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Article 2

Hidden Right to Direct Appeal from a Federal Plea Conviction

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THE HIDDEN RIGHT TO DIRECT APPEAL FROM A FEDERAL PLEA CONVICTION

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INTRODUCTION

Eighty-five percent of the convictions in federal courts[1] arise from guilty pleas[2] or their substantial equivalent, pleas of nolo contendere, thereby saving the government the time and expense involved in holding tens of thousands of trials. Although the Supreme Court has noted the importance to the criminal justice system of prompt, final convictions secured by pleas of guilty[3] and has limited the issues that can be raised on appeal or collateral attack,[4] it has also recognized that a guilty plea conviction is "no

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[1] Statistics for the fiscal year 1976 reveal that 34,041 of the 40,112 convictions in the federal courts were by plea. DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, [1976] ANNUAL REPORT, Table D-7, *reprinted in* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 73,368 app. (1976). *See also* DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, [1973] ANNUAL REPORT, Table D-7 (30,852 of the 37,261 convictions (83%) in the federal courts in fiscal year 1973 by plea), *reprinted in* JUDICIAL CONFERENCE OF THE UNITED STATES, REPORTS OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 87, 416 app. (1973).

[2] "The American system of criminal justice is not a system of trial by jury but one directed to the obtaining of guilty pleas.... [E]very effort is made to maintain the number of guilty pleas at high levels, and this objective prevails over every other competing goal." Allen, *Central Problems of American Criminal Justice,* 75 MICH. L. REV. 813, 819 (1977). Most guilty pleas are the result of plea bargain negotiations between defense counsel and the prosecution. *See* Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts,* 89 HARV. L. REV. 293 (1975).

[3] If every criminal charge were subjected to a full-scale trial, the States and the Federal Government would need to multiply by many times the number of judges and court facilities.

> Disposition of charges after plea discussions is not only an essential part of the process but a highly desirable part for many reasons. It leads to prompt and largely final disposition of most criminal cases ....

Santobello v. New York, 404 U.S. 257, 260-61 (1971).

[4] When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann.*

more foolproof than full trials to the court or to the jury. Accordingly, we take great precautions against unsound results, and we should continue to do so, whether conviction is by plea or by trial."[5] The Court has upheld the right to challenge a guilty plea conviction for the following reasons:

1. The plea was induced by an unkept promise;[6]
2. The plea resulted from improper promises, coercion, or deception;[7]
3. The defendant pleaded without being informed of a critical element of the offense;[8]
4. The defendant pleaded without the assistance of counsel, or did not receive effective assistance of counsel;[9]

Tollett v. Henderson, 411 U.S. 258, 267 (1973). *Accord,* McMann v. Richardson, 397 U.S. 759, 768-71 (1970). *But see* Henderson v. Morgan, 426 U.S. 637 (1976). Justice Stevens wrote for the majority:

> We also accept petitioner's characterization of the competence of respondent's counsel and of the wisdom of their advice to plead guilty to a charge of second-degree murder. Nevertheless, such a plea cannot support a judgment of guilt unless it was voluntary in a constitutional sense.[13]

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[13] A plea may be involuntary either because the accused does not understand the nature of the constitutional protections that he is waiving, *see, e.g., Johnson v. Zerbst,* ... or because he has such an incomplete understanding of the charge that his plea cannot stand as an intelligent admission of guilt.

Id. at 644-45 & n.13 (citation omitted). In Blackledge v. Perry, 417 U.S. 21 (1974), the Court stated:

> While petitioners' reliance upon the *Tollett* opinion is understandable, there is a fundamental distinction between this case and that one. Although the underlying claims presented in *Tollett* and the *Brady* trilogy were of constitutional dimensions, none went to the very power of the State to bring the defendant into court to answer the charge brought against him. ... Unlike the defendant in *Tollett,* Perry is not complaining of "antecedent constitutional violations" or of a "deprivation of constitutional rights that occurred prior to the entry of the guilty plea." ... Rather, the right that he asserts and that we today accept is the right not to be haled into court at all upon the felony charge.

Id. at 30 (quoting Tollett v. Henderson, 411 U.S. 258, 266-67 (1973)). For a penetrating analysis of *Tollett* and *Blackledge,* see Westen, *Away from Waiver: A Rationale for the Forfeiture of Constitutional Rights in Criminal Procedure,* 75 MICH. L. REV. 1214 (1977).

[5] Brady v. United States, 397 U.S. 742, 758 (1970).

[6] *See* Blackledge v. Allison, 431 U.S. 63 (1977); Santobello v. New York, 404 U.S. 257 (1971).

[7] *See* Fontaine v. United States, 411 U.S. 213 (1973); Machibroda v. United States, 368 U.S. 487 (1962); Waley v. Johnston, 316 U.S. 101 (1942).

[8] *See* Henderson v. Morgan, 426 U.S. 637 (1976).

[9] *See* Pennsylvania *ex rel.* Herman v. Claudy, 350 U.S. 116 (1956); Walker v. Johnston, 312 U.S. 275 (1941).

5. The district court judge, in accepting the plea, did not comply with rule 11 of the Federal Rules of Criminal Procedure;[10]
6. The transcript did not adequately show that the plea was knowing and voluntary;[11] and
7. The due process clause prevented the state from bringing the charge.[12]

Although the Constitution does not guarantee a right of appeal,[13] Congress, in 28 U.S.C. § 1291, has provided an appeal as of right to the court of appeals from district court judgments in *all* criminal cases.[14] The two federal rules of appellate procedure governing appeals under section 1291 neither mention nor differentiate between trial convictions and plea convictions.[15] No federal statute or rule of procedure specifically mentions a right to appeal a *plea* conviction. The only rule which discusses that right casts doubt on its existence. Rule 32(a)(2) of the Federal Rules of Criminal Procedure, which governs the duty of the sentencing judge to notify the defendant of the right to appeal, differentiates drastically between the judge's obligation to trial-convicted and to plea-convicted defendants:

> After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. *There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of*

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[10] *See* McCarthy v. United States, 394 U.S. 459 (1969). In Halliday v. United States, 394 U.S. 831 (1969), the Court declined to apply *McCarthy* to guilty pleas accepted prior to the date of that decision.

[11] *See* Boykin v. Alabama, 395 U.S. 238 (1969).

[12] *See* Blackledge v. Perry, 417 U.S. 21 (1974).

[13] *See* Abney v. United States, 431 U.S. 651, 656 (1977); McKane v. Durston, 153 U.S. 684 (1894).

[14] "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts . . . ." 28 U.S.C. § 1291 (1976). "The right of appeal, as we presently know it in criminal cases, is purely a creature of statute . . . 28 U.S.C. § 1291." Abney v. United States, 431 U.S. 651, 656 (1977). *Accord,* United States v. MacDonald, 435 U.S. 850, 853 (1978).

[15] Rule 3(a) of the Federal Rules of Appellate Procedure states: "An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4." Rule 4(b) states: "In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from." Rule 24(a), which sets forth the procedure for seeking leave to appeal *in forma pauperis,* likewise does not differentiate between trial- and plea-convicted defendants.

> *guilty or nolo contendere.* If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.[16]

As originally enacted in 1966, rule 32(a)(2) required the sentencing judge to inform all trial-convicted defendants of both the right to appeal and the right to apply for leave to appeal *in forma pauperis.*[17] Because the rule did not mention plea-convicted defendants, its intended coverage was ambiguous. The 1975 amendment to the rule (italicized above) eliminated this ambiguity.

Although rule 32(a)(2) does not bar the judge from informing the defendant of the right to direct appeal, it absolves the judge of any duty to do so. Further, the rule appears to have misled many judges, defense counsel and defendants to conclude that there is no right to direct appeal from a plea conviction. Of the 364 federal judges responding to a survey questionnaire prepared by the author,[18] twenty-six percent (ninety-four respondents) indicated that, when accepting a guilty plea, they advise the defendant that a plea waives the right to direct appeal.[19] This advice is erroneous. One prominent federal district judge has provided an example of this misunderstanding:

> The reason there is no advice of right to appeal following a plea of guilty is that there is no right to appeal, as I understand the matter in such cases. I think this is not what the law should be. . . . I always advise those who are about to plead that one of the differences between a conviction after trial and on a plea of guilty is that the right to appeal is lost.[20]

The survey also revealed that eighty-five percent (310) of the judges follow the suggestion of the 1975 amendment and, at sentencing, do not advise the plea-convicted defendant of any right to appeal.[21] This is not surprising; most judges would not volunteer information that could result in a challenge to a guilty-plea

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[16] FED. R. CRIM. P. 32(a)(2) (1975 amendment italicized).

[17] FED. R. CRIM. P. 32(a)(2) (amended 1975).

[18] In May 1977, the author conducted a two-question survey of all federal district court judges and senior district court judges. Of the 501 judges contacted, 387 judges responded; 23 of the responses were incomplete or nonresponsive. Thus, there were 364 net responses—73% of the judges surveyed. The questionnaire and results are set forth in the Appendix.

[19] *See* Appendix.

[20] Letter from Judge Jack B. Weinstein (E.D.N.Y.) to Author (July 1, 1976) (copy on file at the *Cornell Law Review*).

