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Varying Degrees of Innocence? Expanding the McQuiggin Exception to Noncapital Sentencing Errors

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Varying Degrees of Innocence? Expanding the *McQuiggin*
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INTRODUCTION

A record-setting number of individuals were exonerated and released from prisons across the United States in 2015, bringing the troubling reality of wrongful convictions to the forefront of public discourse. Yet the issue of wrongful sentencing—the incarceration of an individual for a longer period of time than she deserves based on her offense of conviction and criminal history—remains mere background noise in the discussion. Although wrongful conviction has found greater traction in the media, wrongful sentencing works similarly devastating impacts on prisoners' lives. In both situations, a


2. A proper federal sentence is based on the offense level of the defendant’s crime of conviction, with appropriate adjustments for specific offense characteristics and the defendant’s criminal history category. U.S. SENTENCING GUIDELINES MANUAL § 1B1.1 (U.S. SENTENCING COMM’N 2015).

3. To follow along with the mechanics of the following example, see the Sentencing Table in Appendix I. Take, for example, an individual who is convicted of a federal kidnapping crime. Id. § 2A4.1. This individual's base offense level under the U.S. Sentencing Guidelines is thirty-two, id. § 2A4.1(a), and increases to thirty-four if he used a firearm to commit the offense, id. § 2A4.1(b)(3). The individual’s sentencing range, based solely on his crime of conviction, is 151 to 188 months. Id. at 404. If the defendant has two prior aggravated assault convictions and, as a result, is sentenced as a career offender, the
person is incarcerated for some period of time on the basis of a crime he did not commit.

Despite the equivalent practical effect of wrongful conviction and wrongful sentencing, the judicial system currently treats the two situations differently based on a belief that they implicate “varying degrees of injustice.”4 For instance, the Supreme Court has recognized the importance of allowing a petitioner’s claim that she is innocent of her crime of conviction to overcome judge-made procedural bars to federal habeas corpus review (“conviction innocence”).5 Furthermore, the Supreme Court has concluded that a petitioner presenting credible evidence that he is innocent of the aggravating factors that elevated his sentence to death can receive habeas review despite procedural bars to relief (“capital sentence innocence”).6 But only a handful of circuit courts have recognized an exception to procedural bars to habeas review for petitioners who claim innocence of a prior conviction that served as a basis for enhancing their noncapital sentence (“noncapital sentence innocence”).7

guidelines mandate that his criminal history category is VI. *Id.* § 4B1.1 (stating that a person will be sentenced as a career offender if (1) he was at least eighteen years of age at the time he committed the crime of conviction, (2) the crime of conviction is either a felony crime of violence or felony controlled substance offense, and (3) he has at least two prior felony crime of violence or controlled substance convictions). In this example, applying a criminal history category VI results in a sentencing range of 262 to 327 months. *Id.* at 404. If the defendant is innocent of one of his prior convictions for aggravated assault, then he has been improperly sentenced as a career offender and subjected to a more severe sentence than he deserves. Had the sentence been properly calculated, with only one prior aggravated assault conviction, the defendant would have had three prior conviction points, *id.* § 4A1.1(a), resulting in a criminal history category of II and a sentence of 168 to 210 months, *id.* at 404. As a result of the defendant’s improper classification as a career offender, he was sentenced to a prison term of at least seven years and ten months and up to nine years and nine months longer than he deserves.


5. *See, e.g.*, Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (finding that a habeas petitioner’s credible claim of conviction innocence could overcome the traditional prohibition on successive petitions for habeas relief).


7. For a complete discussion of this circuit split, see *infra* Section I.B. I use the phrase “sentence innocence” to refer to the situation in which a petitioner claims innocence of a prior conviction or aggravating sentencing factor and, therefore, innocence of the enhanced sentence imposed by the trial court. As explained *infra* Section I.A, sentence innocence breaks down into two subsets: (1) capital sentence innocence, in which the petitioner claims innocence of the aggravating factors that resulted in imposition of the death penalty; and (2) noncapital sentence innocence, in which the petitioner claims innocence of one or more prior convictions that enhanced his noncapital sentence.
Deepening the distinction between conviction and sentence innocence, the Supreme Court recently held that a credible claim of conviction innocence could overcome not only judge-made bars to habeas review, but also statutory bars (“conviction innocence exception”). In *McQuiggin v. Perkins*, the Supreme Court recognized that a petitioner who presents convincing evidence of conviction innocence could petition for habeas review even after the one-year statute of limitations on habeas petitions established by the Antiterrorism and Effective Death Penalty Act (“AEDPA”) expires. Yet, a prisoner with a convincing claim of noncapital sentence innocence is powerless to overcome AEDPA’s statute of limitations, no matter how egregious the sentencing error below. This Comment argues that treating innocence claims differently depending on the type of innocence—conviction or sentence—at issue creates a distinction without a difference. In each scenario, an individual is punished more severely than warranted. Courts should recognize the functional equivalence of these two situations and allow both credible conviction and sentence innocence claims to trigger exceptions to AEDPA’s statute of limitations.

Analysis proceeds in four parts. Part I provides background on postconviction relief, the three innocence exceptions prior to AEDPA, the changes wrought by AEDPA, and the contradictory development of the noncapital sentence exception in various circuit courts. Part II explores the Supreme Court’s decision in *McQuiggin v. Perkins*, which allows a credible conviction innocence claim to overcome AEDPA’s one-year statute of limitations on habeas review. Part III suggests that the underlying reasoning in *McQuiggin*, Fourth Circuit precedent, and the fundamental similarities between wrongful

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8. See generally *McQuiggin v. Perkins*, 133 S. Ct. 1924 (2013). I use the phrase “conviction innocence exception” to refer to the situation in which a petitioner claims to be actually innocent of the crime that resulted in the conviction being challenged on habeas review.
conviction and wrongful sentencing weigh in favor of allowing credible noncapital sentence innocence claims to overcome AEDPA’s statute of limitations. Part III also offers hypotheticals that could persuade the Fourth Circuit to create just such an exception. Finally, Part IV addresses several counterarguments critics may make against allowing a noncapital sentence exception to the statute of limitations, concluding that the exception, where properly invoked, should apply regardless of whether a bar to review is judge-made or statutory.

I. THE WRIT OF HABEAS CORPUS: EXPANSION, CONTRACTION, AND THE ACTUAL INNOCENCE EXCEPTION

This Part sets forth a brief history of the judicial expansion of habeas review and Congress’s responsive tightening of the writ through AEDPA’s one-year statute of limitations. It also details the creation and expansion of the conviction and sentence innocence exceptions, which were established prior to AEDPA. The Part then examines the existing circuit split over whether noncapital sentence innocence should be the basis of an exception to judge-made, pre-AEDPA bars to habeas relief. This split has become even more significant since the Court’s ruling in McQuiggin because it identifies the most favorable forums for petitioners arguing that the McQuiggin holding should apply to noncapital sentence innocence, as well as conviction innocence. The Part concludes by explaining AEDPA’s statute of limitations, which worked a major change in habeas jurisprudence.

A. The Pre-AEDPA Actual Innocence Exception to Procedural Bars

Long before AEDPA, and in an effort to stem the rapid flow of federal habeas petitions, the Supreme Court imposed various procedural requirements on habeas petitioners that, if not met,

13. This Comment limits its scope to the Fourth Circuit for a number of reasons. First, Fourth Circuit precedent provides a unique balance between the disavowal of the noncapital sentence exception and liberal application of the exception, which mitigates concerns over the administrability of expanding the exception to AEDPA's statute of limitations. See infra Section I.B.3. Further, the Fourth Circuit's recent decision in United States v. Jones, 758 F.3d 579 (4th Cir. 2014), implicitly leaves the door open for future defendants with a specific set of facts to successfully argue for the expansion of the noncapital sentence exception to AEDPA's statute of limitations. See infra Section III.B. This confluence of circumstances renders the Fourth Circuit a prime candidate for analysis.
rendered courts unable to undertake habeas review. These judge-made, procedural bars prohibited habeas review in situations including:

- Procedural default without cause: failing to adhere to a state court’s procedural requirements due to no external impediment and resulting in a failure to properly preserve the issue at the state level;

- Successive petitions: filing an additional habeas petition on the same grounds set forth in a previous, rejected petition; and

- Abusive petitions: filing a habeas petition on the basis of an argument or claim that could have been, but was not, raised at an earlier stage of the litigation, such as at trial or before a lower appellate court.

The purpose of the successiveness and procedural default bars was to ensure that federal court caseloads were not unreasonably burdened by frivolous habeas claims. Yet, to ensure that prisoners were not unjustly incarcerated simply because of their failure to adhere to procedural rules, the Court established the “miscarriage of justice exception[,]” which allowed the Court to hear procedurally barred habeas claims upon the petitioner’s showing that “a fundamental miscarriage of justice would result from a failure to entertain the claim.”

The stated purpose of the exception was to “serve[] as ‘an additional safeguard against compelling an innocent man to suffer an unconstitutional loss of liberty,’” The Court originally intended this exception to be a narrow one, applied only in “extraordinary instances when a constitutional violation likely has caused the conviction of one innocent of the crime.” The exception was framed

16. McQuiggin, 133 S. Ct. at 1931.
17. Id. at 1931–32.
18. Thomas, supra note 14, at 1750.
20. Id. at 495 (quoting Stone v. Powell, 428 U.S. 465, 491–92 n.31 (1976)).
21. Id. at 494. The foundation of the conviction innocence exception is seen in various cases. See, e.g., Murray v. Carrier, 477 U.S. 478, 496 (1986) (“[W]e think that in an
in terms of “actual innocence.” Petitioners with a credible actual innocence claim could overcome procedural bars to review despite their inability to show cause for their default.

Although the Supreme Court repeatedly emphasized that this exception was a narrow one, it and other federal courts ultimately expanded the exception beyond its original application to conviction innocence and into the sentencing context, creating a sentence exception first for capital sentences and later, in some circuits, for noncapital sentences. In the sentencing realm, a prisoner’s actual innocence does not mean that he is “innocent of the crime,” but rather that he is “actually less guilty” than he was determined to be at sentencing. The Supreme Court has affirmed the expansion of the actual innocence exception only to the context of capital sentencing. In Sawyer v. Whitley, the Court acknowledged that deeming a person “innocent of death” is syntactically strange. Nonetheless, it held that a petitioner may seek habeas review despite procedural bars if she can provide proof that she is actually innocent of either: (1) the elements of the underlying crime of conviction, again affirming the conviction innocence exception; or (2) the aggravating factors that resulted in the imposition of the death sentence, acknowledging for the first time the capital sentence exception.

extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default,”). The exception has since been expanded to various degrees by federal courts, including the Supreme Court, to apply to the death penalty and, in some circuits, to noncapital sentences. See infra Section I.B.


23. See, e.g., Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (holding that a petitioner making a “colorable claim of factual innocence” can overcome the procedural bar on second and successive petitions for habeas review, which are typically prohibited absent a showing of cause or prejudice).

24. See generally Sawyer, 505 U.S. 333 (creating the capital sentence innocence exception).

25. See generally, e.g., United States v. Mikalajunas, 186 F.3d 490 (4th Cir. 1999) (authorizing a noncapital sentence innocence exception).

26. Matthew Mattingly, Actually Less Guilty: The Extension of the Actual Innocence Exception to the Sentencing Phase of Non-Capital Cases, 93 KY. L.J. 531, 536 (2004). While it is syntactically strange to think of a person being actually innocent of his sentence, this is exactly the terminology employed by courts. An actual innocence claim based on innocence of the crime of conviction is termed “actual innocence of conviction,” while a claim based on sentencing miscalculations or innocence of a prior crime taken into account for sentencing purposes is dubbed “actual innocence of sentence.” For brevity I refer to these categories as “conviction innocence” and “sentence innocence,” respectively.


28. Id. at 341.

29. Id. at 346–47.
Going a step further than the Supreme Court, some circuit courts began to expand the sentence exception from capital cases to noncapital cases, allowing sentencing errors in these cases to overcome procedural bars to habeas review. The Supreme Court was presented with the opportunity to decide whether the actual innocence of noncapital sentence exception (“noncapital sentence exception”) was proper in *Dretke v. Haley* but chose not to resolve the circuit split. Rather than deciding the validity of the exception, the Court directed lower courts to look for any alternative grounds for granting postconviction relief before wading into the quagmires of innocence claims and the various innocence-based exceptions. As a result, a circuit split continues unabated over whether there should be a noncapital sentence exception for procedural bars to habeas relief.

