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Application of the Cause and Prejudice Standard to Petitions Under 28 U.S.C. § 2255 by Guilty Plea Defendants

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APPLICATION OF THE CAUSE AND PREJUDICE STANDARD TO PETITIONS UNDER 28 U.S.C. § 2255 BY GUILTY PLEA DEFENDANTS

INTRODUCTION

Inherent in any criminal justice system is a conflict between the individual's fundamental constitutional rights and the government's objectives in enforcing criminal laws. While the proper punishment for conviction of a criminal act may vary, the sentencing court must impose all punishments in a constitutionally valid manner.[1] If the imposition of punishment does not comply with the requirements of due process,[2] the prisoner is entitled to be resentenced or, under appropriate circumstances, released.[3]

The writ of habeas corpus for federal prisoners, codified at 28 U.S.C. § 2255,[4] provides a procedural mechanism for those prisoners to vindicate their due process rights.[5] Upon completion of the direct criminal

1. *See* Gardner v. Florida, 430 U.S. 349, 358 (1977) (sentence proceedings must satisfy requirements of due process clause); United States v. Lee, 818 F.2d 1052, 1055 (2d Cir. 1987) (same), *cert. denied*, 108 S. Ct. 350 (1988); United States v. Satterfield, 743 F.2d 827, 840 (11th Cir. 1984) (same), *cert. denied*, 471 U.S. 1117 (1985). The range of due process rights available at sentencing, however, is not as extensive as that at trial. *See* Williams v. Oklahoma, 358 U.S. 576, 586 (1959) (considering all facts relevant to the crime at sentencing did not violate due process); Williams v. New York, 337 U.S. 241, 250-51 (1949) (due process does not limit information reviewed by sentencing court); United States v. Fatico, 603 F.2d 1053, 1057 (2d Cir. 1979) (hearsay evidence is admissible at sentencing if reliable), *cert. denied*, 444 U.S. 1073 (1980).

2. *See generally infra* note 21.

3. *See* Fay v. Noia, 372 U.S. 391, 402 (1963); Irwin v. Dowd, 366 U.S. 717, 728-29 (1961); Rogers v. Richmond, 365 U.S. 534, 549 (1961); United States v. Hayman, 342 U.S. 205, 211 (1952).

4. 28 U.S.C. § 2255 (1982).

5. *See Ex parte* Yerger, 75 U.S. (8 Wall.) 85, 95 (1868); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 80 (1807). The availability of the writ of habeas corpus is guaranteed by the United States Constitution art. I, § 9, cl. 2, and the Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81-82 (1789). Early court decisions restricted the availability of habeas corpus relief to challenges to the federal trial court's jurisdiction to convict and sentence the defendant. *See, e.g., Ex parte* Dorr, 44 U.S. (3 How.) 103, 105 (1845); *Ex parte* Watkins, 28 U.S. 119, 127-30, 3 Pet. 193, 204-09 (1830). In 1867, Congress expanded the scope of relief to include both state and federal prisoners deprived of their liberty in violation of the Constitution or any treaty or law of the United States. *See* Judiciary Act of 1867, ch. 27, 14 Stat. 385 (1867). Today, the power of federal courts to grant relief to federal prisoners who are unjustly detained is codified in 28 U.S.C. § 2255. Section 2255 allows a federal prisoner to move the court that imposed the sentence to vacate, set aside or correct the sentence that was challenged. *See infra* note 45.

The scope of relief available pursuant to 28 U.S.C. § 2255 parallels that of 28 U.S.C. § 2254, which provides federal habeas corpus relief for state prisoners. As a result, courts use the case authority for habeas corpus petitions by federal prisoners under § 2255 and state prisoners under § 2254 interchangeably. *See, e.g.*, Francis v. Henderson, 425 U.S. 536, 541-42 (1976) (citing § 2255 case as dispositive of § 2254 case); Kaufman v. United States, 394 U.S. 217, 228 (1969) (citing § 2254 case as dispositive of § 2255 case). The deference to state court proceedings under the rubric of federalism and comity generally considered by the federal courts on a § 2254 motion, however, does not arise on a § 2255

proceedings,[6] a defendant may collaterally attack his conviction and sentence by petitioning for a writ of habeas corpus.[7] This petition embodies a prisoner's formal request that a federal court collaterally review his detention and order his release if his constitutional rights have been violated.[8] In deciding whether to grant collateral relief, the reviewing court must balance the interest of the individual in the vindication of his constitutional rights[9] with the interest of the government in the finality of convictions and the orderly administration of justice.[10]

Because the writ of habeas corpus is considered an extraordinary remedy,[11] courts may refuse to entertain a petition if the applicant has had an opportunity to challenge errors in a prior judicial proceeding but by default has failed to do so.[12] The Supreme Court has developed two standards to determine when such failure may result in the forfeiture of the defaulted claims as the basis for habeas corpus relief. First, the fed-

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motion. *See* L. Yackle, Postconviction Remedies § 107, at 419 (1981); Michael, *The "New" Federalism and the Burger Court's Deference to the States in Federal Habeas Corpus Proceedings*, 64 Iowa L. Rev. 233, 268-69 (1979). *Compare* United States v. Frady, 456 U.S. 152, 166 (1982) (considerations of comity do not apply to § 2255) *with* Rose v. Lundy, 455 U.S. 509, 518-19 (1982) (discussing comity and the exhaustion doctrine as applied to § 2254).

6. Direct criminal proceedings include all activity in a prosecution from the original indictment through completion of direct appeal following sentencing, as well as various posttrial motions. *See, e.g., In re* Grand Jury Empanelled, 597 F.2d 851, 856-57 & n.10 (3d Cir. 1979) (grand jury hearing may be considered a criminal proceeding, even though it predates commencement of formal accusatory process); People v. Spurlock, 112 Cal. App. 3d 323, 327, 169 Cal. Rptr. 320, 322 (3d Dist. 1980) (criminal proceeding concludes at date of final judgment).

7. *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 105 (1977) (Brennan, J., dissenting); Ramirez v. Estelle, 678 F.2d 604, 606 (5th Cir. 1982) (per curiam); Hauptmann v. Wilentz, 570 F. Supp. 351, 400-01 (D.N.J. 1983), *aff'd*, 770 F.2d 1070 (3d Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986); Yackle, *supra* note 5, § 15, at 73 & § 30, at 152-54.

8. *See, e.g.*, United States v. Addonizio, 442 U.S. 178, 185 (1979); Ward v. Knoblock, 738 F.2d 134, 137-38 (4th Cir. 1984), *cert. denied*, 469 U.S. 1193 (1985); *see also infra* note 45.

If the court finds that the petitioner's constitutional rights in fact have been violated and he is entitled to relief, the statute and rules governing federal postconviction relief authorize any disposition that is appropriate under the circumstances of that particular case. *See* 28 U.S.C. § 2255 & Rule 8 (1982); *see also* 28 U.S.C. § 2243 (1982) (court shall dispose of the matter as justice requires). A mere finding of constitutional error, however, without satisfying the harmless error analysis of Chapman v. California, 386 U.S. 18 (1967), may be insufficient to entitle petitioner to relief. *See* Stacy & Dayton, *Rethinking Harmless Constitutional Error*, 88 Colum. L. Rev. 79, 80 (1988) (*Chapman* rule presumptively applies to all types of federal constitutional errors).

9. *See* Kaufman v. United States, 394 U.S. 217, 228 (1969); Fay v. Noia, 372 U.S. 391, 431-32 (1963); Pierre v. United States, 525 F.2d 933, 936 (5th Cir. 1976).

10. *See, e.g.*, United States v. Frady, 456 U.S. 152, 166 (1982); Engle v. Isaac, 456 U.S. 107, 127-28 (1982); Wainwright v. Sykes, 433 U.S. 72, 109 (1977) (Brennan, J., dissenting); Yackle, *supra* note 5, § 108, at 423.

11. *See* Lefkowitz v. Fair, 816 F.2d 17, 23-24 (1st Cir. 1987); *see also infra* note 46 and accompanying text.

12. *See* United States v. Frady, 456 U.S. 152, 167-68 (1982); Wainwright v. Sykes, 433 U.S. 72, 87 (1977). *See generally* Fay v. Noia, 372 U.S. 391, 424-25 & nn.35-36 (1963) (collecting cases).

eral courts may deny habeas corpus relief to a petitioner who has failed to appeal his conviction if that failure represents a deliberate bypass of the opportunity to appeal in order to gain a tactical advantage in a later proceeding.[13] Second, the federal courts may deny habeas corpus relief if the defendant has failed to raise a claim pursuant to an express procedural rule that mandates a forfeiture,[14] absent a showing of both cause for the failure and prejudice resulting from the alleged error.[15]

The courts of appeal have applied these two standards inconsistently[16] when a federal defendant who has pleaded guilty[17] attempts to challenge the legality of his detention on grounds he failed to raise prior to filing a

13. *See infra* notes 55-72 and accompanying text. The deliberate bypass standard has been applied to cases involving the failure to appeal a constitutional claim of error. *See, e.g.*, Beaty v. Patton, 700 F.2d 110, 112-13 (3rd Cir. 1983) (per curiam); United States v. Renfrew, 679 F.2d 730, 731 (8th Cir. 1982) (per curiam); United States v. McCollom, 664 F.2d 56, 59 (5th Cir. 1981), *cert. denied*, 456 U.S. 934 (1982); Crick v. Smith, 650 F.2d 860, 867-68 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982). Failure to raise an issue on appeal is not, in itself, a deliberate bypass of the appellate process. *See* Kaufman v. United States, 394 U.S. 217, 220 n.3 (1969). *But see* United States v. Little, 608 F.2d 296, 300 (8th Cir. 1979) (implying that the failure to appeal, if unexplained, is in itself a deliberate bypass), *cert. denied*, 444 U.S. 1089 (1980).