[21] *See* Appendix.

conviction.[22] Only fifteen percent (54) of the judges go beyond the requirements of rule 32(a)(2) and advise the plea-convicted defendant of the right to appeal.[23]

Thus, the obligation to advise the great majority of plea-convicted defendants about the right to appeal falls on defense counsel. Yet, there is no reason to assume that counsel will fulfill this burden. Lack of faith in defense counsel to advise even trial-convicted defendants of the right to appeal led to the adoption of rule 32(a)(2) in 1966.[24] Because counsel for a plea-convicted defendant has negotiated and witnessed a resolution of the case by plea, he is even less likely to notify the defendant of the right to appeal. Not only could such advice overturn counsel's efforts, but the grounds for appeal might reflect upon his own competence or integrity.

The language of rule 32(a)(2), which appears to have misled large numbers of federal district judges, is likely to similarly mislead counsel for plea-convicted defendants to believe that there is no right to appeal. Further likely to mislead defense counsel are the local district court plans, adopted pursuant to the Federal Criminal Justice Act,[25] for appointment of counsel to represent indigent federal defendants. Each of the six sample plans approved in 1965 by the Judicial Conference of the United States for adoption by federal district courts contains the following language: "In the event that a defendant is convicted following trial, counsel appointed hereunder shall advise the defendant of his right to appeal and of his right to counsel on appeal."[26] None of

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[22] "A judge's desire to enhance his own reputation and to protect appellate courts from an excessive number of appeals may prompt him to discourage appeals." Note, *Limiting Judicial Incompetence: The Due Process Right to a Legally Learned Judge in State Minor Court Criminal Proceedings,* 61 VA. L. REV. 1454, 1484-85 (1975).

[23] *See* Appendix.

[24] *See* FED. R. CRIM. P. 32(a)(2) note (1966 Advisory Comm. Note). For discussion of the note, see notes 98-103 and accompanying text *infra.*

[25] 18 U.S.C. § 3006A (1976).

[26] Report of the Committee to Implement the Criminal Justice Act of 1964, 36 F.R.D. 285, 289 (1964). The Committee recommended that the provision be included in "every district court plan." *Id.* A spot check by the author of four district court plans on file with the Administrative Office of the United States Courts indicates compliance with the recommendation. The plans covering the Southern District of California, the Eastern District of Kentucky, the Eastern District of Michigan, and the Eastern District of New York all include the provision.

Some districts, in addition to maintaining a file copy of their plan, transmit pertinent portions to court-appointed counsel. For example, the United States District Court for the Eastern District of Michigan sends the following:

the sample plans mentions the right to appeal a plea conviction or the duty of counsel to provide appeal advice to plea-convicted defendants.

It is unlikely that an unadvised, plea-convicted defendant who wishes to challenge his conviction will discover the right and then perfect a timely appeal or seek leave to appeal *in forma pauperis.* The plea-convicted defendant who reads rule 32(a)(2) or the applicable Criminal Justice Act plan is likely to conclude, as so many judges have, that no right to appeal exists.

Failure to file a direct appeal within ten days after entry of judgment[27] relegates the plea-convicted defendant to inferior collateral remedies: 28 U.S.C. § 2255[28] or rule 32(d) of the Federal Rules of Criminal Procedure.[29] Proceeding collaterally deprives the plea-convicted defendant of an initial consideration by a three-judge panel of the court of appeals, and restricts grounds for reversal to errors of constitutional, jurisdictional or fundamental magnitude.[30] Moreover, on collateral attack the indigent, plea-convicted defendant has no per se right to court-appointed counsel[31] or transcripts of lower court proceedings.[32] Although notifying the plea-convicted defendant of the right to appeal would be likely to significantly increase the number of appeals[33]

TO APPOINTED COUNSEL:

We call your attention to "Section 3, Duties of Appointed Attorney," of the Criminal Justice Act plan .... We reproduce the said section here in full:

....

In the event that a defendant is convicted following trial, counsel appointed hereunder shall advise the defendant of his right of appeal and his right to counsel on appeal.

[27] *See* FED. R. APP. P. 4(b).

[28] (1976), *quoted in* note 66 *infra*. Although motions under § 2255 or rule 32(d) are deemed further steps in the criminal proceeding, this Article designates as collateral all postconviction litigation apart from direct appeal.

[29] *Quoted in* text accompanying note 54 *infra*. Rule 35 of the Federal Rules of Criminal Procedure is available to challenge the sentencing proceeding. For discussion of rule 35, see note 119 *infra*.

[30] For a comparison of the benefits of direct appeal with those of collateral attack, see notes 80-91 and accompanying text *infra*.

[31] *Cf.* Ross v. Moffitt, 417 U.S. 600 (1974) (indigent defendant not entitled to court-appointed counsel on discretionary appeal).

[32] *See* United States v. MacCollom, 426 U.S. 317 (1976) (plurality opinion).

[33] "Professor Carrington is right in saying that if even a small percentage of those convicted on pleas of guilty should appeal their sentence, 'the courts would be swamped.'" H. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 37 (1973) (quoting Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 578 (1969)).

in an already overburdened system,[34] the right of all defendants to appeal deserves protection:

> Appeals are an important part of the solemn process and symbolism that are vital to the legitimacy of criminal law enforcement. In overseeing trial court proceedings, appellate courts are special symbols of the respect our legal system accords to individual rights and concerns. They provide visible assurance to the accused and to society that the criminal law is being administered fairly and lawfully.[35]

This Article initially discusses the right of a plea-convicted defendant to direct appeal as noted in decisions of the Supreme Court and most federal courts of appeals. Next it reviews the advantages of direct appeal over collateral remedies, and examines the legislative intent behind rule 32(a)(2) as originally drafted and then as amended. The Article then evaluates the constitutionality of the following:

1. A sentencing judge informing a plea-convicted defendant that a guilty plea waives the right to appeal;
2. A sentencing judge not informing a plea-convicted defendant of the right to appeal;
3. Rule 32(a) (2) insofar as it conceals from a plea-convicted defendant knowledge of his right to appeal, and distinguishes between the two classes of defendants convicted in federal courts; and

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[34] "The annual number of federal appellate cases has increased from about 5,000 to about 15,000 over the past decade. An exponential projection at this rate of increase yields a caseload of 1 million sometime between the years 2010 and 2015." Barton, *Behind the Legal Explosion,* 27 STAN. L. REV. 567, 567 n.2 (1975). Judge Henry Friendly of the Second Circuit has stated:

> Not surprisingly, criminal appeals more than quadrupled [between 1960 and 1972]; with the Government providing a free lawyer and a free transcript for an indigent defendant, more liberal bail procedures, and, except in most unusual cases, an assurance against a heavier sentence on retrial, it is hard to see why almost every convicted defendant should not appeal.

H. FRIENDLY, *supra* note 33, at 32 (footnote omitted).

[35] P. CARRINGTON, D. MEADOR & M. ROSENBERG, JUSTICE ON APPEAL 58 (1976). A recent Supreme Court decision reinstating a summarily dismissed collateral attack on a plea conviction resolved the issue in similar terms:

> [A]rrayed against the interest in finality is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional guarantees .... And a prisoner in custody after pleading guilty, no less than one tried and convicted by a jury, is entitled to avail himself of the writ in challenging the constitutionality of his custody.

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

4. A defense attorney not informing his plea-convicted client of the right to appeal.

In conclusion, the Article sets forth recommendations designed to protect the right to direct appeal from a plea-conviction.

I.

THE RIGHT TO DIRECT APPEAL FROM A PLEA CONVICTION

The Supreme Court has held that acceptance of a guilty plea by the trial judge is a conviction that warrants an entry of judgment.[36] Final judgment is the predicate for appellate jurisdiction under 28 U.S.C. § 1291;[37] in a criminal case, final judgment means sentence.[38] The Court has recognized the right to appeal all federal court convictions: "Present federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right."[39] None of the three sources cited in the Court's footnote[40]—28 U.S.C. § 1291,[41] 28 U.S.C. § 1294,[42] or rule 37(a)(2) of the Federal Rules of Criminal Procedure,[43] the predecessor to rule 32(a)(2)—suggests that a plea-convicted defendant does not possess the right to direct appeal.

Although the great majority of challenges to federal plea-convictions have been initiated by motions at the district court level under 28 U.S.C. § 2255 and rule 32(d) of the Federal Rules of Criminal Procedure, the Supreme Court has reviewed at least two cases arising from a direct appeal of a guilty-plea conviction. In *McCarthy v. United States*,[44] the Court overturned a plea conviction because the judge, in accepting the plea, had failed to comply

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[36] *See* Kercheval v. United States, 274 U.S. 220, 223 (1927).

[37] *See* Corey v. United States, 375 U.S. 169, 174 (1963) (quoting Berman v. United States, 302 U.S. 211, 212 (1937)); Pollard v. United States, 352 U.S. 354, 360 n.4 (1957) (quoting Miller v. Aderhold, 288 U.S. 206, 210 (1933)).

[38] *See* United States v. MacDonald, 435 U.S. 850, 853-54 (1978); Abney v. United States, 431 U.S. 651, 657 (1977).

[39] Coppedge v. United States, 369 U.S. 438, 441 (1962). *Coppedge* was quoted with approval in Rodriquez v. United States, 395 U.S. 327, 329-30 (1969), and Collins v. United States, 418 F. Supp. 577, 580 (E.D.N.Y. 1976), which added that "the fact that petitioners pled guilty does not foreclose them from an appeal.") *Id.*

[40] Coppedge v. United States, 369 U.S. 438, 441 n.2 (1962).

[41] (1976), *quoted in* note 14 *supra.*

[42] "Appeals from reviewable decisions of the district and territorial courts shall be taken to the courts of appeals as follows: (1) From a district court of the United States to the court of appeals for the circuit embracing the district . . . ." 28 U.S.C. § 1294 (1976).

