NOTES

CLOSING A RESENTENCING LOOPHOLE: A PROPOSAL TO AMEND 28 U.S.C. § 2255

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I. INTRODUCTION

Historically, habeas corpus relief has provided a remedy in extraordinary cases for prisoners incarcerated in violation of the U.S. Constitution. Habeas relief brings to mind gross injustices—prisoners serving sentences for crimes they did not commit or prisoners who are incarcerated because they were not represented by counsel at their trials. Yet under current law, prisoners serving enhanced federal sentences may reduce their sentences without necessarily proving that any constitutional violation or error has occurred.

Under 28 U.S.C. § 2255, a federal prisoner may file a motion to correct a federal sentence without resorting to a habeas petition.[1] In the motion, the prisoner may claim that his or her sentence (1) violates the U.S. Constitution or laws, (2) was imposed by a court that lacked jurisdiction,

* Class of 2006, University of Southern California Gould School of Law; B.A. 1999, University of Notre Dame. I owe special thanks to my faculty advisor, Jean Rosenbluth, for generating the idea for this Note and for assisting me with my outlines and rough draft. In addition, Jean Rosenbluth's brief for the Ninth Circuit case *United States v. LaValle* provided a starting point for my arguments and much of my research. Appellee's Brief, United States v. LaValle, 175 F.3d 1106 (9th Cir. 1999) (No. 98-55037) (on file with the author). I would also like to thank my partner, Beth Heckinger, for her tremendous support and encouragement throughout my law school career.

1. 28 U.S.C. § 2255 (2000). Section 2255 is a modern version of the writ of error *coram nobis*, an ancient remedy that allows prisoners to correct sentencing errors without resorting to habeas petitions. United States v. Frady, 456 U.S. 152, 182 n.5 (1982). In 1948, Congress enacted § 2255 to streamline the process for collaterally attacking a federal criminal sentence. *Id.* at 165.

(3) exceeds the maximum allowed under the law, or (4) "is otherwise subject to collateral attack."[2] A federal court may grant relief by vacating and setting aside the judgment, granting a new trial, and resentencing or even releasing the prisoner.[3] A prisoner serving a sentence enhanced on the basis of prior convictions may reopen his or her federal sentence with a § 2255 motion if one of his or her prior convictions is later vacated or dismissed.[4] Under the United States Courts of Appeals' interpretation of § 2255, a prisoner must show that a prior conviction has been vacated, but need not show that it was vacated on constitutional grounds.[5] Thus, a prisoner serving an enhanced sentence can reduce that sentence, or even secure release, by vacating a prior conviction without showing that a constitutional violation or other error occurred.

To illustrate, imagine that a man pleaded guilty in state court to five separate drug and firearm possession charges in the early to mid-1990s. Then, in 2005, he is convicted in federal court of firearm possession and receives an enhanced sentence under the Armed Career Criminal Act of 1984 ("ACCA").[6] Under ACCA, he receives a mandatory minimum sentence, because he had three previous convictions for violent felonies or serious drug offenses. Faced with this significantly longer sentence, he returns to state court in the hope of vacating at least three of his prior convictions so that the ACCA mandatory minimum will no longer apply. Although he has no evidence to support his claim, he alleges that he was not informed of his right to counsel before he entered his pleas more than a decade ago. Due to the passage of time, the state court has no transcripts or other evidence to review in order to evaluate the claims. Indeed, the State, which has no interest in defending his old convictions, does not even come to court. Faced with no evidence other than the allegations, the court vacates his convictions. Armed with this "new" development, the man files a § 2255 motion in federal court and successfully seeks to be resentenced without the career criminal enhancement. As a result, this man, who never proved that his prior state convictions were in any way constitutionally infirm or otherwise erroneous, has reduced his sentence by many years and may even be released.

Federal prisoners serving enhanced sentences take advantage of § 2255 by bringing delayed challenges to prior state convictions. By

2. § 2255.
3. *Id.*
4. Johnson v. United States, 125 S. Ct. 1571, 1577 (2005).
5. *See infra* Part II.
6. 18 U.S.C. § 924(a) (2000).

delaying their challenges, these prisoners have two distinct advantages in alleging that an error or constitutional violation tainted their prior convictions. First, they benefit from the State's decreased interest in upholding old convictions for which sentences have long since been served. Second, defendants challenging convictions many years after they are finalized are able to take advantage of the fact that the records of their trials and guilty pleas have deteriorated or simply no longer exist. Without a sufficient record, the State frequently will be unable to uphold these convictions—even if it is interested in doing so. Given these advantages, defendants can easily seek to have prior convictions dismissed on the basis of conclusory allegations, often in uncontested hearings with no trial court records before the court. Thereafter, defendants can file § 2255 motions to reopen their enhanced federal sentences. Thus, by doing no more than successfully manipulating the system, federal prisoners may obtain relief in the form of reduced sentences.

All the more disturbing, the prisoners who take advantage of this loophole are the ones who received enhanced federal sentences as a result of their criminal histories. Their enhanced sentences represent an important goal of the criminal justice system: incapacitation of career criminals. Given their histories and overall likelihood of recidivism, these career criminals are considered most at risk for committing future crimes.[7] Yet these same criminals use § 2255 motions to work a perverse form of "justice," getting their enhanced federal sentences reduced without necessarily proving that any errors or constitutional violations tainted their prior convictions. These defendants thwart the goal of incapacitating career criminals by using § 2255 motions to return more quickly to society and, possibly, to lives of crime.

This Note discusses why § 2255 should be amended to prevent its current misuse and to align it with the traditional, historic remedy of habeas corpus relief. Part II discusses the development of case law that has led to the current misuse of § 2255 motions. It explains how dicta from one Supreme Court case, *Custis v. United States*,[8] quickly led eight United

7. In testimony before Congress, Assistant United States Attorney General Christopher A. Wray stated that 66% of federal prisoners are incarcerated for violent crimes or had a prior criminal record. *Implications of the* Booker/Fanfan *Decision for the Federal Sentencing Guidelines: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 109th Cong. 8 (2005) (statement of Christopher A. Wray, Assistant Attorney General of the United States). He also noted that "[t]he rap sheets of federal prisoners incarcerated for non-violent offenses indicate an average of 6.4 prior arrests with an average of at least 2.0 prior convictions. Given the active criminal careers and the propensity for recidivism of most prisoners, incapacitation works." *Id.*

8. Custis v. United States, 511 U.S. 485 (1994).

States Courts of Appeals to decide that a defendant could reopen a federal sentence merely by showing that a prior conviction had been vacated. Part III details how defendants are able to misuse § 2255 motions by easily overturning prior state convictions, which are often vulnerable to attack due to disinterest on the part of the State, a problem which is compounded by deteriorated or nonexistent trial records. Next, Part IV discusses the importance of amending § 2255 by demonstrating that its current use is inconsistent not only with the traditional use of habeas relief to remedy constitutional violations, but also with the goals of promoting the finality of judgments and efficiency in the criminal justice system. Finally, Part V proposes amending § 2255 by limiting the circumstances in which a defendant may apply for sentencing relief and limiting the prior convictions eligible for attack to reduce a federal sentence. This Note concludes that these amendments to § 2255 would prevent career criminals from being rewarded with reduced federal sentences for their successful manipulation of the justice system.

II. THE UNITED STATES COURTS OF APPEALS HAVE MISGUIDEDLY EXPANDED THE SCOPE OF § 2255 MOTIONS

The United States Courts of Appeals have broadened a prisoner's right to attack his or her federal sentence under § 2255 through their interpretation of Supreme Court dicta in *Custis v. United States*.[9] Custis was convicted of possession of a firearm and faced an enhanced sentence pursuant to ACCA based on three prior convictions for violent felonies.[10] Under ACCA, Custis's sentence would increase from a maximum of ten years to a mandatory minimum of fifteen years up to a maximum life sentence.[11] During his federal sentencing proceeding, Custis alleged that his prior convictions were unconstitutionally obtained because they violated his rights to effective assistance of counsel, to make a knowing and intelligent guilty plea, and to be fully informed of his rights at trial. The Court denied Custis's claim, holding that a defendant may not use a federal sentencing proceeding to collaterally attack the validity of prior convictions. The Court made a narrow exception, however, for a conviction obtained in complete violation of the right to counsel.[12] This narrow exception did not apply to Custis's challenge because the alleged

9. *See id.* at 497.
10. *Id.* at 487–88.
11. *Id.* at 487.
12. *Id.* at 487, 494–96.

ineffective assistance of counsel did not "rise[] to the level of a jurisdictional defect resulting from the failure to appoint counsel at all."[13]

At the end of its opinion, in dicta, the Court stated that if Custis were to be successful in attacking his prior state convictions, "he [could] then apply for reopening of any federal sentence enhanced by the state sentences," and concluded by saying, "We express no opinion on the appropriate disposition of such an application."[14] This dictum, as later interpreted by the United States Courts of Appeals, opened the door to a broader § 2255 remedy.

Relying principally on the *Custis* dicta, the United States Courts of Appeals rapidly handed down a series of opinions reinterpreting § 2255. In total, eight circuits have held that prisoners serving enhanced sentences may reopen their sentences with a § 2255 motion if one or more of the underlying convictions is successfully vacated.

The Fifth Circuit first gave life to the *Custis* dictum in *United States v. Nichols*, which involved a prior conviction that was later determined to have violated Nichols's constitutional rights.[15] A year after Nichols was sentenced as a career offender in federal court, the Texas Court of Appeals, on direct appeal, vacated one of the prior drug convictions that had been used to enhance his sentence.[16] The court determined that his conviction was invalid because the State had withheld exculpatory evidence.[17] When Nichols filed a § 2255 motion to adjust his federal sentence, the federal prosecutor conceded that he should be resentenced, because one of his convictions had been vacated on constitutional grounds.[18] "[O]n the basis of the Government's concession," the Fifth Circuit granted Nichols's § 2255 motion to reduce his sentence.[19] Although the relief granted to Nichols was consistent with habeas relief because it remedied a constitutional violation, subsequent United States Courts of Appeals decisions broadened the relief available under § 2255. Under a line of cases following *Nichols*, defendants gained the ability to use § 2255 motions to

13. *Id.* at 496.

14. *Id.* at 497.

15. *See* United States v. Nichols, 30 F.3d 35, 36 (5th Cir. 1994).

16. *See id.* In 1992, Nichols was convicted of distributing crack cocaine within one thousand feet of a public school and was sentenced as a career felon on the basis of his two prior state drug convictions. *Id.*

17. *Id.*

18. *Id.* (noting that "the Government conceded that, in light of *Custis*, Appellant should get the benefit of the fact that he subsequently had the previous state conviction overturned").

19. *Id.*

reduce their federal sentences even if *no* errors or constitutional violations had been shown.