14. The most common example of this is a contemporaneous objection rule, which requires that an objection be raised at the time an error is committed or the objection is deemed waived for purposes of further proceedings. *See, e.g.*, Fed. R. Crim. P. 12(f) (failure by a party to raise pretrial defenses or objections at the appropriate time constitutes a waiver thereof); Fed. R. Crim. P. 30 (objection to jury charge must be made before the jury retires to deliberate). Such rules give the trial judge an important opportunity, where necessary, to correct immediately any errors, thereby eliminating the need for further litigation of the issue. *See* Wainwright v. Sykes, 433 U.S. 72, 88 (1977); Davis v. United States, 411 U.S. 233, 235 (1973).

15. *See infra* notes 73-87 and accompanying text. The cause and prejudice standard has been applied in cases involving the failure to follow prescribed procedural rules. *See, e.g.*, Leroy v. Marshall, 757 F.2d 94, 97 (6th Cir. 1985) (state appellate rule), *cert. denied*, 474 U.S. 831 (1986); United States v. Hearst, 638 F.2d 1190, 1196-97 (9th Cir. 1980) (Fed. R. Crim. P. 12(b)), *cert. denied*, 451 U.S. 938 (1981); Indiviglio v. United States, 612 F.2d 624, 630 & n.11 (2d Cir. 1979) (same), *cert. denied*, 445 U.S. 933 (1980).

16. *See* Yackle, *supra* note 5, § 87.2, at 219 n.70 (Supp. 1987); *id.*, § 108, at 256 n.85. *Compare* United States v. Corsentino, 685 F.2d 48, 50 (2d Cir. 1982) (cause and prejudice inapplicable) *and* United States v. Baylin, 696 F.2d 1030, 1035-36 (3d Cir. 1982) (same) *with* Williams v. United States, 805 F.2d 1301, 1305-06 (7th Cir. 1986) (cause and prejudice applies), *cert. denied*, 107 S. Ct. 1978 (1987).

17. The majority of criminal convictions are based on guilty pleas. *See* Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L.J. 1179, 1180-81 n.6 (1975); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 Harv. L. Rev. 564, 564 (1977); ABA Standards for Criminal Justice, vol. III, ch. 14, at 14-4 (2d ed. 1980). In the 12 month period ending June 30, 1984, 87.1% of all defendants convicted and sentenced pleaded guilty or nolo contendere. *See* Federal Offenders in the United States Courts 16 (1984).

A guilty plea is an admission by the defendant that he in fact committed the offense charged. To be valid under the due process clause, it must be a knowing and intentional waiver of constitutional rights and privileges, including the right to a jury trial, the right to confront accusers, and the right against self-incrimination. *See* Boykin v. Alabama, 396 U.S. 238, 242-43 (1969); McCarthy v. United States, 394 U.S. 459, 466 & n.15 (1969) (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). A guilty plea also acts as a waiver of all nonjurisdictional defects in the proceedings against the defendant prior to the entry

section 2255 motion.[18] The United States Courts of Appeals for the Second and Third Circuits have granted habeas relief, finding that in the absence of an express procedural rule mandating a forfeiture, the petitioner did not waive his claims.[19] The United States Court of Appeals for the Seventh Circuit, however, has denied relief, finding that although no procedural rule required it, the petitioner waived his constitutional claims by failing to raise them in a timely manner.[20]

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of the plea. *See* Tollet v. Henderson, 411 U.S. 258, 266 (1973); McMann v. Richardson, 397 U.S. 759, 772-73 (1970).

All that remains for the disposition of the case after the guilty plea is accepted is a determination of sentence. *See* North Carolina v. Alford, 400 U.S. 25, 32, 37 (1970); Sober v. Crist, 551 F. Supp. 724, 729-30 (D. Mont. 1982). A defendant whose conviction is based on a guilty plea generally is sentenced according to the provisions of a plea agreement. *See generally* Note, *The Standard of Proof Necessary to Establish that a Defendant Has Materially Breached a Plea Agreement*, 55 Fordham L. Rev. 1059, 1063-64 (1987). As part of federal plea agreements, however, the prosecutor may agree only to recommend a sentence, allowing the trial judge to make an independent determination in light of the information available at the time of the sentencing hearing. *See* United States v. McCoy, 770 F.2d 647, 648 (7th Cir. 1985); Fed. R. Crim. P. 11(e).

18. A defendant who has pleaded guilty has three opportunities to challenge errors occurring during the sentencing hearing prior to filing for habeas corpus relief. *See infra* notes 29-35 and accompanying text (objection during the hearing itself); *infra* notes 36-39 and accompanying text (direct appeal pursuant to Federal Rule Appellate Procedure 4(b)); *infra* notes 40-45 and accompanying text (Federal Rule Criminal Procedure 35 motion to have sentence corrected or reduced). None of these rules mandates the forfeiture of constitutional claims not raised at the earliest possible time.

19. *See* United States v. Corsentino, 685 F.2d 48, 50 (2d Cir. 1982); United States v. Baylin, 696 F.2d 1030, 1035 (3d Cir. 1982).

In *Corsentino*, the petitioner failed to appeal the sentence, but he did file a timely motion for sentence reduction under Federal Rule of Criminal Procedure 35. *See* 685 F.2d at 49. The petition for habeas corpus relief raised new constitutional claims not challenged in the Rule 35 motion. *See id.* at 50. On appeal from the district court's denial of the habeas petition, the Second Circuit court rejected the application of the cause and prejudice standard, stating that it did not "[alter] the traditional scope of § 2255 relief to challenge a sentence . . . imposed unlawfully after [the entry of] a plea of guilty." *Id.* at 50. The court reasoned that no federal procedural rule required the defendant to make a contemporaneous objection to the breach of a plea agreement at sentencing, and it was unlikely that any objection would have remedied the situation. *See id.* at 50-51. Moreover, it concluded that failing to raise a claim in a Rule 35 motion was not a waiver of the defects normally presented on collateral attack of the sentence. *See id.* at 51.

In *Baylin*, the petitioner also failed to appeal his sentence, but he did file two separate postconviction motions pursuant to Rule 35. *See* 696 F.2d at 1034. Neither of these motions raised the claim presented in the habeas corpus petition. *See id.* at 1034-35. On appeal from the district court's denial of the collateral motion, the Third Circuit held that the cause and prejudice standard did not pose a jurisdictional bar to a hearing on the merits of the petition. *See id.* at 1035-36. The court reasoned that challenging the imposition of sentence after a guilty plea by a § 2255 motion was analogous to an appeal and therefore considerations of finality did not apply. *See id.* at 1036. In addition, it noted that the rules for raising timely objections were not as well-established at the sentencing stage of the criminal proceedings. *See id.* The Third Circuit found that the petitioner's prior appellate default did not preclude a collateral challenge to the sentence proceedings. *See id.* at 1036.

20. *See* Williams v. United States, 805 F.2d 1301, 1304, 1306 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1978 (1987).

In *Williams*, the petitioner did not appeal his sentence, but he did file an untimely

This Note examines the situation that arises when a defendant who has pleaded guilty petitions for habeas corpus relief, alleging constitutional errors that occurred at sentencing that were not previously presented to the sentencing court by timely objection or to a reviewing court on direct appeal. Part I of this Note reviews the opportunities to challenge errors occurring during the sentencing hearing. Part II considers the relief available to a federal prisoner pursuant to 28 U.S.C. § 2255, and analyzes the conflicting standards of review established by the Supreme Court to determine whether the petitioner's default in direct criminal proceedings precludes the granting of habeas relief. This Note concludes that the more restrictive cause and prejudice standard better serves the government's criminal justice interests while nonetheless allowing for review of meritorious claims presented by the petitioner that were not raised in prior, direct proceedings.

I. OPPORTUNITIES DURING THE DIRECT PROCEEDINGS TO CHALLENGE ERRORS AT THE SENTENCING HEARING

All convicted defendants, including those who have pleaded guilty, have a due process right to the fair imposition of sentence.[21] Procedural

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motion for sentence reduction, which was denied. *See id.* at 1303. As an alternative holding, the district court found that the motion raised no meritorious claims. *See id.* The district court also denied Williams' subsequent habeas corpus petition. The court of appeals affirmed the lower court's finding that the defendant had two opportunities to challenge his sentence prior to filing his § 2255 motion. *See id.* at 1304. These options provided adequate opportunity to raise the issues now presented, but petitioner failed to pursue either fully. *See id.* at 1304. Therefore, absent a showing of cause and prejudice excusing the failure, the issues were deemed waived for the purposes of the § 2255 motion. *See id.*

In reaching this conclusion, the Seventh Circuit expressly rejected the holdings of the Second and Third Circuits, stating that the cause and prejudice test was not limited to situations in which the defendant failed to honor established contemporaneous objection rules. *See id.* at 1306. In addition, the court determined that it was clear that the defendant could raise objections during sentencing proceedings. *See id.*; *see, e.g.*, Fed. R. Crim. P. 32 (a)(1) & (c)(3)(A). Last, it was found that a defendant who pleads guilty is free to pursue a direct appeal of his sentence, rejecting the Third Circuit's notion that a guilty plea defendant's first appeal really was a § 2255 motion. *See* 805 F.2d at 1306.

21. *See, e.g.*, United States v. Tucker, 404 U.S. 443, 446-47 (1972); Townsend v. Burke, 334 U.S. 736, 741 (1948); Parks v. United States, 832 F.2d 1244, 1246 (11th Cir. 1987).

