**No. 12-3168**

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**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

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ANTHONY HILL,
*Petitioner-Appellant,*

v.

RICARDO RIOS,
*Respondent-Appellee.*

---

**Appeal from the United States District Court for the Central District of Illinois, Peoria Division**
**Case No. 1:10-cv-01288-JBM**
**The Honorable Judge Joe Billy McDade**

---

# OPENING BRIEF AND REQUIRED SHORT APPENDIX OF PETITIONER-APPELLANT

---

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**ORAL ARGUMENT REQUESTED**

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 12-3168

Short Caption: Hill v. Rios

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Attorney's Signature: /s/ Brian J. Murray Date: March 12, 2013

Attorney's Printed Name: Brian J. Murray

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No ____

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ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

N/A

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## JURISDICTIONAL STATEMENT

On March 8, 2012, Petitioner-Appellant Anthony Hill filed a Motion for Relief From Judgment pursuant to Federal Rule of Civil Procedure 60(b), in which he sought relief from the district court's order of June 10, 2011, denying his petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241. The district court had jurisdiction under 28 U.S.C. § 1331, 28 U.S.C. § 2241, and Federal Rule of Civil Procedure 60(b).

The district court entered a final order denying Mr. Hill's Motion for Relief From Judgment on August 6, 2012. *See* RSA1.[1] On September 18, 2012, Mr. Hill timely filed a notice of appeal. D.E. 25. *See* Fed. R. App. P. 4(a)(1)(B); Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266, 276 (1988). This Court's jurisdiction rests on 28 U.S.C. §§ 1291, 1294, and 2253.

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in holding that, even though Mr. Hill was illegally sentenced as a career offender under the then-mandatory United States Sentencing Guidelines, he may not obtain relief under 28 U.S.C. § 2241?

2. Does Federal Rule of Civil Procedure 60(b) somehow bar Mr. Hill from obtaining relief under 28 U.S.C. § 2241?

## STATEMENT OF THE CASE

In 1996, Anthony Hill was convicted in the United States District Court for the Eastern District of Wisconsin of possession of methamphetamine with

[1] Material in the Required Short Appendix bound with this brief is cited as RSA__. Material in the separate Appendix is cited as A__. Other material taken from the District Court Docket in the Section 2241 proceeding and not included in either the Required Short Appendix or the Appendix is cited as D.E. __.

intent to distribute and possession of a firearm by a prohibited person. The probation officer recommended that Mr. Hill be deemed a career offender under U.S.S.G. § 4B1.1 (1995). As a result of the career offender enhancement, Mr. Hill's mandatory Guidelines range was increased. The court sentenced Mr. Hill to 284 months imprisonment. Mr. Hill's appeal was dismissed, and he unsuccessfully sought relief under 28 U.S.C. § 2255.

Following the United States Supreme Court's decision in *Begay v. United States*, 553 U.S. 137 (2008), Mr. Hill filed a *pro se* petition for writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Central District of Illinois. Mr. Hill contended that, in light of *Begay*, he was improperly sentenced as a career offender. Unfortunately, by the time he filed his § 2241 petition, Mr. Hill had forgotten that he filed a § 2255 motion in 1997.

The district court denied Mr. Hill's § 2241 petition, and this Court affirmed on the ground that Mr. Hill had not sought relief under § 2255. That decision prompted Mr. Hill to file a motion under § 2255. The United States District Court for the Eastern District of Wisconsin denied that § 2255 motion as an unauthorized second motion.

Upon learning that he had, in fact, sought relief under § 2255, Mr. Hill filed a "Motion for Relief from Judgment" in the district court. The district court denied Mr. Hill's Motion for Relief From Judgment, reasoning that Mr. Hill was not entitled to relief under § 2241 because his 284-month sentence fell within the overlap between the unenhanced Guidelines range and the unlawfully enhanced career-offender Guidelines range.

Mr. Hill filed a timely notice of appeal. Mr. Hill respectfully requests that this Court reverse the judgment of the district court, remand the case, and instruct the district court to grant Mr. Hill's § 2241 petition and order that he be resentenced.

## STATUTORY BACKGROUND

As a general matter, "[28 U.S.C.] § 2255 is the exclusive means for a federal prisoner to attack his conviction or sentence." *Hill v. Werlinger*, 695 F.3d 644, 647 (7th Cir. 2012) (quotation marks and citation omitted). Section 2255 "gives a federal prisoner one opportunity to challenge a conviction and sentence following a direct appeal." *Suggs v. United States*, 705 F.3d 279, 281 (7th Cir. 2013). A prisoner may file a second or successive § 2255 motion only if that motion "presents either (1) newly discovered evidence that makes a clear and convincing showing of innocence or (2) a new rule of constitutional law made retroactive by the Supreme Court." *Id.* at 282; *see* 28 U.S.C. § 2255(h).

However, a federal prisoner may seek relief under 28 U.S.C. § 2241 if a motion under § 2255 would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). Under this Court's precedent, a federal prisoner who is seeking relief from his conviction or sentence under § 2241 and who has previously filed a § 2255 motion must make three showings. *First*, he "must . . . show that the legal theory he advances relies on a change in the law that . . . postdates his first § 2255 motion." *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003) (per curiam). *Second*, he "must . . . show that the legal theory he advances . . . eludes the permission in section 2255 for successive

motions." *Id.* (quotation marks and citation omitted). *Third*, the error of which the petitioner complains must be "grave enough . . . to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding." *Brown v. Rios*, 696 F.3d 638, 640 (7th Cir. 2012).

**STATEMENT OF THE FACTS**

On September 18, 1996, Mr. Hill was convicted in the United States District Court for the Eastern District of Wisconsin of possession of methamphetamine with intent to distribute, in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2, and of possession of a firearm by a prohibited person, in violation of 18 U.S.C. § 924(a)(2). *See* RSA1. Following the conviction, the probation officer prepared a presentence report, in which he calculated Mr. Hill's offense level as 34 and his criminal history as category V. *See id.*; Presentence Investigation Report, D.E. 21, at 12, 21. Had the probation officer stopped there, he would have recommended a Guidelines range of 235 months to 293 months. *See* U.S.S.G. Sentencing Table (1995).

The probation officer then further recommended that Mr. Hill be deemed a "career offender" pursuant to U.S.S.G. § 4B1.1 (1995). *See* Presentence Investigation Report, D.E. 21, at 12, 21. Under that guideline, "[a] defendant is a career offender if (i) the defendant was at least eighteen years old at the time of the instant offense, (ii) the instant offense of conviction is a felony that is either a crime of violence or a controlled substance offense, and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense." U.S.S.G. § 4B1.1 (1995). A "crime of

violence" within the meaning of § 4B1.1 is "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) is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." U.S.S.G. §4B1.2(1) (1995). The probation officer relied on two prior convictions in categorizing Mr. Hill as a career offender: (1) a conviction for possession of marijuana with intent to deliver in violation of Wisconsin law and (2) a conviction for second degree reckless endangerment while armed in violation of Wisconsin law. *See* Presentence Investigation Report, D.E. 21, at 12-13; Judgment of Conviction, D.E. 2, at 13.

Because the probation officer recommended that Mr. Hill be deemed a career offender, he calculated Mr. Hill's criminal history as category VI. Presentence Investigative Report, D.E. 21, at 21; *see* U.S.S.G. § 4B1.1 (1995) ("A career offender's criminal history category in every case shall be Category VI."). Based on his conclusion that Mr. Hill had an offense level of 34 and a criminal history of category VI, the probation officer set Mr. Hill's Guidelines range at 262 months to 327 months. *See* Presentence Investigation Report, D.E. 21, at 30; U.S.S.G. Sentencing Table (1995).

The court held a sentencing hearing on November 18, 1996, *see* Docket for *United States v. Hill*, No. 2:95-cr-00112-RTR-1, at 8, filed in this § 2241 proceeding as D.E. 20-1. The court agreed with the probation officer, adopted

the factual findings and Guidelines application in the presentence report (including the career offender classification) and, thus, determined that petitioner's Guidelines imprisonment range was 262 to 327 months. *See* A10 ("The court adopts the factual findings and guideline application in the presentence report."). The court sentenced Mr. Hill to 284 months imprisonment under the then-mandatory Guidelines regime. *See* A7; RSA1; *United States v. Booker*, 543 U.S. 220 (2005).

On December 2, 1996, Mr. Hill filed a notice of appeal. *See* D.E. 20-1, at 8. That appeal was dismissed in November 1997. *See* A11. On November 17, 1997, Mr. Hill filed a motion pursuant to 28 U.S.C. § 2255 in the court that sentenced him. *See* D.E. 20-1, at 9. The court denied that initial § 2255 motion on May 28, 1998. *See* A18.

After his unsuccessful appeal and § 2255 motion, Mr. Hill settled into the daily routine of prison life and worked to better himself. He obtained his G.E.D., worked in the prison's factory, and provided mentorship to younger prisoners. *See* Letter from D. McMahan, D.E. 22, at 13-14. Almost ten years went by.

Then, in 2008, the United States Supreme Court decided *Begay v. United States*, 553 U.S. 137 (2008), in which it held that the term "violent felony" under the Armed Career Criminal Act (ACCA), 18 U.S.C. § 924(e)(1), includes only crimes that "typically involve purposeful, 'violent,' and 'aggressive' conduct" of a sort "that . . . makes more likely that an offender, later possessing a gun, will use that gun deliberately to harm a victim." *Begay*, 553 U.S. at 144-45. In

other words, strict liability crimes or crimes of negligence or recklessness do not qualify as "violent felon[ies]" under the ACCA, *see id.* at 144-47, as this Court has recognized. *United States v. Smith*, 544 F.3d 781, 786 (7th Cir. 2008) ("We must conclude that, after *Begay*, the residual clause of the ACCA should be interpreted to encompass only 'purposeful' crimes. Therefore, those crimes with a *mens rea* of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA."). While *Begay* itself involved the ACCA, this Court has stated: "Section 924—a part of the [ACCA]—defines 'violent felony' in the same way as [U.S.S.G.] § 4B1.2 defines 'crime of violence,' and we interpret § 4B1.2 in the same way as § 924(e)." *United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008). *Begay*, thus, was relevant to Mr. Hill's classification as a career offender under the Guidelines. *See United States v. Woods*, 576 F.3d 400, 408 (7th Cir. 2009) (applying *Smith*'s holding that "those crimes with a *mens rea* of negligence or recklessness do not trigger the enhanced penalties mandated by the ACCA" in the § 4B1.1 context").