In 1996, the Tenth Circuit, in *United States v. Cox*, effectively held that a prior conviction need not be vacated on constitutional grounds for a defendant to reopen a federal sentence.[20] Cox was serving an enhanced sentence for use of a firearm during drug trafficking. His § 2255 motion sought to reopen his federal sentence because he had successfully obtained orders dismissing or expunging several of the prior convictions that had been used to enhance his sentence.[21] The Tenth Circuit upheld the granting of Cox's § 2255 motion and remanded his case for resentencing, based solely on the changes in his prior convictions.[22] The court found support to reopen Cox's sentence from two recently decided cases—*Nichols* and *United States v. Payne*.[23] The court, however, failed to distinguish a key fact in both *Nichols* and *Payne*: the basis for overturning the defendants' prior convictions.

The *Cox* court cited to *Nichols* for the proposition that § 2255 permits prisoners to reopen their sentences when prior convictions have been successfully invalidated, emphasizing the government's concession of this point in *Nichols*.[24] In making this broad statement, the *Cox* court failed to note that the federal prosecutor in *Nichols* made that concession only because one of Nichols's prior convictions had already been vacated on direct appeal due to a proven constitutional violation. Given that Nichols had diligently proven this violation on direct appeal, the prosecutor could be confident that his conviction was in fact vacated on constitutional grounds. The government's concession was therefore not as simple as the *Cox* court later represented, and it did not apply outside the context of Nichols's case. Under this misguided interpretation of *Nichols*, the *Cox*

20. *See* United States v. Cox, 83 F.3d 336, 339, 342 (10th Cir. 1996) (stating, "[t]his court has recognized the availability of sentence review upon the invalidation of a predicate offense," and concluding that the defendant could reopen his sentence even where the bases for the expungements and dismissals of his prior convictions were unknown).

21. *Id.* at 338–39.

22. *See id.* at 338–40. The court remanded Cox's petition so the district court could determine the state law basis for the invalidation of his prior convictions. The court noted that under the Federal Sentencing Guidelines, U.S. SENTENCING GUIDELINES MANUAL § 4A1.2(j) (2005), convictions that are expunged or dismissed on the basis of constitutional errors, jurisdictional errors, or errors of law may not be used to enhance a sentence. *Cox*, 83 F.3d at 338–40. Yet, as discussed in Part III, *infra*, a defendant may dismiss or overturn a prior conviction without actually proving that a constitutional violation or other error occurred.

23. *Cox*, 83 F.3d at 339–40 (citing *Nichols*, 30 F.3d at 36; United States v. Payne, 894 F. Supp. 534, 539–40 (D. Mass. 1995)).

24. *Id.* at 339.

court found support for the much broader proposition that the successful overturning of a prior conviction alone is always sufficient to reopen a federal sentence.

The *Cox* court's misguided analysis continued with its reliance on a vastly different district court case, *United States v. Payne*.[25] Payne was convicted of unlawful possession of a firearm and sentenced under ACCA on the basis of several prior convictions.[26] After receiving an enhanced federal sentence, Payne returned to Massachusetts state court and requested a new trial for one of his prior convictions.[27] He alleged that the trial judge had failed to provide him with an adequate guilty plea colloquy.[28] The state court accepted his allegation and granted him a new trial; thereafter, the State decided not to retry him and dismissed the case.[29] Armed with the dismissal, Payne returned to federal court and the district court granted his § 2255 motion to reduce his sentence.[30]

Even in its decision to grant Payne relief, the district court expressed concern that his prior conviction had been dismissed on technical, rather than constitutional, grounds. Yet this concern, along with one that Massachusetts convictions generally are subject to "surprising infirmity," was relegated to a footnote.[31] In relying on *Payne*, the *Cox* court did not discuss the district court's concerns about how easily Payne was able to secure the dismissal of his prior conviction and its concern that Payne had won that dismissal without proving any error or constitutional violation.

Under its misguided interpretation of *Nichols* and *Payne*, the Tenth Circuit granted Cox's motion because he had successfully vacated some of his prior convictions.[32] Previously, as under *Nichols*, a § 2255 motion corrected the injustice of serving a sentence that relied on a constitutionally infirm or erroneous conviction. Yet under the new law announced in *Cox*, a § 2255 motion in the Tenth Circuit may seek to "correct" an enhanced

25. *Payne*, 894 F. Supp. 534.

26. *Id.* at 536–37.

27. *Id.* at 537.

28. *Id.* Before a defendant may enter a plea of guilty or nolo contendere, a court must inform the defendant of certain rights. For example, according to the Federal Rules of Criminal Procedure, the court must address the defendant in open court and explain the rights he or she is giving up in making the plea, such as the right to a jury trial, as well as the nature of the charges and the maximum penalty for the crime. FED. R. CRIM. P. 11(b)(1). In addition, the court must determine that the plea is being made voluntarily and that there is a factual basis for the plea. *Id*. at 11(b)(2)–(3).

29. *Payne*, 894 F. Supp. at 536–37.

30. *Id.* at 537, 544.

31. *See id.* at 537 n.7. For a more detailed discussion of the infirmity of Massachusetts convictions, see Part III.B, *infra*.

32. United States v. Cox, 83 F.3d 336, 338–40 (10th Cir. 1996).

federal sentence if it later turns out that one of the enhancing prior convictions simply no longer exists.

Similarly, in *United States v. Bacon*, the Fourth Circuit relied on *Nichols* to state that a defendant could reopen his sentence after he successfully vacated a prior conviction, although the court expressed concern about the defendant's allegations of actual innocence of his prior convictions.[33] In *Bacon*, the district court had failed to enhance Bacon's sentence properly under the then-mandatory Federal Sentencing Guidelines.[34] The district court judge decided not to sentence Bacon as a career offender after Bacon wrote him two letters proclaiming that he was innocent of a prior robbery conviction.[35] On review, the Fourth Circuit expressed concern that, other than writing the letters, Bacon had not sought postconviction relief in any court.[36] The court noted that his failure to appeal or otherwise attack the conviction of which he claimed to be innocent "'bespeak[s] a recognized lack of basis for doing so, thus raising in question the basis now claimed for making the attempt in an even more attenuated collateral setting.'"[37] Concluding that the district court had failed to impose a proper sentence, the Fourth Circuit remanded the case so that Bacon could be sentenced as a career offender.[38] In closing, however, the court noted that sentencing Bacon as a career offender would not prejudice him, even if he were actually innocent of the robbery. Citing *Nichols*, the court stated that if Bacon were to succeed in overturning his robbery conviction, apparently on the basis of actual innocence, he could then file a § 2255 motion to be resentenced.[39]

33. *See* United States v. Bacon, 94 F.3d 158 (4th Cir. 1996).

34. *Id.* at 159.

35. *Id.* at 159–60.

36. *Id.* at 161–62. For the proposition that the previously mandatory Federal Sentencing Guidelines are now advisory in federal court, see United States v. Booker, 125 S. Ct. 738, 756–57, 767 (2005) (stating that "[t]he district courts, while not bound to apply the Guidelines, must consult those Guidelines and take them into account when sentencing").

37. *Bacon*, 94 F.3d at 161 n.3 (quoting United States v. Jones, 977 F.2d 105, 109 (4th Cir. 1992)).

38. *Id.* at 159, 164.

39. *Id.* The court broadly stated, "Of course, if Bacon succeeds in a future collateral proceeding in overturning his robbery conviction, federal law enables him then to seek review of any federal sentence that was enhanced due to his state conviction." *Id*. at 161 n.3. Because the court framed the question broadly and the defendant had failed to invalidate his prior conviction on *any* grounds, it is unclear under what circumstances the Fourth Circuit would have allowed him to reopen his sentence. *Bacon* could be read for the narrow proposition that defendants may reopen their federal sentences only if they proved their innocence of prior convictions. So read, *Bacon*'s holding would be aligned with *Nichols*, which held that only actual constitutional violations entitle defendants to resentencing. Other courts, however, appear to have interpreted *Bacon* as stating more broadly that any overturned

After *Nichols*, *Cox*, and *Bacon* were decided, five other United States Courts of Appeals fell in line behind their sister circuits in a rapid chain reaction.[40] Summarizing the reasoning behind this post-*Nichols* chain reaction, the Eleventh Circuit stated that it had followed the precedent of its sister circuits because it was "[u]nwilling to create a split with such a majority."[41] Thus, eight circuits have held, primarily through reference to one another, that a federal prisoner may use a § 2255 motion to reopen his or her sentence by overturning a prior conviction, regardless of whether a constitutional violation or error had actually occurred.[42]

Judge Hill of the Eleventh Circuit explained why the post-*Nichols* case law is so fundamentally misguided and inconsistent with the traditional habeas remedy. Judge Hill wrote a special concurrence in *United States v. Walker* to note that he "ruefully and with great reluctance" joined the opinion to grant relief to a defendant simply because his or her prior conviction had been vacated.[43] Judge Hill expressed particular concern that Walker easily vacated his prior state conviction. Walker's challenge to his nineteen-year-old conviction was uncontested due to the state prosecutor's complete lack of interest in the old conviction and the federal prosecutor's lack of standing in state court. Judge Hill concluded that *Walker*'s holding

conviction entitles a defendant to win a § 2255 motion. *See* United States v. Doe, 239 F.3d 473, 475 (2d Cir. 2001); Mateo v. United States, 276 F. Supp. 2d 186, 191 (D. Mass. 2003).

40. *See Doe*, 239 F.3d at 475 (refusing to postpone a federal sentencing proceeding while the defendant pursued a collateral attack on a prior state conviction, because the defendant could reopen his federal sentence later under § 2255 if the attack was successful); United States v. Walker, 198 F.3d 811, 812 (11th Cir. 1999); United States v. LaValle, 175 F.3d 1106, 1108 (9th Cir. 1999); United States v. Pettiford, 101 F.3d 199, 200–02 (1st Cir. 1996); Young v. Vaughn, 83 F.3d 72, 78–79 (3d Cir. 1996). I have included *Young v. Vaughn* in this list because other United States Courts of Appeals have cited to *Young* for the proposition that defendants may seek to reduce their sentences after prior convictions have been vacated. *See, e.g.*, *Walker*, 198 F.3d at 814. *Young* actually involved a very different set of circumstances, in which a defendant's federal sentence was based on his commission of a crime while he was on probation for an earlier conviction. *Young*, 83 F.3d at 74. The defendant's prior conviction did not enhance his sentence, but rather served as the basis for his federal conviction and sentence—he was convicted of violating his probation. *Id*. The Third Circuit held that the defendant could challenge his prior conviction within a § 2255 proceeding because *Custis* did not apply to this very different set of facts. *Id.* at 77–78. *Young*'s analysis of *Custis* alluded to the fact that it would have allowed the defendant to reopen his sentence if the facts of his case had been different. *Id*.