A defendant's due process rights are violated when the sentence is based on misinformation or any misunderstanding of facts relevant to the sentence. *See* United States *ex rel.* Welch v. Lane, 738 F.2d 863, 864-65 (7th Cir. 1984); Ashe v. North Carolina, 586 F.2d 334, 336-37 (4th Cir. 1978), *cert. denied*, 441 U.S. 966 (1979); United States v. Powell, 487 F.2d 325, 328 (4th Cir. 1973). Violations of this type render the entire sentencing process invalid. *See* Herron v. United States, 551 F.2d 62, 63 (5th Cir. 1977) (per curiam); United States v. Fatico, 458 F. Supp. 388, 397-98 (E.D.N.Y. 1978), *aff'd*, 603 F.2d 1053 (2d Cir. 1979), *cert. denied*, 444 U.S. 1073 (1980).

Also, compliance merely in form with specific procedural rules at sentencing may deny the defendant due process. *See, e.g.*, United States v. Weichert, 836 F.2d 769, 772 (2d Cir. 1988); United States v. Sparrow, 673 F.2d 862, 865 (5th Cir. 1982); Saddler v. United States, 531 F.2d 83, 86-87 (2d Cir. 1976). Last, due process is denied when the

rules exist to ensure that each sentence is imposed in a fair and legal manner and is based on accurate information.[22] These rules provide the defendant with several opportunities prior to the actual imposition of sentence to object to any inaccurracies in the information used for sentencing or any other errors occurring during the sentencing process.[23] Additional procedural rules allow a defendant at least two other opportunities to challenge his sentence prior to filing a petition for habeas corpus relief. A defendant may appeal pursuant to Federal Rule of Appellate Procedure 4(b).[24] A defendant may also move for correction or reduction of the sentence pursuant to Federal Rule of Criminal Procedure 35.[25] Each of these rules obviates the need for postconviction litigation by providing the defendant an opportunity to challenge the validity of his sentence prior to filing for habeas corpus relief. The Sentencing Reform Act of 1984[26] amended many of the rules governing federal sentencing and postsentencing procedures, but the opportunities to attack a sentence prior to petitioning for relief under section 2255, while substantially amended, remain intact.[27]

Federal Rule of Criminal Procedure 32 establishes the guidelines to be followed when sentencing a convicted defendant.[28] It provides for a

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petitioner lacked the effective assistance of counsel at sentencing. *See* Townsend v. Burke, 334 U.S. 736, 741 (1948).

22. *See infra* notes 28-44 and accompanying text.

23. *See infra* notes 28-34 and accompanying text.

24. *See infra* notes 35-38 and accompanying text.

25. *See infra* notes 39-44 and accompanying text. A defendant also may appeal the denial of a Rule 35 motion, providing a third opportunity to challenge the sentence prior to filing a habeas petition. *See* United States v. Kovic, 830 F.2d 680, 682 (7th Cir. 1987), *cert. denied*, 108 S. Ct. 778 (1988); *see also* United States v. Mittelsteadt, 790 F.2d 39, 40 (7th Cir. 1986) (per curiam).

26. Pub. L. No. 98-473, Title II, ch. II, 98 Stat. 1987 (1984). This Act seeks to establish a comprehensive and consistent pattern for sentencing federal offenders, clearly stating the purposes to be served by the sentencing system and establishing a catalogue of the types and lengths of sentences presumptively to be imposed. *See* S. Rep. No. 225, 98th Cong., 2d Sess. 39 (1984), *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3222. The guidelines seek to ensure that offenders with similar histories, convicted of similar crimes, committed under similar circumstances receive similar sentences. *See id.* at 3221-22; U.S. Sentencing Commission, Federal Sentencing Guideline Manual 2-3 (1987). The Act became effective on November 1, 1987, Pub. L. No. 98-473, Title II, ch. II, § 235 (a)(1), 98 Stat. 2031 (1984), *as amended by* Act of Dec. 12, 1985, Pub. L. No. 99-217, § 4, 99 Stat. 1728 (1985), *as amended by* Act of Nov. 10, 1986, Pub. L. No. 99-646, § 35, 100 Stat. 3599 (1986), and applies to convictions for criminal acts committed after that date. For a review of the Sentencing Guidelines, see Comment, *Structuring Determinate Sentencing Guidelines: Difficult Choices for the New Federal Sentencing Commission*, 35 Cath. U.L. Rev. 181 (1985).

27. *See infra* notes 28, 35, 39.

28. *See* Fed. R. Crim. P. 32; *see also* United States v. Weichert, 836 F.2d 769, 771 (2d Cir. 1988); United States v. Fischer, 821 F.2d 557, 558 (11th Cir. 1987). Rule 32 has been amended in part to comply with the intent of the Sentencing Reform Act of 1984. The most important amendment, within the context of this Note, is the provision in Rule 32(a)(2) requiring the sentencing court to advise the defendant, following a plea of guilty, "of any right to appeal his sentence." Fed. R. Crim. P. 32(a)(2). Previously, the sentencing court had no duty to so advise the guilty plea defendant. *See, e.g.*, United States v.

hearing to present information to the judge that is necessary for the meaningful exercise of his broad discretion in imposing the appropriate sentence.[29] Prior to this hearing, a probation officer generally compiles and submits to the court a presentence report for the court's guidance containing information about the offense, the defendant's background and his personal history.[30] The defendant and his counsel are allowed to review this information and challenge any factual inaccuracy it contains.[31] At the hearing, the defendant may present information on his own behalf and raise any other matters in mitigation of his punishment.[32] The prosecutor is given a similar opportunity to offer information to the sentencing court.[33] Based on all the information presented during this hearing, the judge, in the exercise of his discretion, imposes such sentence as he deems appropriate.[34]

A defendant who believes that his sentence is improper may file a direct appeal pursuant to Federal Rule of Appellate Procedure 4(b).[35] The

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Fels, 599 F.2d 142, 150 (7th Cir. 1979); Barber v. United States, 427 F.2d 70, 71 (10th Cir.) (per curiam), *cert. denied*, 400 U.S. 867 (1970); 18 U.S.C. Fed. R. Crim. P. 32(a)(2) (1982 & Supp. IV 1986). This lack of notice probably resulted in many guilty plea defendants defaulting on their opportunity to pursue direct appeal of the sentencing proceedings. *See* Fed. R. Crim. P. 32 advisory committee note, 1966 amendment, subdivision (a)(2) (court must fully advise the defendant of his right to appeal because counsel may not).

29. Such broad discretion is well established. *See* United States v. Tucker, 404 U.S. 443, 446 (1972); United States v. McCoy, 770 F.2d 647, 649 (7th Cir. 1985); United States v. Long, 656 F.2d 1162, 1164 (5th Cir. Unit A Sept. 1981); Fed. R. Crim. P. 32(c)(1).

30. The presentence report is compiled according to the investigation and report requirements of Fed. R. Crim. P. 32(c)(1) & (2). Use of this report falls within the discretion of the trial court and is not a prerequisite to a lawful sentence. *See* United States v. Latner, 702 F.2d 947, 949 (11th Cir. 1983), *cert. denied*, 464 U.S. 914 (1984); United States v. Trevino, 556 F.2d 1265, 1270 (5th Cir. 1977); United States v. Warren, 453 F.2d 738, 743-44 (2d Cir.), *cert. denied*, 406 U.S. 944 (1972); Fed. R. Crim. P. 32(c)(1).

After sentencing, the presentence report continues to serve as the central document in the correctional process, whether defendant is placed on probation or incarcerated and subsequently paroled. *See* Fennel & Hall, *Due Process at Sentencing: An Empirical and Legal Analysis of the Disclosure of Presentence Reports in Federal Courts*, 93 Harv. L. Rev. 1613, 1628 (1980).

31. *See* Fed. R. Crim. P. 32(c)(3)(A). Disclosure of the presentence report to both the prosecution and the defense must be made at a reasonable time before actual sentencing. *See* United States v. Kovic, 830 F.2d 680, 686 (7th Cir. 1987); Fed. R. Crim. P. 32(c)(3)(A).

32. *See* Fed. R. Crim. P. 32(a)(1)(C) (amending 18 U.S.C. Fed. R. Crim. P. 32(a)(1) (1982 & Supp. IV 1986)). This right is considered so important that a sentence may be reversed when a defendant was not given an opportunity to speak. *See* United States v. Serhant, 740 F.2d 548, 554 (7th Cir. 1984); Saddler v. United States, 531 F.2d 83, 86-87 (2d Cir. 1976).

33. *See* Fed. R. Crim. P. 32 (a)(1); *see also* United States v. Fatico, 579 F.2d 707, 712-13 (2d Cir. 1978), *cert. denied*, 444 U.S. 1073 (1980).

34. *See* Fed. R. Crim. P. 32 (a)(1).

35. *See* Coppedge v. United States, 369 U.S. 438, 441-42 (1962); United States v. Peloso, 824 F.2d 914, 915 (11th Cir. 1987) (per curiam); United States v. Moskow, 588 F.2d 882, 889 (3d Cir. 1978); 28 U.S.C. § 1291 (1982); Fed. R. App. P. 4(b); *see also* Borman, *The Hidden Right to Direct Appeal from a Federal Plea Conviction*, 64 Cornell

Rule requires that a notice of appeal must be filed within ten days of the judgment,[36] unless relieved by overriding circumstances.[37] This strict time limitation is jurisdictional, providing for early termination of direct proceedings in criminal cases. A final judgment or order may not be reviewed on direct appeal after expiration of this limitations period.[38]

Regardless of the resort to direct appellate review, defendants sentenced for criminal acts committed prior to November 1, 1987, may file motions to correct or to reduce their sentences pursuant to Federal Rule of Criminal Procedure 35.[39] An illegal sentence may be corrected at any

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L. Rev. 319, 327 (1979). Because of the broad discretion vested in the trial judge at sentencing, the power of a federal appellate court to review sentencing decisions is limited to abuse of that discretion. *See* United States v. Tucker, 404 U.S. 443, 446 (1972); United States v. Adams, 759 F.2d 1099, 1112 (3d Cir. 1985), *cert. denied*, 474 U.S. 906 (1985); United States v. Oxford, 735 F.2d 276, 278 (7th Cir. 1984). For cases finding an abuse of sentencing discretion, *see, e.g.*, United States v. Sales, 725 F.2d 458, 460 (8th Cir. 1984); United States v. Robin, 545 F.2d 775, 779, 782 (2d Cir. 1976); McGee v. United States, 462 F.2d 243, 246-47 (2d Cir. 1972).