[43] (Repealed 1966), *quoted in* text accompanying note 96 *infra.*

[44] 394 U.S. 459 (1969).

with the requirements of rule 11 of the Federal Rules of Criminal Procedure.[45] Similarly, in *Haynes v. United States,*[46] the Court, on direct appeal, overturned a plea conviction because of irregularities in the plea process. In neither decision, however, did the Court discuss the significance of the fact that the case arose on direct appeal rather than collateral attack.

Six federal courts of appeals have discussed at some length the right to appeal after a plea conviction. Judge, now Justice, Stevens pointed out both the existence of and advantage of direct appeal in a Seventh Circuit opinion dismissing a collateral attack on a plea conviction: "[The] district judge did not make as complete and unambiguous a record of 'the factual basis for the plea' as is contemplated by Rule 11. If this case were here on direct appeal from defendant's conviction, we might well conclude that these shortcomings constitute reversible error."[47] The Second,[48] Fourth,[49] Fifth,[50] Sixth,[51] and District of Columbia[52] Circuits have also noted the existence of a right to direct appeal from a plea conviction.

II.

COLLATERAL ATTACK OF A PLEA CONVICTION— AN INFERIOR REMEDY

The two principal procedures for collateral attack of a federal plea conviction are rule 32(d) of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255.[53]

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[45] *Id.* at 463-64. The principal requirements of rule 11 are set forth in note 112 *infra.*

[46] 390 U.S. 85 (1968). Although the Supreme Court opinion did not mention that post-conviction proceedings had begun with a direct appeal, the court of appeals noted that fact: "Haynes thereupon pleaded guilty, was sentenced to four years imprisonment and has perfected this appeal." United States v. Haynes, 372 F.2d 651, 652 (5th Cir. 1967), *rev'd,* 390 U.S. 85 (1968).

[47] Arias v. United States, 484 F.2d 577, 579 (7th Cir. 1973) (*citing* McCarthy v. United States, 394 U.S. 459 (1969)), *cert. denied,* 418 U.S. 905 (1974).

[48] *See* Del Vecchio v. United States, 556 F.2d 106, 109 (2d Cir. 1977); United States v. Journet, 544 F.2d 633, 634 (2d Cir. 1976).

[49] *See* United States v. White, 572 F.2d 1007, 1009 (4th Cir. 1978).

[50] *See* United States v. Maggio, 514 F.2d 80, 87 (5th Cir. 1975). *Accord,* United States v. Adams, 566 F.2d 962 (5th Cir. 1978).

[51] *See* Timmreck v. United States, 577 F.2d 372, 375 (6th Cir. 1978), *cert. granted,* 99 S. Ct. 830 (1979); United States v. Hoye, 548 F.2d 1271, 1272 (6th Cir. 1977).

[52] McCarthy was a *direct appeal* in which the Supreme Court, relying on its supervisory power, reversed a conviction based on a guilty plea for a violation of Rule 11 .... Appellant seeks to weaken the force of the fact that *McCarthy* was a direct appeal, as distinct from a collateral attack ....

United States v. Watson, 548 F.2d 1058, 1062 n.7 (D.C. Cir. 1977) (emphasis in original).

[53] Section 2255 did not entirely displace the writs of habeas corpus and coram nobis. Although the Court in Swain v. Pressley, 430 U.S. 372 (1977), stated that "§ 2255 created a

A. *Rule 32(d) of the Federal Rules of Criminal Procedure*

Rule 32(d) specifically provides for postsentence challenge of a guilty plea:

> A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but *to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.*[54]

Although the defendant may withdraw his plea after sentence only if he can prove a manifest injustice,[55] he need not prove a

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new postconviction remedy in the sentencing court and provided that a habeas corpus petition may not be entertained elsewhere" (*id.* at 378), it noted that "[§] 2255 allows an exception for the case in which the remedy is 'inadequate or ineffective'" (*id.* at n.10). *Accord,* United States v. Hayman, 342 U.S. 205, 223 (1952). In United States v. Morgan, 346 U.S. 502 (1954), when the defendant sought to overturn a guilty-plea conviction and the remedy provided by § 2255 was unavailable because he was not in custody under federal sentence, the Court permitted him to proceed by writ of coram nobis under the All Writs Act, 28 U.S.C. § 1651(a) (1976). 346 U.S. at 505-06. *Cf.* United States v. Gross, 446 F. Supp. 948 (D.N.J. 1978) (trial-convicted defendant permitted to petition for writ of coram nobis because no longer in federal custody). *See generally* Note, *Post-Conviction Relief from Pleas of Guilty: A Diminishing Right,* 38 BROOKLYN L. REV. 182 (1971); Note, *Withdrawal of Guilty Pleas Under Rule 32(d),* 64 YALE L. J. 590, 590 n.4 (1955).

Rule 35 of the Federal Rules of Criminal Procedure provides a means for attacking sentences: "The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within [120 days] . . . ."

> A Rule 35 motion is used to attack the sentence imposed, not the basis for the sentence. . . .
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> . . . .
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> . . . The 1966 amendment of Rule 35 added language permitting correction of a sentence imposed in an "illegal manner." However, there is a 120 day time limit on a motion to do this, and the added language does not clarify the intent of the rule or its relation to § 2255.

R. GOVERNING § 2255 PROCEEDINGS 2 note (Advisory Comm. Note). For discussion of rule 35, see note 119 *infra.*

[54] FED. R. CRIM. P. 32(d) (emphasis added). "Under Rule 32(d) a plea of nolo contendere is treated as if it were a plea of guilty." Note, *Withdrawal of Guilty Pleas in the Federal Courts,* 55 COLUM. L. REV. 366, 367 n.4 (1955).

[55] "A popular formula is that withdrawal of the plea should be permitted if it was induced by fraud, mistake, imposition, misrepresentation, or misapprehension by the defendant of his legal rights . . . ." 2 C.A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 537, at 465-66 (1969) (footnotes omitted).

The Advisory Committee Note accompanying a proposed amendment to rule 32(d) provides the following examples of manifest injustice:

> The most common instances of "manifest injustice" are where there has been an "improper taking of a guilty plea" in significant noncompliance with rule 11, *United States v. Watson,* [548 F.2d 1058 (D.C. Cir. 1977)]; where it is shown that the defendant was without competence to plead, *United States v. Masthers,* 539 F.2d 721 (D.C. Cir. 1976); and where a plea bargain has not been kept, *United States v. Crusco,* 536 F.2d 21 (3d Cir. 1976).

JUDICIAL CONFERENCE OF THE UNITED STATES COMM. ON RULES OF PRACTICE AND PROCEDURE, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL

denial of due process.[56] Rule 32(d) does not impose a time limit for filing a postsentence motion,[57] but delay in filing a collateral attack is frequently cited as probative of the untruthfulness of a defendant's allegations by courts seeking to justify denial of relief.[58]

Although a proceeding under rule 32(d) is a criminal proceeding, the government is not required to provide counsel to assist the indigent in preparing his motion.[59] The rule 32(d) motion is directed to the sentencing judge. If he permits the defendant to withdraw his plea the case will be added anew to a crowded docket.[60] The judge may dispose of the claim without

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PROCEDURE, RULES GOVERNING SECTION 2254 CASES IN THE UNITED STATES DISTRICT COURTS, RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS, AND FEDERAL RULES OF EVIDENCE, 77 F.R.D. 507, 554 (1978) (proposed FED. R. CRIM. P. 32(d) note).

[56] Although a finding of manifest injustice under Rule 32(d) may not require as strong a showing as a claim of deprivation of due process ... a motion under Rule 32(d) closely resembles a motion to vacate sentence under 28 U.S.C. § 2255.... The defendant's burden in a Rule 32(d) motion, as in a § 2255 proceeding, is heavy.

Woodward v. United States, 426 F.2d 959, 964 (3d Cir. 1970). A showing of a due process violation constitutes manifest injustice as a matter of law. *See* United States v. Crusco, 536 F.2d 21, 26 (2d Cir. 1976); United States v. Washington, 341 F.2d 277, 281 (3d Cir.), *cert. denied,* 382 U.S. 850 (1965). *See generally* Kienlen v. United States, 379 F.2d 20, 28 (10th Cir. 1967); Gilinsky v. United States, 335 F.2d 914, 917 (9th Cir. 1964). Some courts have required facts that would constitute a due process violation before sustaining a claim of manifest injustice:

> A plea of guilty may not be withdrawn after sentence except to correct a "manifest injustice," and we find it difficult to imagine how "manifest injustice" could be shown except by proof that the plea was not voluntarily or understandingly made, or a showing that defendant was ignorant of his right to counsel.

Edwards v. United States, 256 F.2d 707, 709 (D.C. Cir.) (footnotes omitted), *cert. denied,* 358 U.S. 847 (1958). *See* Note, *supra* note 53, 64 YALE L.J. at 590-91 n.4.

[57] Prior to the adoption of the Federal Rules of Criminal Procedure in 1946, a motion to withdraw a guilty plea had to be made within 10 days after entry of the plea and before sentence was imposed. *See* Note, *supra* note 54, at 379 n.92. Under rule 32(d), "there is now no specific time limitation upon the withdrawal of a guilty plea where 'manifest injustice' is shown." Pilkington v. United States, 315 F.2d 204, 209 n.3 (4th Cir. 1963). Judge, now Justice, Stevens disagrees: "I would interpret Rule 32(d) as requiring timely application, although some courts have apparently taken a different view.... This court has not yet decided the timeliness issue under Rule 32(d) ...." United States v. Smith, 440 F.2d 521, 527 n.1 (7th Cir. 1971) (dissenting opinion).

