was sentenced under the pre-*Booker*, mandatory Guidelines.<sup>87</sup> This

---

<sup>81</sup> *Id.* at 628-29.

<sup>82</sup> *Id.* at 629.

<sup>83</sup> *Id.*

<sup>84</sup> *Narvaez*, 674 F.3d at 629.

<sup>85</sup> *Id.*

<sup>86</sup> *Hawkins v. United States*, 706 F.3d 820, 821–22 (7th Cir. 2013).

<sup>87</sup> *Id.* at 824.

distinction proved fatal to Hawkins's motion for post-conviction relief.<sup>88</sup>

In March 2003, Hawkins pled guilty to assaulting a federal officer in violation of 18 U.S.C. § 111.<sup>89</sup> Hawkins was sentenced as a career offender because he had two convictions for felony escape on his criminal record.<sup>90</sup> Similar to the escapes at issue in *Narvaez*, both of Hawkins's escapes were non-violent.<sup>91</sup> On each occasion, Hawkins simply signed himself out of a halfway house and failed to return.<sup>92</sup> Hawkins was sentenced pre-*Chambers*, however, and both escapes were considered "crimes of violence" for sentencing purposes.<sup>93</sup>

Taking into account the career offender-sentencing enhancement, Hawkins's sentencing range was 151-180 months.<sup>94</sup> If Hawkins had not been sentenced as a career offender, his sentencing range would have been 15-21 months.<sup>95</sup> While the sentencing judge recognized that the sentencing range was advisory, the judge sentenced Hawkins to 151 months in federal prison.<sup>96</sup>

Following *Chambers* and *Narvaez*, Hawkins sought post-conviction relief under § 2255.<sup>97</sup> While the Seventh Circuit had granted post-conviction relief for this type of error in *Narvaez*, it now had to consider whether such relief could be granted now that the

---

<sup>88</sup> *Id.* at 823–24.

<sup>89</sup> *United States v. Hawkins*, 136 F. App'x. 922, 923 (7th Cir. 2005).

<sup>90</sup> *Id.*

<sup>91</sup> *See Narvaez v. United States*, 674 F.3d 621, 623-24 (7th Cir. 2011).

<sup>92</sup> *Hawkins*, 136 F. App'x. at 923.

<sup>93</sup> *See id.* at 924.

<sup>94</sup> *Id.* at 923.

<sup>95</sup> *Hawkins v. United States*, 706 F.3d 820, 821 (7th Cir. 2013).

<sup>96</sup> *Id.* at 823. Hawkins was originally sentenced in the pre-*Booker* era, which would have made this case indistinguishable from *Narvaez*. *See id.* at 822. However, *Booker* was decided while Hawkins's direct appeal was pending in the Seventh Circuit. *Id.* On the authority of *Booker*, the Seventh Circuit remanded Hawkins's case for resentencing under the now-advisory Sentencing Guidelines. *Id.* The judge initially imposed a 151-month prison sentence pre-*Booker*, and reentered the same sentence post-*Booker*. *Id.*

<sup>97</sup> *See generally id.*

Guidelines are “merely advisory.”<sup>98</sup> Judge Posner, writing for the court, acknowledged that the sentencing judge was wrong for treating Hawkins’s walkaway escapes as crimes of violence and labeling him as a career offender.<sup>99</sup> The court held, however, that Hawkins did not suffer a miscarriage of justice that could be remedied through post-conviction relief.<sup>100</sup>

In reaching this conclusion, Judge Posner stressed that because *Narvaez* was sentenced in the pre-*Booker* era where the Guidelines “were the practical equivalent of a statute,” his sentence arguably exceeded that which was authorized by law.<sup>101</sup> In contrast, Hawkins was sentenced in the post-*Booker* era where the sentence is premised, primarily, on the sentencing factors set forth in 18 U.S.C. § 3553(a).<sup>102</sup> According to the court, under these circumstances, Hawkins was not “punished for conduct that is not punishable” because the sentencing court could impose a 151-month sentence based on the various sentencing factors rather than the erroneous sentencing enhancement.<sup>103</sup>