Pursuant to the Sentencing Reform Act of 1984, defendants convicted of crimes committed after November 1, 1987 may now appeal their sentence under 18 U.S.C.A. § 3742. *See* 18 U.S.C. § 3742 (Supp. IV 1986), *as amended by* 18 U.S.C.A. § 3742 (West Supp. 1988). Section 3742 makes appellate review of sentences equally available to the defendant and the government, allowing for the correction of incorrect or unreasonable sentences. *See* 18 U.S.C. § 3742 (Supp. IV 1986), *as amended by* 18 U.S.C.A. § 3742 (West Supp. 1988).

36. *See* Fed. R. App. P. 4(b). Satisfaction of Rule 4(b)'s 10 day time limit for direct appeal is a prerequisite for the appellate court's exercise of jurisdiction. *See* United States v. Edwards, 800 F.2d 878, 883 (9th Cir. 1986); United States v. Burns, 668 F.2d 855, 858 (5th Cir. 1982); United States v. Rumell, 642 F.2d 213, 214 (7th Cir. 1981). The 10 days begin to run when the judgment of sentence is entered. *See* United States v. Hashagen, 816 F.2d 899, 901 (3d Cir. 1987) (en banc); United States v. Curry, 760 F.2d 1079, 1079 (11th Cir. 1985) (per curiam); C. Wright, Federal Practice and Procedure § 534, at 179-80 (2d ed. 1982). A convicted defendant who knows of such right and the applicable time to perfect it, yet does not timely exercise it, waives his right to appeal. *See* United States v. Holmes, 680 F.2d 1372, 1373 (11th Cir. 1982) (per curiam), *cert. denied*, 460 U.S. 1015 (1983); Cordle v. United States, 386 F.2d 157, 159 (6th Cir. 1967), *cert. denied*, 411 U.S. 983 (1973).

37. A criminal defendant's good faith efforts to comply with the filing requirements of Rule 4(b) may afford an opportunity to establish "excusable neglect," allowing an extension of 30 days, in addition to the original 10, to file a notice of appeal. *See* United States v. Quimby, 636 F.2d 86, 89 (5th Cir. Unit A Feb. 1981) (per curiam); United States v. Lucas, 597 F.2d 243, 245 (10th Cir. 1979) (per curiam); Fed. R. App. P. 4(b). Whether excusable neglect actually occurred is a question for the judge. *See Lucas*, 597 F.2d at 245. Excusable neglect is a fact specific, variable standard and the common sense meaning of those words should be used to determine if the standard is met. *See* Fallen v. United States, 378 U.S. 139, 144 (1964); United States v. Schuchardt, 685 F.2d 901, 902 (4th Cir. 1982); Buckley v. United States, 382 F.2d 611, 614 (10th Cir. 1967), *cert. denied*, 390 U.S. 997 (1968). The defendant bears the burden of establishing noncompliance due to excusable neglect; the district court, in exercising its absolute discretion, may consider all relevant factors in making its determination. *See Lucas*, 597 F.2d at 245.

38. *See supra* note 36.

39. *See* 18 U.S.C. Fed. R. Crim. P. 35 (1982 & Supp. IV 1986). Rule 35 relates strictly to the sentencing proceeding and may not be used to examine errors occurring at any time prior to the imposition of sentence. *See* Hill v. United States, 368 U.S. 424, 430 & n.8 (1962); United States v. Scotten, 593 F. Supp. 100, 101 (D. Nev. 1984); Yackle, *supra* note 5, § 29, at 152. The motion to correct an illegal sentence is a direct, rather

time,[40] but it may be reduced only by filing a motion within 120 days of the entry of sentence or at the conclusion of a direct appeal.[41] A motion for sentence reduction essentially is a plea for leniency, affording every defendant a second round before the judge who originally imposed the sentence.[42] A motion to correct a sentence, however, allows the court to bring an illegal sentence into conformity with the law.[43] A challenge may be made pursuant to Rule 35 on this basis even though no prior objection was raised at the sentencing hearing or pursued on direct appeal.[44] By allowing the sentencing court a second opportunity to review the punishment imposed, the availability of relief pursuant to this Rule provides an additional procedural mechanism to address matters not raised at the original sentencing.

II. SECTION 2255 MOTIONS BY DEFENDANTS WHO HAVE FAILED TO RAISE SENTENCING ERRORS IN AN EARLIER PROCEEDING

Federal prisoners seeking to challenge the validity of their incarceration after the completion of direct trial and appellate proceedings may file a motion to vacate their sentence pursuant to 28 U.S.C. § 2255, the

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than a collateral, attack on the judgment. *See* C. Wright, Federal Practice and Procedure § 583, at 391-93 (2d ed. 1982) (distinguishing Rule 35 from § 2255). A sentence is considered "illegal" within the meaning of Rule 35 if it exceeds statutory limitations or contravenes the applicable statute in some other way. *See* United States v. Risenhoover, 92 F.R.D. 741, 743 (N.D. Okla. 1979).

The Sentencing Reform Act amended Rule 35 to permit only the correction of an illegal sentence. *See* Fed. R. Crim. P. 35. This can occur either on remand from an appellate court that determined that the sentence was imposed in an illegal manner, *see* Fed. R. Crim. P. 35(a), or by motion of the government within one year after the imposition of the sentence. *See* Fed. R. Crim. P. 35(b). The defendant no longer may file for relief pursuant to Rule 35(b) for sentence reduction under the new amendments. *Compare* Fed. R. Crim. P. 35 *with* 18 U.S.C. Fed. R. Crim. P. 35 (1982 & Supp. IV 1986).

40. *See* 18 U.S.C. Fed. R. Crim. P. 35 (1982 & Supp. IV 1986) ("[t]he court may correct a sentence at any time").

41. *See* United States v. Addonizio, 442 U.S. 178, 189 (1979); Diggs v. United States, 740 F.2d 239, 250 (3d Cir. 1984) (Gibbons, J., dissenting); 18 U.S.C. Fed. R. Crim. P. 35(b) (Supp. IV 1986). This is jurisdictional and cannot be extended by an order of the court under any circumstances. *See* United States v. Robinson, 361 U.S. 220, 226 (1960); United States v. Dansker, 581 F.2d 69, 74 (3d Cir. 1978); United States v. Robinson, 457 F.2d 1319, 1319 (3d Cir. 1972) (per curiam).

42. *See* United States v. Lewis, 743 F.2d 1127, 1129 (5th Cir. 1984); United States v. Hooton, 693 F.2d 857, 859 (9th Cir. 1982); United States v. Clovin, 644 F.2d 703, 705 (8th Cir. 1981); United States v. Ellenbogen, 390 F.2d 537, 543 (2d Cir.), *cert. denied*, 393 U.S. 918 (1968); 8 Moore's Federal Practice ¶ 35.02[1] (2d ed. 1988).

43. *See* United States v. Golden, 795 F.2d 19, 21 (3d Cir. 1986); United States v. Moss, 614 F.2d 171, 175 (8th Cir. 1980); Benson v. United States, 332 F.2d 288, 291 (5th Cir. 1964).

44. *See* United States v. McCrae, 714 F.2d 83, 84 (9th Cir.), *cert. denied*, 464 U.S. 1001 (1983). Even if the defendant waives or forfeits his right to appeal, he does not waive his right to apply to the court to reduce or correct his sentence. United States v. Morales, 498 F. Supp. 139, 142 (E.D.N.Y. 1980).

federal habeas corpus statute.[45] Relief under this statute is granted only in the extraordinary case when a violation of a criminal defendant's fundamental rights results in an unjust deprivation of his liberty.[46] Not every alleged error affecting the defendant's incarceration may be raised on a section 2255 motion; only those errors that are constitutional, jurisdictional, or that have resulted in a complete miscarriage of justice may be so challenged.[47] While a motion under section 2255 is considered a possible further step in the petitioner's criminal proceeding,[48] it is, legally, a collateral attack on his conviction and sentence and is not

45. *See* 28 U.S.C. § 2255 (1982). Section 2255 is the statutory equivalent of habeas corpus. *See* Kaufman v. United States, 394 U.S. 217, 221 (1969); Sanders v. United States, 373 U.S. 1, 14 (1963); Hill v. United States, 368 U.S. 424, 427 (1962); United States v. Hayman, 342 U.S. 205, 219 (1952).

Section 2255 provides in part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

28 U.S.C. § 2255 (1982).

Section 2255 contemplates collateral attack on either the judgment of conviction or the sentence imposed. *See* Andrews v. United States, 373 U.S. 334, 338-39 (1963); United States v. Hayman, 342 U.S. 205, 219 (1952); 28 U.S.C. § 2255 (1982). The district court imposing the sentence has exclusive jurisdiction over the petitioner's § 2255 motion. *See* United States v. Addonizio, 442 U.S. 178, 185 (1979); United States v. Hayman, 342 U.S. 205, 220-21 (1952); Yackle, *supra* note 5, § 50, at 225. The statute allows a motion for relief to be made at any time. *See* 28 U.S.C. § 2255 (1982). Delays in asserting constitutional rights pursuant to the statute, however, can be taken into account by a court ruling on the motion for collateral relief. *See* Heflin v. United States, 358 U.S. 415, 420 (1959) (Stewart, J., concurring); Pacelli v. United States, 588 F.2d 360, 365 (2d Cir. 1978), *cert. denied*, 441 U.S. 908 (1979); Howell v. United States, 442 F.2d 265, 274 (7th Cir. 1971); 28 U.S.C. § 2255, Rule 9 (1982); *cf.* Sanders v. United States, 373 U.S. 1, 17-18 (1963) (new issues raised in successive applications may be deemed waived).

