HABEAS CORPUS — FEDERAL SENTENCING — ELEVENTH CIRCUIT HOLDS MISAPPLICATION OF "CAREER OFFENDER" ENHANCEMENT NOT COGNIZABLE UNDER 28 U.S.C. § 2255. — *Spencer v. United States*, 773 F.3d 1132 (11th Cir. 2014) (en banc).

Habeas corpus requires difficult judgments. Suppose a federal convict appears for sentencing, and because of his criminal past he is classified as a "career offender" under the advisory United States Sentencing Guidelines. That designation triggers an especially harsh recommended sentence, which his judge chooses to accept. But then, some time later, controlling law changes, and the inmate would no longer qualify as a "career offender" if he were sentenced today. Should he be given another shot at sentencing? Recently, in *Spencer v. United States*,[1] a deeply divided Eleventh Circuit, sitting en banc, said no. The 5–4 majority withheld relief because the petitioner's initial sentence was and remained below the applicable statutory maximum, because the conduct that landed him in prison was still illegal, and because none of the convictions used to enhance his sentence had been vacated.[2] The Eleventh Circuit is the fourth appellate court to consider this issue in the past four years, and while each court has ultimately denied relief, the question has been comparably divisive at every turn.[3] Here, the Eleventh Circuit was right to deny the petition, but its reasoning would have been more compelling had it been more deeply rooted in the principles underlying habeas review and the purposes the Great Writ is designed to serve. Specifically, the majority should have explained that Spencer's petition was out of joint with those principles and purposes because it relied on an intervening change in law and because of the serious remedial implications that would follow if Spencer were allowed to prevail. Had the court explored the important conceptual and remedial implications that crop up when a habeas petition depends on an intervening change in law, it would have enriched the analysis and also would have cast the precedents in a new light more helpful to the majority.

In 2007 Kevin Spencer pleaded guilty in federal court to distributing crack cocaine.[4] This was not his first offense. The prior four years had seen Spencer plead guilty to eight different crimes, including

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[1] 773 F.3d 1132 (11th Cir. 2014) (en banc).

[2] *Id.* at 1135, 1139.

[3] *See* Whiteside v. United States, 775 F.3d 180 (4th Cir. 2014) (en banc) (reversing panel decision that had granted petitioner's claim 2–1, Whiteside v. United States, 748 F.3d 541 (4th Cir. 2014), and rejecting petitioner's claim as time barred, 12–3); Hawkins v. United States, 706 F.3d 820 (7th Cir.) (rejecting petitioner's claim 2–1), *supplemented*, 724 F.3d 915 (7th Cir. 2013); Sun Bear v. United States, 644 F.3d 700 (8th Cir. 2011) (en banc) (rejecting petitioner's claim 6–5).

[4] *Spencer*, 773 F.3d at 1135; *see also id.* at 1149 (Martin, J., dissenting).

one for selling cocaine and one for felony child abuse.[5] (When Spencer was eighteen, he had sexual intercourse with a fourteen-year-old girl.[6])

Spencer's latest drug conviction carried a statutory maximum sentence of twenty years in prison.[7] Running Spencer through the federal sentencing guidelines,[8] the district court concluded that Spencer's previous drug conviction and his child abuse conviction made him a "career offender."[9] To be a career offender, a defendant must stand convicted of a crime of violence or a controlled substance offense, and must have at least two prior felony convictions for crimes of violence or controlled substance offenses.[10] That designation enhanced Spencer's recommended sentence dramatically, propelling his advisory guidelines range from 70–87 months to 151–188 months.[11] Ultimately, Spencer's judge sentenced him to 151 months in prison.[12]

At sentencing, Spencer objected that he should not be treated as a career offender, specifically arguing that his child abuse conviction should not count as a "crime of violence." The district court rejected Spencer's claim — correctly, under then-settled circuit law — and on direct appeal an Eleventh Circuit panel unanimously affirmed.[13]

But then, two weeks later, the Supreme Court handed down *Begay v. United States*,[14] an unrelated case that narrowed the definition of "violent felony" under the Armed Career Criminal Act of 1984[15] (ACCA) by holding that drunk driving was not "violent, aggressive, and purposeful" enough to make the cut.[16] Crucially, the ACCA defines "violent felony" in nearly the same terms that the career-offender provision uses to define "crime of violence."[17] Spencer reasoned that after *Begay*'s "change in controlling law"[18] his child abuse conviction would no longer be counted a crime of violence — and thus, if he were resentenced, he would no longer be treated as a career offender.[19]

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[5] *Id.* at 1135 (majority opinion).