41. *Walker*, 198 F.3d at 812.

42. The circuits that have so held include the First, Second, Third, Fourth, Fifth, Ninth, Tenth, and Eleventh Circuits. Several circuits have also held that the *Custis* dictum applies not only to sentences enhanced under ACCA, but also to those enhanced under the Federal Sentencing Guidelines. *See* Brackett v. United States, 270 F.3d 60, 65 (1st Cir. 2001); *LaValle*, 175 F.3d at 1107 (noting that LaValle had been sentenced as a career offender under Federal Sentencing Guideline § 4B1.1). The Supreme Court recently announced that the Federal Sentencing Guidelines are advisory rather than mandatory. United States v. Booker, 125 S. Ct. 738, 756–57 (2005). A court, however, may still choose to enhance a defendant's sentence on the basis of his or her prior convictions.

43. *Walker*, 198 F.3d at 814–15 (Hill, J., concurring).

delegates federal "sentencing authority to such arrangements as may be arrived at between a defendant's new lawyer and a state judge looking at a stale proceeding."[44] Thus, Judge Hill stated that by "observing that the attack could be *brought*," the Supreme Court dicta in *Custis v. United States* has "persuaded seven (now eight) circuit courts of appeal that the Court said that the *defendant's right to bring the attack equaled winning it*."[45]

III. HOW § 2255 MOTIONS ARE MISUSED: THE EASE OF OVERTURNING PRIOR STATE CONVICTIONS

As noted by Judge Hill, the current law in eight United States Courts of Appeals allows defendants to use § 2255 motions to take advantage of the ease of overturning prior state convictions when seeking to reopen and reduce their federal sentences.[46] As discussed in this Section, defendants benefit by delaying their challenges because of a decreased interest on the part of the State in upholding their convictions and a deteriorated or nonexistent record of the trial court proceedings. In addition, defendants in Massachusetts may also benefit from peculiar rules that make prior convictions particularly vulnerable in that state.

The ease with which a person can vacate a prior conviction was demonstrated in *United States v. Cox*, which involved successful challenges to four prior state convictions.[47] Cox attacked a Colorado conviction for attempted cocaine possession, which was dismissed with prejudice.[48] He also successfully moved to expunge three other convictions: a Colorado misdemeanor menacing conviction, a Colorado deferred judgment for unlawful use of a controlled substance, and a California conviction for transporting and selling controlled substances.[49] The sheer number of successful challenges demonstrates the ease with which a perseverant prisoner may attack prior convictions.

A defendant may also seek fraudulently to expunge a prior conviction, and in many cases will have a great incentive to do so. Prior convictions not only affect a person's legal rights and social standing, but also may be used to enhance a later sentence. One example of this type of fraud

44. *Id.* at 815.

45. *Id.* at 814.

46. *See id.* at 814–15; Brief for Appellant at 25–26, *Walker*, 198 F.3d 811 (No. 98-9244).

47. United States v. Cox, 83 F.3d 336, 339 (10th Cir. 1996). *See also* Brief for Appellant, *supra* note 46, at 26–27 (discussing the ease with which Cox vacated his prior convictions).

48. *Cox*, 83 F.3d at 339.

49. *Id.*

occurred in *State v. King*, in which the New Jersey Appellate Court affirmed the vacating of an earlier order expunging the defendant's prior drug conviction.[50] The court vacated this order because the defendant had committed fraud in his petition by misrepresenting the conviction he sought to expunge, failing to list all of his prior convictions in his petition, and failing to serve notice on all required parties.[51] Although these actions mostly remain in the trial courts and thus are not widely reported, *King* demonstrates that defendants may seek to fraudulently expunge prior convictions, particularly in an effort to reduce federal sentences under § 2255 motions.[52]

A. THE BENEFITS OF FILING DELAYED CHALLENGES TO PRIOR CONVICTIONS

By delaying their challenges to prior state convictions, defendants benefit first from the State's diminished interest in preserving old convictions, and second from a deterioration of their trial and guilty plea records.

1. Diminished State Interest in Preserving Decades-Old Convictions

In delaying a challenge to a prior conviction, a defendant gains a significant advantage, because the State has a diminished or nonexistent interest in preserving that conviction. In many cases, the defendant will have served his or her sentence long ago and the State will not care to expend the tremendous effort required to uphold a conviction that no longer serves a pressing state interest.[53] In a brief to the Eleventh Circuit in *United States v. Walker*, the government noted,

> As a practical matter, state prosecutors and state court judges frequently are ill-prepared to address the validity of convictions long-ago entered. Often, the parties involved in the case are no longer available to testify as to the proceedings below, and a defendant's claim that the proceedings were defective will succeed in default.[54]

50. State v. King, 774 A.2d 629, 630–32 (N.J. Super. Ct. App. Div. 2001).

51. *See id.* at 631–33, 635. *See also* State v. DeMarco, 416 A.2d 949, 950–52 (N.J. Super. Ct. Law Div. 1980) (vacating an expungement order where a petitioner had withheld relevant information about his prior criminal charges in another jurisdiction).

52. Indeed, a defendant may be able to succeed on a fraudulent petition to expunge an old conviction for the very same reasons that a defendant can so easily attack prior state convictions.

53. *See* Brief for Appellant, *supra* note 46, at 26.

54. *Id.*

In bringing decades-old challenges, defendants take advantage of states that are unprepared and unwilling to defend old convictions and to retry defendants for old crimes.

Illustrating this very situation, the Eleventh Circuit granted § 2255 relief in *United States v. Walker* to a defendant who overturned a prior conviction when the State did not appear to object.[55] In 1998, after he began serving his federal sentence, Walker challenged a 1979 manslaughter conviction for which he had already served his sentence and for which he had never filed an appeal.[56] He alleged that he had not been informed of the elements of the manslaughter charge before he entered his guilty plea.[57] The State of Georgia did not appear or present any evidence at his evidentiary hearing.[58] After the uncontested hearing, the state court vacated Walker's guilty plea, despite the fact that his transcript reflected that both his own attorney and the judge had asked him about the specifics of his crime and the manslaughter charge.[59] The transcript also indicated that he "had been before the court for the [same] offense on *six* prior occasions."[60]

In light of the facts surrounding the dismissal of Walker's prior conviction, Judge Hill wrote a concurring opinion to note his reluctance to grant Walker sentencing relief. He commented that when Walker challenged his 1979 conviction, he had long since served his sentence and the State had no interest in even attending the evidentiary hearing.[61] The "only real interested party," the assistant United States attorney in charge of Walker's federal case, had no standing to appear at the state hearing.[62] Thus, "[i]n reality, the 1998 evidentiary hearing on the plea colloquy was purely an uncontested proceeding, brought for no purpose other than to have an effect upon the United States Government's interest in seeing to

55. United States v. Walker, 198 F.3d 811, 812, 814 (11th Cir. 1999). Walker had been convicted of knowingly possessing a weapon in violation of 18 U.S.C. § 922(g)(1), and he received an enhanced sentence under ACCA. *Id.* at 812.

56. *Id.* at 812 & n.2.

57. *Id.* at 812.

58. *Id.*

59. *Id.* at 812–13, 812 n.3. Walker's transcript showed the following: "Walker was asked by his attorney, 'Are you, in fact, guilty of shooting one Johnny Lemans?', and Walker responded, 'Yes.' When asked by the judge, ' . . . [D]o you, Zachary Walker, understand the nature of this case charging you with voluntary manslaughter . . . ?', and Walker responded, 'Yes, sir.'" *Id.* at 812 n.3 (alterations in original). *See also* Brief for Appellant, *supra* note 46, at 6–7 (noting that "[n]one of the parties from the 1979 plea of guilty hearing was present at this evidentiary hearing; neither the judge, the prosecutor, nor appointed counsel was available to refute the petitioner's contention[]" that he had not been properly advised during his guilty plea).

60. Brief for Appellant, *supra* note 46, at 7 (emphasis added).

61. *Walker*, 198 F.3d at 814 (Hill, J., concurring).

62. *Id.*

the faithful execution of federal law."[63] The result is that "[a] local attorney for a federal defendant can appear before a state jurist, not counseled by the state prosecutor, whose interest in a nineteen-year-old case is at an end, and (presto!) obtain a reduction in a federal sentence."[64]

As *Walker* demonstrates, defendants gain a significant advantage and greatly increase their chances of successfully overturning prior convictions when they delay their challenges. In addition, if successful in setting aside their prior convictions, defendants most likely will not be prosecuted again by the state that was not interested in upholding the convictions in the first place. Thus, in bringing much-delayed challenges, defendants may benefit from facing disinterested adversaries, as in *Walker*, or no adversary at all.

2. Deterioration of the Record in Delayed Challenges

A second advantage defendants gain by delaying their challenges to prior convictions is a deterioration of the record. The federal courts have long recognized this problem and routinely deny delayed challenges to federal convictions when the government is prejudiced by the lack of an adequate record. For example, the Fifth Circuit dismissed a habeas petition filed fifteen years after a conviction became final. After this lengthy delay, the guilty plea transcript no longer existed, the judge had passed away, and the identities of the police officers involved were unknown.[65] The court noted that the defendant had "been sleeping on his rights" for fifteen years, even with the knowledge that the conviction could have been used to enhance a later sentence, a "profoundly real [concern] for a recidivist like [the defendant]."[66] Similarly, the Eleventh Circuit denied a habeas petition filed seventeen years after a defendant entered a guilty plea in state court. The court held that the State was prejudiced by the defendant's delay in filing because the judge had passed away twelve years earlier and no transcript of the plea proceedings existed because the defendant had not filed an appeal.[67]

In the face of a deteriorated record, the Seventh Circuit has also stated that conclusory allegations of constitutional violations should be

63. *Id.*

64. *Id.* The First Circuit noted that "[b]ecause the length of the federal sentences increases with prior state convictions, the sentencing guidelines have led to a cottage industry of diligent defense counsel seeking to vacate old state convictions in order to reduce the federal sentence." Brackett v. United States, 270 F.3d 60, 64 (1st Cir. 2001).

65. Baxter v. Estelle, 614 F.2d 1030, 1033–35 (5th Cir. 1980).

66. *Id.* at 1034.