46. *See* Davis v. United States, 417 U.S. 333, 346-47 (1974); Keel v. United States, 585 F.2d 110, 114 (5th Cir. 1978); Jeffers v. United States, 461 F. Supp. 300, 303 (N.D. Ind. 1978).

47. *See, e.g.*, United States v. Timmreck, 441 U.S. 780, 783-85 (1979) (technical violation of procedural rule insufficient ground for relief); Hill v. United States, 368 U.S. 424, 428 (1962) (denial of right of allocution insufficient ground for relief); United States v. Angelos, 763 F.2d 859, 861 (7th Cir. 1985) (sentence vacated since defendant's conduct was not a federal crime); United States v. Wilcox, 640 F.2d 970, 973-74 (9th Cir. 1981) (admission of evidence obtained by invalid state search warrant was insufficient constitutional error for relief); Saddler v. United States, 531 F.2d 83, 86-87 (2d Cir. 1976) (sentence vacated when defendant lacked capacity to exercise right of allocution); United States v. Loschiavo, 531 F.2d 659, 665 (2d Cir. 1976) (sentence vacated for failure to prove essential element of crime); Gates v. United States, 515 F.2d 73, 76-78 (7th Cir. 1975) (failure to inform the defendant of consequences of guilty plea was a miscarriage of justice).

48. A motion under § 2255, although codified under Title 28 rather than Title 18, currently is held to be criminal in nature. *See* United States v. Frady, 456 U.S. 152, 178-79 (1982) (Brennan, J., dissenting); 28 U.S.C. § 2255, Rule 1 advisory committee note (1982). *But see* Yackle, *supra* note 5, § 32, at 156-58 (courts confused as to the precise nature of § 2255).

designed to serve as an additional direct appeal or as a substitute for a direct appeal.[49] Absent a manifest injustice in the judicial proceedings or changed circumstances in the law or the factual record, courts generally dismiss section 2255 motions if they raise nonconstitutional claims that were, or might have been, asserted on direct review.[50]

In addition, courts may deny relief to a defendant who fails to challenge constitutional errors in direct proceedings and seeks to raise those issues in a later section 2255 motion, finding that petitioner is attempting to use collateral attack as a substitute for direct appeal.[51] To determine if the prior failure to challenge these errors precludes the granting of habeas corpus relief, the Supreme Court has developed two standards: the deliberate bypass test;[52] and the cause and prejudice standard.[53]

A. *Deliberate Bypass Test*

In *Fay v. Noia*,[54] the Supreme Court considered whether the complete failure to appeal a federal constitutional claim in the state courts precluded collateral relief in the federal courts.[55] Noia, a state prisoner, had been convicted on the basis of a coerced confession, in violation of the fourteenth amendment.[56] He failed to take a timely appeal of his state conviction[57] and, as a result, was denied postconviction relief in state court.[58] His subsequent petition for federal habeas corpus relief challenged his conviction based on the invalid confession.[59]

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49. *See Frady*, 456 U.S. at 165; United States v. Timmreck, 441 U.S. 780, 783-84 (1979); Sunal v. Large, 332 U.S. 174, 178 (1947).

50. *See, e.g., Timmreck*, 441 U.S. at 784; Stone v. Powell, 428 U.S. 465, 477 n.10 (1976); Diggs v. United States, 740 F.2d 239, 242-43 (3d Cir. 1984); Fiumara v. United States, 727 F.2d 209, 213-14 (2d Cir.), *cert. denied*, 466 U.S. 951 (1984); Norris v. United States, 687 F.2d 899, 900 (7th Cir. 1982); Yackle, *supra* note 5, § 108, at 422-23.

51. *See* United States v. Griffin, 765 F.2d 677, 680 (7th Cir. 1985); United States v. Caceres, 745 F.2d 935, 936 n.2 (5th Cir. 1984) (per curiam); Norris v. United States, 687 F.2d 899, 901-02 (7th Cir. 1982); Grimes v. United States, 607 F.2d 6, 10-11 (2d Cir. 1979).

52. *See* Fay v. Noia, 372 U.S. 391, 438 (1963); *infra* notes 54-66 and accompanying text.

53. *See* Davis v. United States, 411 U.S. 233, 243-44 (1973); *infra* notes 71-79 and accompanying text.

54. 372 U.S. 391 (1963).

55. *See id.* at 394.

56. *See id.*

57. *See id.* Noia claimed that, while aware of his right to appeal, he did not have the financial resources to pursue an appeal. *See id.* at 397 n.3. Also, his lawyer stated that Noia feared that if his appeal were successful, he might get the death penalty if convicted on retrial. *See id.*

58. *See id.* at 394.

59. *See id.* at 395-96. The district court denied Noia's habeas corpus petition based on his failure to exhaust the remedies available in state court. *See id.* at 396. The court of appeals reversed, setting aside Noia's conviction, finding that exceptional circumstances excused the failure to appeal. *See id.* at 396-97. The court of appeals rejected the argument that the failure to appeal waived his claim for the purposes of later proceedings and therefore barred the federal habeas corpus remedy. *See id.* at 396-98.

The Supreme Court granted Noia's habeas corpus petition,[60] holding that his failure to appeal did not bar a federal court from adjudicating the merits of a constitutional challenge.[61] The Court recognized that an alleged deprivation of constitutional rights required a full opportunity for plenary review and that conventional notions of finality in criminal litigation must give way to the vindication of federal constitutional rights and the preservation of personal liberty.[62] While advocating liberal availability of habeas corpus relief,[63] the Court recognized the discretionary power of federal judges to deny relief to a petitioner who had deliberately bypassed orderly state court procedures and, in doing so, had forfeited state court remedies.[64] The Court stated that deliberate bypass can be found only when the petitioner himself knowingly and voluntarily waived the opportunity to vindicate his constitutional rights.[65] According to the *Noia* court, a choice made by counsel without the defendant's participation did not automatically bar relief.[66]

Following the decision in *Noia*, the Supreme Court determined that the failure to raise a constitutional claim on direct appeal did not deprive a federal habeas court of the power to adjudicate the merits of that claim.[67] The question, rather, was whether the refusal to exercise that power would be appropriate.[68] Federal courts applied the deliberate bypass standard to petitions of both state and federal prisoners,[69] address-

60. *See id.* at 398-99.

61. *See id.* at 433-34.

62. *See id.* at 424.

63. *See id.* at 405-06.

64. *See id.* at 438. The Court stated that Noia's conscious, "grisly choice" not to appeal in order to avoid the risk of a possible death sentence in the event of a retrial was not a tactical or strategic litigation step or a circumvention of state procedures. *See id.* at 440. In reality, Noia acted deliberately and it can be argued that while espousing the proper standard, the Court did not correctly apply it to the facts. *See* Wainwright v. Sykes, 433 U.S. 72, 95 n.3 (1977) (Stevens, J., concurring).

65. *See Noia*, 372 U.S. at 439. The Court invoked the classic definition of waiver—an intentional relinquishment or abandonment of a known right or privilege—to establish the controlling standard. *See id.* (quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). Only an affirmative waiver of the right to appeal by the defendant warrants denial of review of a habeas corpus petition. *See Noia*, 372 U.S. at 439; Johnson v. United States, 838 F.2d 201, 205-06 (7th Cir. 1988); Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 159-60 (1970). Judge Friendly advocated use of the term forfeiture rather than waiver, stating that "it is a serious confusion of thought . . . to find a 'waiver' when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled." *Id.* (footnotes omitted).

66. *See Noia*, 372 U.S. at 439. The deliberate bypass standard established in *Noia* depends on the considered choice of the petitioner "after consultation with competent counsel." *Id.* Not every aspect of the criminal process, however, is governed by the defendant's knowing and conscious choice. Frequently, counsel makes tactical decisions that do not require the personal participation of the defendant. *See, e.g.*, Jones v. Barnes, 463 U.S. 745, 752-53 (1983).

67. *See* Kaufman v. United States, 394 U.S. 217, 220 n.3 (1969); Dorman v. Wainwright, 798 F.2d 1358, 1368 (11th Cir. 1986); Yackle, *supra* note 7, § 33, at 160-61.

68. *See Kaufman*, 394 U.S. at 220 n.3.

69. *See supra* note 13. *Noia* addressed the relief available under § 2254. *See* Fay v.

ing the merits of a petitioner's claims unless the failure to appeal those claims resulted from a deliberate bypass of the appellate process to gain a tactical advantage.[70]

B. *Cause and Prejudice Standard*

In *Davis v. United States*,[71] decided ten years after *Noia*, the Supreme Court adopted a more restrictive view of the appropriate exercise of habeas corpus discretion to entertain untimely raised federal claims.[72] Davis, a federal prisoner, filed a habeas corpus petition to challenge the composition of the grand jury that issued his indictment.[73] He had failed to raise this claim before trial.[74] Pursuant to an express federal rule of criminal procedure, the failure to raise the claim pretrial constituted a waiver of the objection.[75] The rule, however, also provided that upon a showing of cause for the failure, a court could, at its discretion, grant

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Noia, 372 U.S. 391, 398-99 (1963). In Kaufman v. United States, 394 U.S. 217 (1969), the Supreme Court implicitly extended the deliberate bypass test to petitions pursuant to § 2255. *See Kaufman*, 394 U.S. at 228-29. The Court held that adjudication of the merits of a constitutional claim in a § 2255 proceeding was not forfeited by a failure to raise that claim on appeal. *See id.* at 231. It reasoned that adequate protection of constitutional rights required a full and fair consideration of claims raised in the habeas corpus petition. *See id.* at 226.