**B. The Ongoing Circuit Split**

Due to the Supreme Court’s decision in *Dretke*, the expansion of the innocence exception from conviction innocence, to capital sentence innocence, and finally to noncapital sentence innocence remains subject to a circuit split. Although this split developed prior to AEDPA, it remains relevant today because AEDPA codified the originally judge-made bars, which have since been consistently subjected to the same innocence-based exception scheme that

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30. See, e.g., United States v. Maybeck, 23 F.3d 888 (4th Cir. 1994). These two branches of case law are distinguished by the terms “actual innocence of capital sentence” and “actual innocence of noncapital sentence.” Id.


32. When declining the opportunity to resolve the existing circuit split over whether to recognize an actual innocence of noncapital sentence exception, the Court stated:

> We are asked in the present case to extend the actual innocence exception to procedural default of constitutional claims challenging noncapital sentencing error. We decline to answer the question in the posture of this case and instead hold that a federal court faced with allegations of actual innocence, whether of the sentence or of the crime charged, must first address all nondefaulted claims for comparable relief and other grounds for cause to excuse the procedural default.

*Id.*

33. As will be discussed *infra* Part III, the possibility exists for this noncapital sentence exception to be applied to statutory bars in some circumstances. *Dretke* does not foreclose the prospect that the Court will recognize and apply the actual innocence of noncapital sentence exception in the future; it merely demonstrates the Court’s unwillingness to do so on *Dretke’s* facts.

34. The circuit split over the recognition and application of the noncapital sentence exception to judge-made procedural bars is still relevant because AEDPA codified many of these bars, making the jurisprudence addressed in this Section applicable to the question of whether the now-statutory bars can be overridden by the various innocence claims. *See infra* Section I.C.
flourished prior to AEDPA. Thus, conflict over whether noncapital sentence innocence triggers an exception to these now statutory procedural bars to habeas review renders some jurisdictions more desirable than others for litigants seeking to expand the noncapital sentence exception to include AEDPA’s statute of limitations.

Circuit courts tend to treat the noncapital sentence exception in one of three ways. First, some circuits refuse to recognize the exception, applying only the conviction and capital sentence exceptions recognized by the Supreme Court. Second, other circuits apply a relatively limitless noncapital sentence exception, imposing few requirements on the types of petitioners and sentences that are eligible. Third, some circuits recognize the noncapital sentence exception but condition its application, for instance, by making it available solely to prisoners sentenced as career offenders. Each approach is addressed in turn.

1. No Recognition: The Tenth Circuit

The Tenth Circuit has refused to recognize the noncapital sentence exception. The court instead recognizes only the conviction and capital sentence exceptions, which have express Supreme Court approval.

In United States v. Richards, the Tenth Circuit firmly declined to recognize the noncapital sentence exception. The petitioner, incarcerated for 188 months on a federal drug offense, filed a second § 2255 motion (a petition for habeas review of a federal court’s sentencing decision) for habeas relief after his first petition was

36. See infra Section III.B.2.
37. The Eighth, Tenth, and Eleventh Circuits are representative of those courts that do not recognize the actual innocence exception as it applies to noncapital sentences. See, e.g., Sun Bear v. United States, 644 F.3d 700, 706 (8th Cir. 2011); Gilbert v. United States, 640 F.3d 1293, 1321 (11th Cir. 2011); United States v. Richards, 5 F.3d 1369, 1371–72 (10th Cir. 1993).
38. See, e.g., Spence, 219 F.3d at 170–71.
39. The Fourth and Seventh Circuits are among those courts that have taken this approach. See, e.g., Narvaez v. United States, 674 F.3d 621, 627–28 (7th Cir. 2011); United States v. Mikalajunas, 186 F.3d 490, 495 (4th Cir. 1999).
40. 5 F.3d 1369 (10th Cir. 1993).
41. Id. at 1371.
42. The petitioner pled guilty to possession of one kilogram or more of a mixture containing a detectable amount of methamphetamine, with intent to manufacture methamphetamine in powder form. Id. at 1370. The illegal drug was incorporated into a wastewater mixture. Id.
denied. This second petition was granted, and the petitioner’s sentence was reduced from 188 months to 60 months. The State appealed this reduction, claiming that the petition was successive and, therefore, barred from the court’s consideration. On appeal before the Tenth Circuit, the defendant argued that his original sentence was improperly calculated because it was not “proportionate to his culpability.” The defendant claimed that this improper sentence was a miscarriage of justice and, thus, should render him eligible for postconviction review despite the fact that his habeas petition was barred as successive. In its opinion, the Tenth Circuit firmly stated that only petitioners who are “actually innocent of the [convicted] offense” are eligible for application of an innocence-based exception.

Since Richards, the Tenth Circuit has consistently echoed its refusal to recognize the noncapital sentence exception. As a result, a prisoner who files a procedurally defaulted habeas petition on the basis of an error or miscalculation in her noncapital sentence finds an unfriendly forum in the Tenth Circuit.

43. Id.
44. Id.
45. Id.
46. Id. at 1371. The petitioner argued that his base offense level under the Federal Sentencing Guidelines was improperly calculated because it took into account the weight of some of the wastewater mixture rather than the incorporated methamphetamine alone. Id. at 1370.
47. Id. at 1370–71.
48. Id. at 1371 (“[The defendant] does not claim to be actually innocent of the offense for which he was convicted; he claims only that he should have received a lesser sentence. A person cannot be actually innocent of a noncapital sentence, however.”).
49. Despite its continued refusal to recognize the noncapital sentence exception outright, in the court’s own words, its stance on the noncapital sentence exception is far from “pellucid.” Abernathy v. Wandes, 713 F.3d 538, 545 n.6 (10th Cir. 2013). For an example of the court’s willingness to recognize the noncapital sentence exception when a petitioner is sentenced as a habitual offender but is factually innocent of one of the crimes that form the basis of his classification as a habitual offender, see Selsor v. Kaiser, 22 F.3d 1029, 1036 (10th Cir. 1994). A retreat from the strong pronouncement that there can be no noncapital sentence innocence would likely render the Tenth Circuit’s treatment of noncapital sentence innocence claims quite similar to the Fourth Circuit’s, which is addressed more fully below in Section I.B.3.
50. See, e.g., United States v. Denny, 694 F.3d 1185, 1191 (10th Cir. 2012) (dismissing the petitioner’s actual innocence claim because the court’s precedent dictates that it is impossible to be actually innocent of a noncapital sentence); Reid v. Oklahoma, 101 F.3d 628, 630 (10th Cir. 1996) (“Further, we find nothing in the record to implicate the ‘miscarriage of justice’ exception, which requires a claim of actual innocence regarding the offense under review.”).
2. Liberal Application: The Second Circuit

In stark contrast to the Tenth Circuit, the Second Circuit has not only recognized the noncapital sentence exception, but has also given it broad application. This liberal construction is based on the court’s interpretation of Sawyer, where the Supreme Court recognized the capital sentence exception to procedural bars to habeas relief. The court reads Sawyer’s holding as based not on some fundamental difference between the death penalty and noncapital sentences, but on “whether the constitutional error [that is the subject of the habeas petition] ‘undermined the accuracy of the guilt or sentencing determination.’” The Second Circuit espouses the view that “[b]ecause the harshness of the sentence does not affect the habeas analysis and the ultimate issue, the justice of the incarceration, is the same, there is no reason why the actual innocence exception should not apply to noncapital sentencing procedures” just as it applies to the death penalty. This reasoning prioritizes the principal purpose of all habeas review cases—to correct unwarranted and unjustly imposed sentences regardless of their degree of severity or permanence.

The Second Circuit places few conditions on petitioners’ access to the noncapital sentence exception. Borrego v. United States sets forth the circuit’s three-prong test for determining whether the exception may be invoked:

1. The sentence imposed was the result of a violation of the petitioner’s constitutional rights;

2. the petitioner presents clear and convincing evidence that she is innocent of the facts on which her sentence was based; and

3. the sentence imposed exceeds the maximum permitted under the applicable statute when the appropriate facts are taken into consideration.

52. Id. at 171–72.
53. Id. at 170–71 (quoting Smith v. Murray, 477 U.S. 527, 539 (1986)).
54. Id. at 171.
55. Schlup v. Delo, 513 U.S. 298, 320–21 (1995) (stating that the end goal of all habeas review is “correcting a fundamentally unjust incarceration”).
57. Id. at 525.
This standard does not require the petitioner to have been sentenced under a particular sentencing scheme, such as the Armed Career Criminal Act, 58 or that the petitioner demonstrate factual, as opposed to legal, innocence of a prior conviction that formed the basis for the petitioner’s sentence. 59 The Second Circuit does, however, provide that only those petitioners whose imposed sentences exceed the maximum period of incarceration for the range in which they should have been classified can seek review through the noncapital sentence exception. 60

Although the Second Circuit’s liberal application of the noncapital sentence exception offers broad access for habeas petitioners, the relative dearth of conditions it imposes on the exception’s application creates significant administrability concerns. 61 The Second Circuit’s approach, though ideal from a fairness and justice perspective, is thus less practicable and probably less politically feasible than the Fourth Circuit’s more measured, 60

58. For example, in Spence v. Superintendent, Great Meadow Correctional Facility, the Second Circuit applied the noncapital sentence exception in a case where the petitioner was not sentenced as a habitual offender, but had his sentence enhanced from probation to jail time after allegedly violating his plea agreement. Spence, 219 F.3d at 172. The petitioner’s plea agreement included a provision that would revoke probation and trigger imprisonment if he committed another, future criminal act. Id. at 169 (describing the plea agreement as “a term of probation in exchange for a promise not to engage in misconduct leading to an arrest”). When, after entering this agreement, the petitioner was arrested for an armed robbery, his term of imprisonment was enhanced to between eight and one-third to twenty-five years. Id. at 166. The petitioner was later acquitted of the armed robbery that triggered his sentencing enhancement. Id. The Second Circuit allowed the petitioner to take advantage of the noncapital sentence exception based on a basic conception of innocence, rather than satisfaction of complicated requirements: “Where a sentencing court relies on the commission of an act subsequent to trial or to a guilty plea as grounds for raising the defendant’s sentence..., a petitioner may properly challenge the conclusion that he committed the subsequent act on the ground that he was actually innocent...” Id. at 171–72. Although the quoted language is time-based in its focus on a conviction that occurs after sentencing, other samples of the court’s language are quite broad, indicating that prior convictions of which a defendant is actually innocent also warrant application of the noncapital sentence exception. See id. at 172 (describing the “quintessential miscarriage of justice” as “a person being punished for an act he did not commit”).

59. As will be discussed infra Section I.B.3, these and other conditions are prerequisites for application of the actual innocence of noncapital sentence exception in some circuits, and they may be advisable to deal with certain administrative implications of recognizing the exception. See also infra Section III.B.2.

60. This condition helps reduce the administrative burden of actual innocence of noncapital sentence claims. See infra Section III.B.2.

61. For a more complete discussion of the relationship between administrability in the federal judicial branch and expansion of the noncapital sentence exception, see infra Section IV.B.
conditionally applied noncapital sentence exception, discussed in the next Section.

3. Conditional Application: The Fourth Circuit

In a middle-of-the-road approach, the Fourth Circuit recognizes the noncapital sentence exception but subjects it to certain constraints. Much like the Second Circuit, the Fourth Circuit bases its recognition of the exception on the Supreme Court’s determination that capital sentence innocence warrants special treatment in the postconviction relief context.\(^{62}\) The Fourth Circuit reasons that, “[e]xcept for the obvious difference in the severity of the sentences, [there is] little difference between holding that a defendant can be innocent of the acts required to enhance a sentence in a death case and applying a parallel rationale in non-capital cases.”\(^{63}\) In capital cases, the presence of aggravating factors can result in an enhanced sentence: death. Similarly, in noncapital cases, the presence of certain factors, namely prior convictions, can lead to a more severe—in other words, longer—sentence.\(^{64}\) For the Fourth Circuit, the fundamental similarity between sentencing errors in capital and noncapital cases—a more severe sentence than warranted on the facts—compels the court to provide a remedy for both types of error.