67. Clency v. Nagle, 60 F.3d 751, 752–54 (11th Cir. 1995).

discounted. It explained that a defendant provides no evidence of an unconstitutional guilty plea simply by submitting a personal affidavit that he or she "does not 'remember' being informed 'of the elements of the crime or what the State would prove.'"[68] Indeed, such evidence should be "discounted" as proof of an unconstitutional conviction because it is "largely self-serving."[69] The Seventh Circuit recognized that courts should treat differently a defendant's claim of *not remembering* being informed of his or her rights and a *substantiated* claim of actually not having been informed.[70]

Despite the federal courts' recognition of the problems associated with a deteriorated record, many state courts have not followed suit. Defendants seeking to overturn state convictions may still benefit from deteriorating records, which increase the likelihood of successfully overturning convictions. For example, a Georgia state court accepted a defendant's bare allegation that he had not been informed of the elements of his crime when he entered his guilty plea more than a decade earlier, despite evidence to the contrary.[71] Based on this sparse evidence, the defendant convinced the state court to overturn his conviction and then successfully filed a § 2255 motion to reduce his enhanced federal sentence.[72] Similarly, a Massachusetts state court vacated a defendant's conviction after he submitted a four-paragraph affidavit stating that '"he did not remember'" if he had been informed of his rights prior to his guilty plea.[73] On the basis of this dismissal, which was based solely on the defendant's own self-serving allegation, the First Circuit granted the defendant's § 2255 motion to reduce his sentence.[74] Thus, as demonstrated by these cases, defendants benefit from the deterioration of their state court records, which in turn

68. *See* United States v. Gallman, 907 F.2d 639, 643 (7th Cir. 1990).

69. *Id.*

70. *Id.*

71. *See* United States v. Walker, 198 F.3d 811, 812 (11th Cir. 1999); *supra* notes 65–66 and accompanying text.

72. *See Walker*, 198 F.3d at 812–13. The Fourth Circuit reached a similar result in *United States v. Mobley*, granting a § 2255 motion after a state court vacated the defendant's ten-year-old guilty plea conviction because "'the record [did] not disclose that [Mobley] voluntarily and understandingly entered this plea.'" United States v. Mobley, 96 F. App'x 127, 128 (4th Cir. 2004) (alteration in original). The court, however, did not discuss whether the record was merely silent or missing altogether. *Id.*

73. Brief and Addendum of Appellant at 2, United States v. Pettiford, 101 F.3d 199 (1st Cir. 1996) (Nos. 96-1045, 96-1158).

74. *See Pettiford*, 101 F.3d at 200–02 (accepting Pettiford's version of the events and noting that the state court convictions were vacated because Pettiford "had not been furnished by the courts, before accepting his guilty pleas, the information necessary for his pleas to be considered voluntary, a constitutional requirement").

enables them to take advantage of § 2255 relief to reduce their federal sentences.

B. MASSACHUSETTS CONVICTIONS ARE PARTICULARLY VULNERABLE

A defendant seeking to overturn a prior Massachusetts conviction possesses an additional advantage because of two unique state laws. First, Massachusetts law requires the use of audio tapes to record guilty pleas and other proceedings and mandates that these tapes be preserved for only two and a half years. Second, during any type of challenge, the law places the burden of proof on the state to show that a conviction was constitutionally obtained once the defendant has produced sufficient credible evidence to satisfy an initial burden of production.[75] These two laws, along with other procedural rules, render Massachusetts convictions subject to "surprising infirmity."[76] Particularly in the context of § 2255 motions, these vulnerable convictions are "increasingly coming under intense scrutiny in last ditch attempt[s] [by defendants] to avoid the imposition of ACCA's federal fifteen year mandatory minimum sentence."[77]

A First Circuit case, *United States v. Pettiford*, highlights the infirmity of Massachusetts convictions. Pettiford had received an enhanced sentence

75. *See* Commonwealth v. Pingaro, 693 N.E.2d 690, 692 (Mass. App. Ct. 1997). The court held that the defendant had not satisfied his initial burden of going forward such that the ultimate burden of proof shifted to the government, because

> [a] defendant's naked claim that he did not receive a constitutionally adequate guilty plea colloquy does not automatically thrust upon the Commonwealth the burden of proving the existence of a contemporaneous record establishing that the plea was entered knowingly and voluntarily. Rather, the initial burden is on the moving defendant to present some articulable reason which the motion judge deems a credible indicator that the presumptively proper guilty plea proceedings were constitutionally defective, above and beyond a movant's 'credulity straining' contentions regarding 'questions the judge did *not* ask' almost sixteen years earlier . . . and reliance upon the mere nonexistence of a transcript of the plea proceedings.

Id. at 695 (quoting Commonwealth v. Duest, 572 N.E.2d 572, 575 (Mass. App. Ct. 1991)) (internal citation omitted).

Ordinarily, a defendant challenging a prior conviction has the burden of proving that it was unconstitutionally obtained. *See* Parke v. Raley, 506 U.S. 20, 31 (1992) (stating, "Our precedents make clear . . . that even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant."); United States v. Gallman, 907 F.2d 639, 643 (7th Cir. 1990). *See also* United States v. Taylor, 882 F.2d 1018, 1031 (6th Cir. 1989) (explaining that "[t]he documentary proof adduced by the Government was strong enough to shift to Taylor the burden of proving that his convictions were in fact not constitutionally sound"), *abrogated on other grounds*, 495 U.S. 575 (1990).

76. United States v. Payne, 894 F. Supp. 534, 537 n.7 (D. Mass 1995). As the reasons for this "infirmity," the *Payne* court cited the problems raised by the use of tape recorders and "[t]he failure adequately to advise a defendant of his rights . . . upon pleading guilty during the first-tier proceeding of the Commonwealth's complicated two-tier District Court criminal trial process." *Id.*

77. *Id.*

under ACCA based on nine prior state convictions for violent felonies.[78] After vacating eight of his nine prior convictions, all received in Massachusetts, Pettiford filed a § 2255 motion to reopen his sentence.[79] The First Circuit held that *Custis v. United States* extended the right to reopen an enhanced sentence under § 2255 to a defendant who had successfully vacated a prior conviction.[80]

Pettiford first benefited because many of his guilty plea tapes no longer existed when he challenged his prior convictions.[81] Pursuant to Massachusetts District Court Special Rule 211(A), tape recordings of state trials and other proceedings heard by a judge must be preserved for "at least" two and one-half years.[82] Under this permissive rule, courts may discard all tapes after this short period of time, unless a party makes a motion to preserve them. Because Pettiford had not appealed any of his convictions, a move that would have preserved his tapes, he was especially able to benefit from this rule.

Pettiford also benefited from the use of antiquated tape recorder technology because the few tapes that still existed for one of his convictions were unintelligible and unusable.[83] As noted by the First Circuit in granting his § 2255 motion, the use of antiquated tape recorders "poses substantial risks that the convictions obtained may ultimately be set aside due to the inadequacy of the trial record."[84] The court further commented that "[s]adly, this problem will get worse due to inadequate funding of the Massachusetts court system."[85]

The second major benefit a defendant gains in Massachusetts is the unique placement of the burden of proof on the state when a conviction is attacked, a circumstance illustrated in *Pettiford*.[86] In *Pettiford*, Massachusetts state courts vacated an amazing eight out of nine of the defendant's prior convictions.[87] In each instance, the State "failed to carry its burden of producing a 'contemporaneous record affirmatively [showing] that the defendant waived his rights voluntarily and knowingly,' as required

78. *Pettiford*, 101 F.3d at 200.
79. *Id.*
80. *See id.* at 200–02. In 1991, Pettiford was convicted of firearm possession under 18 U.S.C. § 922(g)(1). *Id.* at 200.
81. *Id.* at 200, 202.
82. MASS. DIST. CT. SPEC. R. 211(A)(4).
83. *Pettiford*, 101 F.3d at 202.
84. United States v. Payne, 894 F. Supp. 534, 537 n.7 (D. Mass. 1995).
85. *Id.*
86. *See Pettiford*, 101 F.3d at 200.
87. *Id.*

under the federal Constitution and Massachusetts law."[88] Carrying the burden of proof, and given that the tapes of Pettiford's proceedings either no longer existed or were not usable, the State did not stand a chance of upholding any of his convictions. Thus, eight of Pettiford's prior convictions were vacated on the basis of technicalities, not proven violations of any sort. Pettiford then filed a § 2255 motion and succeeded in reducing his fifteen-year sentence to time served, four and one-half years.[89]

Similarly, in *United States v. LaValle*, a federal prisoner, Richard LaValle, was held to have demonstrated diligence in attacking his prior state convictions. LaValle was convicted of unarmed bank robbery and received an enhanced career offender sentence under the Federal Sentencing Guidelines on the basis of two prior convictions.[90] He first attempted to collaterally attack both of the prior convictions during his federal sentencing proceeding.[91] He alleged that both were unconstitutional—a 1986 California conviction because of a lack of effective assistance of counsel and a 1987 Massachusetts conviction because he had not been represented by counsel.[92] Neither attack was successful and, notably, the latter failed because LaValle's Massachusetts docket sheet clearly showed that he had been assigned counsel.[93]

LaValle persevered and moved to a more favorable forum to challenge one of his convictions: Massachusetts state court.[94] Although he had failed to appeal his Massachusetts conviction, he claimed that his guilty plea was unconstitutional because he "d[id] not believe" that he had been advised of his right to appeal or other constitutional rights at the time of the plea.[95] LaValle supported his statement with affidavits from his own current attorney and another criminal defense attorney who stated that "to the best of their recollection, defendants appearing in Suffolk County Court in 1987 were usually not informed of certain constitutional rights."[96] Based on this

88. *Id.* (alteration in original).

89. *Id.*

90. United States v. LaValle, 175 F.3d 1106, 1106–07 (9th Cir. 1999). LaValle received a sentence of 210 months, a little over seventeen years. His federal sentence enhancement was based on two prior convictions: a 1986 Los Angeles Superior Court conviction for "inflicting corporal injury on a spouse/cohabitant" and a 1987 Massachusetts conviction for "three counts of assault and battery on a police officer." *Id.* at 1107.

91. *Id.*

92. *Id.*

93. United States v. LaValle, No. 94-50502, 1995 WL 139254, at *1 (9th Cir. Mar. 29, 1995).

94. *See LaValle*, 175 F.3d at 1107.

95. *Id.* (alteration in original).

96. *Id.*

evidence alone, a state court vacated LaValle's conviction, and the district attorney chose not to prosecute him again.[97] After this conviction was vacated, LaValle filed a § 2255 motion and his case was remanded for resentencing.[98]

In conclusion, defendants seeking to overturn prior convictions benefit from delaying these challenges. Defendants first take advantage of the state's lack of interest in upholding old convictions and retrying defendants for old crimes. In addition, they benefit generally from a deteriorated trial record, which is particularly vulnerable in Massachusetts. Furthermore, defendants seeking to overturn Massachusetts convictions benefit from the unique placement of the burden of proof on the government. With sheer perseverance alone, habitual offenders can easily have their prior state convictions overturned in order to achieve sentencing relief under § 2255.