On September 23, 2010—nearly 14 years after he was sentenced and approximately 12 years after his first effort to obtain collateral relief ended unsuccessfully—Mr. Hill filed *pro se* a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241 in the United States District Court for the Central District of Illinois. *See* D.E. 1. Mr. Hill argued that his conviction for second degree reckless endangerment while armed did not qualify as a "crime of violence" predicate for the career offender sentencing enhancement in light of *Begay*. *See* Memorandum of Points and Authorities in Support of Petition for

Habeas Corpus, D.E. 2, at 5. That argument was correct. *See United States v. High*, 576 F.3d 429 (7th Cir. 2009) (per curiam) (holding that second-degree recklessly endangering safety, in violation of Wis. Stat. § 941.30(2), is not a "violent felony" within the meaning of the ACCA); *United States v. Bishop*, 341 F. App'x 239, 240 (7th Cir. 2009) ("Second-degree reckless endangerment, in violation of Wis. Stat. § 941.30(2), is . . . not a crime of violence for the specific purpose of the career-offender enhancement."). So, Mr. Hill was not a career offender under U.S.S.G. § 4B1.1. However, by the time he filed a §2241 petition in 2010, Mr. Hill had forgotten that he had filed a § 2255 motion in 1997. *See* Motion for Relief from Judgment, D.E. 17, at 2 & n.1, 4.

On June 10, 2011, the district court denied Mr. Hill's § 2241 petition, holding that he could not proceed under § 2241. *See* A5. Mr. Hill appealed, and this Court affirmed on the ground that Mr. Hill had failed to seek relief under § 2255. *See* A19-20. This Court explained:

> Section 2241 is not available if 28 U.S.C. § 2255 provides an opportunity for relief. *See* § 2255(e). Section 2255(f)(2) provides that a prisoner has a new one-year period to seek collateral relief after a right has been newly established and made retroactive. *Begay* was decided in 2007 and *Hill* in August 2009. *Narvaez v. United States*, 641 F.3d 877 (7th Cir. 2011), holds that these decisions are retroactive. But Hill let the entire year (and then some) pass without action; he did not file his petition until December 2010. Failure to take advantage of an available remedy under § 2255 does not permit resort to § 2241.

*Id.* This Court's mandate issued on January 24, 2012. *See* A21.

On February 21, 2012, Mr. Hill filed in the United States District Court for the Eastern District of Wisconsin a motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. *See Hill v. United States*, No. 1:12-cv-00180-RTR, D.E. 1 (E.D. Wis. Feb. 21, 2012). The district court dismissed that motion on February 24, 2012, reasoning that, in light of his 1997 § 2255 motion, Mr. Hill's new § 2255 motion was an "unauthorized successive motion" under § 2255(h). *See* A23.

The Eastern District of Wisconsin's order dismissing his § 2255 motion reminded Mr. Hill that he had, in fact, filed a § 2255 motion nearly fifteen years earlier. *See* Motion for Relief from Judgment, D.E. 17, at 4. Upon being reminded of that fact, Mr. Hill filed a document titled "Motion for Relief from Judgment" in the United States District Court for the Central District of Illinois on March 8, 2012. *See* D.E. 17. In that filing, Mr. Hill argued that the district court should grant him relief from judgment under Federal Rule of Civil Procedure 60 in light of his mistaken belief (naturally shared by both the courts and respondent) that he had not sought relief under § 2255 prior to the filing of his § 2241 petition. *Id.* at 4. Mr. Hill also argued that, once his earlier § 2255 motion was acknowledged, he was entitled to relief under this Court's decision in *United States v. Narvaez*, 641 F.3d 877 (7th Cir. 2011), which held that the improper sentencing of a defendant as a career offender under § 4B1.1

of the mandatory Guidelines constituted a denial of due process and a fundamental miscarriage of justice meriting collateral relief.[2] *Id.* at 4-5.

On August 6, 2012, the district court denied Mr. Hill's motion for relief from judgment. *See* RSA1. The district court explained that its prior order denying Mr. Hill's § 2241 petition rested on two grounds: "(1) Petitioner could not show that § 2255 was inadequate or ineffective because he did not previously file for relief under § 2255, and (2) Petitioner was only attacking his sentence, not his conviction, and so was therefore not arguing that he was 'actually innocent' of the underlying crime as required by the savings clause of § 2255(e)." *Id.* at 5.

The district court acknowledged that Mr. Hill had previously filed a §2255 motion. Moreover, the district court declined to base its denial of Mr. Hill's motion on Rule 60(b) procedural grounds. Instead, the court stated that, while it was "not convinced that [Mr. Hill's] failure to mention his 1997 §2255 motion was truly 'excusable neglect,'" "in the interest of a thorough disposition, [it would] reevaluate its second basis for denying [Mr. Hill]'s § 2241 Petition, that he is not 'actually innocent' and therefore ineligible to file a § 2241 petition." *Id.* at 11; *see also id.* ("[T]he Court will assume for the purposes of

[2] This Court issued its original opinion in *Narvaez* on June 3, 2011, seven days before the district court originally dismissed Mr. Hill's § 2241 petition. In that opinion, this Court held that the wrongful imposition of a career-offender enhancement under the mandatory Guidelines regime constituted a denial of due process and a fundamental miscarriage of justice cognizable under § 2255. 641 F.3d 877. The Court withdrew its earlier opinion in *Narvaez* and issued an amended opinion on December 6, 2011. *See Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011). In that opinion, this Court again held that the wrongful imposition of a career-offender enhancement under the mandatory Guidelines regime constitutes a miscarriage of justice meriting collateral relief. *Id.* at 627-30.

this Motion that [Mr. Hill]'s failure to reveal his previous § 2255 Motion falls within Rule 60(b)(1).").

With respect to the second ground, the district court acknowledged that, "[f]ollowing *Begay*, one of [Mr. Hill]'s two prior convictions, second degree reckless endangerment while armed, was no longer considered a violent felony for purposes of sentencing enhancement." *Id.* at 4. The district court also recognized that Mr. Hill could not have advanced this ground for relief in a successive § 2255 motion. *Id.* at 6. Moreover, the district court recognized the import of *Narvaez*. The district court stated that this Court held in *Narvaez* that "being innocent of an illegally enhanced sentence was functionally equivalent to being innocent of the underlying crime for purposes of § 2255(e)." *Id.* at 7; *see also id.* at 9 ("[T]he Seventh Circuit held [in *Narvaez*] that certain sentencing errors may be cognizable on collateral review because such errors are a miscarriage of justice; innocence of such errors is functionally equivalent to being innocent of a crime.").

Despite those recognitions and acknowledgements, the district court held that Mr. Hill was not entitled to relief pursuant to § 2241. The court based that conclusion on the fact that Mr. Hill's 284-month sentence fell within both the career-offender and non-career-offender Guidelines ranges. *See id.* at 11-16. The district court believed that "a miscarriage of justice only occurs when a defendant's erroneous career offender enhancement results in a sentence above the maximum he would have received had the rule of *Begay* been in effect at the time of his original sentence." *Id.* at 16. Thus, in the district

court's view, Mr. Hill's "designation as a career offender under the Sentencing Guidelines does not illegally enhance his sentence because he could have received 284 months with or without being labeled as a career offender had the rule of *Begay* been in effect when he was originally sentenced." *Id.* at 13. The court reasoned that Mr. Hill's "sentence was therefore not 'illegal,' and no miscarriage of justice resulted." *Id.* at 12. Thus, while it noted that this Court "has not yet directly addressed the issue in this case," *id.* at 15, the court denied Mr. Hill's Motion for Relief From Judgment, *id.* at 17.

This timely appeal followed. *See* D.E. 25.

**SUMMARY OF THE ARGUMENT**

The district court erred in denying Mr. Hill's Motion for Relief from Judgment. The court based its decision to deny Mr. Hill's Motion on its belief that the error of which Mr. Hill complains—the wrongful imposition of a career offender enhancement that increased Mr. Hill's sentencing range under the mandatory Guidelines regime—is not sufficiently fundamental to be cognizable in a proceeding under 28 U.S.C. § 2241 because Mr. Hill's sentence fell within both the unenhanced and unlawful career-offender Guidelines ranges. The district court's decision was inconsistent with this Court's reasoning in *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011).

In *Narvaez*, this Court held that the improper imposition of a career-offender enhancement under the mandatory Guidelines constituted a fundamental miscarriage of justice warranting collateral relief because it resulted in "Mr. Narvaez [being] sentenced based upon the equivalent of a non-

existent offense." *Id.* at 628-29. This Court focused on the fact that Narvaez was wrongfully branded as a career offender under the mandatory Guidelines, and that the wrongful branding "increased the sentencing range the district court was authorized to employ." *Id.* All of that is true in this case: Mr. Hill was wrongfully branded a career offender, and that fact markedly increased Mr. Hill's mandatory Guidelines range. Moreover, under the mandatory Guidelines regime, sentencing judges selected sentences "*relative* to the guideline range," *United States v. White*, 406 F.3d 827, 836 (7th Cir. 2005) (quotation marks and citation omitted), so that the calculation of the Guidelines range and the sentence imposed were generally inextricably intertwined. In sum, Mr. Hill was unlawfully "sentenced based upon the equivalent of a non-existent offense," *Narvaez*, 674 F.3d at 628-29, and he is therefore entitled to collateral relief.

That this case comes before the Court in a Federal Rule of Civil Procedure 60(b) posture is of no moment. Rule 60(b) motions are committed to the district court's discretion, and the district court declined to deny relief on the basis of Rule 60(b), choosing instead to evaluate the merits of Mr. Hill's § 2241 petition in light of *Narvaez*. The district court did not abuse its discretion by doing so. This case fits neatly into Rule 60(b)(1), which authorizes relief based on "mistake, inadvertence, surprise, or excusable neglect." Here, Mr. Hill, a *pro se*, incarcerated litigant, mistakenly forgot a long-ago § 2255 motion and therefore inadvertently neglected to bring that motion to the court's attention.

Moreover, even if this case were deemed to fall outside of the scope of Rule 60(b)(1), relief would be appropriate under Rule 60(b)(6)'s catch-all provision. This case presents extraordinary circumstance warranting Rule 60(b)(6) relief, as Mr. Hill was "sentenced based on the equivalent of a non-existent offense." *Narvaez*, 674 F.3d at 628.

Because Mr. Hill is entitled to relief under *Narvaez*, and because no procedural barriers stand in the way of that relief, Mr. Hill respectfully requests that this Court reverse the judgment of the district court and remand this case with instructions requiring the district court to grant Mr. Hill's § 2241 petition and to order that he be resentenced.

**STANDARDS OF REVIEW**

When reviewing the denial of a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2241, this Court reviews a district court's legal conclusions *de novo*. *See Clemente v. Allen*, 120 F.3d 703, 705 (7th Cir. 1997) (per curiam).

This Court reviews for abuse of discretion a district court's resolution of a motion for reconsideration under Federal Rule of Civil Procedure 60(b). *See Philos Techs., Inc. v. Philos & D, Inc.*, 645 F.3d 851, 854 (7th Cir. 2011). If a district court "base[s] its ruling on an erroneous view of the law" then it has "necessarily abuse[d] its discretion." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990).