The Fourth Circuit first recognized the noncapital sentence exception in \textit{United States v. Maybeck}.\(^{65}\) In that case, the defendant mistakenly characterized one of his prior burglary convictions as a violent felony at sentencing, leading him to be inaccurately classified as a career offender and improperly placed into a higher criminal history category.\(^{66}\) This error resulted in an enhanced sentence.\(^{67}\) The petitioner did not object to his improper classification as a career offender at sentencing or on appeal, but later filed a § 2255 motion for postconviction relief.\(^{68}\) This motion was denied as procedurally defaulted without cause because the petitioner failed to exercise his right to appeal the sentence or object to its improper basis below.\(^{69}\)

\(^{63}\) United States v. Maybeck, 23 F.3d 888, 893 (4th Cir. 1994).
\(^{64}\) See id.
\(^{65}\) 23 F.3d 888 (4th Cir. 1994).
\(^{66}\) Id. at 890.
\(^{67}\) Id. at 890–91.
\(^{68}\) Id. at 891. A § 2255 motion refers to the petition for habeas relief brought by a federal prisoner, and a § 2244 motion is the analogue for a state prisoner. See 28 U.S.C. §§ 2244, 2255 (2012).
\(^{69}\) Maybeck, 23 F.3d at 891 (finding that the defendant’s failure to raise his improper classification as a career offender and resulting placement in a higher criminal history
On appeal, the Fourth Circuit reversed on the basis of the noncapital sentence exception, finding that the petitioner’s prior burglary conviction did not qualify as a violent felony, that he was improperly sentenced as a career offender, and that he was, therefore, innocent of his noncapital sentence.\footnote{0} This conclusion allowed the petitioner to have his § 2255 motion heard despite its untimeliness and procedural default.

The Fourth Circuit later cabined its adoption of the noncapital sentence exception in two ways. In \textit{United States v. Mikalajunas},\footnote{1} the court restricted application of the exception to instances where a defendant’s sentence is improperly based on his wrongful classification as a habitual or career offender.\footnote{2} After this case, a petitioner with a procedurally defaulted claim who argues for application of the noncapital sentence exception must allege that she is innocent of one of the underlying crimes that served as the predicate for her classification specifically as a habitual or career offender.\footnote{3} Sentencing enhancement schemes other than habitual offender provisions do not trigger the noncapital sentence exception.\footnote{4}

Second, the Fourth Circuit began requiring a showing of factual innocence in noncapital sentence innocence claims. Factual innocence requires the petitioner to show that he actually did not commit one or more of the crimes on which his sentence was predicated, not merely that a procedural or constitutional defect at trial resulted in a legally wrongful conviction.\footnote{5} Similarly, petitioners seeking habeas review to

\footnote{0}{\textit{Maybeck}, 23 F.3d at 892, 894. In more familiar language, the petitioner was in fact “less guilty” than his original, disproportionate, and, ultimately, unjust sentence.}

\footnote{1}{\textit{United States v. Mikalajunas}, 186 F.3d 490 (4th Cir. 1999).}

\footnote{2}{\textit{See id. at 494–95. For a discussion of the types of sentencing schemes that fall under the general heading of “habitual or career offender” provisions, see infra Section III.B.1.}}

\footnote{3}{\textit{See Mikalajunas}, 186 F.3d at 495.}

\footnote{4}{For instance, in \textit{Mikalajunas}, the court held that the two petitioners were ineligible for the noncapital sentence exception when they sought habeas review of their sentences under the theory that they had not restrained the victim and, therefore, should not have been subject to the corresponding sentencing enhancement. \textit{Id.} at 492. This aggravating factor claim is not based on innocence of a prior conviction.}

\footnote{5}{\textit{Id.} at 494 (citing Sawyer v. Whitley, 505 U.S. 333, 339–41 (1992)) (“[A] petitioner must demonstrate actual factual innocence of the offense of conviction, i.e., that petitioner did not commit the crime of which he was convicted; this standard is not satisfied by a category as an objection at the sentencing hearing was a procedural default barring a motion for habeas review). Procedural defaults come in a variety of shapes and sizes, including “successive” petitions based on arguments previously rejected, “abusive” petitions based on claims that could have been, but were not, raised in an initial petition, and a general failure to observe rules, such as filing deadlines. McQuiggin v. Perkins, 133 S. Ct. 1924, 1931–32 (2013) (citations omitted).}}
appeal a question of statutory interpretation cannot use the noncapital sentence exception to achieve review of procedurally defaulted claims. Mikalajunas also established an evidentiary standard, requiring a petitioner to present clear and convincing evidence of factual innocence of a prior conviction before the noncapital sentence exception can apply. The conditions imposed on the noncapital sentence exception in the Fourth Circuit make it a prime jurisdiction for the creation of an administrable exception to AEDPA’s statute of limitations. While these conditions do close the court’s doors to some unjustly sentenced petitioners, the same conditions provide strong counterarguments to opponents’ assertions that expanding the noncapital sentence exception would be hugely unadministrable, undermine the finality of judicial decisions, and result in an untenable flood of litigation in federal district courts, making an expansion more palatable to opponents.

As this Section demonstrates, recognition and application of the noncapital sentence exception varies among the circuit courts. Those jurisdictions that have taken the initial step of recognizing the noncapital sentence exception are those most likely to expand the exception outside its current context of procedural bars and into new statutory bars, such as AEDPA’s statute of limitations. Those courts that have stringently limited or refused to acknowledge the exception are unlikely to be attractive forums for expansion.

C. The Antiterrorism and Effective Death Penalty Act: Congress Reins in the Courts’ Broad Interpretation of Habeas Review

By 1991, the judiciary had expanded habeas corpus jurisprudence significantly, allowing federal courts to hear “all dispositive constitutional claims” that were properly presented and unmarred by unexcused procedural errors. The innocence exceptions, which

showing that a petitioner is legally, but not factually, innocent.”); see also United States v. Pettiford, 612 F.3d 270, 284 (4th Cir. 2010) (citing Maybeck, 23 F.3d at 894) (“[A]ctual innocence applies in the context of habitual offender provisions only where the challenge to eligibility stems from factual innocence of the predicate crimes, and not from the legal classification of the predicate crimes.”).

76. See, e.g., Pettiford, 612 F.3d at 284 (holding that a petitioner seeking to overcome procedural bars to review through the actual innocence of noncapital sentence exception was ineligible for the exception because the basis of his appeal was whether one of his prior convictions ought to be interpreted as a violent felony, not presentation of evidence tending to show that he was in fact innocent of the previously convicted crime).

77. Mikalajunas, 186 F.3d at 493.

78. See infra Section III.B.2.

allowed courts to hear procedurally barred claims where the petitioner presented a credible claim of conviction or capital sentence innocence (and, in some circuits, even noncapital sentence innocence), were some of the primary tools courts used to expand the writ.\textsuperscript{80}

In response to expansive judicial interpretation of the right to habeas review, Congress passed the Antiterrorism and Effective Death Penalty Act of 1996.\textsuperscript{81} AEDPA’s habeas reforms were largely aimed at imposing limitations on what Congress believed was a widely abused writ.\textsuperscript{82} AEDPA reformed the judiciary’s habeas practices in a number of ways,\textsuperscript{83} including by formally codifying judge-made procedural bars, such as the prohibition on successive petitions.\textsuperscript{84} The codification of these formerly judge-made procedural bars simultaneously incorporated the jurisprudence surrounding the various innocence-based exceptions, rendering the circuit split over whether to recognize the noncapital sentence exception relevant even after AEDPA.\textsuperscript{85} The difference is that the circuit split now centers on justice, a federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice to excuse the default.”).

\textsuperscript{80.} See supra Section I.A.


\textsuperscript{83.} For example, AEDPA amends Rule 22 of the Federal Rules of Appellate Procedure to dictate that habeas petitions must be heard first in the appropriate federal district court and amends 28 U.S.C. § 2254 to require exhaustion of state remedies before appeal to the federal courts. §§ 103, 104, 110 Stat. at 1218. Because the focus of this Comment is on expanding the applicability of the actual innocence exception to include AEDPA’s statute of limitations, only the creation of the one-year statute of limitations will be addressed here.

\textsuperscript{84.} See, e.g., 28 U.S.C. § 2244(b)(1)-(2) (barring second or successive petitions for habeas review).

\textsuperscript{85.} McQuiggin v. Perkins, 133 S. Ct. 1924, 1932 (2013) (stating that “[t]he miscarriage of justice exception . . . survived AEDPA’s passage”). The phrase “miscarriage of justice exception” is another way federal courts have referred to the concept behind the innocence-based exceptions to procedurally defaulted habeas review: that it is a manifest injustice to allow an innocent person to be wrongfully incarcerated for any period of time. \textit{See}, e.g., \textit{id.} at 1935 (finding a “miscarriage of justice” when “no reasonable juror would have convicted” the petitioner of his crime of conviction); Schlup v. Delo, 513 U.S. 298, 320–21 (1995) (explaining that the goal behind all habeas review is to avoid wrongful incarceration of innocent individuals); Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 172 (2d Cir. 2000) (equating a “miscarriage of justice” with a sentence improperly based on a wrongful act the defendant did not commit).
whether the exception can circumvent statutory bars to review rather than judge-made bars.

AEDPA’s most notable change to the habeas regime was its implementation of a one-year statute of limitations on all petitions for review.\textsuperscript{86} Although judge-made procedural bars did exist,\textsuperscript{87} AEDPA was Congress’s first foray into establishing a formal statute of limitations period for habeas petitions.\textsuperscript{88} This one-year statute of limitations applies to both state and federal prisoners’ petitions for habeas review.\textsuperscript{89} For federal prisoners,\textsuperscript{90} the one-year statute-of-limitations period begins to run on the date on which the latest of the following events occurs:

\begin{enumerate}
\item [1] The date on which the judgment of conviction becomes final;
\item [2] the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
\item [3] the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
\end{enumerate}

\textsuperscript{86} See supra Section I.A.

\textsuperscript{87} See supra note 82, at 83–84 (“Prior to 1996, there was no formal statute of limitations applicable in habeas proceedings; however, ‘state law often imposed timeliness requirements.’” (quoting Lisker v. Knowles, 463 F. Supp. 2d 1008, 1034 (C.D. Cal. 2006))).

\textsuperscript{88} See 28 U.S.C. § 2244(d)(1) (establishing a one-year statute of limitations for state prisoners); see also § 2255(f) (mandating a one-year statute of limitations period for federal prisoners).

\textsuperscript{89} See 28 U.S.C. § 2244(d)(1)(A) (establishing a one-year statute of limitations for state prisoners); see also § 2255(f) (mandating a one-year statute of limitations period for federal prisoners).

\textsuperscript{90} Because the focal point of this Comment is the Fourth Circuit and its decision not to extend the actual innocence exception to the federal prisoner in Jones, the federal statute of limitations in § 2255 is most relevant and will serve as the basis for analysis. However, the state statute of limitations provisions in § 2244 are virtually identical in meaning, although some wording of the provision does differ. Compare § 2244(d)(1), with § 2255(f).
(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.\(^9\)

In the wake of AEDPA’s statute of limitations, the question arose whether innocence could serve as an exception to the firm time bar, just as it served as an exception to various procedural bars before AEDPA and to those same bars codified by AEDPA.

II. OVERCOMING STATUTORY BARS TO HABEAS REVIEW: McQUIGGIN V. PERKINS

While the three innocence-based exceptions traditionally overcame only judge-made bars to habeas review, courts continued to apply the exceptions even after AEDPA formally codified the procedural bars.\(^2\) Although AEDPA’s statutory language does not expressly adopt an innocence-based exception, courts continue to see innocence differently, allowing certain types of innocence claims to overcome AEDPA’s statutory bars to postconviction relief\(^3\) based on a fundamental concern that innocent persons not be wrongfully incarcerated.\(^4\) The Supreme Court, for example, has recognized the

\(^{91}\) § 2255(f).

\(^{92}\) See, e.g., Dretke v. Haley, 541 U.S. 386, 388 (2004) (stating, eight years after AEDPA, that actual innocence is a “narrow exception to the general rule” that federal habeas courts will not hear procedurally defaulted claims unless the petitioner can show cause for and prejudice resulting from the default).