[58] "[T]he delay is probative of the untruthfulness of defendant's allegations; presumably if they were true he would have acted with more dispatch ...." Note, *supra* note 54, at 380.

[59] *See* 5 L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 32:2, at 167 (1967).

[60] In United States v. Smith, 440 F.2d (7th Cir. 1971), then Judge Stevens stated:

> The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice. Every

bringing the defendant to court, and without holding a hearing, "if the court is entirely familiar with the facts."[61] Relief is limited to withdrawal of the guilty plea.[62] Because the granting of leave to withdraw a plea is discretionary with the trial court, an appellate court will not interfere in the absence of an abuse of discretion.[63]

Some courts have asserted that rule 32(d) affords a greater chance for relief than 28 U.S.C. § 2255:

> [T]he concept of "manifest injustice" under Rule 32(d) permits the judge a greater latitude than the requirements of constitutional "due process." . . . The facts disclosed in a hearing might not be sufficient for the court to conclude that the guilty plea was involuntary and violative of due process, yet the court may be of the opinion that clear injustice was done.[64]

On the other hand, the defendant's admission of guilt or even his failure to assert innocence may in itself justify denial of the mo-

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> inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas.

Id. at 528-29 (dissenting opinion).

[61] 2 C.A. WRIGHT, *supra* note 55, § 537, at 465. Where a hearing is held, it must be adversary, and the "burden is on the defendant to establish that he is entitled to relief." *Id.* § 539, at 477.

[62] "Of course, the only relief available under Rule 32(d) is withdrawal of the guilty plea and a trial after a plea of not guilty. On the other hand, the possible relief available under 28 U.S.C.A. § 2255 is more varied." Pilkington v. United States, 315 F.2d 204, 209 n.4 (4th Cir. 1963).

[63] *See* Meyer v. United States, 424 F.2d 1181, 1191 (8th Cir.), *cert. denied,* 400 U.S. 853 (1970). "[A] motion after sentence to withdraw a plea of guilty is addressed to the discretion of the district judge, and . . . his action thereon will be disturbed on appeal only for abuse of discretion. This is so well established that citation of supporting authority is unnecessary." Smith v. United States, 324 F.2d 436, 440 (D.C. Cir. 1963), *cert. denied,* 376 U.S. 957 (1964). *See* Woodward v. United States, 426 F.2d 959, 964-65 (3d Cir. 1970); Note, *supra* note 53, 64 YALE L.J. at 591.

[64] Pilkington v. United States, 315 F.2d 204, 209 (4th Cir. 1963) (citations omitted). *Accord,* 2 C.A. WRIGHT, *supra* note 55, § 539, at 476; Note, *supra* note 54, at 367 n.5. "The manifest injustice standard for allowing withdrawal of a guilty plea under Rule 32(d) provides the district court with greater latitude or leeway than the standard under 28 U.S.C. § 2255 relating to vacation of judgment and sentence." Meyer v. United States, 424 F.2d 1181, 1190 (8th Cir.), *cert. denied,* 400 U.S. 853 (1970). *Accord,* United States v. Smith, 440 F.2d 521, 525 n.10 (7th Cir. 1971); United States v. Kent, 397 F.2d 446, 448 n.1 (7th Cir. 1968), *cert. denied,* 393 U.S. 1081 (1969). Nevertheless, some courts have treated § 2255 motions as rule 32(d) motions. *See* note 83 *infra.*

Moore argues that the scope of appellate review may be broader under § 2255 because a rule 32(d) motion is addressed to the discretion of the district judge and can only be reversed for an abuse of discretion. *See* 8 MOORE'S FEDERAL PRACTICE ¶ 11.04[1], at 11-84 (2d ed. 1965).

tion regardless of the circumstances under which the plea was originally obtained.[65]

B. *28 U.S.C. § 2255*

A second avenue of collateral attack on a guilty-plea conviction is provided by 28 U.S.C. § 2255,[66] which "substituted a new collateral review procedure for the preexisting habeas corpus procedure."[67] Most courts permit a collateral attack on a plea conviction under either section 2255 or rule 32(d).[68] Although the literal language of section 2255 limits the remedy—the court may "vacate, set aside or correct the sentence"—the Supreme Court has construed the section to operate against defects in trial or plea proceedings, as well as sentencing.[69]

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[65] *See* 2 C.A. WRIGHT, *supra* note 55, § 537, at 470-71. *See generally* 8 MOORE'S FEDERAL PRACTICE, *supra* note 64, ¶ 11.04[1], at 11-83; Note, *supra* note 53, 38 BROOKLYN L. REV. at 208; Note, *supra* note 53, 64 YALE L.J. at 591 n.6.

[66] Section 2255 states:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.
>
> A motion for such relief may be made at any time.
>
> Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.
>
> A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.
>
> ....
>
> An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

28 U.S.C. § 2255 (1976).

[67] Swain v. Pressley, 430 U.S. 372, 378 (1977).

[68] "[Section] 2255 motions are frequently based upon grounds which can be raised by a 32(d) motion." Note, *supra* note 54, at 367 n.5. Some courts treat a 2255 motion challenging a plea conviction as a motion under rule 32(d). *See* note 83 *infra*.

[69] [Legislative] history makes clear that § 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus. ... Nowhere in the history of Section 2255 do we find any purpose to impinge upon pris-

Because a motion under section 2255 is characterized as a "further step in the movant's criminal case rather than a separate civil action,"[70] the movant is not required to pay a filing fee[71] and may be able to effect discovery under both the Federal Rules of Criminal Procedure and the Federal Rules of Civil Procedure.[72] However, a section 2255 proceeding is not "of necessity governed by the legal principles which are applicable at a criminal trial regarding such matters as counsel, presence, confrontation, self-incrimination, and burden of proof."[73]

As with a rule 32(d) motion to withdraw a plea, the district judge that accepted the plea and imposed sentence will generally hear the motion for relief under section 2255.[74] Although section 2255 requires the sentencing judge to hold a hearing "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief,"[75] the Supreme Court has recently noted procedures by which a district judge can avoid an evidentiary hearing,[76] or even summarily dismiss the pe-

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oners' rights of collateral attack upon their convictions.... [R]elief is available on the ground that "[a person] is in custody in violation of the Constitution *or laws* or treaties of the United States."

Davis v. United States, 417 U.S. 333, 343-44 (1974) (quoting 28 U.S.C. § 2255 (1976)) (emphasis in original).

[70] R. GOVERNING § 2255 PROCEEDINGS 1 note (Advisory Comm. Note).

[71] *See id.* 3 note (Advisory Comm. Note).

[72] *See id.* 6 note (Advisory Comm. Note).

[73] *Id.* 1 note (Advisory Comm. Note).

[74] *See* Swain v. Pressley, 430 U.S. 372, 378 (1977). The Advisory Committee stated:

> Commentators have been critical of having the motion decided by the trial judge. See Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1206-1208 (1970)....
>
> The Court of Appeals for the First Circuit has held that a judge other than the trial judge should rule on the 2255 motion. See *Halliday* v. *United States,* 380 F.2d 270 (1st Cir. 1967).

R. GOVERNING § 2255 PROCEEDINGS 4 note.

[75] 28 U.S.C. § 2255 (1976).

[76] [A]s is now expressly provided in the Rules Governing Habeas Corpus Cases, the district judge (or a magistrate to whom the case may be referred) may employ a variety of measures in an effort to avoid the need for an evidentiary hearing. Under Rule 6, a party may request and the judge may direct that discovery take place, and "there may be instances in which discovery would be appropriate [before an evidentiary hearing, and would show such a hearing] to be unnecessary ...." Advisory Committee note to Rule 6, Rules Governing Habeas Corpus Cases.... Under Rule 7, the judge can direct expansion of the record to include any appropriate materials that "enable the judge to dispose of some habeas petitions not dismissed on the pleadings, without the time and expense required for an evidentiary hearing."

Blackledge v. Allison, 431 U.S. 63, 81-82 (1977) (discussing § 2254) (footnotes omitted). Similar rules govern § 2255 proceedings. *See* R. GOVERNING § 2255 PROCEEDINGS 6, 7.

tition.[77] Where a hearing is required, section 2255 provides that the prisoner need not be present.[78] Finally, although an appeal as of right lies to the court of appeals from the final decision denying the relief requested in a section 2255 motion, the indigent movant is not entitled to assistance of counsel on appeal.[79]

C. *The Advantages of a Direct Appeal*

Direct appeal offers the plea-convicted defendant significant advantages over collateral attack. A direct appeal is reviewed by a three-judge panel of the court of appeals[80] which can overturn the plea conviction on a finding of error of less than constitutional, jurisdictional, or fundamental magnitude.[81] The Supreme

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[77] "In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion . . . . " Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977). The § 2255 rules permit the judge to dismiss the order "[i]f it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief." R. GOVERNING § 2255 PROCEEDINGS 4(b).

[78] 28 U.S.C. § 2255 (1976), *quoted in* note 66 supra.

[79] *See* Note, *Developments in the Law: Federal Habeas Corpus,* 83 HARV. L. REV. 1038, 1204 n.340 (1970).

[80] The petitioner employing collateral remedies is not only denied the initial judgment of a three-judge panel of the court of appeals, but his petition may be dealt with, for the most part, by a United States magistrate rather than a district judge:

> Under this rule the duties imposed upon the judge of the district court by rules 2 [motion], 3 [filing motion], 4 [preliminary consideration by judge], 6 [discovery], and 7 [expansion of the period] may be performed by a magistrate if and to the extent he is empowered to do so by a rule of the district court.