Some courts applying the deliberate bypass test place the burden of proof on the defendant. *See, e.g.*, Nash v. United States, 342 F.2d 366, 368 (5th Cir. 1965); Sandoval v. Tinsley, 338 F.2d 48, 50 (10th Cir. 1964). Others place the burden on the state. *See, e.g.*, Dorman v. Wainwright, 798 F.2d 1358, 1368 (11th Cir. 1986); Crick v. Smith, 650 F.2d 860, 867 (6th Cir. 1981); *see also* Friendly, *supra* note 65, at 158 (the state or federal government does not meet its burden of proof unless it demonstrates " 'a deliberate failure to present an issue *with an intention to present it later*.' " (emphasis in original) (citation omitted)).

70. In Engle v. Isaac, 456 U.S. 107 (1982), the Court suggested that defense counsel might withhold federal constitutional claims in the direct state proceeding in the belief that a more favorable determination would be obtained in federal court on habeas review. *See id.* at 130. The Court has characterized this action as "sandbagging," *see* Wainwright v. Sykes, 433 U.S. 72, 89 (1977), and has denied the possible benefit of such tactics by refusing to review the subsequent habeas petition. *See id.*

With respect to a federal defendant, the benefits of "sandbagging" arguably are nonexistent. It is difficult to imagine that an attorney rendering effective assistance would gamble during the direct proceeding in federal court by omitting meritorious claims on direct review with the expectation that a more favorable determination on other claims would be obtained in a subsequent federal habeas proceeding before the very same court. *See* Yackle, *supra* note 5, § 33, at 159-60; Friendly, *supra* note 65, at 158; *cf.* Note, *Procedural Defaults at the Appellate Stage and Federal Habeas Corpus Review*, 38 Stan. L. Rev. 463, 485 (1986) ("in a trial setting . . . sandbagging can do nothing but hurt a [defendant's] case").

71. 411 U.S. 233 (1973).

72. *See id.* at 238-39; Yackle, *supra* note 5, § 106, at 418.

73. *See* 411 U.S. at 235.

74. *See id.* at 234-35. Davis also omitted this claim from his appeal and several postconviction motions subsequently filed and denied. *See id.*

75. *See id.* at 236; Fed. R. Crim. P. 12(b)(2) (1973). Rule 12(b)(2), in effect at the time, provided in part: "Defenses and objections based on defects in the institution of the prosecution or in the indictment . . . may be raised only by motion before trial; [failure to raise such objections or defenses] constitutes a waiver thereof." *Id.*

appropriate relief from the waiver.[76]

In denying petitioner's request for relief, the Supreme Court ruled that a claim, once waived pursuant to an express procedural rule, ordinarily could not be resurrected during the direct proceedings.[77] The Court held that the procedural rule's pretrial waiver standard governed later collateral review as well.[78] In addition to enforcing the cause requirement of the procedural rule, the Court held that the petition should not be granted absent an additional showing of actual prejudice resulting from the alleged constitutional defect.[79]

Thereafter, in what was believed to sound the death knell of the *Noia* deliberate bypass standard, the Supreme Court extended application of the cause and prejudice standard to all cases in which habeas petitioners had failed to comply with a contemporaneous objection rule at trial, regardless of whether the rule contained an express cause exception.[80] In

76. *See Davis*, 411 U.S. at 236; *see also* Fed. R. Crim. P. 12(b)(2) ("the court for cause shown may grant relief from the waiver"). The petitioner in *Davis* contended that he was deprived of a fundamental constitutional right and that his case was controlled by *Kaufman*, not by Rule 12(b)(2). *See* 411 U.S. at 236. Therefore, collateral attack on his conviction would be barred only if it was established that he deliberately bypassed or knowingly waived his constitutional claims. *See id.* The district court disagreed, concluding that unless the petitioner raised his objection to the composition of the grand jury under Rule 12(b)(2) by a motion prior to trial, he had waived it. *See id.* at 235. The court of appeals affirmed. *See id.* at 236.

77. *See* 411 U.S. at 242. The Court reached its decision without examining, as required by *Noia*, the defendant's participation in the decision not to object pursuant to the rule's provisions. *See id.* at 254-57 (Marshall, J., dissenting).

78. *See id.* at 242. The Court stated that the rule's purpose of encouraging timeliness and finality should not be negated by allowing a more liberal standard of review in a habeas corpus proceeding than applies during the direct proceedings. *See id.*

79. *See id.* at 244-45 (citing Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963)).

80. In Wainwright v. Sykes, 433 U.S. 72 (1977), the state procedural rule in issue contained no specific cause requirement. *See id.* at 76 n.5. The Court in *Sykes* applied the cause and prejudice test, but left open the precise definition of both cause and prejudice, stating only that it was narrower than the standard set forth in the "sweeping language" of *Noia* establishing the deliberate bypass test. *See id.* at 87; Marcus, *Federal Habeas Corpus After State Court Default: A Definition of Cause and Prejudice*, 53 Fordham L. Rev. 663, 664 (1985); Comment, *Federal Habeas Corpus Review of Unintentionally Defaulted Constitutional Claims*, 130 U. Pa. L. Rev. 981, 988-89 (1982).

In United States v. Frady, 456 U.S. 152 (1982), the Court extended the *Sykes* holding to § 2255 motions brought by federal prisoners. *Frady*, 456 U.S. at 166-67 & n.15. The Court held that a federal defendant's failure to comply with a contemporaneous objection rule at trial, or raise on direct appeal his claim of an erroneous jury instruction, barred him from litigating the issue in a subsequent motion absent a showing of good cause and prejudice. *See id.* at 167-68. Collateral attack on the conviction and sentence was deemed inappropriate because society's and the government's legitimate interest in the finality of the conviction had been perfected. *See id.* at 166. This was especially true when the defendant already had an opportunity to present his federal claims in a federal forum. *See id.*

To temper the apparent restrictiveness of the cause and prejudice standard and to preserve the fundamental fairness necessary for an effective criminal justice system, the Supreme Court recently held that the absence of cause and prejudice will not prevent a federal habeas court from adjudicating for the first time federal constitutional claims of a defendant who, in the absence of such adjudication, will suffer a miscarriage of justice.

recent cases, the Court has held that the cause and prejudice standard applies whenever a habeas petitioner has failed to comply with appellate procedural rules that mandate a forfeiture of claims not raised on direct appeal.[81]

The subsequent trend among lower federal courts has been to consider a claim forfeited if not raised in a prior proceeding, whether or not forfeiture is mandated by a procedural rule. Many courts apply the cause and prejudice standard to determine if habeas corpus relief should be granted on the defaulted claim.[82] In light of this trend, several courts have ques-

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See, e.g., Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986) (suggesting that actual innocence would meet this exception); Engle v. Isaac, 456 U.S. 107, 135 (1982) (cause and prejudice must yield to the importance of correcting an unjust incarceration); *cf.* Kuhlmann v. Wilson, 106 S. Ct. 2616, 2627 (1986) (suggesting successive petitions should not be entertained absent colorable claim of innocence). For the most part, such a defendant will meet the cause and prejudice standard. *See Engle*, 456 U.S. at 135. When an incarceration is unjust and a petitioner fails to meet the threshold standard for relief, however, this exception allows the court to look beyond the standard to vindicate the prisoner's constitutional rights. *See Carrier*, 106 S. Ct. at 2668.

Since the inception of the new standard, the Supreme Court has declined to essay a comprehensive catalog of the circumstances that would justify a finding of cause and prejudice. *See* Smith v. Murray, 106 S. Ct. 2661, 2666 (1986). Some guidelines, however, have been established. *See, e.g.*, Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986) (some objective factor external to the defense impeded counsel's efforts to comply with the procedural rule); *id.* (petitioner lacked the effective assistance of counsel at the time of the procedural default); *id.* at 2645 (counsel's failure to recognize the factual or legal basis of a claim, or the failure to raise the claim despite recognizing it is not cause); Reed v. Ross, 468 U.S. 1, 16 (1984) (novelty of constitutional claim may constitute cause); United States v. Frady, 456 U.S. 152, 169 (1982) (prejudice results when the error by itself infects the entire proceeding and violates due process. For an extensive discussion of a proposed definition of prejudice, cause and miscarriage of justice, see Marcus, *supra*, at 708-32.

81. *See* Murray v. Carrier, 106 S. Ct. 2639, 2648 (1986). In *Carrier*, the Court concluded that counsel's failure to raise a particular claim on appeal should be scrutinized under the cause and prejudice test when that failure is treated as a procedural default by the state courts. *See id.* The Court applied the cause and prejudice standard and denied the habeas petition even though petitioner properly raised the claim by timely objection at trial. *See id.* at 2642.

In a companion case, Smith v. Murray, 106 S. Ct. 2661 (1986), the Supreme Court held that a state prisoner could not obtain federal habeas corpus relief on his motion pursuant to 28 U.S.C. § 2254 alleging a constitutional defect during sentencing. *See Smith*, 106 S. Ct. at 2665-66. By failing to assert the claim on direct appeal to the state appellate courts, petitioner committed a procedural default under an express state rule that precluded all future state court review of the claim. *See id.* at 2664. Petitioner's defaulted claim was nonetheless raised on direct appeal in the state court in a brief filed by *amicus curiae*. *See id.* The state supreme court refused to entertain this claim because it was not an error specifically advanced by the defendant himself. *See id.* Because the state courts did not review the claim, the federal habeas court was also barred, in the interests of federalism and comity. *See id.* at 2668.