\(^{93}\) Compare United States v. Denny, 694 F.3d 1185, 1190–91 (10th Cir. 2012) (refusing to recognize a noncapital sentence exception to untimely filed habeas petitions post-AEDPA), with Spence v. Superintendent, Great Meadow Corr. Facility, 219 F.3d 162, 171–72 (2d Cir. 2000) (extending the noncapital sentence exception to AEDPA’s statutory bar against federal court review of procedurally defaulted habeas petitions in which the petitioner failed to adhere to state procedural rules).

\(^{94}\) This concern has been the backdrop behind the actual innocence exception to judge-made procedural bars; the creation and application of the exception reflects the reality that, although the writ of habeas corpus is focused on correcting procedural defects in criminal trials, substantive innocence is a fundamental consideration in habeas review. See The Supreme Court, 2012 Term—Leading Cases, 127 HARV. L. REV. 318, 318 (2013). Despite courts’ continued concern for substantive innocence, petitioners attempting to enter the actual innocence “gateway” must present evidence supporting not only a colorable claim of actual innocence, but also the presence of a procedural defect in their trial. See McQuiggin v. Perkins, 133 S. Ct. 1924, 1928 (2013); see also Herrera v. Collins, 506 U.S. 390, 404 (1993) (“[A]ctual innocence’ is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits.”). Meeting the procedural default requirement is likely relatively easy for actually innocent petitioners. Jordan M. Barry, Prosecuting the Exonerated: Actual Innocence and the Double Jeopardy Clause, 64 STAN. L. REV. 535, 552 n.161 (2012) (“A petitioner who demonstrates that she is actually innocent is likely to have an easier time demonstrating that she was damaged by any legal infirmities that plagued her proceedings.”).
continued application of the conviction innocence and capital sentence exceptions to AEDPA’s successiveness prohibition despite the fact that it is now a statutory, rather than judge-made, bar.\(^95\) In *McQuiggin v. Perkins*, the Supreme Court, for the first time, allowed an innocence claim to overcome AEDPA’s statute of limitations. This Part discusses *McQuiggin*’s facts and reasoning as background for Part III, which argues that the *McQuiggin* Court’s rationale, among other factors, should apply to the noncapital sentence exception as well as the conviction innocence exception.\(^96\)

*McQuiggin* marked the first time the Supreme Court applied the judge-made conviction innocence exception to a congressionally established statute of limitations.\(^97\) The Court’s extension of the exception was based in large part on pre-AEDPA innocence jurisprudence and the understanding that, though of great importance, “the societal interests in finality, comity, and conservation of scarce judicial resources” must be weighed against the strong “individual interest in justice that arises in the extraordinary [innocence] case.”\(^98\) In *McQuiggin*, the Court decided that the need to rectify the incarceration of innocent persons was strong enough to overcome even AEDPA’s statute of limitations.\(^99\)

The petitioner in *McQuiggin*, Floyd Perkins, was convicted of first-degree murder and sentenced to life in prison without the possibility of parole.\(^100\) Eleven years later, Perkins filed a habeas petition alleging both ineffective assistance of counsel and newly discovered evidence proving his innocence.\(^101\) This filing undisputedly occurred after AEDPA’s one-year statute of limitations expired.\(^102\) Although the Supreme Court had previously recognized that petitioners who diligently pursue their rights but face extraordinary obstacles to filing a habeas petition might equitably toll the statute of

95. See, e.g., *Dretke*, 541 U.S. at 388 (“We have recognized a narrow exception to the general rule when the habeas applicant can demonstrate that the alleged constitutional error has resulted in the conviction of one who is actually innocent of the underlying offense or, in the capital sentencing context, of the aggravating circumstances rendering the inmate eligible for the death penalty.”).
96. See infra Section III.B.2.
98. *Id.* at 1932 (quoting *Schlup v. Delo*, 513 U.S. 298, 324 (1995)).
99. *Id.* (“Sensitivity to the injustice of incarcerating an innocent individual should not abate when the impediment is AEDPA’s statute of limitations.”).
100. *Id.* at 1929.
101. *Id.*
limitations. Perkins was not eligible for tolling because he was not diligent in pursuing his claim. Given the unavailability of tolling, the Court considered whether Perkins’s conviction innocence claim allowed him to bypass the statute of limitations altogether. Citing the traditionally accepted application of the conviction innocence exception to judge-made procedural bars, the Court held that credible claims of conviction innocence also trigger an exception to AEDPA’s statute of limitations.

McQuiggin’s holding is, of course, grounded in the facts of the case: Perkins claimed conviction innocence, not noncapital sentence innocence. Furthermore, the Court emphasized that its expansion of the conviction innocence exception was not intended to open the floodgates of litigation and allow every petitioner claiming conviction innocence to do so well after the statute of limitations expires. Yet, this Comment argues that the fundamental similarity between incarcerating an individual for a crime of conviction he did not commit and imprisoning a person for a longer period of time based on a previous crime that he did not commit requires that the two scenarios be treated alike. This approach would permit a wrongfully incarcerated person to seek habeas review beyond the statute of limitations when there is convincing evidence that she is innocent of a prior conviction on which her sentence was based.

103. Holland v. Florida, 560 U.S. 631, 649 (2010) (citing Pace v. DiGuglielmo, 544 U.S. 408, 418 (2004)) (stating that a petitioner is entitled to equitable tolling of AEDPA’s statute of limitations “if he shows ‘(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way’ and prevented timely filing”).

104. The three affidavits that Perkins sought to classify as new evidence of his actual innocence of the murder conviction had been in his possession since 1997, 1999, and 2002. McQuiggin, 133 S. Ct. at 1929–30. Perkins did not petition for habeas review until 2008—almost six years after he obtained the last affidavit tending to prove his innocence—which the Court found to demonstrate a lack of diligence. Id. at 1929, 1931.

105. Id. at 1931 (“[Perkins] thus seeks an equitable exception to § 2244(d)(1), not an extension of the time statutorily prescribed.”).

106. Id. at 1931–32.

107. Id. at 1933–34. The Court emphasized that its holding was supported by precedent. Id. at 1934 (“Our reading of the statute is supported by the Court’s opinion in Holland. ‘[E]quitable principles have traditionally governed the substantive law of habeas corpus . . . [and] we will not construe a statute to displace courts’ traditional equitable authority absent the clearest command.’” (quoting Holland, 560 U.S. at 646)).

108. Id. at 1929.

109. Id. at 1936 (“The gateway should open only when a petition presents ‘evidence of innocence so strong that a court cannot have confidence in the outcome of the trial . . . ’”) (quoting Schlup v. Delo 513 U.S. 298, 316 (1995)).

110. See infra Part III.

111. See infra Section III.B.
III. Expanding the Fourth Circuit’s Actual Innocence of Noncapital Sentence Exception to AEDPA’s Statute of Limitations

The McQuiggin Court’s foray into applying the judge-made conviction innocence exception to AEDPA’s statute of limitations was a significant step forward in minimizing obstacles to postconviction relief. Yet this case does not provide any relief for petitioners bringing untimely habeas claims based on a sentence-innocence theory. This disparate treatment based on the type of innocence at issue (conviction versus sentence) fails to acknowledge the basic commonality between the two: in both instances, an improperly sentenced individual remains incarcerated for a longer period of time than warranted based on his crime of conviction and criminal history.

Petitioners arguing for equal treatment of these two types of innocence may find a receptive court in the Fourth Circuit. The Fourth Circuit’s conditional recognition of the noncapital sentence exception, along with the Supreme Court’s rationale in McQuiggin, present a confluence of elements that render the court ripe for petitioners to argue that AEDPA’s statute of limitations should be subject to the noncapital sentence exception. The Fourth Circuit does not provide the same broad opportunity for expanding the noncapital sentence exception as the Second Circuit’s liberal innocence jurisprudence, but its limits would mitigate concerns over expanding the exception, such as the resulting impact on judicial efficiency and docket load.

This Part addresses the failed attempt to expand the noncapital sentence exception to AEDPA’s statute of limitations in the Fourth Circuit and the remaining opportunity to expand the exception given better facts. It then argues that the Fourth Circuit should—based on its own precedent and in the interest of justice—allow the noncapital sentence exception to overcome AEDPA’s statute of limitations.

A. Jones: A Compelling Argument Doomed by Inapposite Facts

In United States v. Jones, the petitioner argued for an extension of the Fourth Circuit’s noncapital sentence exception that would allow him to bypass AEDPA’s statute of limitations. The Fourth Circuit rejected this argument for two reasons. First, there were facial

112. See infra Section III.B.2.a.
113. See supra Section I.B.2; infra Section IV.B.
114. 758 F.3d 579 (4th Cir. 2014).
distinctions between Jones’s facts and those presented in prior cases where the Fourth Circuit invoked the noncapital sentence exception.\(^{115}\) Second, prior Fourth Circuit cases allowed the judge-made exception to overcome a judge-made bar, but did not address the potential for innocence to trump a statutory bar.\(^ {116}\) Although some portions of the Jones opinion reject a noncapital sentence exception to the statute of limitations in very broad terms,\(^{117}\) the decision does not entirely foreclose the opportunity to expand the exception’s scope.\(^ {118}\)

1. The Facts

Petitioner Torrance Jones was convicted of a nonviolent drug offense in federal court\(^ {119}\) and sentenced to thirty years (360 months) in prison.\(^ {120}\) Jones’s sentence was calculated under the U.S. Sentencing Guidelines and took into account his criminal history, which included two prior convictions under Florida law.\(^ {121}\) Jones received the minimum sentence within the permissible range for his offense level and criminal history category.\(^ {122}\)

After Jones received his federal sentence, the Florida state court vacated his two prior convictions.\(^ {123}\) His 2004 conviction for

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\(^{115}\) See infra Section III.A.2.

\(^{116}\) See infra Section III.A.2.

\(^{117}\) The majority opinion states, “At bottom, we conclude that McQuiggin does not extend to cases in which a movant asserts actual innocence of his sentence, rather than of his crime of conviction[,]” seemingly prohibiting future petitioners from attempting to rely on this Supreme Court case as a means of extending the actual innocence of noncapital sentence exception to statutory bars to review. Jones, 758 F.3d at 586. However, as will be addressed infra Section III.A.3, a number of elements suggest that McQuiggin or other cases could still form the basis of just such an expansion.

\(^{118}\) See infra Section III.A.3.

\(^{119}\) Jones was convicted of trafficking seventy-nine kilograms of cocaine and twenty-six kilograms of cocaine base. The court also found that Jones played a managerial role in the crime, which is an aggravating factor at sentencing. Jones, 758 F.3d at 581.

\(^{120}\) Id. at 580.

\(^{121}\) Id. at 580–81. Jones’s convictions were for: (1) possession of marijuana; and (2) possession of a concealed firearm, loitering or prowling, and possession of burglary tools. Id. at 581. This sentence was appealed and affirmed by the Fourth Circuit in 1998. United States v. Jones, Nos. 97-4083, 97-4084, 97-4107, 1998 WL 761542, at *1 (4th Cir. Nov. 2, 1998).

\(^{122}\) Opening Brief of Appellant Torrance Jones at 3, United States v. Jones, 758 F.3d 579 (4th Cir. 2014) (No. 12-7675). Jones’s conviction required an offense level of forty, and he was designated as a criminal history category III. The criminal history category was determined by assigning points both for Jones’s two prior state court convictions and for the fact that the federal conviction at issue occurred within two years of those prior convictions, totaling six points. Id.

\(^{123}\) Id. at 4.
possession of marijuana was vacated on constitutional grounds, while his 2008 conviction for possession of a concealed firearm was vacated on the basis of his factual innocence. Had one or both of these vacated convictions been excluded from Jones’s criminal history calculation at sentencing, Jones would have fallen into a lower criminal history category (category I or II, depending on which vacated convictions were excluded). If both of Jones’s vacated prior convictions had been excluded, he would have been classified as a criminal history category I and sentenced to 292 to 405 months. If only one of Jones’s vacated prior convictions had been excluded, he would have fallen into criminal history category II and been sentenced to anywhere between 324 and 405 months. While the 360-month sentence ultimately imposed did fall within both of these lower guideline ranges, had the prior convictions been excluded from the calculation, the court could have, in its discretion, sentenced Jones to fewer than 360 months in prison.

Relying on the vacatur of these prior convictions, Jones filed a § 2255 petition for habeas review in 2009, less than one year after his second state conviction was vacated and, thus, within AEDPA’s statute of limitations. But, because Jones had filed a § 2255 petition in 2000 (before his state convictions were vacated), his 2009 petition was denied as successive. Jones filed yet another § 2255 motion for habeas review in 2012, several years after the state convictions were vacated.