R. GOVERNING § 2254 CASES 10 note (Advisory Comm. Note) (made applicable to § 2255 by R. GOVERNING § 2255 PROCEEDINGS 10 note (Advisory Comm. Note)). The 1976 Federal Magistrates Act, 28 U.S.C. § 636(b)(1)(B) (1976), permits magistrates to hold evidentiary hearings in § 2255 proceedings, and to submit to the judge proposed findings and recommendations for disposition.

[81] Although some courts of appeals may sustain a rule 32(d) motion under a less stringent standard than a § 2255 motion (*see* note 83 *infra*), it is not likely that the standard for reversal on collateral attack will approach the leniency of the standard for reversal on direct appeal:

> [I]f a defendant can raise a Rule 11 violation by a § 2255 petition, the question still remains whether the rigid rule requiring reversal for non-compliance with Rule 11 applies for both direct and collateral review, or whether, on collateral attack, the court may allow for more play in the joints in assessing the effects of a Rule 11 violation. Without in any way detracting from the force of [McCarthy v. United States, 394 U.S. 459 (1969)] . . . on direct appeal, we believe that . . . there must be flexibility in the collateral review of a Rule 11 claim. The circuits that have addressed this issue since [Davis v. United States, 417 U.S. 333 (1974)] have reached the same conclusion, and the standard for such review has been variously phrased in terms of whether there was "manifest injustice," see *United States v. Watson,* 548 F.2d 1058 (D.C. Cir. 1977) (reviewing a Rule 11 claim under Rule 32(d)); or a "'fundamental defect which inherently results in a complete miscarriage of justice,'" see *Bachner v. United States,* 517 F.2d 589,

Court has indicated that many claims which would have succeeded on direct appeal will not succeed in a section 2255 proceeding: "The writ of habeas corpus and its federal counterpart, 28 U.S.C. § 2255, 'will not be allowed to do service for an appeal.' . . . For this reason, non-constitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings."[82] Collateral relief under rule 32(d) is likely to be similarly limited.[83] Further, the indigent, plea-convicted defendant is

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592-93 (7th Cir. 1975); *McRae v. United States*, 540 F.2d 943, 945 (8th Cir. 1976); *United States v. Hamilton*, 553 F.2d 63 at 65 (10th Cir. 1977) (all quoting *Davis v. United States*, . . . 417 U.S. at 346 . . .); or error "somewhat less serious than constitutional error, and somewhat more serious than ordinary reversible error," see *Bachner*, . . . 517 F.2d at 598 (Stevens, J., concurring); see also *Aviles v. United States*, [405 F. Supp. 1374, 1379-81 (S.D.N.Y. 1975)]; *Poerio v. United States*, 405 F. Supp. 1258, 1262-63 (E.D.N.Y. 1975).[8] Whatever the differences among these standards, they share the requirement that a defendant must at least show prejudice affecting the fairness of the proceedings or the voluntariness of the plea in order to succeed in a collateral attack based upon a Rule 11 violation.

[8] Although four circuits apparently reached contrary conclusions, see *Bunker v. Wise*, 550 F.2d 1155 (9th Cir. 1977); *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *United States v. Wolak*, 510 F.2d 164, 166 (6th Cir. 1975); *Roberts v. United States*, 491 F.2d 1236 (3d Cir. 1974), none of these cases discussed the standard to be applied on collateral review, and *Roberts* was decided before *Davis v. United States* . . . .

Del Vecchio v. United States, 556 F.2d 106, 110-11 & n.8 (2d Cir. 1977). *Accord,* Keel v. United States, 585 F.2d 110 (1978) (en banc). *But see* Timmreck v. United States, 577 F.2d 372 (6th Cir. 1978), *cert. granted,* 99 S. Ct. 830 (1979). The Sixth Circuit held:

> Admittedly *McCarthy* involved a direct appeal but if "prejudice inheres in a failure to comply with Rule 11," then it must be cognizable in a § 2255 proceeding. We reconcile *McCarthy* and *Davis* by holding that a Rule 11 violation is per se prejudicial and thus must be a "fundamental defect which inherently results in a complete miscarriage of justice."

Id. at 377.

[82] Stone v. Powell, 428 U.S. 465, 477 n.10 (1976) (quoting Sunal v. Large, 332 U.S. 174, 178 (1947)) (citation omitted).

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill v. United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.*, at 428 (internal quotation marks omitted).

Davis v. United States, 417 U.S. 333, 346 (1974).

[83] Some courts of appeals, although permitting postconviction collateral attacks on plea convictions under both rule 32(d) and § 2255, have treated the § 2255 motions as though

entitled to the assistance of counsel[84] and transcripts of earlier

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filed under rule 32(d). In United States v. Watson, 548 F.2d 1058 (D.C. Cir. 1977), the defendant appealed the denial of a § 2255 motion that attacked a plea conviction on the ground that the district judge did not fulfill all the rule 11 requirements in accepting the plea. The court set forth two reasons for remanding the case for consideration under rule 32(d). First, the court stated that rule 32(d) provides "a special, and perhaps exclusive, avenue of collateral challenge to an allegedly improper taking of a guilty plea." *Id.* at 1063. Second, the court found that the explicit standard of rule 32(d) for determining whether to permit withdrawal of the guilty plea—"to correct manifest injustice"—was "immune from the shifting and still somewhat opaque judicial formulations differentiating between direct appeals and 2255 motions." *Id.* at 1063-64. The court noted:

> In his argument against limiting the scope of 2255 in relation to direct appeal, appellant stresses the harshness that would ensue because of the short period of time provided for taking a direct appeal in Rule 4, F.R.App.P. This is undoubtedly a serious problem incident to any such differentiation. But it is not a problem to the extent that Rule 32(d), and not 2255, is regarded as the vehicle for collateral attack in the case of guilty pleas.

Id. at 1063 n.10. Three other courts of appeals have treated a § 2255 motion attacking a plea conviction as a motion under rule 32(d). *See* Meyer v. United States, 424 F.2d 1181, 1190 (8th Cir.), *cert. denied*, 400 U.S. 853 (1970); United States v. Kent, 397 F.2d 446 (7th Cir. 1968), *cert. denied*, 393 U.S. 1081 (1969); Kienlen v. United States, 379 F.2d 20, 23 (10th Cir. 1967).

One court of appeals found nothing to be gained by applying rule 32(d):

> We recognize the recent decision in *United States v. Watson* .... Nothing is to be gained by the invocation of Rule 32(d). *Davis* says that § 2255 may be used when a § 2255 motion presents a defect which results in a miscarriage of justice. We are convinced that there was no miscarriage of justice in the case at bar.

United States v. Hamilton, 553 F.2d 63, 66 (10th Cir.), *cert. denied*, 434 U.S. 834 (1977). Moore maintains that the defendant would be better served by consideration under § 2255:

> As a practical matter the scope of relief under Rule 32(d) is narrow since defendant must ordinarily demonstrate his innocence of the charge in order to withdraw the plea. Under section 2255, on the other hand, since inquiry is directed to violation of fundamental rights, guilt or innocence should be irrelevant.

8 MOORE'S FEDERAL PRACTICE, *supra* note 64, ¶ 11.04[1], at 11-83 (footnotes omitted).

[84] Douglas v. California, 372 U.S. 353 (1963). *Cf.* Ross v. Moffitt, 417 U.S. 600 (1974) (indigent defendant not entitled to court-appointed counsel on discretionary appeal).

An indigent movant under § 2255 will receive assistance of counsel only if the judge orders an evidentiary hearing: "If an evidentiary hearing is required, the judge shall appoint counsel for a movant who qualifies for the appointment of counsel under 18 U.S.C. § 3006A(g) ...." R. GOVERNING § 2255 PROCEEDINGS 8(c). In ensuring counsel where an evidentiary hearing is required, the Advisory Committee relied on reasoning equally applicable where defendant, without counsel, prepares his initial motion: "Counsel can perform a valuable function benefiting both the court and the petitioner. The issues raised can be more clearly identified if both sides have the benefit of trained legal personnel.... At a hearing, the petitioner's claims are more likely to be effectively and properly presented by counsel." R. GOVERNING § 2254 CASES 8 note (made applicable to § 2255 by R. GOVERNING § 2255 PROCEEDINGS 8 note (Advisory Comm. Note)). Due process may require appointment of counsel to aid indigent movants: "More recently, due process analysis has been utilized to guarantee the right of appointed counsel in areas other than those classified as 'criminal'.... Some lower courts have found a due process right to appointed counsel in a variety of other contexts including ... postconviction habeas corpus relief."

proceedings[85] in preparing his brief only if he proceeds by direct appeal. Finally, because the petitioner on direct appeal must act to challenge his conviction within ten days after his sentencing,[86] he is likely to better recollect the matters at issue.