[6] *Id.* at 1136.

[7] *Id.* at 1143.

[8] The guidelines spit out a recommended sentence (often a range of prison time) that the judge must take into consideration but is also free to reject. *See id.* at 1142.

[9] *Id.* at 1136.

[10] U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) (2014).

[11] *Spencer*, 773 F.3d at 1156 (Jordan, J., dissenting).

[12] *Id.* at 1136 (majority opinion).

[13] *Id.*; *see also* United States v. Spencer, 271 F. App'x 977 (11th Cir. 2008).

[14] 553 U.S. 137 (2008).

[15] 18 U.S.C. § 924(e) (2012).

[16] *Begay*, 553 U.S. at 148.

[17] *Spencer*, 773 F.3d at 1136–37.

[18] Spencer v. United States, 727 F.3d 1076, 1096 (11th Cir. 2013).

[19] *Spencer*, 773 F.3d at 1137.

So Spencer filed a habeas petition under 28 U.S.C. § 2255.[20] He claimed that the district court made an "error" in sentencing him as a career offender. Or, more precisely, he argued "that *Begay* applies retroactively to his sentence and makes clear that felony child abuse is not a crime of violence" under the career-offender enhancement.[21] He asked the district court to vacate his sentence and to give him a new one, only this time without the career-offender tag. But because the error he alleged did not implicate any of his constitutional rights (or the jurisdiction of the sentencing court),[22] Spencer could win relief only if he could prove that the alleged error amounted to a "fundamental defect which inherently results in a complete miscarriage of justice."[23]

The district court denied Spencer's motion.[24] A panel of the Eleventh Circuit — recognizing that *Begay* effected a "change in controlling law" — unanimously reversed,[25] but the full court granted en banc review. After rehearing en banc, the Eleventh Circuit voted 5–4 that Spencer was not entitled to a new sentencing even if *Begay* would peel off the career-offender label under the advisory guidelines.

Judge William Pryor wrote for the majority.[26] His "miscarriage of justice" analysis closely tracked the small number of Supreme Court cases that appeared to be on point. The Court first articulated this test in 1962[27] and has expressly applied it five times,[28] granting relief only once. The lone winner was *Davis v. United States*,[29] in 1974. Davis was duly convicted and sentenced, but then he alleged that a change in circuit law decriminalized the conduct that put him behind bars.[30] Clearly, Spencer's allegations leave him far from Davis's hopper. Even after *Begay*, selling crack cocaine is still very much illegal.

The majority placed heavy emphasis on *United States v. Addonizio*,[31] from 1979. Addonizio's judge gave him ten years in pris-

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20 Section 2255(a) (2012) allows a federal inmate to seek collateral review of his custody.

21 *Spencer*, 773 F.3d at 1137.

22 *See id.* at 1145 (Wilson, J., dissenting).

23 *See id.* at 1135 (majority opinion) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)) (internal quotation marks omitted). The breadth of § 2255, which lets petitioners allege a "violation of the Constitution *or laws* of the United States," 28 U.S.C. § 2255(a) (emphasis added), calls for a winnowing mechanism like the "miscarriage of justice" test. *See Hill*, 368 U.S. at 429.

24 *Spencer*, 773 F.3d at 1137.

25 Spencer v. United States, 727 F.3d 1076, 1076, 1096, 1100 (11th Cir. 2013).

26 Judge Pryor was joined by Chief Judge Ed Carnes and Judges Tjoflat, Hull, and Marcus.

27 *Hill*, 368 U.S. at 428.

28 See Reed v. Farley, 512 U.S. 339, 348 (1994) (plurality opinion); United States v. Addonizio, 442 U.S. 178, 185 (1979); United States v. Timmreck, 441 U.S. 780, 783 (1979); Davis v. United States, 417 U.S. 333, 346 (1974); *Hill*, 368 U.S. at 428. More recently, *Peguero v. United States*, 526 U.S. 23 (1999), involved facts nearly identical to *Hill* and *Timmreck*. *Peguero* cited both cases en route to denying relief, *id.* at 28, but did not explicitly mention the "miscarriage of justice" test.