According to Judge Posner, not every error can be corrected though post-conviction relief, “even if the error is not harmless.”<sup>104</sup> Post-conviction relief is disfavored in the interest of finality, and not every error that is reversible on direct appeal may be corrected years later.<sup>105</sup> The interest of finality will not justify “[subjecting] a defendant to a punishment the law cannot impose on him,” such as a sentence that exceeds the mandatory sentencing range.<sup>106</sup> However, “[an] error in the interpretation of a merely advisory guideline is less

---

<sup>98</sup> *Id.* at 821.

<sup>99</sup> *Id.* at 823.

<sup>100</sup> *Id.* at 824.

<sup>101</sup> *See id.* at 822.

<sup>102</sup> *Id.* at 822-23.

<sup>103</sup> *See id.*

<sup>104</sup> *Id.* at 823.

<sup>105</sup> *Id.* at 824.

<sup>106</sup> *Id.* at 824 (internal quotation marks omitted) (citation omitted).

serious.”<sup>107</sup> In that case, the scale is tipped in favor of finality, and post-conviction relief is unavailable.<sup>108</sup>

Judge Rovner dissented from the court’s decision to deny Hawkins’s motion for post-conviction relief.<sup>109</sup> In her view, *Narvaez* was clearly controlling and the distinction between mandatory and advisory Sentencing Guidelines was “illusory.”<sup>110</sup> Additionally, Judge Rovner disagreed with the court’s disinclination to allow post-conviction relief in the interest of finality, noting the significant and detrimental effect of a career offender enhancement on the sentencing process.<sup>111</sup> Put simply, according to Judge Rovner, “finality must not trump justice where a court must correct a career offender enhancement that all agree was imposed in error.”<sup>112</sup> Accordingly, Judge Rovner concluded that such an error constitutes a miscarriage of justice that entitles Hawkins to post-conviction relief.<sup>113</sup>

#### THE CURRENT LAW

##### *A. The Seventh Circuit Refuses to Reconsider Hawkins I Despite the Supreme Court’s Recognition that the Advisory Sentencing Guidelines Have “Binding Legal Effect”*

Few Guidelines have as significant of an impact on a defendant’s prison sentence as the career offender-sentencing enhancement,<sup>114</sup> which imposes a heightened prison sentence upon violent, repeat offenders.<sup>115</sup> In *Narvaez*, the Seventh Circuit granted post-conviction relief from a prison sentence that was premised on the misapplication

<sup>107</sup> *Id.* at 824.

<sup>108</sup> *Id.* at 824–25.

<sup>109</sup> *Id.* at 825 (Rovner, J. dissenting).

<sup>110</sup> *Id.* at 826 (Rovner, J. dissenting).

<sup>111</sup> *Id.* at 827–28 (Rovner, J. dissenting).

<sup>112</sup> *Id.*

<sup>113</sup> *Id.* at 832 (Rovner, J. dissenting).

<sup>114</sup> *See id.*

<sup>115</sup> *See* U.S.S.G. § 4B1.1.



of the career offender enhancement.<sup>116</sup> While the defendant was sentenced in 2003, the sentencing error did not become apparent until the Supreme Court decided *Chambers* in 2009.<sup>117</sup> Notably, the *Narvaez* defendant was sentenced in the pre-*Booker* era, where the erroneously enhanced sentencing range was binding upon the judge.<sup>118</sup> According to the Seventh Circuit, a miscarriage of justice occurred when the sentencing judge erroneously “[increased], dramatically, the point of departure for [the defendant’s] sentence.”<sup>119</sup>

Two years later, in *Hawkins I*, the court denied post-conviction relief from the same sentencing error because the *Hawkins* defendant was sentenced in the post-*Booker* era.<sup>120</sup> Although the sentencing judge similarly increased *Hawkins*’s sentencing range based on the misapplication of the career offender enhancement, the court held that this error was “less serious” because the post-*Booker*-judge had greater discretion to depart from the erroneously enhanced sentencing range.<sup>121</sup> According to the court, such an error did not constitute a miscarriage of justice that could be remedied through post-conviction relief.<sup>122</sup>