124. Id. at 4–5. The conviction was vacated because of violations of the Fourth and Sixth Amendments that occurred incident to Jones’s arrest and trial. This is often considered a vacatur on the grounds of legal innocence, as opposed to factual innocence.

125. Id. An affidavit stating that Jones had committed no crime on which this conviction could be based was submitted to the court and formed the basis of this vacatur. As opposed to the Fourth and Sixth Amendment violations on which his first vacatur was based, this proceeding was founded on the fact that Jones did not in fact commit the crime for which he was convicted.

126. Id. at 3–4.

127. Id.; see also U.S. SENTENCING GUIDELINES MANUAL 404 (U.S. SENTENCING COMM’N 2015).


129. To follow along with these technical facts, please consult Appendix I, which includes a copy of the U.S. Sentencing Guidelines Sentencing Table.

130. Opening Brief of Appellant Torrance Jones, supra note 122, at 6–7. This was Jones’s second § 2255 motion. The first was filed after Jones’s sentence was imposed, but before he obtained the vacaturs of his two Florida convictions. United States v. Jones, 758 F.3d 579, 580 (4th Cir. 2014).

131. This petition was filed in 2000 and based on ineffective assistance of counsel. Jones, 758 F.3d at 580.

132. Opening Brief of Appellant Torrance Jones, supra note 122, at 5.
vacated. In this motion, he argued that his 2009 § 2255 motion was improperly denied as successive because his state convictions had not been vacated at the time of his initial motion in 2000. Jones’s 2012 petition was dismissed as untimely because it was filed after AEDPA’s statute of limitations expired. Jones was, however, granted a certificate of appealability for this denial because of the Supreme Court’s decision in McQuiggin. On appeal, Jones claimed that the vacatur of his prior state convictions rendered him innocent of his 360-month sentence. Jones argued for the noncapital sentence exception to be extended to AEDPA’s statute of limitations based on the Supreme Court’s reasoning in McQuiggin.

2. The Majority Opinion: Focused on Facial Distinctions

On appeal, the Fourth Circuit rejected Jones’s argument, neatly cabining McQuiggin’s application to only those instances in which a petitioner “demonstrates actual innocence of his crime of conviction.” This broad language precludes future defendants from attempting to use McQuiggin alone as a basis for expanding the noncapital sentence exception to AEDPA’s statute of limitations. However, the factual distinctions between Jones’s case and other cases in which the Fourth Circuit has applied the noncapital sentence exception indicate that, given more congruent facts, the court may be willing to create an exception to AEDPA’s statute of limitations based on noncapital sentence innocence.

The majority’s decision to reject Jones’s argument for expanding the noncapital sentence exception rested largely on facial distinctions between Jones’s case, McQuiggin, and Fourth Circuit precedent. The first basis for the majority’s refusal to apply McQuiggin in Jones’s

133. This 2012 § 2255 petition is the central petition in the 2014 Fourth Circuit opinion. id. at 5–6.
134. Id. at 6.
135. Id. The 2012 § 2255 petition was filed four years after the latest vacatur of Jones’s two state convictions, which occurred in 2008, and eight years after the first vacatur, which occurred in 2004. The court found that Jones had not filed the petition within one year of his having notice that the convictions had been vacated and, therefore, his petition fell outside AEDPA’s statute of limitations. Jones, 758 F.3d at 582.
137. Id. at 7.
138. Id.
139. Jones, 758 F.3d at 581.
140. See id. at 586.
141. See id. at 587 (King, J., concurring).
The case was the distinction between the types of innocence at issue.\textsuperscript{142} While the petitioner in \textit{McQuiggin} claimed conviction innocence, Jones claimed only noncapital sentence innocence.\textsuperscript{143} The majority relied on language from \textit{McQuiggin} to justify its refusal to extend that case’s reasoning beyond conviction innocence. In \textit{McQuiggin}, Justice Ginsburg had justified the conviction innocence exception’s expansion by insisting that it would not result in a watershed of untimely and traditionally unreviewable habeas petitions, writing, “[t]he miscarriage of justice exception... applies to a severely confined category: cases in which new evidence shows ‘it is more likely than not that no reasonable juror would have convicted [the petitioner].’”\textsuperscript{144} According to the \textit{Jones} majority, this language suggests that \textit{McQuiggin} applies only to conviction innocence claims.\textsuperscript{145}

The \textit{Jones} majority also presumed that its disparate treatment of these two types of innocence—that of conviction versus that of noncapital sentence—was justified because the two give rise to “varying degrees of injustice.”\textsuperscript{146} While “[i]nnocence of conviction implicates the notion that a person has been incarcerated for a crime he did not commit... a sentencing error does not at all implicate guilt.”\textsuperscript{147} Based on this belief in “varying degrees of injustice[,]”\textsuperscript{148} a Fourth Circuit petitioner who is entirely innocent of the crime for which he was convicted can use \textit{McQuiggin} to seek habeas review after the statute of limitations expires; yet, a person who is innocent of one of the prior convictions that serves as the basis for his enhanced sentence cannot use the same exception to achieve review of his improperly calculated and, thus, unjustly imposed sentence.

\textsuperscript{142} \textit{Id.} at 583 (majority opinion) (“[Jones] asks us to apply a rule providing for relief based on actual innocence of a crime of conviction to a situation where he is actually innocent of a federal sentence.”).

\textsuperscript{143} \textit{Id.} at 584 (quoting \textit{McQuiggin} v. Perkins, 133 S. Ct. 1924, 1933 (2013)).

\textsuperscript{144} As will be discussed \textit{infra} Section III.B.2.c, this particular line of reasoning from \textit{McQuiggin’s} discussion of actual innocence of conviction could reasonably be applied in actual innocence of noncapital sentence claims. For instance, if no reasonable juror could have convicted the petitioner of one of her prior convictions because of convincing evidence that she was factually innocent of the crime, and her instant sentence was based in part of this wrongful prior conviction, it would seem that the exception should apply to overcome the statute of limitations just as it does in \textit{McQuiggin}. Either way, applying the \textit{McQuiggin} exception would allow the court to remedy the unjust incarceration of an individual for a crime that she did not commit.

\textsuperscript{145} \textit{Jones}, 758 F.3d at 584–85.

\textsuperscript{146} \textit{Id.} at 584–85.

\textsuperscript{147} \textit{Id.}

\textsuperscript{148} \textit{Id.}
As further justification for this disparate treatment, the court focused on the conflict between Jones’s proposed application of the noncapital sentence exception and the Fourth Circuit’s historical application of the same. While the court acknowledged Fourth Circuit precedent recognizing and applying the noncapital sentence exception, it distinguished those cases from Jones by pointing out that prior cases used the exception to overcome judge-made bars to review, while Jones sought to use the exception to overcome a statutory bar. The majority did not address the other Fourth Circuit preconditions for applying the noncapital sentence exception.

The Jones opinion used these facial distinctions between conviction and noncapital sentence innocence, as well as between judge-made and statutory bars, to conclude that AEDPA’s statute of limitations could not be overridden absent a claim of conviction innocence. While these facial distinctions certainly exist and provide a sound basis for the Jones decision, this Comment argues that the fundamental similarities between conviction and noncapital sentence innocence claims justify their similar treatment. The two claims implicate the very same injustice—not “varying degrees” of it.

3. The Jones Concurrence: The Majority’s Missed Opportunity for Reform

Judge King’s brief but significant concurrence in Jones suggests that there may still be an opportunity for Fourth Circuit petitioners to expand the noncapital sentence exception to AEDPA’s statute of limitations. In particular, the concurrence suggests that Fourth Circuit precedent recognizing and applying the noncapital sentence exception could serve as an independent basis for expanding the exception.

The concurrence limited its reasoning to distinguishing between Jones’s facts and other cases in which the Fourth Circuit has applied the noncapital sentence exception. Specifically, the court has traditionally limited the application of the noncapital sentence exception to those cases in which the petitioner was sentenced under a habitual or career offender provision. According to the

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149. Id. at 586–87 (“Jones does discuss at length three Fourth Circuit cases addressing an actual innocence of sentence exception. But, in each case, the exception was raised not in the context of a statute of limitations, but rather in the context of a judge-made procedural default rule.”).
150. For discussion of these preconditions, see infra Section III.A.3.
151. See infra Section III.B.2.
152. See infra Section III.B.2.
153. See infra Section III.B.
154. See United States v. Mikalajunas, 186 F.3d 490, 494–95 (4th Cir. 1999).
In the concurrence, Jones was not sentenced under such a provision; his prior convictions were simply taken into account when his sentence was calculated.155 Based on this distinction, Judge King found that the noncapital sentence exception was not available in Jones's case, leaving “for another day—and a more appropriate case—the question of whether AEDPA’s time limitations foreclose a late-filed claim alleging actual innocence of a noncapital (or capital) sentence.”156 The concurrence’s more limited reasoning is preferable to the majority’s broad holding, which seems to foreclose expansion of the noncapital sentence exception not only through McQuiggin, but also through any other line of reasoning. This foreclosure was premature and based on a flawed conception of the injustices wrought by incarcerating an “entirely innocent” person as opposed to a “partially guilty and partially innocent” person.

B. Moving Forward After Jones: Expanding the Noncapital Sentence Exception to AEDPA’s Statute of Limitations

Despite the Jones opinion’s broad language,157 the opportunity to expand the noncapital sentence exception continues to exist in the Fourth Circuit, albeit not through McQuiggin alone. The differences between Jones’s case and the facts presented by petitioners who have invoked the noncapital sentence exception in prior Fourth Circuit cases make Jones a poor case for expanding the exception. But these differences do not altogether foreclose the opportunity. The court could use its own precedent, its traditional equitable power to invoke the exception, and principles of justice and fairness as bases for expanding the exception. By focusing on the incongruences of Jones’s facts, it is possible to hypothesize about what facts future petitioners would need to allege for the Fourth Circuit to expand the noncapital sentence exception to AEDPA’s statute of limitations.

155. See United States v. Jones, 758 F.3d 579, 587 (2014) (King, J., concurring) (“[S]uch exception cannot help Jones because he was not sentenced as a habitual offender.”); see also id. at 580 (majority opinion) (“[Jones’s] sentence was enhanced by, among other things, two prior Florida state court convictions.”).
156. Id. at 587 (King, J., concurring).
157. Specifically, the majority stated that McQuiggin will not be applied in actual innocence of noncapital sentence cases, but will be invoked only when petitioners claim actual innocence of their crime of conviction. Id. at 586 (majority opinion) (“At bottom, we conclude that McQuiggin does not extend to cases in which a movant asserts actual innocence of his sentence, rather than of his crime of conviction.”).
1. Necessary Facts

The outcome in *Jones* suggests two distinct facts that future petitioners must present to persuade the Fourth Circuit to expand the noncapital innocence exception to AEDPA’s statute of limitations: (1) sentencing pursuant to a habitual or career offender provision; and (2) a claim of factual, as opposed to legal, innocence.

First, a court must have sentenced the petitioner as a “habitual offender.” This term is rife with ambiguities. There is no expressly named “habitual offender statute,” although numerous statutory schemes include a defendant’s criminal history as part of the sentencing calculation. For instance, the U.S. Sentencing Guidelines require federal judges to include a defendant’s criminal history in determining the range of available sentences. Similarly, calculating a defendant’s sentence under North Carolina’s Structured Sentencing scheme involves totaling the defendant’s “points” based on prior convictions to determine his prior record level. This level, along with the offense class for the crime of conviction, controls the available sentencing range.

Other sentencing mechanisms emphasize the defendant’s prior convictions beyond simply including them as an element of the sentencing scheme. By exclusion, it is clear that these are the statutory schemes that the Fourth Circuit speaks of when referencing habitual and career offender sentencing provisions. One of these schemes is the federal career offender enhancement. A defendant may be treated as a career offender based on his prior commission and conviction of certain offenses when certain factors are present. If deemed a career offender, the defendant is subjected to a

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158. *Id.* at 587 (King, J., concurring).
161. *United States v. Jones*, 758 F.3d 579, 580, 587 (4th Cir. 2014) (King, J., concurring) (distinguishing the sentencing scheme used to sentence Jones, which merely took prior conviction into account, from true “habitual offender provisions”).
162. These factors are: (1) the convicted person must be eighteen or older at the time of the instant offense; (2) the instant conviction must be a felony crime of violence or felony controlled substance offense; and (3) the defendant must have at least two prior convictions for felony crime of violence or controlled substance offenses. *OFFICE OF GEN. COUNSEL, U.S. SENTENCING COMM’N, CRIMINAL HISTORY PRIMER* 7 (2013); see also *U.S. SENTENCING GUIDELINES MANUAL* § 4B1.1.
significantly enhanced sentence. The Armed Career Criminal Act ("ACCA") also provides for an enhanced sentence based on prior convictions and the convicted person’s presumed undeterrability from a life of crime.