29 417 U.S. 333.

30 *See id.* at 346–47.

31 442 U.S. 178.

on, all the while expecting the Parole Commission to release him after three and a half or four.[32] But then the Commission "markedly changed its policies,"[33] and so Addonizio was condemned to serve a much larger fraction of his original term. Addonizio filed a habeas petition seeking a reduced sentence; his trial judge granted it, but the Supreme Court reversed, explaining among other things that the original ten-year sentence "was and is a lawful one,"[34] in part because it remained "within the statutory limits."[35] This line of reasoning all but doomed Spencer in the eyes of the majority,[36] for the same could be said of his 151-month sentence: *Begay* left the governing twenty-year statutory maximum unchanged; his prison term thus remained within the bounds marked out by Congress.[37] Habeas relief lay out of reach.

Next, the majority turned its attention to *Johnson v. United States*,[38] a 2005 Supreme Court decision that formed the rallying point for each of the dissents. *Johnson* involved a federal prisoner who had been sentenced as a career offender, but whose predicate state convictions were later vacated, rendering him no longer eligible for the enhancement.[39] Given those factual developments, the Supreme Court said (in dicta) that Johnson would likely deserve a new sentence.[40] But, the *Spencer* majority reasoned, unlike Johnson's past infractions, Spencer's child-abuse conviction was still entirely valid — notwithstanding its current, more favorable treatment under the guidelines — and it would still be taken into consideration if he were resentenced.[41]

Summing up its view of the case law, the majority concluded that "[w]hen a federal prisoner, sentenced below the statutory maximum, complains of a sentencing error and does not prove either actual innocence of his crime or the vacatur of a prior conviction, the prisoner cannot satisfy the demanding standard that a sentencing error resulted in a complete miscarriage of justice."[42]

Looking beyond the precedents, the majority pointed out that none of the dissenters had even attempted to lay down a principle that could

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[32] *Id.* at 183.

[33] *Id.* at 182.

[34] *Id.* at 187.

[35] *Id.* at 186.

[36] Said the court, "[w]e lack the authority to provide Spencer relief. Even if he is not a career offender, his sentence is lawful." *Spencer*, 773 F.3d at 1140 (citing *Addonizio*, 442 U.S. at 186–87).

[37] *See id.* at 1138. Had *Begay* dropped the applicable statutory maximum below 151 months, the majority implied, then Spencer would be entitled to relief. *See id.* at 1143.

[38] 544 U.S. 295 (2005).

[39] *Id.* at 300–01.

[40] *Id.* at 303. The Court then denied him relief on statute-of-limitation grounds. *Id.* at 311.

[41] *See Spencer*, 773 F.3d at 1143.

[42] *Id.* at 1139. The majority also figured that the "miscarriage of justice" test should track the "similarly phrased" exception to the rule of procedural default for state prisoners, which requires a "fundamental miscarriage of justice" and kicks in only if a defendant can prove his innocence. *Id.*

limit relief to some but not all alleged guidelines errors.[43] Spencer tried to argue that a "career offender" error is distinct from other guidelines errors because its impact on a typical sentence is especially harsh; this difference the majority rejected as "immaterial."[44] The majority also stressed that even if Spencer got what he wanted, his judge would be free to reimpose the exact same 151-month sentence, and the majority provided several examples of district courts doing just that.[45]

The majority concluded with a brief discussion emphasizing that any inroad on finality — whether of a conviction or a sentence — undermines the criminal law's deterrent effect.[46]

Judges Wilson, Martin, Jordan, and Rosenbaum each filed a separate dissent. They all agreed that Spencer was serving at least six years more than he would be without the enhancement, and hence that the court was undoubtedly party to a complete miscarriage of justice.[47]

First, even granting the majority's premise that Spencer's sentence was and is "lawful" simply because it fell below the statutory maximum, each dissent rejected the majority's conclusion that Supreme Court precedent forbade relief.[48] *Davis* and *Addonizio*, Judge Wilson said, made clear that "unlawful sentences result in a complete miscarriage of justice," but, he continued, the majority had illicitly "inferred that the negative must also be true," that "lawful sentences do not."[49]

Second, the dissenters proposed a rival "miscarriage of justice" test that would ask simply whether Spencer had been "prejudiced" by his alleged error. In other words, did the career-offender enhancement likely make a difference to the amount of jail time he is serving?[50] Rather than emphasizing *Davis* and *Addonizio*, the dissenters marshaled a separate line of "miscarriage of justice" cases where the Supreme Court denied relief because the petitioner could not show prejudice.[51] The dissenters insisted that relief should be forthcoming in *Spencer* because here, they believed, the alleged error was clearly prejudicial.[52]

Third, the dissenters protested in unison that no meaningful distinction separates *Spencer* and *Johnson*.[53] Each prisoner had been a

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[43] *Id.* at 1140.