Thus, taken together, *Narvaez* and *Hawkins I* demonstrate that the Seventh Circuit has drawn a line between pre-*Booker* sentencing errors and post-*Booker* sentencing errors, allowing post-conviction relief in the former but not the latter. This distinction is premised on the perception that the post-*Booker* Guidelines merely advise, rather than bind, the sentencing judges.<sup>123</sup> This premise, however, was undercut by the Supreme Court’s recognition in *Peugh v. United States*

---

<sup>116</sup> See generally, *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011).

<sup>117</sup> *Id.* at 623–24.

<sup>118</sup> *Id.* at 628–29.

<sup>119</sup> *Id.* at 629.

<sup>120</sup> *Hawkins v. United States*, 706 F.3d 820, 823–24 (7th Cir. 2013).

<sup>121</sup> *Id.* at 824.

<sup>122</sup> *Id.* at 824–25.

<sup>123</sup> *Id.* at 822–24.

that the post-*Booker*, advisory Guidelines still has “binding legal effect.”<sup>124</sup>

### 1. The Supreme Court Holds that the Misapplication of Advisory Guidelines Can Violate the Ex Post Facto Clause

*Peugh* was decided in June 2013, four months after *Hawkins I*.<sup>125</sup> In *Peugh*, the defendant was convicted for crimes committed in 1999 and 2000, but was sentenced in accordance with the 2009 Sentencing Guidelines rather than the more lenient 1998 version that was in effect at the time the crimes occurred.<sup>126</sup> The Court was presented with the issue of whether a misapplication of the Sentencing Guidelines could violate the *Ex Post Facto* Clause of the Constitution.<sup>127</sup>

An *ex post facto* law enhances the punishment for a crime after the crime has been committed.<sup>128</sup> The crux of the government’s argument was that the misapplication of merely advisory Sentencing Guidelines could not give rise to an *ex post facto* violation because the sentencing court is not required to impose a sentence within the recommended sentencing range.<sup>129</sup> The Court rejected this contention, holding that the post-*Booker*, advisory Guidelines are the “lodestar of sentencing,” and “[a] retrospective increase in the Guidelines range applicable to a defendant creates a sufficient risk of a higher sentence to constitute an *ex post facto* violation.”<sup>130</sup>

In reaching this conclusion, the Court observed that, while advisory in nature, the Guidelines achieve “binding legal effect through a set of procedural rules and standards for appellate review.”<sup>131</sup> For example, sentencing courts must calculate the correct

<sup>124</sup> 133 S.Ct. 2072, 2086 (2013).

<sup>125</sup> See generally *id.*

<sup>126</sup> *Peugh*, 133 S.Ct. at 2078.

<sup>127</sup> *Id.* at 2079.

<sup>128</sup> See *Calder v. Bull*, 3 Dall. 386, 390 (1798).

<sup>129</sup> See *Peugh*, 133 S.Ct. at 2081.

<sup>130</sup> *Id.* at 2084.

<sup>131</sup> *Id.* at 2086.

sentencing range as the first step in the sentencing process.<sup>132</sup> A failure to do so is grounds for remand.<sup>133</sup> Additionally, while a district court may impose a non-Guidelines sentence, the court “must consider the extent of the deviation and ensure the justification is sufficiently compelling to support the degree of the variance.”<sup>134</sup> Furthermore, even where a judge deviates from the advised sentencing range, the sentencing range determines the point from which the sentence is adjusted.<sup>135</sup> Thus, according to the Court, “the Guidelines are in a real sense the basis for the sentence.”<sup>136</sup> Moreover, within-Guidelines sentences are presumptively reasonable on review, which further incentivizes sentencing judges to enter within-Guidelines sentences.<sup>137</sup>

Congress created the current sentencing scheme to achieve uniformity in federal sentencing.<sup>138</sup> The now-advisory Guidelines still achieve this purpose.<sup>139</sup> Indeed, since 2007, district courts have only imposed sentences outside the Guidelines sentencing range in twenty percent of cases, absent a Government motion.<sup>140</sup> Thus, based on the significant influence that the Guidelines exert over the sentencing process, the Court held that Guidelines could form the basis of an *Ex Post Facto* Clause violation, even under in post-*Booker*, advisory regime.<sup>141</sup>

---

<sup>132</sup> *See id.* at 2083.