## ARGUMENT

## I. MR. HILL IS ENTITLED TO RELIEF UNDER 28 U.S.C. § 2241.

### A. Mr. Hill Was Not and Is Not a Career Offender.

As the district court correctly recognized, Mr. Hill's prior conviction for second degree reckless endangerment while armed does not qualify as a predicate "crime of violence" for purposes of the U.S.S.G. § 4B1.1 career offender enhancement. *See* RSA4, 11. That offense was one of the two prior offenses that served as predicates for Mr. Hill's career offender enhancement. *See id.* An enhancement under § 4B1.1 requires that "the defendant ha[ve] at least *two* prior felony convictions of either a crime of violence or a controlled substance offense" (emphasis added). Therefore, because his conviction for second degree reckless endangerment does not qualify as a § 4B1.1 predicate, Mr. Hill was not—and is not—a career offender and was unlawfully sentenced as one. Respondent has not disputed these points. *See* Respondent's Response to Petitioner's Motion for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, D.E. 8; Respondent's Response to Petitioner's Rule 60(b) Motion to Vacate Judgment, D.E. 20.[3]

[3] Twice in its Opinion and Order, the district court suggested that Mr. Hill's 1996 conviction of possession of a firearm by a prohibited person qualifies, or could qualify, as a violent felony post-*Begay*. *See* RSA4 n.2; RSA11 n.5. The district court's statements on this point were less than clear, but to the extent that the district court was suggesting that Mr. Hill's 1996 possession-of-a-firearm offense could serve as a predicate for a career offender enhancement, those suggestions are incorrect. In fact, the Application Notes to U.S.S.G. § 4B1.2 specifically provide that "'crime of violence' does not include the offense of unlawful possession of a firearm by a felon." Application Note 2, U.S.S.G. § 4B1.2 (1995); *see also United States v. Glover*, 479 F.3d 511, 521 (7th Cir. 2007) ("[W]e have held that mere possession of a weapon is not a crime of violence.").

### B. Mr. Hill Could Not Have Challenged His Sentence Via 28 U.S.C. § 2255.

Mr. Hill has clearly satisfied the first two conditions that this Court has placed on a federal prisoner's ability to seek relief under § 2241. *First*, the legal theory advanced by Mr. Hill relies on a change in the law that postdates his first § 2255 motion. *See Kramer*, 347 F.3d at 217. Mr. Hill's first § 2255 motion was filed in 1997, *see* RSA9, and *Begay* and *High* were decided in 2008 and 2009, respectively, *see Begay*, 553 U.S. 137; *High*, 576 F.3d 429.[4] *Second*, as the district court recognized, Mr. Hill could not have pressed his argument in a second or successive § 2255 motion. *See* RSA6; *Brown,* 696 F.3d at 640 ("*Begay* was not a constitutional case, but a statutory-interpretation case, so Brown could not have invoked it by means of a second or successive section

(continued...)

And, even if the district court's suggestions on this point were correct as a general matter, they would be irrelevant to the issues presented in this appeal. *First*, the 1996 felon-in-possession offense was not relied upon as support for the imposition of a career offender enhancement on Mr. Hill. *See* RSA1.

*Second*, and more important, to serve as a predicate for a § 4B1.1 career offender enhancement, a prior felony conviction must have been sustained *before* the commission of the offense for which the defendant is being sentenced. *See* U.S.S.G. §4B1.2(3) (1995) ("The term 'two prior felony convictions' means . . . the defendant committed the instant offense subsequent to sustaining at least two felony convictions of either a crime of violence or a controlled substance offense . . . . The date that a defendant sustained a conviction shall be the date that the guilt of the defendant has been established, whether by guilty plea, trial, or plea of *nolo contendere*."). Here, Mr. Hill sustained his 1996 possession-of-a-firearm conviction and his conviction for possession with intent to distribute methamphetamine at the same time, and both of these convictions were, of course, sustained *after* the commission of the offenses. Thus, the possession-of-a-firearm conviction cannot serve as a predicate for Mr. Hill's career offender enhancement.

[4] *Begay* and *High* are retroactively applicable on collateral review. *See Brown*, 696 F.3d at 640; *Narvaez*, 674 F.3d at 625; *Welch v. United States*, 604 F.3d 408, 415 (7th Cir. 2010). *See also* A19 (stating that *Narvaez* holds that *Begay* and *High* are retroactive).

2255 motion."). Respondent has not argued that Mr. Hill failed to satisfy either of these conditions for seeking relief under § 2241. *See* Respondent's Response to Petitioner's Motion for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241, D.E. 8; Respondent's Response to Petitioner's Rule 60(b) Motion to Vacate Judgment, D.E. 20.[5]

### C. Mr. Hill Is Entitled to Relief Under This Court's Reasoning in *Narvaez*.

The key question in this case, therefore, is whether the wrongful imposition of a career offender enhancement on Mr. Hill is "a grave enough error to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding." *Brown*, 696 F.3d at 640. Under this Court's reasoning in *Narvaez*, the answer to that question is clearly "yes."

In that case, Narvaez pleaded guilty to bank robbery in 2003, and the district court sentenced him as a career offender under U.S.S.G. § 4B1.1. *Narvaez*, 674 F.3d at 623. Two prior escape convictions served as the predicates for Narvaez's career-offender enhancement. *Id.* The United States Supreme Court's decisions in *Begay*, 553 U.S. 137, and *Chambers v. United States*, 555 U.S. 122 (2009), made it clear that Narvaez was improperly sentenced as a career offender. Narvaez filed a motion under 28 U.S.C. § 2255, arguing that his improper categorization as a career offender violated his right to due process and resulted in a miscarriage of justice entitling him to relief

[5] Nor is Mr. Hill relying on a mere "difference between the law in the circuit in which the prisoner was sentenced and the law in the circuit in which the prisoner was incarcerated." *In re Davenport*, 147 F.3d 605, 612 (7th Cir. 1998). Mr. Hill was sentenced in the Eastern District of Wisconsin, in the Seventh Circuit. He is confined in the Central District of Illinois, which is also in the Seventh Circuit.

under § 2255. *Narvaez*, 674 F.3d at 627 n.10. This Court declined to reach Narvaez's due process claim because it agreed with his miscarriage-of-justice argument. *Id.*

As an initial matter, the Court recognized that "a non-jurisdictional, non-constitutional error of law is not a basis for collateral attack under § 2255 unless the error is 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Id.* at 623 n.2 (quoting *Hill v. United States*, 368 U.S. 424, 428 (1962)). This Court also acknowledged that, given the high standard, "sentencing errors are generally not cognizable on collateral review, especially when such errors can be raised on direct appeal." *Id.* at 627.

Despite that high bar, the Court held that Narvaez was entitled to relief. This Court explained that Narvaez's situation was analogous to a situation in which a post-sentencing ruling has made clear that the defendant was innocent of the underlying crime for which he was convicted. *Id.* at 628. After all, "Mr. Narvaez was not eligible for the categorization of violent offender wrongfully imposed upon him." *Id.* In holding that Narvaez's situation presented a miscarriage of justice, this Court stressed the heavy stigma (and the corresponding risk of increased punishment) facing those branded as career offenders. *See id.* at 629 ("This case . . . involves the classifying of an individual as belonging to a subgroup of defendants, repeat violent offenders, that traditionally has been treated very differently from other offenders."); *id.* ("The imposition of the career offender status branded Mr. Narvaez as a malefactor deserving of far greater punishment than that usually meted out for

an otherwise similarly situated individual who had committed the same offense. It 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."). And, dispatching the Government's argument that Narvaez could receive the same sentence under the now-advisory Guidelines, this Court observed that, while Narvaez did "not have an absolute 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." *Id.*

Under the reasoning in *Narvaez*, Mr. Hill is entitled to relief. Both Narvaez and Mr. Hill were sentenced under the mandatory Guidelines scheme. And like Narvaez, Mr. Hill "was not eligible for the categorization of violent offender wrongfully imposed upon him," *id.* at 628, and should not have been saddled with the stigma and presumption of differential treatment that goes along with that enhancement. In short, Mr. Hill is unlawfully in custody pursuant to a sentence under the career-offender enhancement and, like Narvaez, Mr. Hill "ha[s] an absolute right not to stand before the court as a career offender when the law does not impose that label on him." *Id.* at 629.

### D. Because Mr. Hill Was Sentenced Based Upon the Equivalent of a Non-Existent Offense, He May Obtain Relief Under § 2241.

It is irrelevant that Mr. Hill presented his claim for relief in a § 2241 petition, as opposed to a § 2255 motion of the sort at issue in *Narvaez*. *Id.* at 623. As an initial matter, this Court need not and should not address this issue, because Respondent declined to argue in the district court that the logic of *Narvaez* does not extend to the § 2241 context. Rather, Respondent

admitted that *Narvaez* "raises a serious question of whether there are claims in addition to those of actual innocence that are cognizable under the savings clause of § 2255(e) and § 2241," Respondent's Response to Petitioner's Rule 60(b) Motion to Vacate Judgment, D.E. 20, at 7, before moving on to its main argument, which will be discussed below. Thus, Respondent has waived this argument, *see Marseilles Hydro Power, LLC v. Marseilles Land & Water Co.*, 518 F.3d 459, 470 (7th Cir. 2008), and this Court need not pursue the issue whether *Narvaez* extends to the § 2241, as opposed to the § 2255, context. *Cf. Brown*, 696 F.3d at 641 ("[W]e needn't pursue the issue whether or what sentencing errors can be corrected in a habeas proceeding further in this case, in view of the government's concession.").

But, in an abundance of caution, Mr. Hill notes that the reasoning in the *Narvaez* opinion applies in the § 2241 context. This Court's precedent makes plain that there is no categorical bar prohibiting a prisoner from challenging his sentence via a § 2241 petition. *See Garza v. Lappin*, 253 F.3d 918, 923 (7th Cir. 2001) (federal prisoner entitled to raise challenge to the legality of his sentence where he never had an opportunity to test legality of that sentence under § 2255). And, the Government has conceded in other cases that, at least under some circumstances, a prisoner may attack his sentence via a § 2241 petition. *See, e.g.*, *Brown*, 696 F.3d at 640 ("The district court in this case, seconded by the government, held that section 2241 was a proper vehicle for Brown's attack on his sentence[.]").

More specifically, Mr. Hill should be permitted under this Court's precedent to challenge his unlawful career-offender sentence via a §2241 petition, as he was sentenced, and is therefore in custody, on the basis of a non-existent offense. It would be passing strange to hold that the improper imposition of a career offender enhancement under the mandatory Guidelines scheme constitutes "'a fundamental defect which inherently results in a complete miscarriage of justice,'" *Narvaez*, 674 F.3d at 623 n.2 (citation omitted), while at the same time concluding that such an error is not "grave enough . . . to be deemed a miscarriage of justice corrigible therefore in a [§ 2241] proceeding." *Brown*, 696 F.3d at 640. After all, in concluding that the improper imposition of a career offender sentence under the then-mandatory Guidelines constituted a miscarriage of justice warranting § 2255 relief, the Court in *Narvaez* explained that the case before it fell within the reasoning of "cases provid[ing] collateral relief when a defendant is innocent of the underlying crime." *Narvaez*, 674 F.3d at 628. When a subsequent, retroactive decision reveals that a defendant was wrongfully sentenced as a career offender under the mandatory Guidelines, there exists a "fundamental error equivalent to actual innocence," *Taylor v. Gilkey*, 314 F.3d 832, 836 (7th Cir. 2002), of the sort cognizable in a § 2241 proceeding, because the defendant is innocent of the "categorization of violent offender wrongfully imposed upon him," *Narvaez*, 674 F.3d at 628, and was therefore "sentenced based upon the equivalent of a non-existent offense," *id.* at 629. *See In re Davenport*, 147 F.3d 605, 611 (7th Cir. 1998) ("A procedure for postconviction relief can fairly be

termed inadequate when it is so configured as to deny a convicted defendant any opportunity for judicial rectification of so fundamental a defect in his conviction as *having been imprisoned for a nonexistent offense*." (emphasis added)); *see also Fiore v. White*, 531 U.S. 225 (2001) (continued incarceration of defendant following state supreme court ruling that the statute of conviction did not encompass defendant's conduct constitutes a violation of due process).