[44] *Id.* at 1142.

[45] *Id.* at 1142–43 (collecting cases); *see also id.* at 1140.

[46] *See id.* at 1144.

[47] *See, e.g.*, *id.* at 1145 (Wilson, J., dissenting).

[48] *E.g.*, *id.* at 1146; *id.* at 1157 (Jordan, J., dissenting); *id.* at 1165 (Rosenbaum, J., dissenting).

[49] *Id.* at 1147 (Wilson, J., dissenting).

[50] *See, e.g.*, *id.* at 1148; *id.* at 1159 (Jordan, J., dissenting).

[51] At various points the dissenters cited *Hill v. United States*, 368 U.S. 424 (1962); *United States v. Timmreck*, 441 U.S. 780 (1979); *Reed v. Farley*, 512 U.S. 339 (1994); and *Peguero v. United States*, 526 U.S. 23 (1999).

[52] *E.g.*, *Spencer*, 773 F.3d at 1148 (Wilson, J., dissenting); *id.* at 1160 (Jordan, J., dissenting).

[53] *See id.* at 1146 (Wilson, J., dissenting); *id.* at 1152–53 (Martin, J., dissenting); *id.* at 1160 (Jordan, J., dissenting); *id.* at 1164–65 (Rosenbaum, J., dissenting).

career offender at the time he was sentenced, but not by the time he filed for habeas; relief should be equally available to both.[54]

Finally, the dissenters proclaimed that here justice and fairness should trump finality and administrative convenience.[55] Judge Martin specifically challenged the idea that finality interests are equally compelling when sentences but not convictions are at stake.[56]

The majority was right to deny Spencer's petition. But given the small number of "miscarriage of justice" precedents and the limited guidance they provide (not to mention their considerable vintage), the court should have analyzed Spencer's petition in light of the principles and purposes that underlie habeas review and the remedial implications at stake. Most importantly, the court should have made more of the fact that Spencer's petition relied on a change in the meaning of the guidelines that took place after his sentence became final. There are essential differences between habeas petitions that arise out of intervening changes in controlling law, and petitions that allege a violation of governing law as it stood when the relevant proceedings took place. Attending to these differences would have done more to justify the majority's reluctance to give Spencer another shot at sentencing. What is more, reframing the analysis along these lines would have cast the precedents in a new light, enabling the majority to respond more persuasively to the cases invoked by the four judges in dissent.

Starting with first principles, the Supreme Court has often stressed that the primary purpose of habeas review is to ensure that state and federal courts faithfully apply controlling federal law as it exists at the time they try and sentence offenders. As Justice Harlan argued decades ago, "the threat of habeas serves as a necessary additional incentive for . . . courts throughout the land to conduct their proceedings in a manner consistent with established constitutional standards."[57] And the Court has continued to avow that "[f]oremost" among "the underlying purposes of the habeas writ" is to ensure each defendant the benefit of the law as it stands at the time he is convicted and sentenced.[58]

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[54] Judge Jordan also argued that *United States v. Behrens*, 375 U.S. 162 (1963), proved that the majority's reading of § 2255 was too stingy: *Behrens* granted relief under § 2255 to a petitioner who had been denied his right to be present at sentencing under Federal Rule of Criminal Procedure 43, even though his sentence fell well below the statutory maximum. *Spencer*, 773 F.3d at 1157–58 (Jordan, J., dissenting). The majority responded that this violation deprived Behrens of the "ancient" right to allocute at his sentencing, codified in Rule 32(a), *id.* at 1140 (majority opinion) (quoting *Behrens*, 375 U.S. at 165) (internal quotation mark omitted), making "the error in *Behrens* . . . far more profound than a misapplication of advisory sentencing guidelines," *id.*

[55] *E.g.*, *Spencer*, 773 F.3d at 1148 (Wilson, J., dissenting); *id.* at 1164 (Jordan, J., dissenting).