82. *See, e.g.*, Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982) (failure to appeal constitutional issue precludes habeas relief unless cause and prejudice is shown); United States v. Barnes, 610 F.2d 888, 892-94 (D.C. Cir. 1979) (failure to object to admission of prearrest statements may be subject to cause and prejudice standard); Sincox v. United States, 571 F.2d 876, 879-80 (5th Cir. 1978) (failure to appeal nonunanimous jury verdict in federal court scrutinized under cause and prejudice standard).

tioned the continued viability of the *Noia* deliberate bypass test.[83] The Supreme Court has not yet ruled on the fate of the *Noia* test,[84] but the test is not practical as applied to a guilty plea defendant who challenges sentencing errors for the first time in a habeas corpus petition.[85]

C. *Application of the Cause and Prejudice Standard*

A petition for habeas corpus relief based on constitutional claims not raised at a prior procedural opportunity implicates two sets of competing concerns. On the one hand, the individual has a vital interest in the vindication of his constitutional rights.[86] The liberal availability of habeas corpus relief best serves this interest. On the other hand, the government is concerned with judicial economy, the orderly administration of justice and the finality of judgments.[87] In recent years the Supreme Court has emphasized these concerns,[88] thereby limiting the availability of habeas corpus relief to exceptional cases.

Procedural options provide a defendant who has pleaded guilty with several opportunities to raise sentencing errors prior to petitioning for relief pursuant to section 2255.[89] The failure to utilize these earlier opportunities seriously undermines the government's interests in judicial economy, finality, and the orderly administration of justice.[90] Timely use of these opportunities limits the need for additional postconviction litigation. Therefore, review of issues not timely raised in one of these prior procedural opportunities should be limited under section 2255 unless the

83. *See* United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 357-58 (7th Cir. 1983) (en banc); Crick v. Smith, 650 F.2d 860, 867 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982); Forman v. Smith, 633 F.2d 634, 640 n.8 (2d Cir. 1980); Cole v. Stevenson, 620 F.2d 1055, 1059 (4th Cir.), *cert. denied*, 449 U.S. 1004 (1980); Sincox v. United States, 571 F.2d 876, 879 (5th Cir. 1978); Ramsey v. United States, 448 F. Supp. 1264, 1269 (N.D. Ill. 1978); Robbins, *Whither (or Wither) Habeas Corpus?: Observations on the Supreme Court's 1985 Term*, 111 F.R.D. 265, 281-82 (1986).

84. Several justices have stated that the standard applies only to cases where the defendant has failed completely to pursue a direct appeal. *See* Murray v. Carrier, 106 S. Ct. 2639, 2648 (1986); *id.* at 2682 & n.3 (Brennan, J., dissenting); Wainwright v. Sykes, 433 U.S. 72, 88 n.12 (1977).

85. The federal guilty plea defendant applying for habeas corpus relief generally has not deliberately bypassed available procedural opportunities, but rather has failed to pursue them because he was not aware of them. *See supra* note 28.

86. *See supra* note 9 and accompanying text.

87. *See supra* note 10 and accompanying text.

88. *See* Murray v. Carrier, 106 S. Ct. 2639, 2645 (1986); Smith v. Murray, 106 S. Ct. 2661, 2666 (1986); Engle v. Isaac, 456 U.S. 107, 128 (1982); United States v. Frady, 456 U.S. 152, 166 (1982); Wainwright v. Sykes, 433 U.S. 72, 88-90 (1977).

89. *See* Parks v. United States, 832 F.2d 1244, 1246 n.3 (11th Cir. 1987); Williams v. United States, 805 F.2d 1301, 1304 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1978 (1987); Gammarano v. United States, 732 F.2d 273, 276 (2d Cir. 1984); *see also supra* notes 22-44 and accompanying text.

90. *See* Reed v. Ross, 468 U.S. 1, 10-11 (1984); United States v. Frady, 456 U.S. 152, 166 (1982); Wainwright v. Sykes, 433 U.S. 72, 88-89 (1977); Ramsey v. United States, 448 F. Supp. 1264, 1270 (N.D. Ill. 1978).

petitioner can show cause for his failure to raise the claim and prejudice resulting from that alleged error.

Implementation of the cause and prejudice standard encourages prompt and complete compliance with legitimate rules of procedure. At the sentencing hearing, the petitioner has several opportunities to challenge factual inaccuracies in the information considered by the court and prevent a possible deprivation of his due process rights.[91] While there are no contemporaneous objection rules at sentencing like those existing at the trial stage,[92] Rule 32 unambiguously establishes the time for making objections to inaccurate sentencing information and for making statements in mitigation of punishment.[93] Timely objection at the hearing gives the sentencing judge a chance to correct any errors in the available information and contributes to the accuracy of the sentence determination.[94]

The petitioner has two further opportunities as part of the direct proceedings to challenge his sentence: appellate review pursuant to Rule 4(b),[95] and correction or reduction of the sentence pursuant to Rule 35.[96] Each of these options provides the defendant with a chance to raise errors not previously challenged at the hearing itself.[97] Errors that would affect the validity or severity of a sentence should be raised pursuant to one of these procedural vehicles so that they may be addressed promptly

91. *See* Fed. R. Crim. P. 32 (a)(1) & (c)(3) (1976), *as amended* Fed. R. Crim. P. 32(a)(1)(C) & (c)(3) (1987); *see also supra* notes 30-32 and accompanying text.

92. *See* United States v. Restrepo, 832 F.2d 146, 149-50 (11th Cir. 1987); United States v. Baylin, 696 F.2d 1030, 1036 (3d Cir. 1982); United States v. Corsentino, 685 F.2d 48, 50 (2d Cir. 1982).

93. *See* Fed. R. Crim. P. 32 (a)(1) & (c)(3) (1976), *as amended* Fed. R. Crim. P. 32(a)(1)(C) & (c)(3) (1987).

94. *See* United States v. Weichert, 836 F.2d 769, 771 (2d Cir. 1988); United States v. Restrepo, 832 F.2d 146, 148 (11th Cir. 1987); United States v. Aleman, 832 F.2d 142, 143-44 (11th Cir. 1987).

When the factual accuracy of the information contained in the presentence report is challenged, the court either must make any necessary correction, or state that the controverted matter will not be taken into account when determining the sentence. *See* United States v. Navaro, 774 F.2d 565, 566 (2d Cir. 1985) (per curiam); Fed. R. Crim. P. 32(c)(3)(D). If the judge fails to comply with this provision, remand for resentencing is required. *See Weichert*, 836 F.2d at 772; Kramer v. United States, 788 F.2d 1229, 1231 (7th Cir. 1986).

The defendant's interest in an accurate and reliable presentence report continues long after the imposition of sentence. This report is used as the basic source of information in the handling of the defendant. *See* Fennel & Hall, *supra* note 30, at 1679-80. Both the Bureau of Prisons and the Parole Commission may rely on the information contained in the report in making critical determinations relating to custody and parole. *See* Fed. R. Crim. P. 32 advisory committee note, 1983 amendment (Supp. IV 1986).

95. *See* Fed. R. App. P. 4(b); *supra* notes 35-38 and accompanying text.

96. *See* Fed. R. Crim. P. 35 (amending 18 U.S.C. Fed. R. Crim. P. 35 (1982 & Supp. 1986); *supra* notes 39-44 and accompanying text.

97. *See* Gammarano v. United States, 732 F.2d 273, 276 (2d Cir. 1984); United States v. Stoddard, 553 F.2d 1385, 1389 (D.C. Cir. 1977); United States v. Hopkins, 531 F.2d 576, 580 (D.C. Cir. 1976); Hodges v. United States, 282 F.2d 858, 860-61 (D.C. Cir. 1960) (per curiam); *see also supra* note 44.

and the necessary corrective action taken. In this way, the orderly administration of justice is maintained and the defendant does not suffer any unnecessary deprivation of liberty.

If a defendant fails to utilize available procedural opportunities for review, forfeiture of further opportunities is appropriate. This policy would promote compliance with valid procedural rules. Without penalty to discourage further abuse of procedure, a defendant may continue to violate the rules.[98] Any effective judicial system must be able to exact compliance with legitimate rules of procedure.[99] Enforcing a forfeiture of claims under the cause and prejudice standard serves this policy without foreclosing the review of meritorious claims.[100]

The Supreme Court has stated unequivocally that federal trial and appellate procedures are sufficiently reliable and their completed operation should be given preclusive effect.[101] Because effective procedures to raise sentencing errors are available at several levels, both during the hearing and on appellate review, there is no need to provide additional, collateral review that would divert the finite resources of the courts.[102] A federal

98. *See* Smith v. Murray, 106 S. Ct. 2661, 2667 (1986); Murray v. Carrier, 106 S. Ct. 2639, 2658-59 (1986); United States v. Frady, 456 U.S. 152, 167-68 (1982); Engle v. Isaac, 456 U.S. 107, 130 & n.36 (1982); Sanchez v. Miller, 792 F.2d 694, 699 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987); Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982); Ramsey v. United States, 448 F. Supp. 1264, 1273 n.18 (N.D. Ill. 1978).

99. To preserve the orderly administration of justice, procedural rules must be enacted and enforced. *See* Comment, *supra* note 80, at 1012. Compelling a defendant to seek redress of an error by raising it in a timely fashion, pursuant to available rules, or be deemed to have forfeited further consideration of the error, encourages procedural compliance at the earliest possible time in the proceeding. This prompts all defendants to seek fairness and accuracy in the initial proceeding. *See* United States v. Frady, 456 U.S. 152, 163 (1982); Wainwright v. Sykes, 433 U.S. 72, 90 (1977).

100. In the interest of uniformity, this standard should apply to all guilty plea defendants, sentenced both before and after enactment of the Sentencing Guidelines. However, in pre-enactment cases when the defendant has not been informed of the right to appeal, *see supra* note 28, and no appeal is taken, greater flexibility should be afforded the courts in interpreting the cause and prejudice standard. In those cases, the failure to appeal resulting from counsel's inadvertence or negligence should satisfy the cause requirement, *see* Murray v. Carrier, 106 S. Ct. 2678, 2682 & nn.3,4 (1986) (Brennan, J., dissenting); Marcus, *supra* note 80, at 718, 727-28, particularly where there is no suggestion of a deliberate bypass of the opportunities for direct review of the sentence. This flexibility would allow each defendant at least one chance for review of the sentence when meritorious claims are raised, preserving the fundamental fairness of the criminal justice system that habeas corpus ensures. Such an interpretation is wholly consistent with the Supreme Court's unwillingness to overrule the *Noia* deliberate bypass standard when no appeal is taken. *See* Murray v. Carrier, 106 S. Ct. 2639, 2648 (1986); Murray v. Carrier, 106 S. Ct. 2678, 2682 n.3 (1986) (Brennan, J., dissenting).