IV. THE IMPORTANCE OF CHANGING § 2255 TO PREVENT THE MISUSE OF HABEAS SENTENCING RELIEF

The courts have interpreted § 2255 as providing "a remedy identical in scope to federal habeas corpus."[99] The habeas remedy primarily serves to "safeguard a person's freedom from detention in violation of constitutional guarantees."[100] It does *not* serve as a safeguard for every type of error of law or to "'do service for an appeal.'"[101] Thus, as with a habeas petition, a court considering a § 2255 motion must inquire whether the alleged error is "'a fundamental defect which *inherently* results in a complete miscarriage of justice,' and whether '[i]t . . . present[s] exceptional circumstances for which a *habeas corpus* remedy is apparent.'"[102] Yet the current interpretation of § 2255 by the United States Courts of Appeals fails to satisfy the goals of habeas relief and allows defendants to obtain relief without proving that an error of constitutional magnitude has occurred.

97. *Id.* at 1107–08.

98. *Id.* Without explanation, the court summarily adopted the position of the First, Fourth, Fifth, and Tenth Circuits, which had all held that a defendant's § 2255 motion should be granted when a prior conviction has been successfully vacated or dismissed. *Id.* at 1108. The court was not concerned that LaValle had failed to challenge his state convictions on direct appeal. *Id.*

99. Davis v. United States, 417 U.S. 333, 343 (1974).

100. Blackledge v. Allison, 431 U.S. 63, 72 (1977).

101. *Davis*, 417 U.S. at 345 (quoting Sunal v. Large, 332 U.S. 174, 178 (1947)). *See* Reed v. Farley, 512 U.S. 339, 354 (1994) (holding that a guilty plea may be attacked collaterally on the basis of a nonconstitutional error only if the claim was first raised on direct appeal).

102. *Davis*, 417 U.S. at 346–47 (emphasis added) (alterations in original) (quoting Hill v. United States, 368 U.S. 424, 428 (1962)).

A. THE CURRENT USE OF § 2255 MOTIONS IS INCONSISTENT WITH THE TRADITIONAL REMEDY OF HABEAS RELIEF TO CORRECT ERRORS OF CONSTITUTIONAL MAGNITUDE

The Supreme Court has narrowly defined the exceptional circumstances in which a defendant may receive habeas relief. For example, the Supreme Court granted a § 2255 motion when an intervening change of law rendered the act for which the defendant had been convicted no longer illegal.[103] In this exceptional circumstance, there was "no room for doubt" that letting his sentence continue would result in a "'complete miscarriage of justice.'"[104] Under this same standard, the Court denied a habeas petition that alleged a procedural error when a sentencing court failed to ask a defendant, who was represented by counsel, to make a mitigating statement on his own behalf.[105] The Court thus determined that this procedural error was not of a nature or character to make it cognizable as an "exceptional circumstance[]" for which habeas relief could be granted.[106]

Under the United States Courts of Appeals' interpretation of § 2255, however, a defendant may reopen an enhanced federal sentence without having to show that a prior conviction was obtained in error or in violation of the Constitution. As interpreted by the courts, § 2255 relief is not limited to cases, like *Nichols*, in which a constitutional violation was actually proven (in Nichols's case, on direct appeal to the Texas Court of Appeals).[107] Rather, a defendant serving an enhanced sentence may be rewarded with a reduced federal sentence merely because he or she has overturned a vulnerable prior conviction on any ground.

What is particularly surprising is that the United States Courts of Appeals announced the expansion of § 2255 relief in cases in which defendants had committed particularly transparent abuses of the justice system. For example, in *Pettiford*, *LaValle*, *Walker*, and *Cox*, the defendants were able to vacate their prior state convictions, but none of them actually proved violations in their prior convictions or even produced credible evidence of any errors.[108] The circuits recognized, but apparently

103. *Id.* at 334, 346–47.

104. *Id.* at 346–47 (quoting *Hill*, 368 U.S. at 428).

105. *Hill*, 368 U.S. at 425, 428.

106. *Id.* at 428 (quoting Bowen v. Johnston, 306 U.S. 19, 27 (1939)).

107. United States v. Nichols, 30 F.3d 35, 36 (5th Cir. 1994).

108. *See* United States v. Walker, 198 F.3d 811, 812 (11th Cir. 1999); United States v. LaValle, 175 F.3d 1106, 1107 (9th Cir. 1999); United States v. Pettiford, 101 F.3d 199, 200 (1st Cir. 1996); United States v. Cox, 83 F.3d 336, 338–40 (10th Cir. 1996).

deemed unimportant, the fact that the defendants' prior convictions were vacated on technicalities. Pettiford's convictions proved infirm for a mere lack of records, making it impossible for Massachusetts to meet its burden of proof required to either uphold his convictions or to retry him.[109] Similarly, LaValle's Massachusetts conviction was vacated when he stated that he "d[id] not believe" he had been advised of his right to counsel.[110] With similar ease, Walker vacated a prior conviction at an uncontested evidentiary hearing.[111] Finally, in Cox's case, there was no explanation of why his convictions had been vacated, let alone evidence of any errors.[112] Evolving from a surprising set of cases, the United States Courts of Appeals' current interpretation of § 2255 allows defendants to reduce federal sentences without proving that any type of violation or error occurred in their prior convictions.

B. THE CURRENT USE OF § 2255 MOTIONS VIOLATES THE PRESUMPTION OF VALIDITY THAT ATTACHES TO FINAL CONVICTIONS

At one time, the Supreme Court held that a presumption of invalidity attaches to a conviction when there is no affirmative record showing that the defendant's constitutional rights had been observed at trial.[113] In its landmark ruling in 1969, *Boykin v. Alabama*, the Court held that a proper guilty plea by a defendant could not be ascertained from a "silent record."[114] In 1992, the Court in *Parke v. Raley* revised this long-standing presumption of invalidity, as it pertains to collateral challenges to prior convictions.[115] Under *Parke*, a presumption of validity attaches to all finalized convictions when they are collaterally attacked, even when constitutional rights are at stake.[116] Despite the Supreme Court's clear statement in *Parke*, the United States Courts of Appeals disregard this presumption of validity by granting § 2255 motions when prior convictions have been vacated solely for a lack of affirmative records.

109. *Pettiford*, 101 F.3d at 200, 202.

110. *LaValle*, 175 F.3d at 1107 (alteration in original).

111. *Walker*, 198 F.3d at 812.

112. *Cox*, 83 F.3d at 339 & n.3.

113. *See* Boykin v. Alabama, 395 U.S. 238, 242 (1969); Burgett v. Texas, 389 U.S. 109, 114–15 (1967) (stating that a waiver of the right to counsel could not be assumed without an affirmative record).

114. *Boykin*, 395 U.S. at 243 (stating that the Court could not "presume a waiver of . . . federal rights from a silent record").

115. *See* Parke v. Raley, 506 U.S. 20, 29–30 (1992).

116. *See id.* at 30–31 (noting that "[i]n [a collateral review] situation, *Boykin* does not prohibit a state court from presuming, at least initially, that a final judgment of conviction offered for purposes of sentence enhancement was validly obtained").

1. The Development of the Presumption of Validity

Nearly a quarter of a century after announcing the presumption of invalidity under *Boykin*, the Court held in *Parke* that a prior conviction based on a guilty plea that is challenged in a collateral setting shall be presumed valid, at least initially, even in the face of a silent record.[117] Parke had been convicted of robbery and sentenced under a Kentucky recidivist statute on the basis of two prior burglaries to which he had pleaded guilty in 1979 and 1981.[118] He failed to appeal either conviction, but later sought to suppress their use in his recidivist proceeding.[119] Given that the State could not produce transcripts of his earlier guilty pleas, Parke claimed that his convictions were presumptively invalid.[120] In support of his argument, he alleged that his plea colloquies were unconstitutional under *Boykin*'s[121] presumption of invalidity for any guilty plea unsupported by an affirmative record.[122]

The Court found Parke's comparison to *Boykin* unsound for two reasons: the legal environment had significantly changed since *Boykin* was decided, and the procedural postures of the two cases were distinct. With *Boykin*, the Court had announced a rule that all defendants have a right to make knowing and voluntary guilty pleas. Given that there was no uniformity within the states for observing proper guilty plea colloquies, the Court held that Boykin's conviction was presumptively invalid because his guilty plea could not be shown from an affirmative record.[123] Unlike Boykin, whose guilty plea was made prior to the requirement of plea colloquies, Parke pled guilty nearly twenty-five years after the Court mandated such colloquies. Parke's record was not "suspiciously 'silent'"—it simply no longer existed eleven years after he was convicted.[124] The lack of a record was not at all unusual because transcripts of guilty plea proceedings are made in Kentucky only if a trial judge makes a specific request or if a defendant appeals his or her conviction, which Parke never did.[125] Additionally, tapes and other records of proceedings are not kept for

117. *Id.* at 29–30.

118. *Id.* at 22–23. The state sentencing judge denied challenges to his prior convictions and sentenced him as a repeat felon offender. *Id.* at 25. Thereafter, Parke appealed his conviction in state court and eventually filed a writ of habeas corpus in federal court. *Id.*

119. *Id.* at 23.

120. *Id.* at 22–23, 29–30.

121. *Id.*

122. Boykin v. Alabama, 395 U.S. 238, 242–44 (1969).

123. *See id.*

124. *Parke*, 506 U.S. at 30.

125. *Id.*

longer than five years.[126] Thus, in failing to appeal and then delaying his claim for over a decade, Parke himself was primarily responsible for the lack of a record of his guilty plea. The *Parke* Court found that because *Boykin* colloquies had been required for nearly a quarter of a century, "it defie[d] logic to presume from the mere unavailability of a transcript . . . that the defendant was not advised of his rights."[127] Thus, due to the changed legal environment since *Boykin* was decided in 1969, the Court found that a defendant's guilty plea should be presumed valid, even in the face of a silent record.[128]

In addition, the Court distinguished the procedural posture of Parke's collateral challenge to his prior convictions[129] from that of Boykin's direct appeal.[130] Unlike Boykin, Parke had failed to appeal his two prior guilty pleas; instead, he waited more than a decade to file an attack in a separate recidivist proceeding.[131] The Court stated that "[t]o import *Boykin*'s presumption of invalidity into this very different context would, in our view, improperly ignore another presumption deeply rooted in our jurisprudence: the 'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights."[132] Although the presumption of regularity is most commonly referred to in the habeas context, the Court stated that it applies with equal force to other types of collateral attacks.[133] Parke's collateral attack on his prior convictions "sought to deprive them of their normal force and effect in a proceeding that had an independent purpose other than to overturn the prior judgments."[134] Thus, in *Parke*, the Court announced that a presumption of validity protects finalized convictions from collateral attacks, even when constitutional rights are at stake.