[56] *See id.* at 1155 (Martin, J., dissenting).

[57] Desist v. United States, 394 U.S. 244, 262–63 (1969) (Harlan, J., dissenting).

[58] Saffle v. Parks, 494 U.S. 484, 488 (1990); *see also* Sawyer v. Smith, 497 U.S. 227, 234 (1990) ("[T]he purpose of federal habeas corpus is to ensure that . . . convictions comply with the federal law in existence at the time the conviction became final, and not to provide a mechanism for the

Hence the host of equitable and prudential strictures the Court has crafted "to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of . . . convictions valid when entered."[59] The meaning of "violent felony" surely evokes reasonable disagreement, as *Begay* and the bevy of later cases grappling with it make all too clear.[60] By these lights, Spencer did indeed receive justice the day he entered federal prison.[61]

But this is not just a conceptual argument. Far more important are the serious remedial consequences that would follow if Spencer were allowed to take advantage of the change in the meaning of the guidelines that took place after the judgment against him became final.

Crucially, as the majority noted, none of the dissenting judges put forth a principle that could limit relief to alleged misapplications of the career-offender enhancement.[62] Indeed, if Judge Jordan was right that the real question should be whether Spencer suffered any prejudice — that is, whether Spencer's original sentence "*might have been different*" had he not been treated as a career offender[63] — it is difficult to imagine how the court could avoid resentencing *any* petitioner whose

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continuing reexamination of final judgments based upon later emerging legal doctrine."); United States v. Martinez, 139 F.3d 412, 415 (4th Cir. 1998) ("Habeas relief . . . serves as an incentive — in addition to direct review — for state and federal courts to faithfully apply federal law. This purpose is served sufficiently by requiring courts to apply federal law as it exists at the time a defendant's conviction becomes final."); *cf.* Sunal v. Large, 332 U.S. 174, 182 (1947).

59 *Sawyer*, 497 U.S. at 234.

60 In fact, four times in four years the Supreme Court divided over which crimes are "violent felonies" under the ACCA. *See* Sykes v. United States, 131 S. Ct. 2267, 2284 (2011) (Scalia, J., dissenting) (collecting cases). Other elements of the career-offender enhancement are likewise unsettled. *See, e.g.*, United States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc) (dividing 8–5, reinterpreting which prior convictions count as "felonies" sufficient to trigger the enhancement).

61 Of course, here the dissents repeatedly insisted that Spencer was right all along, even claiming that he "was wrongfully characterized as a career offender from the day his sentence was imposed." *Spencer*, 773 F.3d at 1153 (Martin, J., dissenting). *But see id.* at 1152 (describing Spencer as "prescient"). While perhaps rhetorically effective, this riposte is conceptually unsound and analytically unhelpful. Conceptually, it would make sense only under Blackstone's declaratory jurisprudence, whereby judges never make new law but only discover and expound what the law has meant from time immemorial. This picture is an obvious fiction that the Supreme Court abandoned decades ago. *See* Linkletter v. Walker, 381 U.S. 618, 622–29 (1965). *See generally* Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1739, 1758–64 (1991). Analytically, Spencer's foresight contributes little if anything to the dissenters' preferred outcome, for his prescience adds nothing to the prejudice he suffered — measured by the amount of additional jail time he is serving because of the enhancement. To put the same point differently, there seems little chance the dissenters would have voted to deny relief had Spencer not anticipated the change in law back when he was first sentenced.

62 *Spencer*, 773 F.3d at 1140 (majority opinion). To be sure, the majority, too, might struggle to formulate a palatable limiting principle. Suppose a district court misinterprets the reach of an aggravating factor in a federal death penalty statute and imposes death. Say the prisoner could have gotten the death penalty anyway, and could well receive it again. Still no relief?

63 *Id.* at 1161 (Jordan, J., dissenting) (quoting United States v. Tucker, 404 U.S. 443, 448 (1972)) (internal quotation mark omitted).

guidelines status happens to improve thanks to a change in controlling law sometime after his sentence becomes final.