<sup>133</sup> *Id.* at 2083 (citation omitted).

<sup>134</sup> *Peugh*, 133 S.Ct.at 2083.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See Id.*

<sup>138</sup> *United States v. Booker*, 543 U.S. 220, 253 (2005).

<sup>139</sup> *Peugh*, 133 S.Ct. at 2084.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 2084.

## 2. The Seventh Circuit Refuses to Reconsider *Hawkins I* in Light of *Peugh*

In light of *Peugh*, Hawkins requested that the Seventh Circuit reconsider his motion for post-conviction relief.<sup>142</sup> While the court recognized that *Peugh* was arguably significant to Hawkins's case to the extent that "the Court held that an error in calculating a merely advisory guidelines range nevertheless invalidated the sentence," Judge Posner, again writing for the court, denied Hawkins's motion for reconsideration.<sup>143</sup>

In reaching this conclusion, Judge Posner provided three reasons why *Peugh* does not apply to Hawkins's motion for post-conviction relief.<sup>144</sup> First, the *Peugh* holding was limited to constitutional errors, which are not present in Hawkins's case.<sup>145</sup> Second, since *Peugh* concerned an *Ex Post Facto* Clause violation, *Peugh* was decided against a different legal standard than is applied to Hawkins's motion for post-conviction relief.<sup>146</sup> Third, *Peugh* does not apply retroactively, as would be required to incorporate that decision into Hawkins's motion.<sup>147</sup> Beyond distinguishing *Peugh*, Judge Posner reiterated his stance in *Hawkins I* that, while the district court admittedly erred, "the social interest in a belated correction of the error [was] outweighed by the social interest in the finality of judicial decisions."<sup>148</sup>

Judge Rovner argued for a contrary conclusion in her dissenting opinion.<sup>149</sup> In her view, the only basis for denying Hawkins's motion in *Hawkins I* was the perceived distinction between the advisory and mandatory Sentencing Guidelines.<sup>150</sup> According to Judge Rovner, this

---

<sup>142</sup> See generally *Hawkins v. United States*, 724 F.3d 915 (7th Cir. 2013).

<sup>143</sup> *Id.* at 915–16.

<sup>144</sup> *Id.* at 916–17.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* at 917.

<sup>147</sup> *Id.* at 917.

<sup>148</sup> *Id.* at 918.

<sup>149</sup> See *id.* at 919.

<sup>150</sup> *Id.* at 919–20. (Rovner, J. dissenting).

distinction was rejected by *Peugh*, where the Court “[instructed] that the advisory nature of the Guidelines and the presence of discretion did not alleviate the infirmities that arise when a sentencing court chooses the improper Guideline range as a starting point.”<sup>151</sup> And, while the *Peugh* Court considered an *ex post facto* violation, the specific holding is not at issue here.<sup>152</sup> Rather, it is the Court’s broad reasoning in regard to the legal force and effect of the advisory Sentencing Guidelines that undercuts the court’s holding in *Hawkins I*.<sup>153</sup> Additionally, Judge Rovner elaborated on her concerns regarding the majority’s elevation of finality over fairness by noting that, wherever the line between fairness and finality may fall, “justice requires the ability to rectify substantial uncontroverted judicial errors that cause significant injury,” as was seen in this case.<sup>154</sup>