In sum, as district courts in this Circuit have recognized, this Court's decision in *Narvaez* naturally applies in cases involving § 2241 petitions. *See Phillips v. Holinka*, No. 10-cv-439-bbc, 2012 WL 1516605 (W.D. Wis. Apr. 26, 2012) (applying *Narvaez* and granting relief under § 2241 where petitioner was improperly sentenced pursuant to the career-offender enhancement); *McCoy v. Rios*, No. 10-cv-1239, 2012 WL 3267707 (C.D. Ill. Aug. 9, 2012) (applying *Narvaez* and granting relief under § 2241 where the petitioner had been wrongfully subjected to an ACCA enhancement); *Harvey v. United States*, No. 3:10-cv-00647-DRH, D.E. 32 (S.D. Ill. 2012) (applying *Narvaez* and granting § 2241 relief, without opposition from the Government, where petitioner was improperly subjected to the career-offender sentencing enhancement); *see also Salazar v. Sherrod*, No. 09-cv-619-DRH-DGW, 2012 WL 3779075 (S.D. Ill. 2012) (granting § 2241 relief, without citing *Narvaez*, where the petitioner had been improperly sentenced pursuant to the career-offender enhancement); *Veach v. Sniezek*, No. 11-cv-575-DRH, 2011 WL 6826423, at *2 (S.D. Ill. Dec. 28, 2011) (without citing *Narvaez*, directing respondent to answer § 2241 petition because petitioner's argument that he was wrongfully sentenced

pursuant to a career-offender enhancement presented "one of the few cases where § 2255 does not provide an adequate remedy").[6]

### E. The District Court Offered No Valid Basis for Distinguishing *Narvaez* From This Case.

As shown above, the reasoning of *Narvaez* applies to this case and entitles Mr. Hill to relief. Yet, the district court concluded otherwise. The district court offered two reasons for its holding. *First*, the district court reasoned that § 2241 affords Mr. Hill no relief because, if Mr. Hill were resentenced under the now-advisory Guidelines system without the improper career-offender enhancement, "it is possible that he would receive the same sentence." RSA14. *Second*, the district court reasoned that, because Mr. Hill's 284 month sentence fell within both the illegally-enhanced, career-offender Guidelines range (262 to 327 months) and the unenhanced Guidelines range (235 to 293 months), no miscarriage of justice warranting § 2241 relief occurred. RSA11-17. Neither ground stands up to scrutiny.

#### 1. It Is Irrelevant That Mr. Hill Could Receive the Same Sentence Upon Resentencing.

The first reason offered by the district court—that Mr. Hill is not entitled to relief because he could receive the same sentence upon resentencing—is easily dispatched. This Court considered and rejected that very argument in *Narvaez.* In that case, the government argued that, "because Mr. Narvaez

[6] Although it did not explicitly address the issue, it appears that the district court in this case concluded that *Narvaez* applies in the § 2241 context. *See* RSA9 ("[T]he Seventh Circuit held [in *Narvaez*] that certain sentencing errors may be cognizable on collateral review because such errors are a miscarriage of justice; innocence of such errors is functionally equivalent to being innocent of a crime.").

would be exposed to the full range of punishment authorized by Congress for his crime at resentencing, and would remain eligible for the identical . . . sentence under the advisory guidelines, his claim does not present a fundamental defect." *Narvaez*, 674 F.3d at 629. In refusing to accept that argument, this Court explained that the wrongful imposition of a career-offender enhancement on Narvaez "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." *Id.* In light of that fact, this Court explained that "[s]peculation that the district court today might impose the same sentence is not enough to overcome the fact that, at the time of his initial sentencing, Mr. Narvaez was sentenced based upon the equivalent of a non-existent offense." *Id.* That error—being sentenced based on the equivalent of a non-existent offense—warranted collateral relief, regardless of whether the district court might impose the same sentence on remand. *Id.* The same is true here. Like Narvaez, Mr. Hill has "an absolute right not to stand before the court as a career offender when the law does not impose that label on him," *id.*, even if he has no absolute right to receive a lower sentence at resentencing.[7]

[7] It is highly unlikely that Mr. Hill would receive the same sentence if he were resentenced. There is substantial evidence of Mr. Hill's rehabilitation, as demonstrated by a letter from Mr. Hill's case manager detailing Mr. Hill's work ethic, maturity, and mentorship to young inmates. *See* Letter from D. McMahan, D.E. 22, at 14 ("I would be comfortable seeing [Mr. Hill] in my own home town or neighborhood once he is released from prison. I do not normally use the word 'rehabilitated' but in [Mr. Hill's] case I believe it actually applies."). A resentencing court would be permitted to consider that evidence at Mr. Hill's resentencing. *See Pepper v. United States*, 131 S. Ct. 1229 (2011).

### 2. It Is Irrelevant That Mr. Hill's Sentence Fell Into Both the Non-Career-Offender and Career-Offender Guidelines Ranges.

The district court's other ground for denying Mr. Hill relief from his illegally-enhanced sentence is no better. The district court concluded that, because Mr. Hill's sentence of 284 months fell within the overlap between the illegally-enhanced Guidelines range and the unenhanced Guidelines range as calculated by the probation officer, his "sentence was therefore not 'illegal,' and no miscarriage of justice resulted." RSA12. That reasoning ignores key aspects of this Court's opinion in *Narvaez*.

In *Narvaez*, this Court relied on *Davis v. United States*, 417 U.S. 333 (1974), and *In re Davenport*, 147 F.3d 605, observing that, "[a]lthough these cases provide collateral relief when a defendant is innocent of the underlying crime, we believe that [their] reasoning extends to this case, where a post-conviction Supreme Court ruling made clear that Mr. Narvaez was not eligible for the categorization of violent offender wrongfully imposed upon him." *Narvaez*, 674 F.3d at 628. In other words, this Court focused on the fact that *Narvaez* "involve[d] the [wrongful] classifying of an individual as belonging to a subgroup of defendants, repeat violent offenders, that traditionally has been treated very differently from other offenders." *Id.* at 629.

In addition to emphasizing the wrongfulness of the career-offender classification, the *Narvaez* Court explained that the career-offender enhancement impacted Narvaez's sentence by "brand[ing] [him] as a malefactor deserving of far greater punishment than that usually meted out for an

otherwise similarly situated individual who had committed the same offense." *Id.* As the Court explained it, the wrongful classification of Narvaez as a career offender "placed him in a very special status for the calculation of his final sentence" under the then-mandatory Guidelines. *Id.*; *see id.* at 628-29 ("[A]t the time of Mr. Narvaez's sentencing, the Guidelines were *mandatory*. The imposition of a career offender status therefore increased the sentencing range the district court was authorized to employ."). Thus, the illegal characterization of Narvaez as a career offender, in and of itself, qualified as a miscarriage of justice because it resulted in "Mr. Narvaez [being] sentenced based upon the equivalent of a non-existent offense." *Id.*

All of that is true in this case, where Mr. Hill is unlawfully in custody pursuant to a career-offender sentence. Like Narvaez, Mr. Hill was wrongfully branded as a career offender under the then-mandatory Guidelines. And, as in *Narvaez*, that wrongful branding labeled him "a malefactor deserving of far greater punishment than that usually meted out for an otherwise similarly situated individual who had committed the same offense." *Id.* at 629. Thus, the circumstances that entitled Narvaez to relief are present in this case.

The wrongful imposition of a career-offender enhancement necessarily impacted how the sentencing Court viewed Mr. Hill. But it did more than that. As in *Narvaez*, the career-offender enhancement illegally imposed on Mr. Hill shifted both the floor and the ceiling of the mandatory Guidelines range markedly upward, thereby placing him "in a very special status for the calculation of his final sentence." *Id.*; *see Hicks v. Oklahoma*, 447 U.S. 343,

(1980) (violation of due process where improper application of habitual offender provision foreclosed jury from exercising its discretion to impose lower sentences). Thus, Mr. Hill is entitled to relief because a post-conviction clarification of the law demonstrates that the sentencing court's decision to sentence him as a career offender, which "increased the sentencing range the district court was authorized to employ," *Narvaez*, 674 F.3d at 628-29, was unlawful. *Id.* at 627. In other words, like Narvaez, Mr. Hill "[1] never should have been classified as a career offender and [2] never should have been subjected to the enhanced punishment reserved for such repetitive *and* violent offenders." *Id.*

The key fact for present purposes is that the "imposition of a career offender status . . . increased the sentencing range the district court was authorized to employ," thereby rendering Mr. Hill's sentence unlawful. *Id.* at 628-29. That the sentence ultimately imposed on Mr. Hill fell into both the enhanced and unenhanced Guidelines ranges does not somehow cure that unlawfulness because it does not change the fact that, by increasing the floor and ceiling of his mandatory Guidelines range, the wrongful imposition of a career-offender enhancement illegally "subjected [Mr. Hill] to the enhanced punishment reserved for such repetitive *and* violent [career] offenders." *Id.* at 627. Moreover, as this Court has noted, under a mandatory Guidelines regime, "a conscientious judge . . . would pick a sentence *relative* to the guidelines range." *White*, 406 F.3d at 836 (quotation marks and citation omitted); *United*

*States v. Paladino*, 401 F.3d 471, 482 (7th Cir. 2005) (same).[8] Mr. Hill's 284-month sentence was twenty-two months above the bottom of the wrongfully enhanced Guidelines range. Within the unenhanced Guidelines range, a corresponding sentence would have been 257 months. Similarly, Mr. Hill's 284-month sentence fell forty-three months below the top of the wrongfully-

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[8] That Mr. Hill was wrongfully sentenced pursuant to a career-offender enhancement under the mandatory Guidelines scheme distinguishes this case from *Hawkins v. United States*, -- F.3d --, 2013 WL 452441 (7th Cir. Feb. 7, 2013), in which this Court recently held that an error in calculating the applicable Guidelines sentencing range cannot be corrected on post-conviction review now that the Guidelines are advisory, rather than mandatory.