Merely being sentenced under a statutory scheme that takes prior convictions into account is insufficient to invoke the noncapital sentence exception in the Fourth Circuit. This is one of the primary differences between Jones’s facts and those in prior cases where the exception has been invoked. Jones was not treated as a career offender or sentenced under the ACCA; rather, his prior state convictions were simply taken into account to calculate his appropriate sentencing range. The concurrence emphasizes this difference as one basis for declining to expand the exception in Jones.

Second, a petitioner attempting to expand the noncapital sentence exception must ground her claim in factual innocence of a prior conviction, which involves evidence showing that the petitioner did not in fact commit the crime, as opposed to legal innocence, which is based on a constitutional or procedural error at trial. This is consistent with the Fourth Circuit’s ruling in Mikalajunas, which restricts the noncapital sentence exception to those instances in which the petitioner presents a claim of factual innocence and prohibits its use when the petitioner asserts mere legal innocence. This is yet another distinction between Jones’s facts and those presented by previous petitioners who successfully invoked the noncapital sentence exception. While one of Jones’s prior convictions was vacated due to factual innocence, the other vacatur was granted due to constitutional

163. U.S. SENTENCING GUIDELINES MANUAL § 4B1.1. In addition to mandating an enhanced sentencing range, a defendant sentenced as a career offender must be considered as having a criminal history category of VI, regardless of what category would be appropriate absent treatment as a career offender. OFFICE OF GEN. COUNSEL U.S. SENTENCING COMM’N, supra note 162, at 8.


165. See 18 U.S.C. § 924(e) (2012). The ACCA applies when a defendant has been convicted of being a felon in possession of a firearm, § 922(g), and also has three prior convictions for any “violent felony or ... serious drug offense[].” § 924(e)(1). The ACCA mandates that eligible defendants be sentenced to at least fifteen years in prison due to their continued commitment to breaking the law. Id.

166. See Jones, 758 F.3d at 580.

167. Id. at 587 (King, J., concurring).

168. See United States v. Mikalajunas, 186 F.3d 490, 494 (4th Cir. 1999) (“[A] petitioner must demonstrate actual factual innocence of the offense of conviction, i.e., that petitioner did not commit the crime of which he was convicted; this standard is not satisfied by a showing that a petitioner is legally, but not factually, innocent.”).

169. Id.
errors at trial.\textsuperscript{170} Even if Jones had been sentenced under a career offender provision, the only basis for his request to expand the noncapital sentence exception would have been the conviction vacated for factual innocence.

In sum, a petitioner seeking to expand the noncapital sentence exception in the Fourth Circuit must base her request for habeas review on factual innocence of one or more of the prior convictions that formed the basis for her sentencing as a habitual or career offender.\textsuperscript{171} The petitioner must show that she did not in fact commit one of the crimes of which she was previously convicted; she will not be able to rely on legal innocence to expand the exception.\textsuperscript{172}

2. In the Interest of Justice: The Argument for Expanding the Noncapital Sentence Exception to AEDPA’s Statute of Limitations

While there are significant facial differences between the McQuiggin Court’s decision to expand the conviction innocence exception to AEDPA’s statute of limitations and any future decision by the Fourth Circuit to permit the noncapital sentence exception to do the same, the implications for fairness and justice that the two scenarios present are practical equivalents. A petitioner who is factually innocent of past crimes that formed the basis for his prison sentence should have habeas review available to him beyond the mere 365-day period permitted by AEDPA. Although allowing the noncapital sentence exception to apply to AEDPA’s statute of limitations might condone a lack of diligence in pursuing claims and add to federal courts’ already substantial caseload,\textsuperscript{173} failing to expand the exception allows individuals to be incarcerated on the basis of crimes that they did not commit. The balance of the scales of justice, Fourth Circuit precedent, and the purpose behind the innocence exceptions weigh in favor of expanding the noncapital sentence exception.

\textit{a. Fourth Circuit Precedent}

Allowing the noncapital sentence exception to override AEDPA’s statute of limitations would be consistent with Fourth Circuit precedent, which strikes a unique balance between liberal
application of the exception and complete refusal to recognize it. The Fourth Circuit is one of a handful of courts that has recognized and adopted the exception, as well as placed conditions on its application. Its decision to recognize the exception acknowledges that the incarceration of an individual for a crime she did not commit, whether it is the crime of conviction or a prior conviction, is simply unjust.

Moreover, the Jones majority’s claim that conviction and noncapital sentence innocence implicate “varying degrees of injustice” runs contrary to Fourth Circuit precedent. The Fourth Circuit has long insisted that imprisonment of an innocent person is a manifest injustice regardless of the type of innocence at issue. Recognizing that incarceration for a longer period of time than warranted is as much an injustice as incarceration for any length of time when none is warranted, the court has stated, “[t]hree years of a man’s life is not a trifling thing.” Three years of life in prison for a crime that the petitioner never committed and three years in prison added to a deserved sentence on the basis of a crime that the petitioner never committed are effectively the same—the end result is simply three years unjustly spent in prison. This common result in both conviction and noncapital sentence innocence cases lends strong credence to allowing both doctrines to overcome AEDPA’s statute of limitations.

b. The Purposes of Habeas Review and Fundamental Similarities

In addition to Fourth Circuit precedent, the stated purposes of habeas review also weigh in favor of applying the noncapital sentence

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174. As discussed supra Section I.B.3, the conditions that petitioners must meet before invoking the actual innocence of noncapital sentence exception make this court a prime candidate for expansion of the exception.
175. See supra Section I.B.3.
176. See United States v. Maybeck, 23 F.3d 888, 893 (4th Cir. 1994) (citing the Supreme Court’s expansion of the exception to the capital sentence context and applying the same logic to noncapital cases, stating that “[e]xcept for the obvious difference in the severity of the sentences, we see little difference between holding that a defendant can be innocent of the acts required to enhance a sentence in a death case and applying a parallel rationale in non-capital cases”).
178. See, e.g., Maybeck, 23 F.3d at 893 (recognizing the actual innocence of noncapital sentence exception).
179. United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996). In Ford, the Fourth Circuit vacated and remanded the appellant’s sentence to the district court with instructions to impose a shorter sentence because the court had improperly calculated the appellant’s prior conviction level, despite the fact that the appellant failed to object to this error during sentencing. Id.
exception to AEDPA’s statute of limitations. Habeas review was designed to thwart just the type of “unconstitutional loss of liberty” that the noncapital sentence exception prevents. After all, the central concept of the exception is that it should “appl[y] where a petitioner is ‘actually innocent’ of the crime of which he was convicted or the penalty which was imposed.” Although noncapital sentence innocence cases do not present facts in which the entirety of the sentence is wrongfully imposed, and the consequences of the improper sentence do not include death, it is contrary to our sense of justice to incarcerate an innocent individual for even a day longer than he deserves.

While the Supreme Court has recognized the equivalent nature of the conviction and sentence innocence exceptions only in the context of the death penalty, it rings true for noncapital sentence cases as well. Where a person is innocent of the prior convictions that serve as the basis of her sentence, she is “actually innocent” of that sentence. The same is true of a person who did not commit the aggravating factors that led to the imposition of the death penalty: he is “actually innocent” of his capital sentence. Although there is certainly more finality inherent in the death penalty, the basic principle remains the same. An individual should not be deprived of his liberty for a longer period of time or in a more extreme way when such an enhancement is unwarranted. To decide otherwise is an injustice and a failure to preserve the constitutional protection against unlawful incarceration guaranteed by the writ of habeas corpus.

Both the conviction and noncapital sentence innocence exceptions serve the fundamental purpose of habeas review because they attempt to rectify the same injustice: unconstitutional incarceration. Although a petitioner claiming noncapital sentence innocence is admittedly guilty of her crime of conviction, failure to apply the exception allows her to be incarcerated for some period of time on the basis of a crime she did not commit. This equivalent injustice alone is reason for expanding the noncapital sentence exception to instances in which petitioners who credibly claim factual innocence seek habeas review after the statute of limitations has expired. As in McQuiggin, these petitioners are potentially

182. See id.
183. See id; see also supra Section I.B.
184. See United States v. Maybeck, 23 F.3d 888, 893 (4th Cir. 1994).
incarcerated on an improper basis and should be entitled to review regardless of when they file their claims.

c. Individual Obstacles and the Convoluted Habeas Review Process

Another similarity between the conviction, capital sentence, and noncapital sentence exceptions is that each distinct doctrine functions within the same, complex system of habeas corpus. Sanctioning different treatment of the statute of limitations period depending on which exception a petitioner alleges is a failure to recognize the practical, and often harsh, reality of the habeas system.\(^{185}\)

Habeas petitioners must navigate a system of habeas review that is often maligned as far too convoluted. “Habeas procedures have come to resemble a maze of mirrors . . . .”\(^{186}\) Even trained attorneys must be acutely aware of the various timetables governing habeas and the intertwined statutory and judge-made intricacies of the successiveness doctrine.\(^{187}\) Giving petitioners only one year in which to file petitions for federal habeas review\(^{188}\) is already an arguably unrealistic deadline.\(^{189}\)

If the habeas system is deemed a complicated maze for practitioners, consider petitioners who navigate the system pro se.\(^{190}\) Many startling statistics on the prevalence of mental illness, low IQ scores, illiteracy, and below-average educational levels within the state and federal prison populations\(^{191}\) suggest that pro se petitioners

\(^{185}\) See Stone, 428 U.S. at 492–93 n.31.


\(^{187}\) See id.

\(^{188}\) 28 U.S.C. § 2244(d)(1) (2012). However, the one-year statute of limitations is tolled while the petitioner pursues any state appellate or habeas review proceedings. § 2244(d)(2).

\(^{189}\) Congress itself has recognized that habeas corpus law has become increasingly complex, for courts as well as for petitioners. H.R. REP. NO. 103-470, at 3 (1994) (“In recent years, the practice and procedures in Federal habeas corpus have become extremely complex—taking the resources of the Federal courts, delaying final adjudication of petitioners’ claims, and creating friction with the State courts.”). For a more complete discussion of the complicated and time consuming habeas process, see generally Mello & Duffy, supra note 186. While this article addresses these topics in the context of a previously proposed six-month time limit on state prisoners’ filing habeas petition claims after obtaining counsel, its dialogue concerning the pitfalls of strict time limits on habeas review is instructive for AEDPA’s one-year statute of limitations as well.

\(^{190}\) Mello & Duffy, supra note 186, at 489–90 (“The doctrine can ‘operate as a trap for the uneducated and indigent pro se prisoner-applicant.’”).

\(^{191}\) For instance, a 1982 study in Florida revealed that more than half of the state’s inmates were “functionally illiterate.” Id. at 481. For a more complete discussion of the
face serious obstacles when seeking habeas review. As the Fourth Circuit itself noted, “[c]ertainly a prisoner, unversed in the law and the methods of legal research, will need more time or more assistance than the trained lawyer in exploring his case.”192 AEDPA’s one-year statute of limitations places these petitioners under an unreasonable time crunch, especially given the complicated nature of habeas law and the institutional barriers faced by so many inmates. Allowing conviction innocence claims to overcome the statute of limitations mitigates this problem, but refusing to do the same in sentence innocence cases results in inequitable treatment of inmates who face the same obstacles to asserting their constitutional rights.