126. *Id.*

127. *Id.*

128. *See id.* at 29–30.

129. *Id.*

130. Boykin v. Alabama, 395 U.S. 238, 240 (1969).

131. *See Parke*, 506 U.S. at 23, 29–30.

132. *Id.* at 29 (quoting Johnson v. Zerbst, 304 U.S. 458, 468 (1938)).

133. *Id.* at 30 (stating that "'[t]here is no principle of law better settled, than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, till the contrary appears'" (alteration in original) (quoting Voorhees v. Jackson, 10 U.S. (1 Pet.) 449, 472 (1836))). *See also* Barefoot v. Estelle, 463 U.S. 880, 887 (1983) (noting that a habeas corpus petition provides only limited review because "[w]hen the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction and sentence"), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1217.

134. *Parke*, 506 U.S. at 30.

2. Current Challenges Under § 2255 Disregard the Presumption of Validity

Despite the Supreme Court's view that a presumption of validity attaches to prior convictions, the United States Courts of Appeals continue to grant § 2255 motions when prior convictions are vacated solely for the lack of affirmative records. In a delayed challenge, in which no affirmative trial or guilty plea record exists, a state court may vacate a conviction out of a concern that a defendant's constitutional rights *might* have been violated. Thereafter, the defendant is free to return to federal court under a § 2255 motion to have his or her sentence reduced. In giving these dismissals weight in contemplating § 2255 motions, the United States Courts of Appeals perpetuate a presumption of invalidity that is no longer appropriate today.

Although many courts have failed to state their reasoning for specifically disregarding this presumption, the First Circuit, in *United States v. Pettiford*, discussed why it granted a § 2255 motion when a defendant successfully moved to vacate several prior convictions because his guilty plea transcripts were no longer available.[135] The *Pettiford* court stated that if it failed to reopen federal sentences, defendants would be disadvantaged after *Custis v. United States*,[136] which held that defendants could not attack prior convictions during federal sentencing proceedings.[137] The *Pettiford* court questioned,

> [If] it is only *after* sentence that a defendant may attack the convictions that contributed to it, what sense would it make to say that he may attack pre-sentence convictions, but not one whose flaw did not appear until after the federal sentence? Obviously this is the situation every time it is defendant who establishes the flaw.[138]

The court was unconvinced that Pettiford had "'sandbagged'" the government and received a sentencing "'windfall.'"[139] The court reasoned that refusing to allow a defendant to reopen a sentence on the basis of later-dismissed state convictions would effectively "etch[] the defendant's criminal history record in stone as of that moment."[140]

The *Pettiford* court failed to realize two important flaws in its argument. First, *Custis* does not restrict a defendant's ability to attack a

135. United States v. Pettiford, 101 F.3d 199, 202 (1st Cir. 1996).
136. *Id.*
137. Custis v. United States, 511 U.S. 485, 487 (1994).
138. *Pettiford*, 101 F.3d at 201 (emphasis added).
139. *Id.* at 200 (quoting Brief and Addendum of Appellant, *supra* note 73, at 2, 39).
140. *Id.* at 201.

prior conviction that might be used to enhance a federal sentence. To the contrary, *Custis* only narrowed the remedy that a defendant could obtain during his or her federal sentencing proceeding. It did not limit the numerous other remedies available to defendants, such as challenges to state convictions in a timely manner before the federal proceedings begin, direct appeals, and habeas corpus petitions.[141] A defendant is "prejudiced" only when he or she chooses to forgo available remedies, and then regrets this choice upon receiving an enhanced federal sentence. If, for example, the First Circuit had denied Pettiford relief, he would have been prejudiced only by his own decisions. He failed to pursue appeals in *any* of his nine prior convictions,[142] despite the fact that the federal government and each of the fifty states have recidivist statutes that could have applied to an active career criminal like him.[143] Thus, despite the First Circuit's fear of "prejudicing" defendants, Pettiford himself, not *Custis* or any other outside force, was to blame for his arrival in a federal recidivist proceeding with numerous prior convictions on his record.

Second, the *Pettiford* court misguidedly concluded that it would be unfair to penalize a defendant who did not establish a "flaw" in a prior conviction until after a federal sentence had been enhanced. The great irony in the court's reasoning is that Pettiford *never* established any flaws in his prior convictions. He simply took advantage of the procedural rules making Massachusetts convictions vulnerable to attack. He did not establish anything other than that his records had been destroyed long ago and that the state had no particularly pressing interest in preserving his convictions. Furthermore, Pettiford was not prejudiced by receiving an enhanced sentence because, at the time of his federal sentencing, none of his prior convictions were unresolved pending the outcome of a postconviction petition or direct appeal, as was the case in *United States v. Nichols*.[144] Pettiford's convictions were older and had long since been finalized—any "flaw" in his convictions had existed, unchallenged, for years.[145] Thus,

141. *See Custis*, 511 U.S. at 487, 497 (noting that Custis, who was still "in custody" at the time of his federal sentencing, could still attack his state sentences in Maryland, presumably via direct appeal, or through federal habeas review).

142. *Pettiford*, 101 F.3d at 200.

143. Daniels v. United States, 532 U.S. 374, 380 (2001).

144. *See* United States v. Nichols, 30 F.3d 35, 36 (5th Cir. 1994).

145. In a brief to the First Circuit, the Government stated,

> [Pettiford] never claimed, [in the setting of state court or in his § 2255 proceeding], that he would have done anything different had he been fully informed of the rights he was waiving by not going to trial. He never claimed, in either setting, that his lawyer did not explain to him the rights he was waiving by not going to trial. Indeed he never claimed, in either setting, that he in fact had not understood the rights he was waiving by not going to trial. Pettiford himself may have believed these convictions to be reliable, moreover, inasmuch as he never contested

although Pettiford's challenges were technically successful, in that they succeeded in getting the convictions vacated, he did not actually *prove* that they rested on any flaws or errors.

In conclusion, the United States Courts of Appeals disregard the Supreme Court's presumption of validity by giving weight to state court dismissals based on the lack of affirmative records. This permits the misuse of § 2255 motions, thereby rewarding habitual offenders with undeserved reduced sentences.

C. THE CURRENT USE OF § 2255 MOTIONS VIOLATES WELL-SETTLED PRINCIPLES OF THE CRIMINAL JUSTICE SYSTEM

The Supreme Court has stated that "[r]esort to habeas corpus, especially for purposes other than to assure that no innocent person suffers an unconstitutional loss of liberty, results in serious intrusions on values important to our system of government."[146] Without limits on postconviction remedies, defendants may succeed in overturning convictions as a result of "mechanistic rules quite unrelated to justice in a particular case."[147] With this fear in mind, the Supreme Court has narrowed habeas and postconviction relief to protect two important values of the criminal justice system: the finality of judgments and efficiency in administering justice.[148]

1. Finality of Judgments

To promote the finality of judgments, the Supreme Court has interpreted habeas remedies narrowly, as a form of review that is

> them until after the completion of his federal case, even though other collateral consequences . . . may have flowed from their existence on his record from the outset, as early as 1985.

Reply Brief of the United States of America at 2–3, *Pettiford*, 101 F.3d 199 (Nos. 96-1045, 96-1158).

146. Stone v. Powell, 428 U.S. 465, 491 n.31 (1976). The *Custis* Court also stated that "'[i]nroads on the concept of finality tend to undermine confidence in the integrity of our procedures,' and inevitably delay and impair the orderly administration of justice." *Custis*, 511 U.S. at 497 (alteration in original) (quoting United States v. Addonizio, 442 U.S. 178, 184 n.11 (1979)).

147. Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring).

148. *See Custis*, 511 U.S. at 496–97. *See also Schneckloth*, 412 U.S. at 259; John T. Wolak, Note, *Application of the Cause and Prejudice Standard to Petitions Under 28 U.S.C. § 2255 by Guilty Plea Defendants*, 56 FORDHAM L. REV. 1129, 1130–31 (1988). In a concurrence to *Schneckloth*, Justice Powell stated that the extension of habeas relief to a convicted defendant asserting no constitutional claim and instead simply alleging an unlawful search that had no "bearing on [his] *innocence* . . . defeats our societal interest in a rational legal system but serves no compensating ends of personal justice." *Schneckloth*, 412 U.S. at 258 (emphasis added).

"secondary and limited."[149] The Court has stated that habeas relief prevents significant constitutional errors but is not defined by "'a perceived need to assure that an individual accused of crime is afforded a trial *free* of constitutional error.'"[150] Thus, the Court has held that postconviction remedies, such as § 2255 motions, merely simplify the procedure for making a collateral attack, but do not eliminate the basic distinction between a direct appeal and a collateral attack.

To preserve the finality of judgments, a defendant seeking postconviction relief faces several procedural limits, such that most claims that are cognizable on direct appeal will not be recognized in a collateral attack, such as a habeas petition.[151] These limits encourage defendants to resolve all of their claims in a timely and orderly fashion, using direct appeal as the "primary avenue" of relief.[152] For example, a defendant attempting to attack a finalized conviction will be constrained by strict rules against successive petitions and limitations on discovery.[153] Most notably, if a defendant fails to raise a claim on direct appeal, the defendant must then meet a strict standard to be able to present that claim for the first time in a habeas petition. This standard requires that the defendant show both cause for the failure to raise the claim and actual prejudice resulting from the alleged violation.[154] These procedural limitations serve the finality of the justice system by restricting collateral relief to only the most extraordinary cases, thereby encouraging defendants to seek relief on direct appeal.

149. Barefoot v. Estelle, 463 U.S. 880, 887–88 (1983), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1217.

150. Teague v. Lane, 489 U.S. 288, 308 (1989) (emphasis added) (quoting Kuhlmann v. Wilson, 477 U.S. 436, 447 (1986) (plurality opinion)). In *Schneckloth*, Justice Powell's concurrence noted that an expansion of the habeas remedy has "costs in terms of serious intrusions on other societal values. It is these other values that have been subordinated—not to further justice on behalf of arguably innocent persons but all too often to serve mechanistic rules quite unrelated to justice in a particular case." *Schneckloth*, 412 U.S. at 259.

151. United States v. Addonizio, 442 U.S. 178, 184 (1979) (stating that to promote the finality of judgments, it has "long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment"). *See Kuhlmann*, 477 U.S. at 447.

152. *Barefoot*, 463 U.S. at 887–88. The Court noted that "[f]ederal courts are not forums in which to relitigate state trials. . . . The procedures adopted to facilitate the orderly consideration and disposition of habeas petitions are not legal entitlements that a defendant has a right to pursue irrespective of the contribution these procedures make toward uncovering constitutional error." *Id.*

153. Judith A. Goldberg & David M. Siegel, *The Ethical Obligations of Prosecutors in Cases Involving Postconviction Claims of Innocence*, 38 CAL. W. L. REV. 389, 408 (2002).