The Supreme Court has noted the handicaps of the indigent, trial-convicted defendant seeking postconviction collateral relief:

> Applicants for relief under § 2255 must, if indigent, prepare their petitions without the assistance of counsel. . . . Those whose education has been limited and those, like petitioner, who lack facility in the English language might have grave difficulty in making even a summary statement of points to be raised on appeal. Moreover, they may not even be aware of errors which occurred at trial.[87]

Similarly, the plea-convicted defendant may not be aware of errors at the plea and sentencing proceedings. Inability of the movant to specify adequate grounds for relief will result in dismissal of the motion without a hearing.[88] Few postconviction motions

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Note, *Indigents' Right to Appointed Counsel in Interstate Extradition Proceedings*, 28 STAN. L. REV. 1039, 1057-58 (1976). The commentator noted that "the Supreme Court has avoided analyzing the civil/criminal problem in the post-conviction relief area" (*id.* at 1066):

> In Smith v. Bennett, 365 U.S. 708 (1961), the Court stated: "While habeas corpus may, of course, be found to be a civil action for procedural purposes . . . it does not follow that its availability in testing the State's right to detain an indigent prisoner may be subject to the payment of a filing fee. . . . We shall not quibble as to whether in this context it be called a civil or criminal action for . . . it is "the highest remedy in law, for any man that is imprisoned." . . . The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." *Id.* at 712. Yet it is precisely this "quibble" that may define the right to appointed counsel in postconviction proceedings

(*id.* at 1066 n.158).

[85] *See* United States v. MacCollom, 426 U.S. 317 (1976) (plurality opinion).

[86] *See* FED. R. APP. P. 4b.

[87] Rodriquez v. United States, 395 U.S. 327, 330 (1960). Most movants under § 2255 are indigent. *See* R. GOVERNING § 2255 PROCEEDINGS 3 note (Advisory Comm. Note).

[88] "Most habeas petitions are dismissed before the pre-hearing conference stage." R. GOVERNING § 2254 CASES 8 note (Advisory Comm. Note) (made applicable to § 2255 by R. GOVERNING § 2255 PROCEEDINGS 8 note (Advisory Comm. Note)). Petitioner may not have benefited from assistance of counsel:

> [S]ubdivision (a) [of Rule 6] provides that the judge should appoint counsel for a petitioner who is without counsel and qualifies for appointment when this is necessary for the proper utilization of discovery procedures. Rule 8 provides for the appointment of counsel at the evidentiary hearing stage . . . but this would not assist the petitioner who seeks to utilize discovery to stave off dismissal of his petition . . . or to demonstrate that an evidentiary hearing is necessary.

Id. 6 note (Advisory Comm. Note) (made applicable to § 2255 by R. Governing § 2255 Proceedings 6 note (Advisory Comm. Note)).

by federal prisoners receive an evidentiary hearing.[89] Although the recent Supreme Court decision in *Bounds v. Smith*,[90] which "requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law,"[91] should aid prisoners in filing collateral attacks, these benefits are not comparable to those provided on direct appeal.

III.
RULE 32(a)(2) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE

Both the original proposal for rule 32(a)(2), enacted in 1966, and the amendment, enacted in 1975, originated in the Advisory Committee on Criminal Rules of the Judicial Conference of the United States.[92] The Advisory Committee sent the proposals to the Conference's Standing Committee on Rules of Practice and Procedure, which reported the final draft, including the Advisory Committee Notes, to the full Judicial Conference.[93] The Judicial Conference forwarded the proposals to the Supreme Court, which prescribed them[94] and reported them to Congress.[95] Both rule 32(a)(2) and the amendment went into effect as initially proposed by the Advisory Committee.

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[89] "Federal Courts fail to grant the relief requested in 96% of all prisoner cases. . . . In fact, however, few cases receive an evidentiary hearing." Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 YALE L.J. 1395, 1415 n.74 (1977).

[90] 430 U.S. 817 (1977).

[91] *Id.* at 828. For discussion of *Bounds*, see notes 149-169 and accompanying text *infra*.

[92] *See generally Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 93d Cong., 2d Sess. 3 (1974) (statement of Judge Roszel C. Thomsen, Chairman, Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States) [hereinafter cited as *House Criminal Justice Hearings*].

[93] *See generally id.* at 4.

[94] *See* Amendments to the Federal Rules of Criminal Procedure, 416 U.S. 1001, 1014 (1974); Amendments to Rules of Criminal Procedure for the United States District Courts, 383 U.S. 1087, 1107 (1966). Although the Supreme Court may adopt "rules of practice and procedure with respect to any or all proceedings after verdict . . . or plea of guilty" (18 U.S.C. § 3772 (1976)) without reporting them to Congress, both rule 32(a)(2) and the 1975 amendment were reported to Congress. On the other hand, the Court must report to Congress "rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict . . . or plea of guilty." *Id.* § 3771.

[95] *See* 18 U.S.C. § 3771 (1976). Congress postponed the effective date of all proposed 1975 amendments until August 1, 1975 (*see* Act of July 30, 1974, 88 Stat. 397), and then, on July 31, 1975, provided that the proposed amendments, except the amendment to rule 11(e)(6), should take effect on December 1, 1975 (*see* Act of July 31, 1975, 89 Stat. 370). *See generally* Weinstein, *Reform of Federal Court Rulemaking Procedures*, 76 COLUM. L. REV. 905 (1976).

A. *The Purpose of Rule* 32(a)(2) *as Enacted in 1966*

Rule 37(a)(2), the predecessor of rule 32(a)(2), stated: "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant."[96] Rule 32(a)(2), enacted in 1966, extended the duty of the court to advise *all* trial-convicted defendants of the appropriate right to appeal:

> After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of his right to appeal and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court

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[96] FED. R. CRIM. P. 37(a)(2) (repealed 1966). The origin of present rule 32(a)(2) goes beyond the enactment of rule 37(a)(2) in 1946. In 1940, the Supreme Court, pursuant to authorizing legislation (*see* Act of June 29, 1940, 54 Stat. 688), appointed the Advisory Committee on Rules in Criminal Cases. *See* Appointment of Advisory Committee on Rules in Criminal Cases, 312 U.S. 717 (1940). In 1943, the Advisory Committee developed a first preliminary draft of the Federal Rules of Criminal Procedure which contained the following provision: "When a court imposes sentence upon a defendant represented by counsel appointed by the court or not represented by counsel, the court shall ask the defendant whether he wishes to appeal." FED. R. CRIM. P. 35(a)(2) (Prelim. Draft 1943). The Advisory Committee Note accompanying this rule stated:

> The provision with respect to defendants not represented by counsel or represented by assigned counsel is designed to eliminate any possible hardship which might result in such cases because of the requirement that the appeals by defendants be taken within 10 days. Compare *Boykin* v. *Huff*, 121 F.(2d) 865 (App. D.C., 1941).

Id. note. The rule and accompanying note did not distinguish between plea-convicted and trial-convicted defendants.

In the second preliminary draft, rule 39(a)(2), the successor to rule 35(a)(2), reflected a significant change: "When a court *after trial* imposes sentence upon a defendant *not represented by counsel*, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith on behalf of the defendant a notice of appeal." FED. R. CRIM. P. 39(a)(2) (Second Prelim. Draft 1944) (emphasis added). The Advisory Committee Note accompanying rule 39(a)(2) did not discuss the rationale for limiting the court's duty to contested cases, or for limiting the duty to cases where sentence is imposed upon a defendant not represented by counsel. *See id.* note. One possible explanation appears in a comment received by the Advisory Committee: "Judge W. Calvin Chesnut, of the District of Maryland, objected to the provision, as to the judge's asking a defendant whether he wishes to appeal. The rule should not apply to a defendant who pleads guilty." 5 L. ORFIELD, *supra* note 59, § 37:3, at 539 (footnote omitted).

The Advisory Committee submitted the rules to the Supreme Court in 1944, and the Court promulgated rule 39(a)(2), with the text unchanged, as rule 37(a)(2). *See* Rules of Criminal Procedure, 323 U.S. 821 (1944). The rule went into effect in March 1946. *See* Federal Rules of Criminal Procedure, 327 U.S. 821 (1946).

> shall prepare and file forthwith a notice of appeal on behalf of the defendant.[97]

The Advisory Committee Note accompanying the rule provided the following justification for extending the judge's duty: "[S]ituations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal."[98] The Committee advanced two reasons for this conclusion. First, many trial counsel believe that their role ends with the imposition of sentence.[99] Second, the "defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him."[100] Because of the Committee's special concern

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[97] FED. R. CRIM. P. 32(a)(2) (amended 1975). The amended version is set forth in text accompanying note 16 *supra.*

[98] FED. R. CRIM. P. 32(a)(2) note (1966 Advisory Comm. Note). The note states, in pertinent part:

> This amendment is a substantial revision and a relocation of the provision originally found in Rule 37(a)(2): "When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant." The court is required to advise the defendant of his right to appeal in all cases which have gone to trial after plea of not guilty because situations arise in which a defendant represented by counsel at the trial is not adequately advised by such counsel of his right to appeal. Trial counsel may not regard his responsibility as extending beyond the time of imposition of sentence. The defendant may be removed from the courtroom immediately upon sentence and held in custody under circumstances which make it difficult for counsel to advise him. See, e.g., *Hodges v. United States,* 368 U.S. 139 (1961). Because indigent defendants are most likely to be without effective assistance of counsel at this point in the proceedings, it is also provided that defendants be notified of the right of a person without funds to apply for leave to appeal in forma pauperis.

Id.

[99] *See id.* "I have seen many claims of abandonment of counsel, retained and appointed, after the imposition of sentence." Letter from Robert Erdahl, Chief, Appellate Section, Criminal Division, Department of Justice, to the Advisory Committee on Criminal Rules, *reprinted in* [1963] Meetings and Comments 72(on file at Administrative Office of the United States Courts, Washington, D.C.).