Under the pre-*Booker* Guidelines regime, the improper imposition of a career-offender enhancement that affected the district court's Guidelines calculation "placed [the defendant] in a very special status for the calculation of his final sentence," *Narvaez*, 674 F.3d at 629, by "increas[ing] the sentencing range the district court was authorized to employ," *id.* at 628-29, and it did so "based upon the equivalent of a non-existent offense," *id.* at 629. Under *Narvaez*, a fundamental defect of that sort may be corrected on collateral review. Moreover, we know that under the mandatory Guidelines scheme district court judges sentenced relative to the Guidelines, *see White*, 406 F.3d at 836, such that the calculated Guidelines range and the sentence actually imposed were fundamentally intertwined.

Now, things are different. As this Court recognized in *Hawkins*, "[n]ot only do the guidelines no longer bind the sentencing judge; the judge may not even *presume* that a sentence within the applicable guidelines range would be proper." *Hawkins*, 2013 WL 452441, at *2. In the post-*Booker* world, instead of simply implementing the Guidelines, the sentencing judge "must determine whether [the sentence] is consistent with the sentencing considerations set forth in 18 U.S.C. § 3553(a), and if he finds it is not he may not impose it even though it is within the applicable guidelines range." *Id.* In other words, under the advisory Guidelines regime, the wrongful imposition of a career-offender enhancement does not change the range of sentences the district court is authorized to employ. Further, rather than sentence relative to the Guidelines (as under the mandatory regime), "the sentencing judge . . . must make an *independent determination*" of whether a sentence fulfills the § 3553(a) sentencing standard. *Id.* (emphasis added). Thus, in *Hawkins*, the sentencing judge explained on collateral review that he considered the sentence imposed appropriate "'even without application of the § 4B1.1 career offender enhancement.'" *Id.* The point is that, under the advisory Guidelines regime, the wrongful imposition of a career-offender enhancement may not be sufficiently serious to warrant collateral relief, as this Court held in *Hawkins*. But, because Mr. Hill was sentenced under the mandatory Guidelines, that holding has nothing to do with this case. *See id.* (noting that calculating the Guidelines range correctly is less important post-*Booker* and referring to that fact as a "critical difference" between *Narvaez* and *Hawkins*).

enhanced Guidelines range. A corresponding sentence under the unenhanced Guidelines range would have been 250 months. In sum, Mr. Hill was "sentenced on the basis of a nonexistent offense," *Narvaez*, 674 F.3d at 629, which "increased the sentencing range the district court was authorized to employ," *id.* at 629-29, and illegally "subjected [him] to the enhanced punishment reserved for . . . repetitive and violent offenders." *Id.* at 627; *see Fiore*, 531 U.S. 225 (incarceration of a defendant for conduct that the law does not make criminal constitutes a violation of due process). Mr. Hill is therefore entitled to relief.

In reaching its conclusion to the contrary, the district court relied on the Eighth Circuit's opinion in *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011) (en banc). *See* RSA15-16. That reliance was misplaced because the Eighth Circuit's reasoning in *Sun Bear* is inconsistent with this Court's reasoning in *Narvaez*. Both this Court and the Eighth Circuit have noted the tension. *See Sun Bear*, 644 F.3d at 705 n.8 (noting tension with original *Narvaez* opinion); *Narvaez*, 674 F.3d at 630 n.14.

Whereas this Court held in *Narvaez* that the improper imposition of a career offender enhancement may be cognizable on collateral review even if the sentence imposed does not exceed the statutory maximum, *id.* at 628-30, the Eighth Circuit's opinion in *Sun Bear* strongly suggests that the misapplication of a career-offender enhancement would never be cognizable on collateral review. *See* 644 F.3d at 704-05. The Eighth Circuit in *Sun Bear* stated that "[a]n unlawful or illegal sentence is one imposed without, or in excess of,

statutory authority," *id.* at 705 (emphasis added), and cited its own cases to support the proposition that a miscarriage of justice cognizable on collateral review either (1) could not be based on a non-capital sentencing error, *id.* at 706 (citing *United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001)), or (2) could be based on a non-capital sentencing error only if "the sentence imposed 'exceeds the statutory maximum for the offense of conviction,'" *id.* (quoting *United States v. Stobaugh*, 420 F.3d 796, 804 (8th Cir. 2005)). The Eighth Circuit has since explained that *Sun Bear* held that collateral review "provides no avenue of relief for a federal prisoner sentenced below the applicable statutory maximum sentence even if that prisoner is sentenced as a career offender based upon a predicate offense later determined not to be a crime of violence in light of *Begay*." *Brydon v. United States*, No. 12-1429, 2012 WL 6013060, at *1 (8th Cir. Dec. 3, 2012) (per curiam). That is not the law of this Circuit. *See generally Narvaez*, 674 F.3d at 621.

Moreover, the Eighth Circuit in *Sun Bear* relied on the fact that "the same . . . sentence could be reimposed were Sun Bear granted the . . . relief he requests" in concluding that the wrongful imposition of a career-offender enhancement did not entitle *Sun Bear* to collateral relief. 644 F.3d at 705; *see also id.* at 706 ("[I]f granted § 2255 relief, Sun Bear would be resentenced under an advisory guidelines regime that permits an upward variance to 360 months even if the district court were persuaded to determine a lower advisory range[.]"). This Court rejected that argument in *Narvaez*. *See Narvaez*, 674 F.3d at 629.

Most important, notably absent from the Eighth Circuit's opinion in *Sun Bear* was the concern about wrongful "categorization," *Narvaez*, 674 F.3d at 628, 629, and "brand[ing]," *id.* at 629, and the corresponding exposure to increased punishment, *id.* at 627, 628-29 & n.11, that animated this Court's opinion in *Narvaez*. *Narvaez*, not *Sun Bear*, is the law of this Circuit. Rather than rely on *Sun Bear* to deny Mr. Hill's petition, the district court should have adhered to the reasoning of *Narvaez*, under which Mr. Hill is entitled to relief.

## II. Federal Rule of Civil Procedure 60(b) Poses No Bar to Relief.

As discussed above, Mr. Hill is entitled to relief on the merits of his § 2241 petition. Federal Rule of Civil Procedure 60(b) does nothing to change that fact. Rule 60(b) permits "the court [to] relieve a party or its legal representative from a final judgment, order, or proceeding" for enumerated reasons. "[T]he fundamental purpose of the Rule 60(b) motion is to prevent the judgment from becoming a vehicle of injustice." *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980). Mr. Hill may obtain relief under either Rule 60(b)(1) or Rule 60(b)(6), and the district court did not abuse its discretion in declining to foreclose relief on the basis of Rule 60(b).

### A. The District Court Did Not Err In Refusing to Foreclose Relief On the Basis of Rule 60(b) Because Mr. Hill Has Shown "Mistake" and "Excusable Neglect" Within the Meaning of Rule 60(b)(1).

Rule 60(b) does not foreclose Mr. Hill's arguments here because the district court did not exercise its discretion to deny relief on the basis of Rule 60(b). Instead, the district court said only that it was "not convinced that Petitioner's failure to mention his 1997 § 2255 motion was truly 'excusable

neglect'" within the meaning of Rule 60(b), but that it would reevaluate the merits of Mr. Hill's § 2241 petition. RSA11. A decision under Rule 60(b) is committed to the district court's discretion, *see DeBoer v. Village of Oak Park*, 267 F.3d 558, 565 n.4 (7th Cir. 2001), and the district court exercised that discretion to consider the merits of Mr. Hill's § 2241 petition in light of the fact that Mr. Hill had, in fact, previously sought relief under § 2255. *See* RSA10-16; *see also id.* at 17 (explaining in conclusion that Mr. Hill's Motion for Relief from Judgment was being denied because his "classification as a career offender did not increase his sentence above the maximum it would have been had he not been classified as such").

The district court did not abuse its discretion by doing so. Rule 60(b)(1) provides that, on just terms, a court may relieve a party from a final judgment or order based on "mistake, inadvertence, surprise, or excusable neglect." The circumstances in this case fit that bill because Mr. Hill's honest mistake in forgetting that he had filed a § 2255 motion led him to inadvertently, but excusably, neglect to mention that fact during the earlier proceedings.

Mr. Hill is not trained in the law, and thus lacks understanding of the labels applied to, and the significance of, the myriad post-conviction remedies and procedures. He is also imprisoned, and his ability to track down documents pertaining to his cases (which might have revealed the earlier § 2255 motion) is therefore limited. Further, Mr. Hill proceeded *pro se* during the § 2241 proceedings in the district court. Moreover, Mr. Hill filed his § 2241 petition *nearly thirteen years after* he filed his first § 2255 petition. Memories

fade over time, and the daily stresses of prison life naturally exacerbate that fact. Given those circumstances, Mr. Hill's mistake—and it was a mistake; the district court did not find and nothing suggests that Mr. Hill somehow acted in bad faith to misstate a fact and thereby foreclose his own effort to obtain §2241 relief—in forgetting that he had already sought relief under § 2255 and his resulting neglect in failing to mention that § 2255 motion are entirely understandable and excusable. Moreover, Mr. Hill filed his Motion for Relief from Judgment *a mere thirteen days* after learning that he had previously filed a § 2255 motion in the district of his conviction. And, obviously, the relative hardship to the parties favored reconsideration in this case: Mr. Hill faced (and faces) continued incarceration under a sentence imposed based on the equivalent of a non-existent offense, whereas any burden to Respondent caused by reconsideration is comparatively slight given that respondent has no legitimate interest in keeping an inmate in prison pursuant to a sentence imposed based on the equivalent of a non-existent offense.

In these circumstances, the district court did not abuse its discretion when it revisited its order denying Mr. Hill's petition. *See Eskridge v. Cook Cnty.*, 577 F.3d 806, 809 (7th Cir. 2009) ("misunderstanding of the surrounding facts and circumstances" constitutes "mistake" within the meaning of Rule 60(b)); *In re Lintz West Side Lumber*, 655 F.2d 786, 791 (7th Cir. 1981) (noting that Rule 60(b) motion provided a basis for setting aside an order on motion of a party who had been mistaken as to facts and stating, "[i]f a mistake has been made, it should be corrected, if the correction is not

unfairly prejudicial to innocent parties"); *Chi. Dist. Council of Carpenters Pension Funds v. Hewitt & Hewitt Constr. Co.*, No. 85 C 5749, 1986 WL 4432 (N.D. Ill. Apr. 4, 1986) (Rule 60(b) motion granted on the basis of excusable neglect where movant believed that attorney was representing it in action and timely filed motion upon learning that he was not); *see also Crue v. Aiken*, 370 F.3d 668, 680-81 (7th Cir. 2004) (no abuse of discretion where district court's finding of "excusable neglect" under Fed. R. Civ. P. 6(b) was based on mistake in calculation of deadline); *Redfield v. Continental Cas. Corp.*, 818 F.2d 596, 602-03 (7th Cir. 1987) (no abuse of discretion where district court's finding of "excusable neglect" under Fed. R. App. P. 4(a)(5) was based on plaintiff's mistaken conclusion as to date that order was docketed). After all, attorney negligence can constitute excusable neglect under Rule 60(b), *see Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993); *Robb v. Norfolk & Western Ry. Co.*, 122 F.3d 354 (7th Cir. 1997), so, *a fortiori*, a *pro se*, incarcerated petitioner's mistaken memory of events that occurred more than a decade before the litigation at issue that results in a failure to mention those events in that litigation is grounds for Rule 60(b) relief.