154. *Teague*, 489 U.S. at 308.

In the context of sentencing and § 2255 proceedings, the Supreme Court in *Custis v. United States* and *Daniels v. United States* has narrowed the relief available to defendants. In *Custis*, the Court held that collateral challenges to prior convictions may not be brought during a federal sentencing proceeding, unless the conviction had been obtained in complete violation of the right to counsel. One of the Court's main concerns in denying Custis's collateral challenge to several prior convictions was the system-wide impact it would have had on the finality of judgments.[155]

The Court extended *Custis*'s reasoning to § 2255 proceedings in *Daniels v. United States*, holding that as a "general rule," a defendant may not use a § 2255 proceeding to collaterally attack a prior conviction that is being used to enhance a federal sentence.[156] In *Daniels*, during a § 2255 proceeding, a defendant attempted to challenge three prior convictions that were being used to enhance his sentence under ACCA.[157] In his § 2255 motion, Daniels claimed that two of his three prior convictions were unconstitutional because his guilty pleas were not made knowingly and voluntarily, and additionally, one of those convictions resulted from ineffective assistance of counsel.[158] As in *Parke v. Raley*, the Court held that a presumption of validity attached to Daniels's earlier convictions and that he could not challenge them in a § 2255 proceeding.[159] The Court noted that the government's interest in the "finality of judgments" and "ease of administration," two considerations in *Custis*, were the guiding principles in its decision.[160] Thus, specifically within the context of federal sentencing and § 2255 proceedings, the Supreme Court has narrowed the relief available to defendants in order to protect the finality of judgments.

a. Particular Importance of Finality for Guilty Plea Convictions

Given that the majority of criminal convictions are obtained from guilty pleas, the finality of these convictions is crucial to the functioning of the criminal justice system.[161] The continued revisiting of these convictions would decrease the substantial benefits obtained from guilty pleas and impair the efficiency of the courts. The benefits that accrue to defendants include avoidance of lengthy pretrial incarceration and uncertain trials,

155. *See* Custis v. United States, 511 U.S. 485, 497 (1994).
156. Daniels v. United States, 532 U.S. 374, 376, 379–83 (2001).
157. *Id.* at 376–77.
158. *Id.* at 377.
159. *Id.* at 382.
160. *Id.* at 378, 382.
161. *See* United States v. Smith, 440 F.2d 521, 528–29 (7th Cir. 1971) (Stevens, J., dissenting).

acceptance of responsibility for their crimes, the ability to begin rehabilitation more quickly, and, most notably, an opportunity to reduce their sentences. The justice system also benefits from the efficient use of its limited resources of judges, prosecutors, and prison facilities. To secure all of these benefits, courts must give guilty plea convictions "a great measure of finality."[162]

Given the importance of guilty pleas within the criminal justice system, the finality of these convictions has "special force" in collateral attacks.[163] One reason for the extra weight given to the finality of guilty pleas is that prisoners are often highly motivated to attack them. "More often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea. If he succeeds in vacating the judgment of conviction, retrial may be difficult."[164] Even if a defendant alleges a constitutional violation, a guilty plea conviction generally should be very difficult to challenge with a § 2255 motion. The Supreme Court has stated that "[t]he subsequent presentation of conclusory allegations unsupported by specifics is subject to summary dismissal, as are contentions that in the face of the record are wholly incredible."[165] Thus, after the opportunity for an appeal has passed, the courts "are entitled to presume [a defendant] stands fairly and finally convicted."[166]

Despite the protection of the finality of guilty pleas, the United States Courts of Appeals undermine the finality of these convictions by allowing defendants to seek reduced federal sentences after vacating prior guilty pleas without proving any violations. Under § 2255, defendants, just like LaValle, Pettiford, and Walker, may successfully attack their guilty pleas using the type of "conclusory allegations unsupported by specifics" that the Supreme Court expressly disapproved of in the context of finalized guilty

162. Blackledge v. Allison, 431 U.S. 63, 71 (1977).

163. Custis v. United States, 511 U.S. 485, 497 (1994) (quoting United States v. Timmreck, 441 U.S. 780, 784 (1979)).

164. *Blackledge*, 431 U.S. at 71–72.

165. *Id.* at 74. *See also* United States v. Gallman, 907 F.2d 639, 643 (7th Cir. 1990) (asserting that courts should discount statements by defendants claiming that they do not remember being informed of their constitutional rights).

166. United States v. Frady, 456 U.S. 152, 164 (1982). The Court continued, "[o]ur trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect . . . . To the contrary, a final judgment commands respect." *Id.* at 164–65. The Court also stated in *Blackledge* that findings by the judge, along with the statements made by the defendant, his or her lawyers, and the prosecutor create a "formidable barrier" in collateral proceedings because "[s]olemn declarations in open court carry a strong presumption of verity." *Blackledge*, 431 U.S. at 73–74.

pleas.[167] By giving weight to dismissals of guilty plea convictions, the United States Courts of Appeals disregard the principle of finality long protected by the Supreme Court.

The reopening of federal sentences based on dismissals of guilty plea convictions is also problematic because it results in an even greater erosion of the principle of finality. The Supreme Court in *Custis* found the principle of finality so persuasive that it refused to allow collateral attacks on prior convictions during a federal sentencing proceeding.[168] While *Custis* dealt only with the reopening of one finalized conviction, the current application of § 2255 requires at least two collateral attacks. Defendants must first collaterally attack their finalized convictions in state or federal court, and then collaterally attack their enhanced federal sentences in separate proceedings.[169] During this process, defendants' pending state convictions and federal sentences remain unresolved, pending outcomes in at least two separate court proceedings.[170] Thus, the current application of § 2255 motions further erodes the principle of finality by subjecting to attack multiple final convictions that should be given great respect.

b. Congress Has Advanced the Goal of Finality by Placing a One-year Statute of Limitations on All Habeas Petitions

Congress has also expressed its intent to protect the finality of convictions by passing the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which imposes a one-year statute of limitations on all habeas remedies, including § 2255 motions.[171] This one-year limit begins to run for § 2255 motions from the latest of (1) the date of the final judgment of conviction; (2) the date on which a preventative unconstitutional or unlawful government impediment to making the motion is removed; (3) the date that an asserted right, if newly recognized and retroactively applied, is declared by the Supreme Court; or (4) when facts

167. *Blackledge*, 431 U.S. at 74. *See also* United States v. Walker, 198 F.3d 811, 812 (11th Cir. 2001) (allowing a defendant to overturn a prior conviction by alleging that he had not been informed of the elements of his crime prior to pleading guilty); United States v. LaValle, 175 F.3d 1106, 1107–08 (9th Cir. 1999) (allowing a defendant to overturn a conviction after stating that he "d[id] not believe" he had been informed of his right to counsel); United States v. Pettiford, 101 F.3d 199, 200 (1st Cir. 1996) (allowing a defendant to overturn eight out of nine prior convictions because tapes of his guilty pleas no longer existed many years later).

168. *See Custis*, 511 U.S. at 487, 497.

169. Appellee's Brief at 23, *LaValle*, 175 F.3d 1106 (No. 98-55037).

170. *See id.*

171. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, § 105, 110 Stat. 1214 (1996) (codified at 28 U.S.C. § 2255 (2000)).

supporting a claim could have been discovered as a result of due diligence.[172]

Despite AEDPA's goal of promoting finality, however, the Supreme Court in *Johnson v. United States* recently held that, so long as a defendant has shown "due diligence" in seeking to vacate his prior convictions, the invalidation of a prior conviction is a "fact" that will start a new one-year statute of limitations, effectively nullifying AEDPA.[173] In *Johnson*, the defendant pled guilty to distributing cocaine and received an enhanced sentence in 1994 on the basis of two 1989 convictions for cocaine distribution.[174] Only after receiving this enhancement did Johnson claim that one of his prior convictions was invalid because he had failed to waive his constitutional rights.[175] In 1998, over four years after his federal conviction became finalized, Johnson filed a writ of habeas corpus in a Georgia superior court to challenge the guilty pleas he had made in seven cases between 1983 and 1993.[176] The Georgia court vacated and reversed all seven of these convictions because the record did not show that he had affirmatively waived his right to counsel in any of the cases.[177] In fact, the State, which did appear to challenge Johnson, was not able to produce any hearing transcripts, presumably because the guilty pleas had taken place between five and fifteen years ago.[178] Johnson was able to wait until he was sufficiently motivated by an enhanced federal sentence before attacking his increasingly vulnerable prior convictions. The Court's ruling fails to recognize that Johnson had sufficient motivation to attack his allegedly unconstitutional convictions when he received them.

With the Supreme Court's recent ruling in *Johnson*, defendants can continue to delay their challenges to prior convictions without risking violation of AEDPA's deadline. Thus, although AEDPA's one-year statute of limitations announced Congress's intention to protect the finality of judgments and on its face applies fully to § 2255 motions, it has not effectively ended the misuse of these motions.

172. 28 U.S.C. § 2255.
173. Johnson v. United States, 125 S. Ct. 1571, 1577 (2005).
174. *Id.* at 1575.
175. *Id.* at 1575 & n.1.
176. *Id.* at 1576.
177. *Id.*
178. *Id.*

2. Efficiency as a Protected Value of the Criminal Justice System

The Supreme Court has also narrowed collateral relief, particularly under § 2255, in order to promote efficiency in the justice system.[179] The Court has expressed concerns that collateral challenges decrease efficiency by placing significant burdens on the courts: the "increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice."[180] Given that there is no time limit on state challenges, "evidentiary hearings are often inconclusive, and retrials may be impossible if the attack is successful."[181]

The Court narrowed collateral relief under § 2255 in response to its concerns about the burden on federal courts that such motions represent. In both *Custis v. United States* and *United States v. Daniels*, the Court held that defendants could not challenge prior state convictions during federal sentencing hearings or in § 2255 proceedings, respectively.[182] The Court expressed concern that, in deciding claims such as ineffective assistance of counsel and the alleged invalidity of guilty pleas, federal courts would be forced to "rummage through frequently nonexistent or difficult to obtain state-court transcripts or records that may date from another era, and may come from any one of the 50 States."[183] Thus, the Court foreclosed these challenges to prevent federal courts from expending excessive effort to determine such complex claims, which would seriously undermine efficiency in the justice system.

The Supreme Court's efficiency concern for federal courts applies with equal force to state courts. Even though collateral challenges have been strictly limited in federal court by AEDPA, the value of efficiency is undermined when defendants bring delayed challenges in state court for the purpose of reducing federal sentences. Most state courts suffer the same inconveniences and difficulties as do federal courts when assessing delayed challenges. For example, many state judges hearing these challenges are no more closely related to these old convictions, in time or personal

179. *See* Daniels v. United States, 532 U.S. 374, 378, 382 (2001).