And this concern is especially acute in the context of the sentencing guidelines, because judicial decisions affecting the scope of the guidelines — decisions like *Begay* — come "pouring out" of the Supreme Court, the courts of appeals, and state courts all the time.[64] The sentencing guidelines directly reference over a thousand statutes of conviction, whose language they draw on to articulate hundreds and hundreds of sentencing enhancements.[65] Each one is open to interpretation. In fact, as the Eleventh Circuit itself has recognized, "the case law about what various and sundry guidelines mean and whether they apply in different factual situations is in a constant state of flux."[66] Just this Term the Supreme Court splintered over the phrase "tangible object," which appears not only in "[d]ozens of federal laws and rules of procedure (and hundreds of state enactments),"[67] but also in the obstruction-of-justice enhancement under the guidelines.[68] Similarly, suppose a circuit court or the Supreme Court reinterprets "means of transportation,"[69] or "organizer or leader."[70] Or suppose a state court reinterprets any one of the many state crimes that can serve as a predicate for an enhancement under the guidelines. Many a prisoner whose recommended sentence would go down after any of these decisions could file a habeas petition just as compelling as Spencer's.

Of course, it may be true that the justice system's interest in finality is less pressing when only sentences rather than convictions are in jeopardy. But given that the error Spencer alleged is not meaningfully different from an extremely broad set of possible sentencing errors, and given how frequently judicial decisions can redraw the boundaries of various guidelines provisions, the aggregate resentencing costs that would ensue are likely to be quite high. Expanding the reach of habeas to such an extent would risk undermining at least some of the systemic interests traditionally linked to finality, including the time and resources of prosecutors and defense counsel, and, perhaps, the law's ability to rehabilitate offenders whose sentences — even though properly imposed — would now fall under a cloud of perpetual uncertainty.[71] In addition, shifting all of those resources away from trials

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[64] Hawkins v. United States, 706 F.3d 820, 824 (7th Cir.), *supplemented*, 724 F.3d 915 (7th Cir. 2013).

[65] *See* U.S. SENTENCING GUIDELINES MANUAL app. A (2014).

[66] Gilbert v. United States, 640 F.3d 1293, 1309 (11th Cir. 2011) (en banc).

[67] Yates v. United States, 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting).

[68] U.S. SENTENCING GUIDELINES MANUAL § 2J1.2(b)(3).

[69] *Id.* § 2A1.4(a)(2)(B).

[70] *Id.* § 3B1.1(a).

[71] *Cf.* Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 452 (1963).

and direct appeals and onto collateral proceedings would likely compromise the courts' ability to deliver justice to other litigants, civil and criminal, who may find it more difficult to have their primary disputes adjudicated in a careful and timely manner.

By and large the majority chose not to engage in the analysis outlined above. But doing so would have been especially appropriate given that habeas jurisdiction has always been "tempered by the restraints that accompany the exercise of equitable discretion."[72]

Moreover, such a discussion would have recast the precedents in a new light more helpful to the majority, for the considerations discussed above suggest why the dissents are likely wrong to insist that courts should focus exclusively on whether an alleged error worked any "prejudice." Indeed, it is telling that, of the cases the dissents relied on to support a mere-prejudice inquiry, not one involved a post-sentencing change in controlling law. Instead, each of these cases — including *Hill*, *Timmreck*, *Reed*, and *Peguero* — involved a judge who violated the clearly established meaning of a federal procedural rule at the time the relevant proceedings took place.[73] If a low bar akin to a mere-prejudice test is ever appropriate for a habeas court reviewing a non-constitutional violation, perhaps it might be so in cases presenting flagrant real-time errors,[74] but not in cases involving intervening changes in law.[75] The disruptive capacity latent in the latter category really is more potent, precisely because — as *Spencer* well shows — a great many "errors" cannot be seen until a change in the legal climate illuminates them. And because the legal climate changes all the time, a rising tide of errors is far from an alarmist concern.

In addition, a more principles-driven analysis would have enabled the majority to show why *Johnson* says little about the proper outcome in *Spencer*. Indeed, the majority and the dissents faltered by all simply assuming that *Johnson* was applying the "miscarriage of justice"

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[72] Withrow v. Williams, 507 U.S. 680, 716 (1993) (Scalia, J., concurring in part and dissenting in part); *see also id.* at 699–700 (O'Connor, J., concurring in part and dissenting in part).