[100] FED. R. CRIM. P. 32(a)(2) note (1966 Advisory Comm. Note). This justification by the Committee mirrors the concern voiced by the Supreme Court in Coppedge v. United States, 369 U.S. 438 (1962):

> The salutary purpose of this provision [former rule 37(a)(2)] may, however, not be achieved when the defendant appears at sentencing with counsel. If neither counsel, whether retained or court appointed, nor the district judge imposing sentence, notifies the defendant of the requirement for filing a prompt notice of appeal, the right of appeal may irrevocably be lost.

Id. at 443 n.5. The Court released the *Coppedge* opinion on April 30, 1962, 27 days after Professor Edward L. Barrett, Jr., then Reporter to the Advisory Committee on Criminal Rules, had sent a memorandum to the Committee discussing this problem. *See* Memoran-

that indigent defendants represented by court-appointed counsel "are most likely to be without effective assistance of counsel at this point in the proceedings," the rule required the judge to further advise them of appeals *in forma pauperis.*[101]

The Advisory Committee Note never discussed the plight of plea-convicted defendants, indigent or otherwise. Professor Edward L. Barrett, then Reporter to the Committee, has stated that in the early 1960's there was little reason to be concerned about any right to direct appeal from a plea conviction.[102] The Supreme Court's decision in *McCarthy v. United States,*[103] which dealt with a direct appeal from a plea-conviction, did not come down until 1969.

B. *The 1975 Amendment to Rule* 32*(a)(2).*

> There shall be no duty on the court to advise the defendant of any right of appeal after sentence is imposed following a plea of guilty or nolo contendere.[104]

This single sentence amendment clearly answers the question left unresolved by rule 32(a)(2) as originally enacted. The judge has no duty to advise plea-convicted defendants, indigent or otherwise, of any right to appeal. Moreover, the amendment never mentions or suggests the existence of the right to appeal a plea conviction.

1. *Congressional Commentary*

The legislative commentary on the amendment consists of only one sentence: "Proposed subdivision (a)(2) provides that the court is not duty-bound to advise the defendant of a right to appeal when the sentence is imposed following a plea of guilty or nolo contendere."[105] This sentence simply paraphrases the first

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dum from Edward L. Barrett to Chairman and Members of the Committee (Apr. 3, 1962) (on file at Administrative Office of the United States Courts, Washington, D.C.).

[101] FED. R. CRIM. P. 32(a)(2) note (1966 Advisory Comm. Note). The Committee rejected a proposal by Judge Walter Hoffman to provide trial-convicted defendants with a form containing the information necessary to perfect an appeal, in lieu of notification by the judge. *See* Minutes of the Advisory Committee on Criminal Rules (Oct. 14, 1963) (on file at the Administrative Office of the United States Courts, Washington, D.C.).

[102] Telephone conversation with Professor Edward L. Barrett, Jr., University of California, Davis, School of Law (Feb. 14, 1978).

[103] 394 U.S. 459 (1969).

[104] FED. R. CRIM. P. 32(a)(2).

[105] H.R. REP. No. 247, 94th Cong., 1st Sess. 17, *reprinted in* [1975] U.S. CODE CONG. & AD. NEWS 674, 689.

sentence of the Advisory Committee Note accompanying the amendment. No testimony addressed this amendment during the House Judiciary Subcommittee Hearings on the package of proposed amendments to the Federal Rules of Criminal Procedure.[106]

2. *The Advisory Committee Note*

The Advisory Committee Note accompanying the amendment clearly indicates that the Committee intended not only to remove the judge as a source of appeal information to plea-convicted defendants but also to denigrate even the concept of an appeal from a plea conviction.[107] The note initially states that the purpose of the amendment was "to make clear that there is no duty on the court to advise the [plea-convicted] defendant of the right to appeal."[108] Judicial silence is the probable effect of leaving such notification to the discretion of the trial judge. The Federal Rules of Criminal Procedure already impose a myriad of duties upon a judge when accepting a guilty plea and sentencing the defendant.

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[106] *See House Criminal Justice Hearings, supra* note 92.

[107] The Advisory Committee Note accompanying the 1975 amendment to rule 32(a)(2) states, in its entirety:

> Subdivision (a)(2) is amended to make clear that there is no duty on the court to advise the defendant of the right to appeal after sentence is imposed following a plea of guilty or nolo contendere.
>
> To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant. See American Bar Association Standards Relating to Criminal Appeals § 2.1(b) (Approved Draft, 1970), limiting the court's duty to advice [*sic*] to "contested cases."
>
> The Advisory Committee is of the opinion that such advice, following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers.
>
> Former rule 32(a)(2) imposes a duty only upon conviction after "trial on a plea of not guilty." The few federal cases dealing with the question have interpreted rule 32(a)(2) to say that the court has no duty to advise defendant of his right to appeal after a conviction following a guilty plea. *Burton v. United States,* 307 F. Supp. 448, 450 (D. Ariz 1970); *Alaway v. United States,* 280 F. Supp. 326, 336 (C.D. Calif. 1968); *Crow v. United States,* 397 F.2d 284, 285 (10th Cir. 1968).
>
> Prior to the 1966 amendment of rule 32, the court's duty was even more limited. At that time the court's duty to advise was limited to those situations in which sentence was imposed after trial upon a not guilty plea of a defendant not represented by counsel. 8A J. Moore, Federal Practice ¶ 32.01[3] (2d ed. Cipes 1969); C. Wright, Federal Practice and Procedure: Criminal § 528 (1969); 5 L. Orfield, Criminal Procedure Under the Federal Rules § 32:11 (1967).
>
> With respect to appeal in forma pauperis, see appellate rule 24.

FED. R. CRIM. P. 32(a)(2) note.

[108] *Id.*

It is highly unlikely that a judge would voluntarily provide further information, in particular information that could ultimately restore the case to his crowded docket.[109]

The second paragraph of the Advisory Committee Note suggests that the judge would do a disservice to the defendant by providing such information: "To require the court to advise the defendant of a right to appeal after a plea of guilty, accepted pursuant to the increasingly stringent requirements of rule 11, is likely to be confusing to the defendant."[110] This conclusion necessarily assumes that valid grounds for appeal from a plea conviction do not exist. The many Supreme Court decisions upholding challenges to plea convictions[111] belie this assumption.

Although rule 11 requires the district judge, in accepting a plea, to follow many procedures designed to insure a proper conviction,[112] federal plea convictions are not foolproof: "The objec-

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[109] "[C]rowded calendars throughout the Nation impose a constant pressure on our judges to finish the business at hand." Arizona v. Washington, 434 U.S. 497, 516 n.35 (1973) (Stevens, J.).

[110] FED. R. CRIM. P. 32(a)(2) note (1974 Advisory Comm. Note).

[111] *See* notes 6-12 and accompanying text *supra*.

[112] Rule 11 requires the judge to adhere to the following procedures prior to accepting a guilty plea:

> (c) Advice to Defendant.
>
> Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and that he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and
>
> (5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers those questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.
>
> (d) Insuring That the Plea Is Voluntary.
>
> The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, determining that the plea is vol-

tive of [rule 11], of course, is to flush out and resolve all such issues, but like any procedural mechanism, its exercise is neither always perfect nor uniformly invulnerable to subsequent challenge calling for an opportunity to prove the allegations."[113] Further, the Advisory Committee has created a false scenario of a judge in one breath accepting the plea and in the next breath advising the defendant how to undo the conviction.[114] The plea and the sentencing generally occur at two separate proceedings because rule 32(c) requires the preparation of a presentence report after the plea and prior to sentencing.[115] Also misleading is the Committee's implication that grounds for appeal arise solely from the plea proceedings. The sentencing proceeding itself may generate *inter alia* the following grounds for appeal: refusal by the judge to grant defense counsel's request to see the presentence report,[116]

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untary and not the result of force or threats or of promises apart from a plea agreement. The court shall also inquire as to whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the attorney for the government and the defendant or his attorney.

(e) Plea Agreement Procedure.

. . . .

(2) *Notice of Such Agreement.* If a plea agreement has been reached by the parties, the court shall, on the record, require the disclosure of the agreement in open court or, on a showing of good cause, in camera, at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider the presentence report.

(3) *Acceptance of a Plea Agreement.* If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement.

. . . .

(f) Determining Accuracy of Plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as shall satisfy it that there is a factual basis for the plea.

FED. R. CRIM. P. 11.

[113] Fontaine v. United States, 411 U.S. 213, 215 (1973). Blackledge v. Allison, 431 U.S. 63, 73 (1977), quoted *Fontaine* with approval.

[114] FED. R. CRIM. P. 32(a)(2) note (1974 Advisory Comm. Note). The next paragraph of the note correctly states that such advice would be provided "following a sentence imposed after a plea of guilty" (*id.*), but does not indicate that the sentencing would occur at a subsequent proceeding.

[115] *See* FED. R. CRIM. P. 32(c)(1)-(2). The court may forego the presentence report if the defendant waives the report or if the extensive background information required by rule 32(c)—defendant's prior record, financial condition and other relevant data—is present in the trial record. *See id.*

[116] "Before imposing sentence the court shall upon request permit the defendant, or his counsel if he is so represented, to read the report of the presentence investigation . . . ." *Id.* 32(c)(3).

refusal to permit allocution,[117] or refusal to provide counsel to an indigent defendant.[118] It is not valid to assume that fewer errors will occur at proceedings to sentence plea-convicted defendants than at those to sentence trial-convicted defendants.[119] Finally, failure of the prosecution to adhere to the terms of the plea bargain may not become apparent until the sentencing proceeding.