180. United States v. Addonizio, 442 U.S. 178, 184–85, 184 n.11 (1979).

181. *Id.*

182. *Daniels*, 532 U.S. at 382; Custis v. United States, 511 U.S. 485, 487 (1994).

183. *Custis*, 511 U.S. at 496. *See also* Lackawanna County Dist. Attorney v. Coss, 532 U.S. 394, 403–04 (2001) (limiting collateral attacks made on prior convictions for the purposes of reducing state sentences under § 2254 motions, in part due to concern about the difficulty of determining the merits of those challenges). *Custis* did, however, make a narrow exception for defendants who were completely denied the right to counsel in a prior conviction. The Court reasoned that this was a significant constitutional violation that could easily be ascertained from the judgment itself or a minute order. *Custis*, 511 U.S. at 487, 496.

familiarity, than are federal judges. Moreover, the efficiency concern applies with even greater weight to state courts because they are burdened with challenges that are brought for the sole purpose of reducing *federal* sentences. State courts must examine claims that have nothing to do with the state or its continuing interest in upholding these convictions. Thus, given that the state often has no stake in upholding old convictions, the Court's efficiency concern applies with equal, if not greater, force to state courts.

Finally, the Court's concern for efficiency applies to federal prosecutors, who are responsible not only for seeking and securing federal convictions, but also for defending state convictions. As noted by Judge Hill in his concurrence in *Walker v. United States*, more often than not, when a defendant challenges a prior state conviction, a federal prosecutor is the only interested government party.[184] Yet the federal prosecutor has no standing to appear at a defendant's state challenge. To uphold a prior state conviction, the federal prosecutor must expend additional effort to coordinate with a local district attorney's office in order to file briefs,[185] or must seek to be cross-designated to make an appearance in state court. Unless the federal prosecutor makes these efforts, the state court will be presented with a less than accurate picture of the interests involved in upholding the conviction, and may grant more freely a defendant's request to vacate that conviction. Thus, in the context of § 2255 motions, the Court's efficiency concern also applies to federal prosecutors, who are burdened with upholding both federal sentences and prior state convictions.

In sum, the Supreme Court and Congress have narrowed habeas and other forms of collateral relief to protect the values of finality and efficiency within the justice system. The United States Courts of Appeals disregard these values by continually granting § 2255 motions on the basis of prior state convictions having been vacated, particularly where there is no proof that any violation has occurred.

V. PROPOSED AMENDMENT TO PREVENT MISUSE OF § 2255

Section 2255 should be narrowed to prevent misuse by defendants who successfully seek to vacate prior state convictions on purely technical

184. United States v. Walker, 198 F.3d 811, 814 (11th Cir. 1999) (Hill, J., concurring).

185. In *United States v. Pettiford*, assistant United States attorneys worked with a Suffolk County district attorney to prepare briefs for Pettiford's challenge in state court. *See* Reply Brief for the United States of America at 1 n.1, United States v. Pettiford, 101 F.3d 199 (1st Cir. 1996) (Nos. 96-1045, 96-1158).

grounds, without proving any constitutional violation or error. First, an amendment could narrow § 2255 to allow resentencing only when a defendant presents evidence that a prior conviction has been vacated on the grounds of (1) actual innocence, or (2) the complete denial of the right to counsel. A second amendment could further narrow § 2255 by limiting the prior convictions eligible for attack for purposes of reducing an enhanced federal sentence.

A. AN AMENDMENT TO ALLOW RESENTENCING ONLY UPON EVIDENCE OF ACTUAL INNOCENCE OR A COMPLETE DENIAL OF THE RIGHT TO COUNSEL

Section 2255 could first be amended to restrict sentencing relief resulting from overturned prior convictions to two claims that have long been protected by the Supreme Court: actual innocence and a complete denial of the right to counsel. In providing relief for actual innocence, § 2255 motions, like the writ of habeas corpus, will prevent injustice of a constitutional magnitude.[186] Allowing this claim will ensure that defendants do not continue to serve sentences enhanced on the basis of crimes that they did not commit and will provide a truth-seeking incentive for defendants who are actually innocent of earlier crimes.

Next, a defendant should be allowed to seek resentencing under § 2255 if he or she was completely denied counsel in a prior conviction, which the Supreme Court has described as a "unique constitutional defect."[187] The Court has guarded against this defect because "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.'"[188] Even in *Custis*, which otherwise held that defendants could not challenge prior convictions during federal sentencing proceedings, the Court provided an exception for defendants convicted of prior offenses without the benefit of counsel.[189] In addition to protecting this important right, determining the merits of this claim would not inhibit the efficiency of the courts because the complete denial of counsel can often be easily determined from the judgment or a minute order.[190] Thus, restricting § 2255 relief to these two claims, actual

186. *See* Blackledge v. Allison, 431 U.S. 63, 72 (1977).

187. *Custis*, 511 U.S. at 496. *See also* Gideon v. Wainwright, 372 U.S. 335, 341–44 (1963) (extending the right to counsel to state criminal proceedings because the right to be represented by counsel is fundamental to a "fair system of justice"); Powell v. Alabama, 287 U.S. 45, 53, 71–73 (1932) (reversing state convictions in which the defendants were not given reasonable time to select and meet with counsel).

188. *Custis*, 511 U.S. at 494–95 (alteration in original) (quoting *Powell*, 287 U.S. at 68–69).

189. *Id.* at 487, 497.

190. *Id.* at 496.

innocence and a complete denial of counsel, will protect important constitutional rights without impairing the efficiency of the justice system.

B. AN AMENDMENT TO LIMIT THE PRIOR CONVICTIONS ELIGIBLE FOR ATTACK

A second amendment would limit the pool of prior convictions eligible for attack for purposes of reducing an enhanced federal sentence under § 2255. This amendment could track a limitation applied in 21 U.S.C. § 851, which dictates how prior convictions are to be established for the purposes of enhancing a sentence for a drug conviction.[191] Section 851 states that a prior conviction may be challenged only if the conviction was obtained within five years of the defendant being made aware that it would enhance his or her federal sentence.[192] Applying a similar restriction to § 2255 motions, a federal prisoner would be able to seek a reduced federal sentence only by overturning convictions that were obtained in the five years prior to receiving the enhanced federal sentence. This limitation would greatly restrict the misuse of § 2255 by decreasing each defendant's pool of prior convictions that would be subject to attack. By sheer numbers alone, the burden on state courts and federal prosecutors of upholding old prior convictions would decrease. In addition, within the five-year time frame, a state court will likely have greater access to trial and guilty plea records upon which to refute a defendant's conclusory allegations regarding a prior conviction. Most importantly, the five-year time frame would prevent habitual offenders from being rewarded with shorter federal sentences for the likely easy task of overturning decades-old prior convictions.

The narrowing of § 2255 relief with these two amendments would not invade defendants' rights or incentives to challenge prior convictions. Defendants would still retain numerous other remedies, not the least of which is direct appeal, that they may pursue long before the imposition of an enhanced federal sentence.[193] Further, these amendments would not

191. 21 U.S.C. § 851 (2000). Section 851 relates to drug convictions obtained under 21 U.S.C. § 841. Jean Rosenbluth suggested this amendment for § 2255.

192. The statute is worded as follows: "No person who stands convicted of an offense under . . . [21 U.S.C. § 841] may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction." § 851(e).

193. The Supreme Court has noted that by the time a claim reaches the level of federal habeas corpus review, it will have been considered by two or more levels of state courts:

> It is the solemn duty of these courts, no less than federal ones, to safeguard personal liberties . . . . The presumption that "if a job can be well done once, it should not be done

decrease defendants' incentives to challenge their convictions at the time they are obtained. The Supreme Court in *Daniels* foreclosed collateral attacks to prior convictions in § 2255 proceedings for precisely that reason:

> Whatever incentives may exist at the time of conviction, the fact remains that avenues of redress are generally available if sought in a timely manner. If a person chooses not to pursue those remedies, he does so with the knowledge that the conviction will stay on his record. This knowledge should serve as an incentive not to commit a subsequent crime and risk having the sentence for that crime enhanced under a recidivist sentencing statute.[194]

If a defendant fails to take advantage of the "ample opportunity to obtain constitutional review of a state conviction" or does not do so successfully, "the defendant is not entitled to another bite at the apple simply because that conviction is later used to enhance another sentence."[195] Thus, these amendments narrowing § 2255 relief would further the finality of judgments without limiting other remedies and would encourage defendants to challenge their convictions in an orderly and efficient manner.

In conclusion, § 2255 should be amended to prevent its misuse by defendants who vacate prior state convictions on the basis of technicalities or bare allegations, without ever proving that their convictions were infected with any type of error. These amendments, working alone or together, would decrease the misuse of § 2255 by federal prisoners, particularly those that the justice system and society have a great interest in keeping incarcerated.

> twice' is sound and one calculated to utilize best 'the intellectual, moral, and political resources involved in the legal system."

Schneckloth v. Bustamonte, 412 U.S. 218, 259 (1973) (Powell, J., concurring) (quoting Paul M. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 HARV. L. REV. 441, 466 (1963)). Moreover, even these remedies are not open for limitless review, in part because judgments must at some point become final. *Id.* at 261. *See also* Yakus v. United States, 321 U.S. 414, 444 (1944) (noting that "[n]o procedural principle is more familiar . . . than that a constitutional right . . . may be forfeited . . . by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it").

194. Daniels v. United States, 532 U.S. 374, 381 n.1 (2001). In this passage, the Court addressed Justice Souter's "concern[] that a defendant may forgo 'direct challenge because the penalty was not practically worth challenging, and . . . [forgo] collateral attack because he had no counsel to speak for him.'" *Id.* (internal citations omitted).

195. *Id.* at 383.

VI. CONCLUSION

Under the current interpretation of § 2255, prisoners serving enhanced federal sentences may achieve sentencing relief simply by showing that one or more prior convictions no longer exist. The current liberal interpretation, however, creates a loophole that has proven vulnerable to exploitation by career criminals and repeat offenders. In pursuing § 2255 resentencing motions after they have successfully vacated or overturned previous convictions, they are not required to show that those prior convictions resulted from error or constitutional violation. By delaying their challenges, they also exploit states' lack of interest in preserving old convictions and maintaining records of old proceedings. This loophole, left untouched by AEDPA in light of *Johnson*, lets career offenders manipulate the system to receive undeserved sentencing relief. For these reasons, § 2255 should be amended to close this loophole and to align it with both the traditional and historic remedy of habeas corpus relief and the interests of the justice system in promoting efficiency and the finality of judgments.