#### ANALYSIS

##### A. *The Seventh Circuit Erroneously Decided Hawkins’s § 2255 Motion*

The Seventh Circuit got it wrong. Rather than recognize the impact of *Peugh* on the court’s treatment of advisory Sentencing Guidelines, the court avoided the issue by holding that *Peugh* did not apply to Hawkins’s challenge.<sup>155</sup> As Judge Rovner correctly recognized in her dissent, however, the court need not apply the holding of *Peugh* to determine that *Hawkins I* was wrongly decided.<sup>156</sup>

By revisiting *Hawkins I* in light of *Peugh*, it is clear that Hawkins was entitled to post-conviction relief for two reasons. First, in *Peugh*, the Court articulated general principles regarding the legal effect of

---

<sup>151</sup> *Id.* at 920 (Rovner, J. dissenting) (citing *Peugh v. United States*, 133 S.Ct. 2072, 2086 (2013)).

<sup>152</sup> *Id.* at 921–22 (Rovner, J. dissenting).

<sup>153</sup> *Id.* (Rovner, J. dissenting).

<sup>154</sup> *Id.* at 922 (Rovner, J. dissenting).

<sup>155</sup> *Id.* at 916–17.

<sup>156</sup> *Id.* at 921–22 (Rovner, J. dissenting).

advisory Sentencing Guidelines that align *Hawkins I* with *Narvaez*. Second, by rejecting the distinction between advisory and mandatory Guidelines, the *Peugh* Court tipped the scale in favor of granting post-conviction relief and elevating “fairness” over “finality.”

### 1. The *Peugh* Decision Aligns *Hawkins* With *Narvaez*

In *Hawkins I*, Judge Posner indicated that, post-*Booker*, a prison sentence is primarily determined by considering the sentencing factors set forth in 18 U.S.C. § 3553(a).<sup>157</sup> As such, the Sentencing Guidelines calculation is “less important”<sup>158</sup> and a misapplication of the career offender enhancement “less serious.”<sup>159</sup> Posner is correct, to a certain extent. Mandatory Sentencing Guidelines will certainly exert greater influence over the sentencing process than advisory Guidelines. However, it does not follow that the misapplication of the career offender enhancement under the advisory Guidelines does not rise to the level of a miscarriage of justice.

In *Narvaez*, the court held that a miscarriage of justice occurred because the defendant was erroneously classified as a career offender, an individual who was deserving of severe punishment.<sup>160</sup> The court considered this designation to be extremely damaging because the erroneously enhanced sentencing range was the “lodestar” for the defendant’s sentence.<sup>161</sup> Once designated a career offender, the defendant could do nothing to “erase that branding or its effect on his sentence.”<sup>162</sup> For this reason, the court concluded that a defendant has “an absolute right not to stand before the court as a career offender when the law does not impose that label on him.”<sup>163</sup>

---

<sup>157</sup> *Hawkins v. United States*, 706 F.3d 820, 822–23 (7th Cir. 2013).

<sup>158</sup> *Id.* at 822.

<sup>159</sup> *Id.* at 824.

<sup>160</sup> *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011).

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 629.

Just like the defendant in *Narvaez*, Hawkins was erroneously branded as a career offender and subjected to a higher sentencing range.<sup>164</sup> It would appear, then, that the *Narvaez* reasoning should have applied with full force in *Hawkins I*.<sup>165</sup> Indeed, in *Hawkins I*, Judge Posner recognized that the advisory Guidelines still have an “anchoring effect” on a defendant’s prison sentence.<sup>166</sup> However, Judge Posner nonetheless held that a miscarriage of justice had not occurred because the judge was not *required* to impose a sentence within the erroneously enhanced sentencing range.<sup>167</sup>

In *Peugh*, the Court recognized that the advisory Guidelines have “binding legal effect”<sup>168</sup> and remain the “lodestone of sentencing.”<sup>169</sup> While the advisory Guidelines are not binding by law, they are binding in effect.<sup>170</sup> Accordingly, *Peugh* narrowed the gap between the mandatory Guidelines in *Narvaez*<sup>171</sup> and the advisory Guidelines in *Hawkins I*.<sup>172</sup>

Additionally, *Peugh*’s effect on *Hawkins I* is amplified by the fact that the *Peugh* Court challenged the Seventh Circuit’s reluctance to grant relief from sentencing errors in the post-*Booker* era. Specifically, the *Peugh* Court reversed the Seventh Circuit’s decision in *United States v. Peugh*<sup>173</sup> and abrogated *United States v. Demaree*.<sup>174</sup> By rejecting the rationale of these cases, the *Peugh* Court arguably

<sup>164</sup> *Hawkins I*, 706 F.3d 820, 825–26 (7th Cir. 2013) (Rovner, J. dissenting).