In sum, the district court did not abuse its discretion by revisiting the merits of Mr. Hill's § 2241 petition. In fact, given the special circumstances of this case and the relative hardship to the parties, it would have been an abuse of discretion to refuse to do so. *See United States v. Forty-Eight Thousand, Five Hundred Ninety-Five Dollars*, 705 F.2d 909, 913 (7th Cir. 1983) (excusable neglect established such that district court abused its discretion in denying

Rule 60(b) relief where movant lacked funds, was imprisoned, lacked legal knowledge, had no counsel acting on his behalf, and was under mistaken belief that the government was going to return one-half of seized money); *A.F. Dormeyer Co. v. M.J. Sales & Distributing Co.*, 461 F.2d 40 (7th Cir. 1972) (district court abused its discretion in denying Rule 60(b) motion premised on "mistake" and "excusable neglect" where defendant's attorney failed to file an answer or appearance with the Clerk).

Once the district court acknowledged Mr. Hill's mistake in forgetting his earlier § 2255 motion and exercised its discretion to decline to foreclose Rule 60(b)(1) relief on the basis of Mr. Hill's mistake, it was free to consider Mr. Hill's § 2241 petition in light of *Narvaez*. This Court's first opinion in *Narvaez* was decided before Mr. Hill's § 2241 case became final. In that opinion, this Court held that the improper imposition of a career-offender enhancement under the mandatory Guidelines constituted a clear miscarriage of justice and a violation of Due Process because "application of the career offender provision increased the sentencing range for Mr. Narvaez" such that he "was sentenced based upon the equivalent of a nonexistent offense." *Narvaez*, 641 F.3d at 884. This Court adhered to its miscarriage of justice determination in its second *Narvaez* opinion, which was decided on December 6, 2011, *see Narvaez*, 674 F.3d 621, before this Court's January 24, 2012, mandate issued in Mr. Hill's first appeal, *see* A21. Thus, if not for his mistake, Mr. Hill would have been entitled to rely on *Narvaez* during his initial appeal. *See McCool v. Strata Oil Co.*, 972 F.2d 1452, 1457 (7th Cir. 1992) ("[I]f a new rule has been applied to the parties

before a federal court, that rule must apply to all cases then pending on direct review."); *Kawashima v. Holder*, 615 F.3d 1043, 1055 n.7 (9th Cir. 2010) (because mandate had not yet issued, circuit court's "decision remain[ed] subject to modification, either at the request of a party or *sua sponte*," so that the court was obligated to decide the merits of the case in light of an intervening decision), *aff'd by* 132 S. Ct. 1166 (2012).

As discussed above at length, Mr. Hill is entitled to relief under the *Narvaez* rule, but his mistake foreclosed him from obtaining relief on that basis. Thus, once Mr. Hill's mistake was taken out of the equation, the district court was free to examine Mr. Hill's petition in light of *Narvaez*, as Mr. Hill would have been entitled to the benefit of that decision but for his mistake. Respondent did not argue to the contrary in the district court, *see* Respondent's Response to Petitioner's Rule 60(b) Motion to Vacate Judgment, D.E. 20, at 6, and has therefore waived any argument that the district court was foreclosed from revisiting the substance of Mr. Hill's § 2241 petition in light of *Narvaez*, assuming the district court properly declined to foreclose Rule 60(b)(1) relief on the basis of Mr. Hill's failure to remember his long-ago § 2255 motion. *See Marselles Hydro Power,* 518 F.3d at 470.

### B. Because Mr. Hill Was Sentenced Based On the Equivalent of a Non-Existent Offense, He Has Shown Exceptional Circumstances Warranting Relief Under Rule 60(b)(6).

In addition, if Mr. Hill is indeed entitled to relief under *Narvaez*—and he is—he may obtain relief under Rule 60(b)(6)'s catch-all provision. Rule 60(b)(6) "vests power in courts adequate to enable them to vacate judgments whenever

such action is appropriate to accomplish justice." *Klapprott v. United States*, 335 U.S. 601, 614-15 (1949) (opinion of Black, J.). It is true, as noted by the Government in its Response to Petitioner's Rule 60(b) Motion to Vacate Judgment, D.E. 20, at 6-7, "that Rule 60(b)(6) . . . permits a judgment to be reopened only in extraordinary circumstances." *Justice v. Town of Cicero, Ill.*, 682 F.3d 662, 665 (7th Cir. 2012). But the circumstances in this case are extraordinary: Mr. Hill was illegally characterized as a career offender and was therefore "sentenced based upon the equivalent of a non-existent offense," *Narvaez*, 674 F.3d at 628, a circumstance that this Court in *Narvaez* recognized as "'a fundamental defect which inherently results in a complete miscarriage of justice,'" *id.* at 623 n.2 (citation omitted), and which plainly qualifies as "so fundamental a defect . . . as having been imprisoned for a nonexistent offense," *In re Davenport*, 147 F.3d at 611. It is now clear that Mr. Hill is entitled to relief from his illegal sentence and that he is not barred from obtaining relief under § 2241 by a failure to file a § 2255 motion. Given the fundamental nature of the defect of which Mr. Hill complains, the Rule 60(b) posture of this case does not foreclose him from obtaining that relief.

## CONCLUSION

For the foregoing reasons, petitioner-appellant Anthony Hill respectfully requests that this Court reverse the judgment of the district court and remand with instructions to grant Mr. Hill's § 2241 petition and order that he be resentenced.

Dated: March 13, 2013

Respectfully submitted,

*/s/ Brian J. Murray*

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**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned attorney for Petitioner certifies that the foregoing brief

(i) complies with the type-volume limitation in Fed. R. App. P. 32(a)(7)(B) because it contains 10,809 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as supplemented by Circuit Rule 32(b), because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 12-point Bookman Old Style.

Dated: March 13, 2013

*/s/ Brian J. Murray*
Brian J. Murray

**CIRCUIT RULE 30(d) CERTIFICATE**

Pursuant to Circuit Rule 30(d), the undersigned hereby certifies that all materials required by Circuit Rule 30(a) are included in the Required Short Appendix bound with the brief and that all materials required by Circuit Rule 30(b) are bound in the Appendix filed with this brief.

Dated: March 13, 2013

*/s/ Brian J. Murray*
Brian J. Murray

**CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of March, 2013, I electronically filed the foregoing with the Clerk of the Court of the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that the CM/ECF system will serve notice on counsel for respondent-appellee, Joseph H. Hartzler.

*/s/ Brian J. Murray*
Brian J. Murray

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Clerk, U.S. District Court, ILCD

# UNITED STATES DISTRICT COURT
# CENTRAL DISTRICT OF ILLINOIS
# PEORIA DIVISION

| | | |
|---|---|---|
| ANTHONY HILL, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. 10-cv-01288 |
| | ) | |
| RICARDO RIOS, | ) | |
| | ) | |
| Respondent. | ) | |

## O P I N I O N and O R D E R

Before the Court is Petitioner's Motion for Relief from Judgment filed on March 8, 2012. (Doc. 17). On April 4, 2012, Respondent filed a Response to Petitioner's Motion (Doc. 20), to which Petitioner filed a Reply (Doc. 22). For the reasons stated below, the Motion for Relief from Judgment is denied.

### 1. *Petitioner's Conviction and Sentence*

On September 18, 1996, Petitioner Anthony Hill was convicted in a jury trial of two counts: possession with intent to distribute methamphetamine and possession of a firearm by a prohibited person. (Doc. 20 at 2). In preparing the presentence report, the probation officer calculated Petitioner's offense level to be 34, (Doc. 20 at 10-12), and his criminal history category to be V, (Doc. 20 at 20-21). The probation officer then determined that Petitioner was a career offender based on two prior violent felony convictions: second degree reckless endangerment while armed and possession of a controlled substance with the intent to distribute. (Doc. 21 at 12-13). Under the United States Sentencing Guidelines, a person is designated

as a career offender if he had been convicted of two prior felony convictions of either a crime of violence or a controlled substance offense, in addition to his instant offense of either a crime of violence or a controlled substance offense. U.S.S.G. § 4B1.1. As a result of Petitioner's designation as a career offender, his total offense level remained at 34 and his criminal history category was increased from V to VI. (Doc. 20 at 9-13, 21). Therefore, Petitioner's designation as a career offender changed only his criminal history category; his total offense level did not change.[1] Without the career offender enhancement, Petitioner's sentencing range would have been 235-292 months imprisonment. U.S.S.G. Sentencing Table (1997). With the enhancement, Petitioner's sentencing range was increased to 262-327 months imprisonment. (Doc. 20 at 30). Petitioner was ultimately sentenced to 284 months imprisonment, (Doc. 17 at 2), under what was then a mandatory Sentencing Guidelines scheme, *see United States v. Booker*, 543 U.S. 220 (2005).

Petitioner pursued a direct appeal that was subsequently dismissed by the Seventh Circuit. (Doc. 20 at 3). On November 17, 1997, Petitioner filed a collateral attack pursuant to 28 U.S.C. § 2255, which was later denied by the district court that sentenced him, the Eastern District of Wisconsin. (Doc. 20 at 3). On September 23, 2010, Petitioner filed a motion pursuant to 28 U.S.C. § 2241 in this Court, in which he claimed that he was improperly sentenced as a career offender under the

[1] Respondent Rios states in his Response that "[t]he petitioner's status as a career offender resulted in a total offense level of 34 and a criminal history category of VI . . . petitioner's career offender status changed only his criminal history category (from V to VI); it had no impact on his total offense level." (Doc. 20 at 2). Petitioner failed to address these allegations in his Reply. The Court interprets Petitioner's silence on this issue as an acceptance of Respondent's assertions as true.

Sentencing Guidelines in light of the Supreme Court's redefinition of the term "violent felony" in *Begay v. United States*, 553 U.S. 137 (2008) and *Chambers v. United States*, 555 U.S. 122 (2009). Specifically, Petitioner argued that his conviction for second degree reckless endangerment while armed was no longer classified as a violent felony post-*Begay*. Therefore, Petitioner argues, he is wrongly classified as a career offender and entitled to a rehearing because his sentence was illegally enhanced. Petitioner did not reveal his prior § 2255 Motion to the Court in his § 2241 Petition.

**2. *"Violent Felony" post-Begay***

In *Begay*, the Supreme Court clarified the definition of "violent felony" under the Armed Career Criminal Act ("ACCA"). The Supreme Court noted that crimes listed in the ACCA "all typically involve purposeful, violent, and aggressive conduct," *Begay* at 144-45, and so the term "violent felony" applies only to crimes that are "roughly similar, in kind as well as in degree of risk posed, to the examples [listed in the ACCA] themselves," *id.* at 143. Although *Begay* specifically involved the ACCA, the Seventh Circuit has recognized that the language defining violent felonies in the ACCA and § 4B1.2 of the Sentencing Guidelines identical, and therefore, interchangeable. *United States v. Woods*, 576 F.3d 400, 403-04 (7th Cir. 2009); *see also United States v. Templeton*, 543 F.3d 378, 380 (7th Cir. 2008) (noting that the definition of a violent felony under the ACCA was "repeated verbatim" by the Sentencing Commission in defining a crime of violence in § 4B1.2 and that "[i]t

would be inappropriate to treat identical texts differently just because of a different caption").