In addition, it may be even more difficult for an inmate to discover that he has a cause of action for noncapital sentence innocence than it is for him to comprehend that conviction innocence renders a sentence wrongful. The concept of being entirely innocent of a crime is presumably easier to grasp than an understanding that the law imposes enhanced sentences on those with prior convictions and that innocence of a prior conviction could result in a reduced sentence. In other words, innocence of a prior conviction requires a degree of knowledge of the law and sentencing schemes, whereas being entirely innocent of a crime of conviction gives rise to a sense of injustice even absent knowledge of the legal system. A petitioner without legal counsel may be unaware of and slower to understand that there are options available to vacate prior convictions and then seek habeas review, particularly within a one-year period.193 This level of difficulty is only exacerbated if the petitioner is also dealing with one of the common barriers, such as mental illness or illiteracy, mentioned above. These petitioners, just like their wrongfully convicted counterparts, should have access to a gateway through AEDPA’s statute of limitations.

Fourth Circuit precedent, the purposes of habeas review, the fundamental similarities between conviction and sentence innocence claims, and the institutional and individual obstacles to habeas review weigh strongly in favor of allowing credible noncapital sentence

192. Williams v. Leeke, 584 F.2d 1336, 1339 (4th Cir. 1979), cert. denied, 442 U.S. 911 (finding that stringent restrictions on the amount of time prisoners could spend in the prison library were within the bounds of providing prisoners with meaningful access to the courts only if prisoners were given access to trained research assistants).

193. See id.
inocence claims to be brought even after AEDPA’s statute of limitations expires.

IV. CONTEMPLATING AND ADDRESSING COUNTERARGUMENTS

While strong fairness and justice concerns weigh in favor of creating an exception to AEDPA’s statute of limitations on the basis of noncapital sentence innocence, such an exception would admittedly present practical and administrative challenges. Many of these challenges can be minimized or eliminated by imposing conditions on the exception’s application. The challenges that remain are simply the unavoidable and warranted consequences of allowing petitioners to access the judicial system to remedy their unjust sentences. This Part addresses several concerns raised by opponents to expanding the exception and then proposes solutions to mitigate these concerns.

A. Undue Expansion of the Original Innocence Exception

The most significant argument against expanding the noncapital sentence exception is that doing so overly broadens the scope of what was intended to be a “‘narrow’ exception.”194 In numerous cases, courts have emphasized that the innocence exception is only to be applied when there is evidence of the petitioner’s innocence such that no reasonable jury could have convicted her of the crime.195 While it is true that expanding the noncapital sentence exception would be a further expansion of the original conviction innocence exception, this expansion is warranted on the basis of fairness and justice. Although any expansion of the exception will make it available to a greater number of petitioners, the exception can be construed narrowly and imbued with requirements that are just as stringent as those imposed on conviction innocence cases. Such a construction mitigates concerns for the courts’ scarce resources and better preserves the original intent of the innocence exception as a limited doctrine.

195. See, e.g., McQuiggin v. Perkins, 133 S. Ct. 1924, 1933 (2013) (“The miscarriage of justice exception, we underscore, applies to a severely confined category: cases in which new evidence shows ‘it is more likely than not that no reasonable juror would have convicted [the petitioner].’ ” (alteration in original) (quoting Schlup v. Delo, 513 U.S. 298, 329 (1995))); Schlup v. Delo, 513 U.S. 298, 329 (1995) (“A petitioner does not meet the threshold requirement unless he persuades the district court that, in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.”).
For example, the rule for the noncapital sentence exception could include a prejudice requirement. This requirement could state that, for the noncapital sentence exception to apply, there can be no overlap in the relevant sentencing guidelines ranges: the sentence the defendant improperly received and the range in which he should have been sentenced. In other words, for the noncapital sentence exception to be available, the appropriate sentence (without any improperly included prior convictions) must be a length of time that is lower than the minimum sentence available in the guidelines range in which the petitioner was wrongfully sentenced.\textsuperscript{196}

Such a requirement would keep petitioners like Jones from accessing the exception. In \textit{Jones}, the petitioner’s sentencing range, taking into account his later-vacated crimes, was 360 months to life in prison.\textsuperscript{197} Had the later-vacated crimes been left out of the sentencing calculation, his sentencing range would have been either 292 to 405 months (if both prior convictions were omitted) or 324 to 405 months (if only one prior conviction was omitted).\textsuperscript{198} Jones could have, in the court’s discretion, been given the same 360-month sentence even if one or both of his prior convictions were excluded from the sentencing calculation. Under a prejudice rule, the fact that there was a possibility for Jones to be sentenced to the incarceration period he ultimately received would mean that he suffered no demonstrable prejudice and would not be eligible for application of the noncapital sentence exception. A prejudice requirement would, however, remedy the sentences of prisoners like the petitioner in \textit{Maybeck}. There, had the court not erred by improperly sentencing the petitioner as a career offender, his sentencing range would have been bounded by a maximum sentence lower than the minimum sentence in the career offender range in which he was improperly placed.\textsuperscript{199}

\textsuperscript{196} Use Appendix I to follow along with this concrete example. A prejudice requirement would allow a petitioner sentenced to forty-six to fifty-seven months based on a criminal history category of IV and an offense level of nineteen to use the noncapital sentence exception to achieve habeas review and resentencing if the removal of a prior conviction of which he was factually innocent would reduce his criminal history category to II and, thus, reduce his properly available sentencing range to thirty-three to forty-one months. The exception would apply here because the high end of this reduced sentencing range does not reach the low end of the original sentencing range.

\textsuperscript{197} United States v. Jones, 758 F.3d 579, 581 (4th Cir. 2014).

\textsuperscript{198} Opening Brief of Appellant Torrance Jones, \textit{supra} note 122, at 4.

\textsuperscript{199} Had the petitioner been properly sentenced, the maximum sentence in the appropriate range would have been 165 months. With the sentencing court’s error of classifying the petitioner as a career offender, the minimum sentence within the range was 168 months. United States v. Maybeck, 23 F.3d 888, 894 (4th Cir. 1994).
Setting a high evidentiary bar is another means of ensuring that the noncapital sentence exception is not unduly expanded. In conviction innocence cases, the Supreme Court requires the petitioner to present clear and convincing evidence that no reasonable jury would have found her guilty had the newly discovered evidence been presented at trial. Similarly, for the capital sentence exception to apply, the petitioner must prove that no reasonable jury could have found that he committed the aggravating factors that resulted in the imposition of the death penalty. To satisfy this proposed heightened evidentiary threshold, petitioners would likely need to present some concrete evidence—more than simply a statement or a single witness announcing the petitioner’s innocence. DNA, other physical evidence, and evidence of vacaturs already granted in the jurisdiction of conviction would likely satisfy this standard. This heightened evidentiary standard is likely to reduce the feared flood of litigation resulting from an expansion of the exception to AEDPA’s statute of limitations.

An additional way to condition application of the exception and avoid its undue expansion is to limit the eligible petitioners to those sentenced under the Armed Career Criminal Act as career offenders. According to a U.S. Sentencing Commission report from 2012, of the 84,173 cases reported to the Commission in 2012, only 2232 involved defendants sentenced as career offenders. Allowing only career offenders to use the noncapital sentence exception would drastically reduce the number of petitioners able to use the exception and the types of instances in which it could be invoked, keeping it nearer its original scope. A petitioner limit is already embedded in

200. See, e.g., Sawyer v. Whitley, 506 U.S. 333, 336 (1992) (“We . . . hold that to show ‘actual innocence’ one must show by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.”). Congress has also selected the clear and convincing evidence standard as the evidentiary standard in the instances in which it has codified a modified miscarriage of justice exception, as in the case of second or successive petitions. 28 U.S.C. § 2244(b)(2)(B)(ii) (2012).

201. The Fourth Circuit has already presumably done just this, according to the reasoning in Jones. United States v. Jones, 758 F.3d 579, 584 (4th Cir. 2014); see also supra Section I.C.3. Again, placing this limit on the type of improperly imposed sentences eligible for review under the noncapital sentence exception beyond the statute of limitations period is not an attempt at achieving perfect justice—such a proposal would include no technical or procedural limits. Rather, this proposal is an attempt to suggest plausible mechanisms for assuaging opponents’ concerns that expanding the noncapital sentence exception would result in an unbearable flood of litigation.

Fourth Circuit precedent, making the circuit a particularly ideal setting for expanding the exception in a manner that preserves its original intent as an exception of limited application. Under this scheme, only those petitioners sentenced as career offenders because of one or more prior convictions of which they were factually innocent would be eligible for application of the exception.

B. Administrability and Finality

In addition to concerns over expanding the exception beyond its original purpose, there are potentially adverse administrative implications arising from allowing the noncapital sentence exception to bypass AEDPA’s statute of limitations. By widening the actual innocence gateway, courts may open themselves up to a flood of litigation. If there is effectively no statute of limitations on these claims, then the court will be required to consider every habeas petition brought on the basis of conviction or noncapital sentence innocence, no matter how long the petitioner knew about the facts on which the claim is based. After McQuiggin, some suggest that “each time an untimely petitioner claims innocence—and how many prisoners asking to be let out of jail do not?—the district court will be obligated to expend limited judicial resources wading into the murky merits of the petitioner’s innocence claim.” This would divert the courts’ time, funds, and energy away from “primary disputes” and toward adjudicating habeas petitions.

These administrative problems will, admittedly, be more pronounced if the actual innocence gateway through AEDPA’s statute of limitations is opened to noncapital sentence innocence claims. Yet, this Comment argues that there is no higher use of our justice system than to uphold the right to be free from unconstitutional incarceration. There can be no better use of our judicial resources, scarce though they are, than to ensure that innocent persons are not deprived of their liberty, to correct unjust misapplications of the law, and to promote public confidence in the judiciary by acknowledging and righting past wrongs.

203. Jones, 758 F.3d at 587 (finding that, because Jones “was not sentenced as a habitual offender[,]” he could not take advantage of the noncapital sentence exception).
204. See United States v. Mikalajunas, 186 F.3d 490, 494–95 (1999) (declining to broaden Maybeck’s holding to apply the exception whenever a guideline is misapplied).
205. Id.
208. U.S. CONST. art. I, § 9, cl. 2 (establishing the right of habeas review).
209. See United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996).
At a more practical level, the cost to a court of holding a resentencing hearing is less than “the annual cost to taxpayers of keeping people in prison who should no longer be there.” While maintaining prisoners in prison facilities during the resentencing process certainly continues to impose a burden on the fisc, presumably the resentencing process will be much shorter, at least in most cases, than allowing the wrongfully sentenced prisoner to finish out her sentence. Furthermore, there are means of protecting scarce judicial resources other than refusing to expand the noncapital sentence exception. For instance, a postconviction bargaining or mediation process could be implemented. Such a process would allow prisoners claiming conviction or sentence innocence to bring their evidence to the Attorney General or District Attorney and engage in a dialogue over whether the sentence should be reduced. There are certainly instances in which both parties agree that the petitioner has been wrongfully convicted or improperly sentenced; especially in these cases, the parties could agree on a solution to the improperly imposed enhancement and present the results of the negotiation (presumably a reduced sentence) to the court for approval. Instances of successful mediation would eliminate the need for courts to expend resources hearing evidence, making findings, and rendering a judgment. This may be a practically viable model today when wrongful conviction watchdog groups and prosecutors have begun to work toward a common goal of identifying and correcting wrongful convictions.

In addition to administrative concerns, expanding the noncapital sentence exception could undermine finality. This consequence, too, requires a balancing act—weighing the legitimacy that finality lends the court system against the need to correct injustices like wrongful conviction and unjust sentencing. As former Fourth Circuit Judge Murnaghan wrote, “I do not believe that the state’s interest in finality outweighs even one year of a man’s life.” While it is true that

210. Spencer v. United States, 727 F.3d 1076, 1091 (11th Cir. 2013).
211. See, e.g., United States v. Mikalajunas, 186 F.3d 490, 497 (1999) (“All agree that, without a doubt, Appellees do not qualify for the sentencing enhancement which they received.”) (Murnaghan, J., dissenting).
212. For example, prosecutors’ offices in Los Angeles, Brooklyn, Dallas, Manhattan, and Washington, D.C. have formed wrongful conviction units solely to investigate and remedy wrongful convictions. Marisa Gerber, L.A. County D.A. Jackie Lacey to Unveil Details on Wrongful-Conviction Unit, L.A. TIMES (June 29, 2015, 6:00 AM), http://www.latimes.com/local/lanow/la-me-ln-conviction-integrity-unit-20150629-story.html [http://perma.cc/M9FE-Z77S].
213. Mikalajunas, 186 F.3d at 497 (Murnaghan, J., dissenting).
finality is an ideal toward which the justice system should strive, it provides no excuse for allowing an individual to be incarcerated for a crime that she did not commit. And, in situations in which the petitioner has been properly convicted (both of prior crimes and the crime at issue) and accurately sentenced, finality will be unaffected by an expansion of the noncapital sentence exception.