101. *See* United States v. Frady, 456 U.S. 152, 164-65 (1982); *see also* Kaufman v. United States, 394 U.S. 217, 227 (1969).

102. *See Kaufman*, 394 U.S. at 233-34 (Black, J., dissenting) (citing Thornton v. United States, 368 F.2d 822, 824-26 (1966)); Johnson v. United States, 838 F.2d 201, 202 (7th Cir. 1988); Williams v. United States, 805 F.2d 1301, 1308 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1978 (1987). The resources of the judicial system are finite and "overextension jeopardizes the care and quality essential to a fair adjudication." Schneckloth v. Bustamonte, 412 U.S. 218, 261 (1973) (Powell, J., concurring); *see also* Hodges v. United States, 282 F.2d 858, 860 (D.C. Cir. 1960).

sentence that has been reviewed by a federal court on appeal or on a Rule 35 motion should be deemed presumptively valid.[103]

Allowing a petitioner the continued opportunity to challenge his sentence when he has bypassed appellate remedies permits him to use collateral attack as a direct appeal.[104] The Supreme Court expressly has prohibited this practice.[105] Section 2255 is not an additional appeal nor a substitute for appeal.[106] Its purpose is to ensure that a sentence has been imposed in compliance with the Constitution and the laws of the United States.[107] Sufficient procedural opportunities already exist in the direct proceedings to ensure this result.[108] Therefore, the relief available pursuant to section 2255 should be conditioned upon a higher standard than exists on direct review.[109] The guilty plea defendant's failure to avail himself of procedural opportunities for the correction of sentencing errors should constitute a forfeiture of those claims for later proceedings unless, under the cause and prejudice standard, the petitioner can show that he is entitiled to the relief granted by the writ of habeas corpus.[110]

Failing to raise a claim either at the sentencing hearing or on direct review of that hearing reduces the finality of the criminal proceedings.[111] A judgment may no longer be presumed valid at the completion of the direct proceedings if it remains open to an endless series of new chal-

103. *See* Barefoot v. Estelle, 463 U.S. 880, 887 (1983); United States v. Frady, 456 U.S. 152, 164 (1982); *see also* United States v. Restrepo, 832 F.2d 146, 148 (11th Cir. 1987); United States v. Mitchell, 788 F.2d 1232, 1237 (7th Cir. 1986); United States v. Sparrow, 673 F.2d 862, 864 (5th Cir. 1982).

104. *See* Norris v. United States, 687 F.2d 899, 903 (7th Cir. 1982); United States v. Johnson, 607 F. Supp. 258, 263 (N.D. Ill. 1985).

105. *See supra* note 49 and accompanying text.

106. *See* Johnson v. U.S., 838 F.2d 201, 202 (7th Cir. 1988); U.S. v. Hanyard, 762 F.2d 1226, 1230 n.1 (5th Cir. 1985); Government of the Virgin Islands v. Nicholas, 759 F.2d 1073, 1074-75 (3d Cir. 1985); United States v. Dukes, 727 F.2d 34, 41 (2d Cir. 1984); United States v. Samuelson, 722 F.2d 425, 427 (8th Cir. 1983).

107. *See* Kaufman v. United States, 394 U.S. 217, 221 (1969); Hill v. United States, 368 U.S. 424, 426 (1962); United States v. Hayman, 342 U.S. 205, 211 (1952).

108. *See supra* notes 28-44. When a meritorious constitutional claim does not meet the cause and prejudice standard, the court may, in its discretion, grant relief in the interests of fundamental fairness. *See supra* note 80. Courts retain the power to reach the merits in the face of a forfeiture; the forfeiture does not affect jurisdiction. *See* United States v. Angelos, 763 F.2d 859, 860-61 (7th Cir. 1985); Jackson v. Cupp, 693 F.2d 867, 869 & n.2 (9th Cir. 1982).

109. *See* United States v. Frady, 456 U.S. 152, 166 (1982). Cause and prejudice, rather than plain error, is the proper standard for evaluating claims not raised at trial but later raised in a petition for habeas corpus. *See id.* at 166-67; *see also* Parks v. United States, 832 F.2d 1244, 1246 (11th Cir. 1987); Lilly v. United States, 792 F.2d 1541, 1546 (11th Cir. 1986) (Johnson, J., dissenting); United States v. Rivera-Ramirez, 715 F.2d 453, 456 (9th Cir. 1983), *cert. denied*, 467 U.S. 1215 (1984).

110. *See* Smith v. Murray, 106 S. Ct. 2661, 2665-66 (1986) (citing Wainwright v. Sykes, 433 U.S. at 84); Tague, *Federal Habeas Corpus and Ineffective Representation of Counsel: The Supreme Court Has Work To Do*, 31 Stan. L. Rev. 1, 34-39 (1978).

111. *See* Reed v. Ross, 468 U.S. 1, 10-11 (1984); United States v. Timmreck, 441 U.S. 780, 784 (1979); Fay v. Noia, 372 U.S. 391, 448 (1963) (Harlan, J., dissenting); Sanchez v. Miller, 792 F.2d 694, 698 (7th Cir. 1986), *cert. denied*, 479 U.S. 1056 (1987); United States *ex rel.* Spurlark v. Wolff, 699 F.2d 354, 361 (7th Cir. 1983) (en banc).

lenges.[112] Conceding the continuing possibility that there is error in every proceeding and that every incarceration may be unconstitutional undermines the courts' ability to administer justice in an orderly and efficient manner.[113] It also diminishes the public's perception of the judiciary as able administrators of justice.[114] Both the individual and the government have an interest in insuring that at some point criminal litigation will be considered final and that attention will not be focused on errors in the conviction, but rather on rehabilitation of the prisoner.[115] Except in unusual cases,[116] that point should be reached at the completion of the direct proceedings.

Allowing the petitioner to raise issues on collateral attack that were not previously challenged on direct review encourages piecemeal litigation by allowing the petitioner to keep issues in reserve, presenting challenges one at a time.[117] Each of these separate motions must be considered on the merits if the court does not find that petitioner deliberately bypassed his prior opportunities for review.[118] The time necessary for a thorough review of each claim overextends judicial resources and jeopardizes the care and quality essential to a fair adjudication of any meritorious suit.[119] To alleviate this potential burden, the cause and prejudice standard should apply to enforce gatekeeping procedures that bar the defendant from raising the new issues on a section 2255 motion.

CONCLUSION

No express procedural rules exist to preclude relief on a constitutional claim not raised in a timely manner at sentencing or on appeal from that hearing. Granting a full hearing of such claims, however, undercuts the

112. *See* Barefoot v. Estelle, 463 U.S. 880, 887 (1983); United States v. Frady, 456 U.S. 152, 164 (1982); *see also* United States v. Restrepo, 832 F.2d 146, 148 (11th Cir. 1987) (judge granted broad discretion at sentencing); United States v. Mitchell, 788 F.2d 1232, 1237 (7th Cir. 1986) (same); United States v. Sparrow, 673 F.2d 862, 864 (5th Cir. 1982) (finality deters prisoner from filing endless attacks on the judgment).

113. *See* Schneckloth v. Bustamonte, 412 U.S. 218, 262 (1973) (Powell, J., concurring).

114. *See* United States v. Frady, 456 U.S. 152, 164-65 (1982); Note, *supra* note 138, at 478-79.

115. *See* Sanders v. United States, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting); Parks v. United States, 832 F.2d 1244, 1246 (11th Cir. 1987); *see also* United States v. Moskow, 588 F.2d 882, 890 (3d Cir. 1978); Note, *supra* note 70, at 479.

116. For example, if new information is discovered after sentencing, the defendant may be entitled to be resentenced if the absence of that information is sufficiently prejudicial to a fair determination of sentence. *See* Smith v. Murray, 106 S. Ct. 2661, 2668 (1986).

In addition, where petitioner was not informed of his right to appeal the sentence or apply for relief under Rule 35 and no direct review was taken, different considerations may exist in applying the cause and prejudice test. *See supra* note 100.

117. *See* Norris v. United States, 687 F.2d 899, 903 (7th Cir. 1982); Williams v. United States, 805 F.2d 1301, 1308 (7th Cir. 1986), *cert. denied*, 107 S. Ct. 1978 (1987); *see also* Wainwright v. Sykes, 433 U.S. 72, 90 (1977); United States v. Moskow, 588 F.2d 882, 890 (3d Cir. 1978).

118. *See* Norris v. United States, 687 F.2d 899, 903 (7th Cir. 1982); Hodges v. United States, 282 F.2d 858, 860 (D.C. Cir. 1960) (per curiam).

119. *See supra* note 102.

finality of criminal convictions, encourages piecemeal litigation, interrupts the orderly administration of justice, and overburdens limited judicial resources. Sufficient opportunities to challenge the validity of a sentence already exist, both during the hearing and on postsentencing review. The deliberate bypass standard, while promoting fairness to the defendant, provides inadequate assurance that finality will be enforced, procedural rules will be respected, and meritorious claims will be presented in a timely manner. The cause and prejudice standard, however, provides a workable means of limiting federal habeas jurisdiction to discourage frivolous collateral appeals while still allowing meritorious claims to be redressed. The cause and prejudice standard should be applied to all cases when a guilty plea defendant challenges errors at sentencing for the first time in a petition for habeas corpus.

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