<sup>165</sup> *See id.* at 826–27 (Rovner, J. dissenting).

<sup>166</sup> *Id.* at 824 (the “anchoring effect” refers to the tendency for a judge who enters a non-guideline sentence to still enter a sentence close to the advised sentencing range).

<sup>167</sup> *See id.* at 824–25.

<sup>168</sup> *Peugh v. United States*, 133 S.Ct. 2072, 2084 (2013).

<sup>169</sup> *Id.* at 2086.

<sup>170</sup> *See id.* at 2084.

<sup>171</sup> *See Narvaez v. United States*, 674 F.3d 621, 628–29 (7th Cir. 2011).

<sup>172</sup> *Hawkins I*, 706 F.3d 820, 822–23 (7th Cir. 2013).

<sup>173</sup> 675 F.3d 736 (7th Cir. 2012), *reversed*, *Peugh*, 133 S.Ct. 2072 (2013).

<sup>174</sup> 459 F.3d 791 (7th Cir. 2006), *abrogated*, *Peugh*, 133 S.Ct. 2072 (2013).

rejected, albeit indirectly, a similar rationale that formed the basis of the court's decision in *Hawkins I*.

In *United States v. Demaree*, the Seventh Circuit, in an opinion authored by Judge Posner, held that advisory sentencing guidelines could not form the basis for a violation of the *Ex Post Facto* Clause.<sup>175</sup> While the court acknowledged that sentencing guidelines could be *ex post facto* laws, the court distinguished between pre-*Booker* and post-*Booker* guidelines, and held that “the *ex post facto* clause should apply only to laws and regulations that bind rather than advise.”<sup>176</sup> The court reasoned that, while the applicable advisory Guidelines will “nudge” a sentencing court towards a sentencing range, the judge has “unfettered” discretion to impose a sentence outside the applicable range.<sup>177</sup> Thus, advisory Sentencing Guidelines could not substantially disadvantage the defendant during the actual sentencing process as to implicate the *ex post facto* clause.<sup>178</sup>

In *Hawkins I*, the court relied upon a similar line of reasoning to determine that a misapplication of the career offender enhancement in the advisory Guidelines era could not give rise to a miscarriage of justice.<sup>179</sup> In *Hawkins I*, the court distinguished the pre-*Booker* and post-*Booker* Sentencing Guidelines, explaining that errors in the post-*Booker* era are less serious because the sentencing judge is not required to impose a sentence within the recommended range.<sup>180</sup> The court even went so far as to indicate that calculating the sentencing range is irrelevant to the sentencing process.<sup>181</sup>

Thus, in both *Demaree* and *Hawkins I*, the Seventh Circuit distinguished the pre-*Booker*, mandatory Guidelines from the post-

<sup>175</sup> *Demaree*, 459 F.3d at 795.

<sup>176</sup> *Id.* at 794–95.

<sup>177</sup> *Id.* at 795.

<sup>178</sup> *See id.* at 793.

<sup>179</sup> *See Hawkins v. United States*, 706 F.3d 820, 824–25 (7th Cir. 2013).

<sup>180</sup> *Id.* at 822–23.

<sup>181</sup> *See also id.* (While the judge must calculate the sentencing range, the judge may not presume that a within-Guidelines sentence is reasonable. Rather, the judge must consider the sentencing factors set forth in 18 U.S.C. § 3553(a) to determine the appropriate prison sentence).