C. Separation of Powers

As Justice Scalia recognized and criticized in McQuiggin, creating, or in this case expanding, a judge-made exception to overcome a legislatively created statute of limitations presents separation of powers concerns. Until McQuiggin, judge-made exceptions in habeas law had only been permitted to overcome judge-made bars—the court overruling the court itself. Using the exception to undermine Congress’s actions could be viewed as the judicial branch overstepping its bounds by undermining the stated intent and effect of legislation. Although separation of powers is a serious constitutional concern, the need for comity and unyielding respect for the boundaries between the branches of federal government must be balanced with other issues of grave constitutional concern, such as the unconstitutional incarceration of innocent individuals. The Court has stated that the appropriate balance gives greater weight to individual liberty when there is an unconstitutional taking of life or liberty through unjust incarceration, indicating that a separation of powers objection should yield in the face of a credible conviction or sentence innocence claim. Furthermore, petitioning the legislature would likely be ineffective in this particular context. The issue of wrongful incarceration is unlikely to be at the forefront of broad public concern, and those who are most detrimentally affected by the problem—incarcerated felons with enhanced sentences based on their

214. McQuiggin v. Perkins, 133 S. Ct. 1924, 1937 (2013) (“Never before has the Court applied the exception to circumvent a categorical statutory bar to relief.”) (Scalia, J., dissenting).

215. Id.

216. Id. at 1938 (stating that the “free-and-easy approach” of modifying judge-made doctrines to overcome judge-made procedural bars at will “has no place where a statutory bar to habeas relief is at issue”).

217. See Schlup v. Delo, 513 U.S. 298, 324 (1995) (noting the importance of balancing the acknowledged need for comity among the various branches of government with the “individual interest in justice that arises in the extraordinary case”).

218. See Engle v. Isaac, 456 U.S. 107, 135 (1982) (insisting that, though important, the emphasis on comity “must yield to the imperative of correcting a fundamentally unjust incarceration”).
criminal history—are often disenfranchised and unable to vote for legislators likely to raise the issue in Washington.\textsuperscript{219}

Furthermore, Congress likely did not intend to abridge the courts’ liberal treatment of innocence claims when it passed AEDPA and its accompanying statute of limitations.\textsuperscript{220} The Supreme Court and lower courts have applied the innocence exceptions after AEDPA’s passage without Congress issuing corrective legislation.\textsuperscript{221} Some argue that Congress did address innocence in its codification of the statute of limitations. They suggest that the statute of limitations supplants the traditional innocence exceptions as created and applied by courts.\textsuperscript{222} According to proponents of this argument, AEDPA does not foreclose review based on innocence claims, but simply requires that these claims be brought within one year of the time at which the facts underlying those claims could reasonably have been discovered.\textsuperscript{223}

Yet, as Justice Ginsburg made clear in \textit{McQuiggin}, the statute of limitations is not specific to innocence claims.\textsuperscript{224} Section 2244(d)(1)(D) allows the statute of limitations period to begin running on “the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.”\textsuperscript{225} There is no limitation on this provision that allows it to apply only when a petitioner claims actual innocence.\textsuperscript{226} Additionally, the innocence exceptions do not contain a diligence requirement, unlike § 2244.\textsuperscript{227} Rather than replacing the innocence exceptions with § 2244’s modified, heightened, and less specific standard, Congress likely intended for the innocence exceptions to

\textsuperscript{219}. \textit{Sentencing Project, Felony DisenfranchiseMENT LAWS IN THE UNITED STATES} 1 (Apr. 2014) (“[Forty-eight] states and the District of Colombia prohibit voting while incarcerated for a felony offense.”).

\textsuperscript{220}. \textit{McQuiggin}, 133 S. Ct. at 1932 (“The miscarriage of justice exception, our decisions bear out, survived AEDPA’s passage.”).

\textsuperscript{221}. See, e.g., \textit{Calderon v. Thompson}, 523 U.S. 538, 558 (1998) (“The miscarriage of justice standard is altogether consistent . . . with AEDPA’s central concern that the merits of concluded criminal proceedings not be revisited in the absence of a strong showing of factual innocence.”).

\textsuperscript{222}. See, e.g., \textit{McQuiggin}, 133 S. Ct. at 1939 (Scalia, J., dissenting).

\textsuperscript{223}. See \textit{28 U.S.C. § 2244(d)(1) (2012)} (explaining the moments at which AEDPA’s one-year statute of limitations begins to run for various actual situations).

\textsuperscript{224}. \textit{McQuiggin}, 133 S. Ct. at 1932–33.

\textsuperscript{225}. § 2244(d)(1).

\textsuperscript{226}. \textit{McQuiggin}, 133 S. Ct. at 1933 (explaining that the continued application of the miscarriage of justice exception does not render § 2254(d)(1)(D) superfluous and therefore violate accepted principles of statutory interpretation).

\textsuperscript{227}. \textit{See id.} (finding that § 2244(d)(1)(D) is “modestly more stringent [than the miscarriage of justice exception] (because it requires diligence)”)}.
have continued efficacy under appropriate factual circumstances.\textsuperscript{228} Courts have historically exercised substantial control over habeas law, and this traditional equitable power can only be overcome by the “clearest command” from Congress.\textsuperscript{229} While AEDPA may contain alternative mechanisms and timelines governing habeas review, there is no clear command that federal courts abandon the established innocence exceptions.\textsuperscript{230} Thus, courts should continue to apply and expand the exceptions as appropriate until Congress issues a clear command to the contrary.

\textbf{D. Jones’s Foreclosure of Applying McQuiggin in the Sentence Innocence Context}

Though the reasons for and means of responsibly extending \textit{McQuiggin}’s reasoning to the noncapital sentence exception abound, the Fourth Circuit foreclosed this particular route of expansion through its broad language in \textit{Jones}.\textsuperscript{231} However, \textit{McQuiggin} is not the sole route to achieve the exception’s expansion. In particular, \textit{United States v. Begay},\textsuperscript{232} provides an alternate means of bypassing the \textit{McQuiggin} dead-end created by \textit{Jones}. In \textit{Begay}, the Supreme Court redefined many crimes that had previously been classified as crimes of violence as outside the definition of “crime of violence” under the U.S. Sentencing Guidelines’ career offender provision.\textsuperscript{233}

The Seventh Circuit used \textit{Begay} as the basis for postconviction relief in the face of procedural bars to habeas review in \textit{Narvaez v. United States}.\textsuperscript{234} Applying \textit{Begay}, the Seventh Circuit held that a petitioner who was wrongfully sentenced as a career offender because of the improper classification of one or more of his prior convictions as crimes of violence could use the noncapital sentence exception to overcome procedural bars to collateral review.\textsuperscript{235} Seventh Circuit

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} at 1934.
\item \textsuperscript{229} \textit{Holland v. Florida}, 560 U.S. 631, 646 (2010).
\item \textsuperscript{230} \textit{McQuiggin}, 133 S. Ct. at 1934.
\item \textsuperscript{231} United States v. Jones, 758 F.3d 579, 586 (4th Cir. 2014) (“At bottom, we conclude that \textit{McQuiggin} does not extend to cases in which a movant asserts actual innocence of his sentence, rather than of his crime of conviction.”).
\item \textsuperscript{232} 553 U.S. 137 (2008).
\item \textsuperscript{233} See \textit{Begay v. United States}, 553 U.S. 137, 145 (2008); see also \textit{UNITED STATES SENTENCING GUIDELINES MANUAL} \textsection 4B1.1 (U.S. SENTENCING COMM’N 2015).
\item \textsuperscript{234} 674 F.3d 621 (7th Cir. 2011).
\item \textsuperscript{235} For a thorough discussion of \textit{Narvaez} and its application of \textit{Begay}, see Greg Siepel, \textit{The Wrong Kind of Innocence: Why United States v. Begay Warrants the Extension of “Actual Innocence” to Include Erroneous, Noncapital Sentences}, 116 W. VA. L. REV. 665 (2013). This article also addresses the virtues of using \textit{Begay} to recognize the actual innocence of noncapital sentence in circuits that have not yet done so. \textit{Id.} at 696–99.
\end{itemize}
petitioners whose sentences took into account prior crimes of violence that were later deemed outside the scope of that category by Begay can now seek habeas review using the noncapital sentence exception without concern for untimeliness or successiveness.\(^\text{236}\) Although this rule is limited in a number of ways,\(^\text{237}\) its creation “seems to suggest that serving an erroneously enhanced sentence is equivalent to being punished for a non-existent crime.”\(^\text{238}\)

While Narvaez is limited in scope to procedural bars, its reasoning could be applied to AEDPA’s statute of limitations in a particular set of factual situations. For those petitioners whose sentences were rendered unlawful by Begay, the court could recognize that their noncapital sentence innocence should allow them to seek habeas review after the statute of limitations expires. Otherwise, these prisoners will continue to serve “sentences that are clearly erroneous” in light of Begay.\(^\text{239}\) While such a rule would not aid petitioners whose sentences were not imposed under the crime of violence rule,\(^\text{240}\) it would begin to reform a system that currently leaves wrongfully sentenced inmates little recourse. Just as the Seventh Circuit applied Begay in Narvaez, the Fourth Circuit could use Begay to expand the noncapital sentence exception to the statute of limitations in all instances where a habeas petitioner was previously sentenced under the now void definition of “crime of violence.” This is not a perfectly just or ideal solution because it excludes petitioners who are innocent of prior convictions that were not erroneously classified as crimes of violence under the ACCA. It is, however, a step in the right direction.

CONCLUSION

Whether a person is incarcerated for a crime that she did not commit, or is imprisoned for a longer period of time based on a crime that she did not commit, the result is the same—she is wrongfully

\(^{236}\) See id. at 687–88.
\(^{237}\) For instance, the rule only applies to petitioners who were sentenced before the Supreme Court’s ruling in United States v. Booker, 543 U.S. 220 (2005), which held that the United States Sentencing Guidelines are merely advisory. Hawkins v. United States, 706 F.3d 820, 826–27 (7th Cir. 2013). The rule also applies only to petitioners whose sentences exceed the statutory maximum allowable in the proper range—the one in which they would have been sentenced had one or more of their prior convictions not unlawfully been taken into account. See Narvaez, 674 F.3d at 630.
\(^{238}\) See Siepel, supra note 235, at 687.
\(^{239}\) See id. at 700.
sentenced and unconstitutionally incarcerated. In *McQuiggin*, the Supreme Court recognized that AEDPA’s statute of limitations must take a backseat when a petitioner presents a convincing claim of conviction innocence. The same reasoning rings true in sentence innocence claims: when a petitioner presents a convincing claim that he is innocent of a prior conviction that formed the basis of his sentence, he should be able to access the courts and pursue a proper sentence. Although a perfectly just system would impose no conditions on this access to relief from wrongfully imposed noncapital sentences, limits like a prejudice requirement and a heightened evidentiary standard could be imposed to assuage the concerns of those who believe that expanding the exception will result in a crippling flood of frivolous claims.\footnote{241. See supra Part IV.}

Expanding the noncapital sentence exception to AEDPA’s statute of limitations will certainly entail increased litigation and administrative obstacles. Yet,

\[\text{[w]e cannot casually ignore [unjust incarceration] because of an overly strict adherence to technical requirements. No court of justice would require a man to serve… undeserved years in prison when it knows that the sentence is improper. The fairness, integrity, and public reputation of our judicial system demand that we correct [these] sentence[s].}^{242}\]

We should abandon the illusion that there are varying degrees of injustice when it comes to wrongfully imposed sentences. The Fourth Circuit, with its pre-existing conditions on the noncapital sentence exception, is a good place to start. The court has an opportunity to continue its progressive trend of recognizing the basic commonality between conviction innocence and sentence innocence claims. Doing so would not only set a tone that could reverberate nationwide, but would also achieve a just result for prisoners currently serving wrongfully imposed sentences.

\footnote{242. United States v. Ford, 88 F.3d 1350, 1356 (4th Cir. 1996).}
2016] VARYING DEGREES OF INNOCENCE? 1035

APPENDIX I: U.S. SENTENCING GUIDELINES SENTENCING TABLE

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TRAVIS S. HINMAN**


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