Following *Begay*, one of Petitioner's two prior convictions, second degree reckless endangerment while armed, was no longer considered a violent felony for purposes of sentencing enhancement. In *United States v. Smith*, 544 F.3d 781 (7th Cir. 2008), the Seventh Circuit found that Congress intended for the ACCA "to encompass those offenders convicted of crimes involving 'intentional or purposeful conduct' rather than those offenders who simply behave recklessly." *Id*. The Seventh Circuit ultimately concluded that, post-*Begay*, the ACCA "should be interpreted to encompass only purposeful crimes." *Id*. A crime requiring a mental state of negligence or recklessness, therefore, is not a crime of violence under the ACCA. *Id.* at 786. *See also United States v. Woods,* 576 F.3d 400 (7th Cir. 2009) (finding the mental state of recklessness does not satisfy the standards established by the Supreme Court in *Begay*). Using the reasoning in *Smith*, the Seventh Circuit in *United States v. Bishop*, 341 F. App'x. 239 (7th Cir. 2009), concluded that "[s]econd-degree recklessness endangerment . . . is therefore not a crime of violence for the specific purpose of the career-offender enhancement."[2] *Id*. at 240. The Seventh Circuit later determined that *Begay* is retroactively applicable on collateral review. *See Welch v. U.S.*, 604 F.3d 408, 415 (7th Cir. 2010).

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[2] Petitioner did not address whether his 1996 weapons conviction (possession of a firearm by a prohibited person) is correctly classified as such post-*Begay*. The Court interprets Petitioner's silence on this issue as accepting the classification of this violent felony as correct post-*Begay*.

Although part of Petitioner's argument—that his conviction of second degree endangerment while armed is no longer a violent felony post-*Begay*—was correct, the Court denied his § 2241 Petition on June 10, 2011. On June 10, 2011, this Court, acting under then-existing precedent, correctly denied Petitioner's § 2241 motion on two grounds: (1) Petitioner could not show that § 2255 was inadequate or ineffective because he did not previously file for relief under § 2255,[3] and (2) Petitioner was only attacking his sentence, not his conviction, and so was therefore not arguing that he was "actually innocent" of the underlying crime as required by the savings clause of § 2255(e). (Doc. 10 at 3-4). At that time, his unlawful sentence enhancement claim was not cognizable because he was not alleging innocence of the crime of which he was convicted, but was instead alleging that he was innocent of his sentence.

Petitioner filed a timely appeal to the Seventh Circuit Court of Appeals, which was denied on December 2, 2011. The Seventh Circuit denied Petitioner's appeal on the basis of his failure to previously file a § 2255 motion for relief. In denying Petitioner's appeal, the Seventh Circuit stated that

> Section 2241 is not available if 28 U.S.C. § 2255 provides an opportunity for relief. See § 2255(e). Section 2255(f)(2) provides that a prisoner has a new one-year period to seek collateral relief after a right has been newly established and made retroactive. *Begay* was decided in 2007 and Hill in August 2009. Narvaez v. United States . . . holds that these decisions are retroactive. But Hill let the entire year (and then some) pass without action; he did not file his petition until December 2010. Failure to take advantage of an available remedy under § 2255 does not permit resort to § 2241.

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[3] As noted above, Petitioner failed to inform the Court that he had previously filed a § 2255 Motion.

(Doc. 16 at 1-2).

Section 2255(h) bars a petitioner from filing a second or successive motion, with two exceptions: a petitioner must make a showing "either that (1) there is newly discovered evidence which would . . . result in no reasonable fact finder finding him guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that had not been previously available." *Gilbert v. U.S.*, 640 F.3d 1293, 1331 (11th Cir. 2011). Petitioner was not alleging any newly discovered evidence. As to the second ground, although *Begay* announced a new rule of law, courts have found that *Begay* "has not been deemed to pronounce a new rule of *constitutional* law under § 2255(h)." *Id.* (emphasis added). *See also United States v. Kenney*, 391 F. App'x 169, 172 (3d Cir. 2010) (finding that *Begay* addressed a statutory, not a constitutional rule for purposes of § 2255(h)(2)); *United States v. Williams*, 363 F. App'x 576, 578 (10th Cir. 2010) (same). Petitioner thus could not file a second § 2255 motion.

A petitioner may seek relief pursuant to § 2241 only by showing that a § 2255 motion would be "inadequate or ineffective to test the legality of his detention." 28 U.S.C. § 2255(e). In other words, a petitioner may file a § 2241 motion using § 2255(e) (which is referred to as the "savings clause") only if his § 2255 motion has been previously shown to be ineffective or inadequate. In this context, the Seventh Circuit has held that a § 2255 motion is inadequate or ineffective only if the petitioner's claim is not cognizable by the court. *Kramer v. Olson*, 347 F.3d 214, 217 (7th Cir. 2003). The Seventh Circuit has held that in order to bring a cognizable

claim under § 2241, a petitioner must demonstrate that he is actually innocent of the crime of which he was convicted. *See In re Davenport*, 147 F.3d 605, 609 (7th Cir. 1998); *Uthank v. Jett*, 549 F.3d 534, 535-36 (7th Cir. 2008); *Kramer*, 347 F. 3d at 217-19. Under this precedent, a petitioner arguing he is innocent of being an armed career criminal under the ACCA was innocent only in a technical sense. *In re Davenport*, 147 F. 3d at 609. In sum, a petitioner could only utilize the savings clause of § 2255(e) on collateral attack if § 2255 relief is unavailable and if he alleges that he is actually innocent of the *crime* of which he was convicted.

**3. *"Actual Innocence" of a Sentence Post-Narvaez***

While Petitioner's appeal was pending, the Seventh Circuit issued its decision in *Narvaez v. United States*, 641 F.3d 877 (7th Cir. 2011).[4] In *Narvaez*, the Seventh Circuit held that being innocent of an illegally enhanced sentence was functionally equivalent to being innocent of the underlying crime for purposes of § 2255(e). *Id.* at 883. In *Narvaez*, the petitioner had pleaded guilty in 2003 to bank robbery in violation of 18 U.S.C. § 2113(a). *Id.* at 878. He was sentenced as a career offender under the Sentencing Guidelines § 4B1.1 because he had been twice convicted of escape (involving failure to return to confinement) in violation of Wisconsin Statute section 946.42(3)(a), *id.*, which was classified as a violent felony pre-*Begay*.

As a result of the § 4B1.1 enhancement, Narvaez's then-mandatory sentencing range was increased from 100-125 months to 151-188 months. *Narvaez*,

[4] The Seventh Circuit reheard *Narvaez* en banc. The Seventh Circuit affirmed its decision in *Narvaez*, and issued an amended decision, *Narvaez v. United States*, 674 F.3d 621 (7th Cir. 2011), on December 6, 2011.

641 F.3d at 878. Narvaez received a sentence of 170 months—a sentence higher than the maximum he could have received had the sentence enhancement not been applied. *Id.* at 879. Subsequently, the Supreme Court held in *Begay* that escape was no longer a violent felony within the meaning of the United States Sentencing Guidelines. *Begay*, 553 U.S. at 148. Narvaez filed a motion to vacate his sentence under 28 U.S.C. § 2255, in which he asserted that the application of the § 4B1.1 enhancement was illegal in light of *Begay* and *Chambers*. *Narvaez*, 641 F.3d at 879-880. The Seventh Circuit noted that although it had "recognized that § 2255 relief is appropriate only for an error of law that is jurisdictional, constitutional, or constitutes a fundamental defect which inherently results in a complete miscarriage of justice," it found that Narvaez's case

> presents a special and very narrow exception: a postconviction clarification in the law has rendered the sentencing court's decision unlawful . . . the [*Begay* and *Chambers*] decisions make clear that, at the time of his sentencing, Mr. Narvaez did not qualify as a career offender under the guidelines. An additional five years of incarceration was imposed upon him without *any* legal justification . . . Nothing in the record indicates that the court would have sentenced Mr. Narvaez to five additional years of incarceration had the judge not been under the legal misapprehension, shared by the rest of the circuit, that Mr. Narvaez was a career offender and that the corresponding guidelines required such an enhancement. *The application of the career offender provision increased the sentencing range for Mr. Narvaez* . . . [A]t the time of his initial sentencing, Mr. Narvaez was sentenced based upon the equivalent of a nonexistent offense. This error clearly constitutes a miscarriage of justice.

*Id.* at 880-83 (second emphasis added). The Seventh Circuit did acknowledge that there was a difference between alleging innocence of a crime and alleging innocence of a sentence. The court noted that although a miscarriage of justice has only previously been held to apply to instances where prisoners are innocent of the crime

of which they were convicted, *see In re Davenport*, 147 F.3d 606, 609 (7th Cir. 1998), it nevertheless concluded "that [the same] reasoning extends to this case, where a post-conviction Supreme Court ruling made clear that Mr. Narvaez was not eligible for categorization of violent offender wrongfully imposed upon him . . . . Accordingly, we believe that a miscarriage of justice occurred." *Narvaez*, 674 F.3d at 628-29. Thus, the Seventh Circuit held that certain sentencing errors may be cognizable on collateral review because such errors are a miscarriage of justice; innocence of such errors is functionally equivalent to being innocent of a crime.

Although *Narvaez* might have created new hope for Petitioner's desire for resentencing, the Seventh Circuit properly denied his appeal, as he was still required to file a § 2255 Motion before his § 2241 relief was available on collateral review; under the facts as presented by Petitioner up to that point, he had not filed a previous § 2255 Motion.

Following the Seventh Circuit's order denying Petitioner's appeal, Petitioner attempted to pursue relief in the Eastern District of Wisconsin under 28 U.S.C. § 2255, presumably in an attempt to pursue § 2255 relief within one year of the *Narvaez* decision, but he was denied relief because he had already pursued § 2255 relief in 1997. (Doc. 17 at 3). He claims to have forgotten that he had filed a § 2255 Motion in 1997. This fact seemed to call into question the Seventh Circuit's decision based on his failure to file a § 2255 Motion, so Petitioner filed a motion pursuant to Rule 60(b) in this Court to vacate its judgment in light of his discovery that he had in fact pursued § 2255 relief within the requisite time frame. (Doc. 17 at 4).

Petitioner argues that because he "applied for [§ 2255] relief, by motion, to the court which sentenced him," and was denied, he is able to prove that § 2255 relief is "inadequate and ineffective to test the legality of his sentence," and therefore his § 2241 relief is cognizable on collateral review in light of the Seventh Circuit's holding in *Narvaez*. (Doc. 17 at 4-5). The Seventh Circuit, Petitioner argues, would have reversed and remanded this Court's decision for resentencing if it had known about his § 2255 motion in 1997. (Doc. 17 at 4).