*Booker*, advisory Guidelines on the basis that, in the post-*Booker* era, a judge has the discretion to impose a sentence outside the applicable Guidelines range, while in the pre-*Booker* era he did not.<sup>182</sup>

The *Peugh* Court rejected this rationale by holding that the advisory Guidelines have “binding legal effect.”<sup>183</sup> Rather than “nudge” the sentencing court towards a sentencing range, the advisory Guidelines “steer” federal sentences towards the advised sentencing range through “a set of procedural rules and standards for appellate review that, in combination, encourage district courts to sentence within the guidelines.”<sup>184</sup> As this distinction formed the basis of the court’s decision in *Hawkins I*, the *Peugh* decision undercuts the court’s reasoning in that case.<sup>185</sup>

In *Hawkins II*, Judge Posner appeared to resolve this contradiction by observing that *ex post facto* challenges and motions for post-conviction relief are decided against two different standards.<sup>186</sup> An *ex post facto* violation occurs where “a change in the law creates a significant risk of a higher sentence.”<sup>187</sup> Post-conviction relief, in contrast, requires “actual prejudice.”<sup>188</sup> Accordingly, Judge Posner held that, while advisory Guidelines may create a significant risk of a higher sentence, it does not follow that a misapplication of the Guidelines could also result in actual prejudice.<sup>189</sup>

Judge Posner’s concerns are not without merit. In reaching this conclusion, however, the court appears to ignore key language from *Peugh* that indicates advisory Guidelines errors can cause actual prejudice.<sup>190</sup> The *Peugh* Court specifically observed that the

<sup>182</sup> *Id.* at 824; see *Demaree*, 459 F.3d at 794-95.

<sup>183</sup> *Peugh v. United States*, 133 S.Ct. 2072, 2086 (2013).

<sup>184</sup> See *id.* at 2084, 2086.

<sup>185</sup> *Hawkins v. United States*, 724 F.3d 915, 920–921 (7th Cir. 2013) (Rovner, J. dissenting).

<sup>186</sup> *Id.* at 917.

<sup>187</sup> *Id.* (quoting *Peugh*, 133 S.Ct. at 2088).

<sup>188</sup> *Id.* (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993)).

<sup>189</sup> *Id.* at 917.

<sup>190</sup> See *id.* at 921 (Rovner, J. dissenting).

Guidelines are not deprived of “force as the framework for sentencing” simply because “a district court may ultimately sentence a defendant outside the [applicable] Guidelines range.”<sup>191</sup> The potential for actual prejudice is further illustrated by the fact that, since 2007, the “vast majority” of courts impose a sentence within the applicable Guidelines range or below the applicable range.<sup>192</sup> Even under the advisory scheme, a misapplication of the career offender enhancement “creates a high probability of getting a much higher sentence,”<sup>193</sup> which warrants post-conviction relief.

## 2. The *Peugh* Decision Minimizes Concerns Regarding Finality in the Criminal Process

Furthermore, in light of *Peugh*, the sentencing error in *Hawkins I* so closely resembles the sentencing error in *Narvaez* that the denial of post-conviction relief can no longer be premised on the need for finality in the criminal process. Certainly, the interest of finality cannot be elevated above all other interests, otherwise the judiciary would deny all appeals and requests for post-conviction relief.<sup>194</sup> The question is where to draw the line.<sup>195</sup> On one side of the line we have *Narvaez*, and on the other, *Hawkins I*. By rejecting the distinction between advisory and mandatory Guidelines, *Peugh* pushed *Hawkins I* over the line, thereby entitling *Hawkins I* to post-conviction relief.

In *Hawkins I*, Judge Posner recognized that resentencing places less of a burden on district courts than does complete retrials, but still considered the burden substantial.<sup>196</sup> In weighing the interest of finality, Judge Posner observed that finality must yield where a defendant has received a punishment that is not authorized by law,

<sup>191</sup> *Peugh v. United States*, 133 S.Ct. 2072, 2083 (2013).

<sup>192</sup> *Id.* at 2084.