[73] Peguero v. United States, 526 U.S. 23, 24–25 (1999) (petitioner's trial judge violated Rule 32 of the Federal Rules of Criminal Procedure by failing to advise him of his right to appeal); Reed v. Farley, 512 U.S. 339, 341–42 (1994) (petitioner's state trial judge violated a deadline specified in the Interstate Agreement on Detainers Act); United States v. Timmreck, 441 U.S. 780, 781–83 (1979) (petitioner's trial judge violated Rule 11 by forgetting to say that his guilty plea carried a mandatory special parole term); Hill v. United States, 368 U.S. 424, 424–25 (1962) (petitioner's sentencing judge violated Rule 32(a) by neglecting to give him an opportunity to allocute).

[74] Or maybe in something like the hypothetical death penalty case described in note 62, *supra*.

[75] *Addonizio* illustrates this principle as well. Addonizio — who did rely on a post-sentencing change in law — surely had been prejudiced by the error he alleged, as shown by the fact that on habeas his sentencing judge not only granted his petition but set him free. *See* United States v. Addonizio, 442 U.S. 178, 183 (1979). But the Supreme Court sent him back, *see id.* at 190, demonstrating that in some contexts even undisputed prejudice will not warrant relief.

test.[76] To the contrary, there are substantial reasons to doubt that *Johnson* and *Spencer* would arise under the same standard.[77]

Most importantly, as the very existence of the "miscarriage of justice" standard testifies, correcting non-constitutional errors is not a core function of habeas review.[78] Spencer's petition, of course, had nothing to do with the Constitution.[79] But Johnson's directly implicated the Constitution in at least two distinct ways. First, Johnson's state convictions had been obtained in violation of his right to counsel as secured by *Gideon v. Wainwright*.[80] As the Court said decades earlier in *United States v. Tucker*[81] — a case Judge Jordan himself identified as the "precursor" to *Johnson*[82] — federal courts must vacate sentences like that in order to prevent "[e]rosion of the *Gideon* principle."[83] Nothing comparable can be said on behalf of Spencer's petition. Second, after Johnson's convictions were vacated, his enhanced sentence came to lack a valid *factual* basis.[84] Critically, the Supreme Court has recognized that refusing to vacate an enhanced sentence, when the enhancement is later deprived of its factual basis, would raise substantial questions under the Due Process Clause.[85] And although the majority recognized that Spencer relied on new law while Johnson raised a new fact, the majority failed to note why this distinction raised due process concerns for Johnson but left Spencer's petition free of constitutional overtones. In short, the majority failed to acknowledge that the principles that drove *Johnson* quickly run out of gas in a case like *Spencer*, in which no constitutional rights are imperiled and nobody doubts the factual basis for an enhanced sentence.

In the end, the majority built its analysis largely atop the select few Supreme Court decisions that appeared to be on point. But although the court came to the right conclusion, reframing the debate to emphasize the Great Writ's underlying principles and purposes, as well as the remedial consequences at stake, would have produced a more compelling resolution of Spencer's hard case.

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[76] *See, e.g.*, *Spencer*, 773 F.3d at 1139 (majority opinion).

[77] Not least being that *Johnson* never mentioned the "miscarriage of justice" test and nowhere cited any of the cases employing it. *See* Johnson v. United States, 544 U.S. 295 (2005).

[78] *See* Reed v. Clark, 984 F.2d 209, 211 (7th Cir. 1993) ("High costs [of habeas review] may be worth bearing to prevent continuing unconstitutional custody, and in one other circumstance: when the confined person is innocent."), *aff'd sub nom.* Reed v. Farley, 512 U.S. 339 (1994).

[79] *Spencer*, 773 F.3d at 1137.

[80] *See Johnson*, 544 U.S. at 300–01; *see also Gideon*, 372 U.S. 335 (1963).

[81] 404 U.S. 443 (1972).

[82] *Spencer*, 773 F.3d at 1160 (Jordan, J., dissenting).

[83] *Tucker*, 404 U.S. at 449.

[84] *Johnson*, 544 U.S. at 302.

[85] Dretke v. Haley, 541 U.S. 386, 397 (2004) (Stevens, J., dissenting on other grounds); *id.* at 395–96 (majority opinion) (agreeing that the Due Process concern identified by Justice Stevens is a "difficult constitutional question[]").