**4. *Fed. R. Civ. P. 60(b)***

In order for this Court to consider the merits of Petitioner's § 2241 petition, he must first overcome a procedural bar: he must demonstrate that his failure to mention his first § 2255 was a mistake or excusable neglect under Rule 60(b) of the Federal Rules of Civil Procedure. Petitioner notes that "[t]he text of [Rule 60(b)] . . . provides that a court may relieve a party from a final judgment due to mistake, inadvertence, surprise, or excusable neglect." (Doc. 22 at 5). In this context, Petitioner argues, forgetting that he had filed a § 2255 in 1997 and failing to inform the court of a prior collateral attack "constitutes excusable neglect within the meaning of the rule." (Doc. 22 at 5).

The Seventh Circuit has recognized that relief under Rule 60(b) should only be granted when "a misunderstanding of the facts and surrounding circumstances" has occurred. *Eskridge v. Cook County*, 577 F.3d 806, 809 (7th Cir. 2009). Mistakes of law, procedural errors, and strategic errors, on the other hand, do not warrant relief under Rule 60(b). *See Russell v. Declo Remy Div. of Gen. Motors Corp.*, 51 F.3d

746, 749 (7th Cir. 1995) (finding that Rule 60(b) was not designed to address erroneous applications of law); *Easley v. Kirmsee*, 382 F.3d 693, 697-98 (7th Cir. 2004) (finding an attorney's failure to comply with motions deadlines was not excusable neglect within the meaning of Rule 60(b)); *Eskridge v. Cook County*, 577 F.3d 806, 810 (7th Cir. 2009) (finding that an attorney's strategic mistake did not constitute excusable neglect within the meaning of Rule 60(b)).

The Court is not convinced that Petitioner's failure to mention his 1997 § 2255 motion was truly "excusable neglect." However, in the interest of a thorough disposition, the Court will reevaluate its second basis for denying his § 2241 Petition, that he is not "actually innocent" and therefore ineligible to file a § 2241 petition.

**5. *Application of Narvaez to Petitioner's § 2241 petition***

This Court acknowledges that Petitioner had previously filed a § 2255 motion with the court that convicted him and that Petitioner's prior conviction of second degree reckless endangerment while armed is no longer a crime of violence under the Sentencing Guidelines,[5] and the Court will assume for the purposes of this Motion that Petitioner's failure to reveal his previous § 2255 Motion falls within Rule 60(b)(1). However, this Court finds that Petitioner still loses on the merits. Petitioner is not required to be resentenced pursuant to § 2241 because his sentence

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[5] The Court will also presume that Petitioner's prior conviction of being a felon in possession of a firearm is also not considered a violent felony post-*Begay*, although this Court is not sure of that proposition. *See Bailey v. United States*, 516 U.S. 137, 150 (1998) (narrowly interpreting the word "use" to conclude that passive possession of a firearm during a drug crime was not a violation of the statutory prohibition against "use" of a firearm).

of 284 months imprisonment is within both Sentencing Guideline ranges: 235-292 months under a criminal history category of V and 262-327 months under a criminal history category of VI. Petitioner's designation as a career offender did not result in his sentence being increased above the maximum he would have received had the rule of *Begay* been in effect when he was originally sentenced. Petitioner's sentence was therefore not "illegal," and no miscarriage of justice resulted.

Petitioner argues that he "should be afforded an opportunity to be resentenced without the career offender label and within the correctly determined criminal history category." (Doc. 22 at 8). Further, Petitioner argues that, in light of *Narvaez*, he is "actually innocent" of his sentence within the meaning of § 2255 because "being erroneously sentenced as a career offender is the functional equivalent of a conviction for a non-existent offense." (Doc. 17 at 4).

However, this case is different from *Narvaez*: this case involves overlapping guideline ranges; *Narvaez* did not. The Seventh Circuit found that Narvaez's sentence was illegal, and a miscarriage of justice occurred, because his erroneous designation as a career offender resulted in a sentence enhancement above the maximum for which he would have been sentenced if the rule of *Begay* had been in effect when he was originally sentenced. *Narvaez*, 674 F.3d at 629-30. The Seventh Circuit stated, "[t]he career offender status illegally increased Mr. Narvaez's sentence approximately five years beyond that authorized by the sentencing scheme." *Id.* at 630. If the rule of *Begay* had been in effect, and Narvaez would not have been erroneously designated as a career offender, his *maximum* sentence

would have been 125 months. *Id*. at 624. With the erroneous enhancement, his *minimum* sentence was 151 months. *Id*. Therein laid the miscarriage of justice.

Here, Petitioner's designation as a career offender did not increase his sentence above the maximum it would have otherwise been had the rule of *Begay* been in effect at the time of his original sentencing. Without the career offender enhancement (under a criminal history category of V), Petitioner's maximum sentence would have been 292 months. Petitioner's sentence of 284 months is within the non-career offender range. Petitioner's sentence is therefore "legal," and no miscarriage of justice resulted.

The classification of a defendant as a career offender itself is not determinative of the legality of a sentence. Petitioner argues in his Reply that "fundamental fairness requires a resentencing hearing where Mr. Hill can be free from all of the harsh labels and governing policy considerations designated for the 'worst of the worst.'" (Doc. 22 at 9). However, a sentence is illegally enhanced when the designation as a career offender increases a defendant's sentence *above the maximum* it would have otherwise been but for the erroneous enhancement. *Narvaez*, 674 F.3d 628-29. Here, Petitioner's designation as a career offender under the Sentencing Guidelines does not illegally enhance his sentence because he could have received 284 months with or without being labeled as a career offender had the rule of *Begay* been in effect when he was originally sentenced. The career offender status did increase Petitioner's sentencing guideline range, but an increase in his guideline range within the maximum it would have otherwise been had the

rule of *Begay* been in effect does not constitute an illegal sentence. The effect of the career offender status, not the classification itself, determines the legality of a sentence.

Petitioner argues that because the sentencing guidelines are no longer mandatory, his sentence of 284 months is above what he would have received had the guidelines been advisory when he was originally sentenced. He may be right; a judge now has discretion to depart from the applicable guideline range. However, this does not make his current sentence of 284 months an "illegal sentence" amounting to a miscarriage of justice, as Petitioner argues. A sentence is "illegal" if a prisoner is sentenced to a term above the maximum he would have received without the erroneous career offender enhancement. *Narvaez*, 674 F.3d at 629. But there is no guarantee, even under the post-*Booker* advisory guidelines system, that Petitioner's sentence will be shorter than 284 months. It is true that if Petitioner were resentenced now, his new sentence would be free from any *Begay* error. But it is possible that he would receive the same sentence.

In *Phillips v. Holinka*, No. 10-cv-439 BBC, 2012 WL 1516605 (W.D.Wis. 2012), the United States District Court for the Western District of Wisconsin applied the Seventh Circuit's reasoning in *Narvaez*, and found that the petitioner was innocent of his sentence. There, the petitioner's guideline range with the erroneous enhancement was 262-327 months. *Id.* at *1. Without the erroneous enhancement, petitioner's guideline range would have been 188-235 months at his original sentencing. *Id*. The petitioner received a sentence of 262 months. The court

found that, in light of *Begay*, petitioner was erroneously designated as a career offender, which directly resulted in his sentence being increased above the maximum it would have otherwise been if the rule of *Begay* had been in effect at his original sentencing. *Id*. at *2. The court granted petitioner's § 2255 motion, finding that his sentence was illegally enhanced, which constituted a miscarriage of justice. *Id*. at *3.

However, *Phillips* is distinguishable from Petitioner's case. In *Phillips*, the petitioner's erroneous classification as a career offender increased his sentence above the maximum he would have received had the rule of *Begay* been in effect when he was originally sentenced. Here, Petitioner's designation as a career offender did not increase his sentence above the maximum it would have been had the rule of *Begay* been in effect when he was originally sentenced. Instead, Petitioner's sentence fell within both guideline ranges, regardless of whether or not he was classified as a career offender. Thus, Petitioner's sentence is legal, and no miscarriage of justice occurred.

The Seventh Circuit has not yet directly addressed the issue in this case. However, this case factually parallels a case decided in the Eighth Circuit. In *Sun Bear v. United States*, 644 F.3d 700 (8th Cir. 2011), the petitioner pleaded guilty to second degree murder, resulting in a sentencing guideline range of 292-365 months, *id.* at 701. The district court ruled that petitioner's prior felony convictions for attempted escape, attempted theft of a vehicle, and attempted burglary were "crimes of violence" under the Sentencing Guidelines, resulting in a career offender

enhancement that increased the guideline range to 360 months to life. *Id.* The court sentenced the petitioner as a career offender to 360 months in prison. *Id.*

The petitioner pursued a direct appeal, which was denied. In 2008, petitioner filed a § 2255 motion to vacate his sentence, arguing that he is no longer a career offender in light of *Begay* and therefore his sentence was illegally enhanced. *Id.* The Eighth Circuit concluded that the petitioner's collateral attack under § 2255 was not cognizable because

> Sun Bear's sentence is well-within the statutory maximum authorized for the offense of second-degree murder, and in addition within the initial guidelines range of 292-365 months . . . [A] miscarriage of justice cognizable under § 2255 occurs when the sentence is in excess of that authorized by law . . . Thus, no miscarriage of justice is at issue.

Id. at 705-706. It is the opinion of this Court that the Eighth Circuit correctly concluded that Sun Bear's 360-month sentence was not a miscarriage of justice because he could have received the same sentence if the rule of *Begay* were in effect at the time of his original sentencing. The Eighth Circuit correctly concluded that a miscarriage of justice only occurs when a defendant's erroneous career offender enhancement results in a sentence above the maximum he would have received had the rule of *Begay* been in effect at the time of his original sentencing. Petitioner's sentence, like Sun Bear's, would have been lawful had the rule of *Begay* been in effect at the time of his original sentencing. Also, Petitioner's sentence, like Sun Bear's, was within both the enhanced and unenhanced guideline ranges. Petitioner's sentence, like Sun Bear's, was "legal."

**6. *Conclusion***

Although the Court's June 10, 2011 Opinion & Order was correct under then-prevailing precedent and the facts as presented by Petitioner, the Seventh Circuit's subsequent decision in *Narvaez* cast some doubt on this and other district courts' interpretations of the meaning of "actual innocence" with regard to § 2241 petitions alleging "innocence" of sentences. However, this new understanding does not help Petitioner: for a prisoner to be considered innocent of his sentence, his erroneous classification as a career offender must have increased his sentence above the maximum it would have been had he not been designated as a career offender. *See Narvaez*, 674 F.3d at 883. Because Petitioner's classification as a career offender did not increase his sentence above the maximum it would have been had he not been classified as such, Petitioner could have received the same sentence had the rule of *Begay* been in effect when he was originally sentenced. Therefore, Petitioner is not innocent of his sentence, and no miscarriage of justice occurred.

For the foregoing reasons, Petitioner's Motion for Relief from Judgment is DENIED. IT IS SO ORDERED.

CASE TERMINATED.

Entered this 3rd day of August, 2012.

s/ Joe B. McDade
Joe Billy McDade
United States District Judge