<sup>193</sup> *Hawkins v. United States*, 706 F.3d 820, 831 (7th Cir. 2013).

<sup>194</sup> *See Hawkins II*, 724 F.3d at 923 (Rovner, J. dissenting).

<sup>195</sup> *Id.*

<sup>196</sup> *Hawkins I*, 706 F.3d at 824 (approximately 80,000 prisoners are sentenced each year).

such as a sentence in excess of a binding sentencing range.<sup>197</sup> To the contrary, the miscalculation of an advisory sentencing range is “less serious,” and cannot be elevated over the interest in finality.<sup>198</sup>

Judge Posner reiterated his stance in *Hawkins II*, where he commented, “[judicial] systems that ignore the importance of finality invite unreasonable delay in the disposition of cases.”<sup>199</sup> Thus, in Hawkins’s case, preventing judicial delay is more important than providing post-conviction relief from a sentencing error that may or may not have increased the defendant’s prison sentence.<sup>200</sup>

Ironically, it is judicial delay that put Hawkins in this position to begin with. Hawkins was originally sentenced under the mandatory, pre-*Booker* Guidelines.<sup>201</sup> *Booker* was decided *two years later* while Hawkins’s direct appeal was still pending.<sup>202</sup> The Seventh Circuit remanded Hawkins’s case for resentencing under the post-*Booker* advisory scheme.<sup>203</sup> On remand, the district court applied the career offender enhancement and imposed the same 151-month sentence as was entered under the pre-*Booker* scheme, which was affirmed on appeal as reasonable because it was “within a properly calculated guidelines range.”<sup>204</sup> If Hawkins’s sentence would have become final before the Court decided *Booker*, his case would be indistinguishable from *Narvaez*, and there could be little argument that he would be entitled to relief.

According to *Narvaez*, a defendant has “an absolute right not to stand before the court as a career offender when the law does not impose that label on him.”<sup>205</sup> Refusing to grant Hawkins post-conviction relief because he was sentenced in the post-*Booker* era

---

<sup>197</sup> *Id.*

<sup>198</sup> *Id.*

<sup>199</sup> *Hawkins II*, 724 F.3d at 918.

<sup>200</sup> *Id.* at 919.

<sup>201</sup> *United States v. Hawkins*, 136 F. App’x. 922, 924 (7th Cir. 2005)

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *United States v. Hawkins*, 168 F. App’x. 98, 99 (7th Cir. 2006).

<sup>205</sup> *Narvaez v. United States*, 674 F.3d 621, 629 (7th Cir. 2011).

appears to contradict the plain language of the *Narvaez* decision. Compounding this apparent injustice is the fact that Hawkins would have received his final sentence in the pre-*Booker* era but for judicial delay in deciding his direct appeal.<sup>206</sup> Now that *Peugh* bridges the gap between *Narvaez* and *Hawkins I*, allowing Hawkins to remain in prison arguably calls into question the legitimacy of the criminal justice system. Where such a question can be raised, the court should err on the side of “fairness” and allow post-conviction relief.

### CONCLUSION

Hawkins was prejudiced by the misapplication of the career offender enhancement and the Seventh Circuit should have granted him post-conviction relief. The Seventh Circuit premised its *Hawkins I* decision on the purported distinction between mandatory and advisory Guidelines, but the *Peugh* Court rejected this distinction by emphasizing the “binding legal effect” of the post-*Booker*, advisory Sentencing Guidelines. Accordingly, the Seventh Circuit’s decision in *Narvaez* and the Supreme Court’s decision in *Peugh*, taken together, stand for the proposition that the misapplication of a career offender enhancement is a miscarriage of justice that can be remedied on post-conviction relief, regardless of whether the defendant was sentenced under the mandatory or advisory Sentencing Guidelines. Therefore, the Seventh Circuit erroneously denied Hawkins’s motion for rehearing in *Hawkins II*, and, by extension, erroneously denied Hawkins’s motion for post-conviction relief in *Hawkins I*.

---

<sup>206</sup> *Hawkins*, 136 F. App’x. at 925.