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[117] "Before imposing sentence, the court shall afford counsel an opportunity to speak on behalf of the defendant . . . ." *Id.* 32(a)(1).

[118] *See* Mempa v. Rhay, 389 U.S. 128 (1967).

[119] Rule 35 of the Federal Rules of Criminal Procedure provides a method to correct or reduce a sentence by filing a postsentence motion with the district judge:

> The court may correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided herein for the reduction of sentence. The court may reduce a sentence within 120 days after the sentence is imposed, or within 120 days after receipt by the court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or within 120 days after entry of any order or judgment of the Supreme Court denying review of, or having the effect of upholding, a judgment of conviction. The court may also reduce a sentence upon revocation of probation as provided by law.

A rule 35 motion is not the exclusive means for attacking a sentence. Errors cognizable under rule 35, if apparent from the record, may be considered for the first time on direct appeal from the final judgment of the district court. *See* United States v. Rosenbarger, 536 F.2d 715, 722 (6th Cir. 1976); 2 C.A. WRIGHT, *supra* note 55, § 583, at 563. *See generally* Bartone v. United States, 375 U.S. 52, 54 (1963); Bozza v. United States, 330 U.S. 160, 166 (1947). Both the sentence and the sentencing process are subject to review. *See* United States v. Hoye, 548 F.2d 1271 (6th Cir. 1977) (direct appeal from guilty plea claiming errors solely related to sentencing); United States v. Bass, 535 F.2d 110, 118-21 (D.C. Cir. 1976); United States v. Sheppard, 462 F.2d 279 (D.C. Cir. 1972); United States v. Weston, 448 F.2d 626, 631-34 (9th Cir. 1971). Some courts have said that the better practice is to raise sentencing errors on direct appeal rather than in a subsequent rule 35 proceeding. *See, e.g.*, United States v. Lopez, 428 F.2d 1135, 1138 (2d Cir. 1970). Nevertheless, errors which could have been raised on direct appeal, but were not, can be raised on a subsequent rule 35 motion. *See* Popeko v. United States, 513 F.2d 771, 773 (5th Cir. 1975); United States v. Lopez, 428 F.2d 1135, 1138 (2d Cir. 1970). *See generally* Callanan v. United States, 364 U.S. 587, 589 n.3 (1961); United States v. Barash, 428 F.2d 328, 330-31 (2d Cir. 1970); United States v. Sutton, 415 F. Supp. 1323, 1327 (D.D.C. 1976). In addition, errors previously raised on direct appeal can be raised again on a subsequent rule 35 motion. *See* Popeko v. United States, 513 F.2d 771, 773 (5th Cir. 1975). *See generally* United States v. Hoye, 548 F.2d 1271, 1273 (6th Cir. 1977); United States v. Bass, 535 F.2d 110, 121 (D.C. Cir. 1976); United States v. Sheppard, 462 F.2d 279 (D.C. Cir. 1972). Where relief is denied on direct appeal, however, a subsequent rule 35 motion would "have to carry a heavier burden of proof as well as be tested by a narrower standard of review." United States v. Donner, 528 F.2d 276, 279 (7th Cir. 1976) (Justice Clark, retired, writing for a unanimous panel, including Judge, now Justice, Stevens). Furthermore, it is significant that neither the Constitution nor statute requires the appointment of counsel to assist in the preparation of a postappeal rule 35 motion. *Cf.* Burrell v. United States, 332 A.2d 344 (D.C. App.) (interpreting a District of Columbia rule comparable to rule 35), *cert. denied*, 423 U.S. 826 (1975).

Prior to the 1966 amendments to rule 35, some sentencing errors could only be remedied on direct appeal. *See* Hill v. United States, 368 U.S. 424, 429 n.6 (1962). Even with the amendments, a direct appeal may still constitute the exclusive means of reviewing certain errors committed at the sentencing stage. *See, e.g.*, Whitfield v. United States, 410 F.2d

Although the Advisory Committee branded judicial notification of the right to direct appeal from a plea conviction as "likely to be confusing to the defendant," it offered no justification for its conclusion. If the defendant feels that his rights have been violated, he will, and indeed should, appeal. Thus, judicial advice would be enlightening rather than confusing.[120] Furthermore, the

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480, 482 (9th Cir. 1968) (rule 35 not applicable to suspension of sentence or granting of probation).

Once notice of appeal is filed, the district court is without authority to entertain a rule 35 motion. *See* United States v. Allen, 510 F.2d 651, 654 n.3 (D.C. Cir. 1974); United States v. Mack, 466 F.2d 333, 340 (D.C. Cir.), *cert. denied,* 409 U.S. 952 (1972); United States v. Ellenbogen, 390 F.2d 537, 542-43 (2d Cir. 1968); United States v. Dabney, 397 F. Supp. 782, 783 (E.D. Pa. 1975); 8A MOORE'S FEDERAL PRACTICE, *supra* note 64, ¶ 35.02[1]. *See generally* Berman v. United States, 302 U.S. 211 (1937); United States v. Dooley, 471 F.2d 570, 571 n.1 (8th Cir. 1973); United States v. Burns, 446 F.2d 896, 897 (9th Cir. 1971); Turner v. United States, 423 F. Supp. 581, 584 n.5 (E.D. Va. 1976).

The Advisory Committee has recently proposed a rule permitting a defendant, whether convicted by trial or plea, to seek leave to appeal for a reduction of most sentences of imprisonment:

> (c) WHEN DEFENDANT MAY PETITION. A defendant may petition for leave to appeal under subdivision (b) of this rule if sentenced to imprisonment, unless:
>
> (1) execution of the sentence is suspended; or
>
> (2) the sentence was part of a plea agreement accepted by the judge and was no greater than the sentence which the attorney for the government agreed to recommend or not to oppose under Rule 11(e)(1)(B) or which was agreed to by the attorney for the government and the defendant under Rule 11(e)(1)(C).

JUDICIAL CONFERENCE OF THE UNITED STATES, COMM. ON RULES OF PRACTICE AND PROCEDURE, PROPOSED RULE 35.1 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE (1976).

[120] The Advisory Committee reads § 2.1(b) of the ABA Standards Relating to Criminal Appeals as "limiting the court's duty to advice [*sic*] to 'contested cases.'" FED. R. CRIM. P. 32 (a)(2) note (1974 Advisory Comm. Note). That section states: "It is appropriate for courts imposing sentence in contested cases to assume the burden of advising the defendant that he has the right of review, that it must be exercised within a specified time, and that he should promptly consult counsel in that regard." ABA STANDARDS RELATING TO CRIMINAL APPEALS § 2.1(b) (Approved Draft 1970). The Committee has misinterpreted § 2.1(b) and, also, taken it out of context. Section 2.1(b) does not impose a duty on the sentencing judge, but merely states that it is "appropriate" for the judge to assume the burden of notification in contested cases. Section 2.2 imposes a *duty* on defense counsel to advise *all* defendants of the right to appeal:

> (a) Trial counsel, whether retained or court-appointed, should continue to represent a convicted defendant to advise on whether to take an appeal and, if the appeal is sought, through the appeal . . . .
>
> (b) Defense counsel . . . should take it as his duty to advise a defendant on the meaning of the court's judgment and his right to appeal . . . .

Id. § 2.2. Moreover, the ABA standards state clearly that there should be a right to appeal a plea conviction: "A defendant should have the right to seek review of any final judgment adverse to him, including . . . a conviction based upon a plea of guilty or nolo contendere." *Id.* § 1.3(a)(iii). The Committee should have read § 2.1(b) in light of provisions setting forth the existence of a right to appeal all convictions and the duty of counsel to advise all

plea-convicted defendant could dispel any confusion by discussing the matter with counsel.

The Advisory Committee also dismissed the prospect of a valid appeal from plea conviction: "[A]dvice [of the right to appeal], following a sentence imposed after a plea of guilty, will merely tend to build false hopes and encourage frivolous appeals, with the attendant expense to the defendant or the taxpayers."[121] The Committee set forth no evidence supporting this conclusion[122] and ignored the many Supreme Court decisions

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defendants of that right. *See generally* Erickson, *The Finality of a Plea of Guilty*, 48 NOTRE DAME LAW. 835, 845 (1973).

The Committee also overlooked additional ABA standards that recognize a right to appeal plea-convictions and impose a duty on the trial judge or defense counsel to advise plea-convicted defendants of that right. Section 2.2(b) of the ABA Standards Relating to the Appellate Review of Sentences states:

> In all cases where a sentence is imposed after a guilty plea or the equivalent, review of the sentence, as well as review of other matters which can be raised, could appropriately be governed by a procedure patterned after the following:
>
> (i) Notice of appeal should be required of the defendant within [15] days of the imposition of sentence. The court should advise the defendant at the time of sentencing of his right to appeal and of the time limit, and should at the same time afford him the opportunity to comply orally with the notice requirement. It should be the responsibility of the attorney who represented the defendant at the sentencing stage to advise him with respect to the filing of the notice of appeal, and to assure that his rights in this respect are protected.

ABA STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES § 2.2(b) (Approved Draft 1968). Section 8.2 of the ABA Standards Relating to the Defense Function states:

> (a) After conviction, the lawyer should explain to the defendant the meaning and consequences of the court's judgment and his right of appeal. The lawyer should give the defendant his professional judgment as to whether there are meritorious grounds for appeal and as to the probable results of an appeal. He should also explain to the defendant the advantages and disadvantages of an appeal. The decision whether to appeal must be the defendant's own choice.
>
> (b) The lawyer should take whatever steps are necessary to protect the defendant's right to appeal.

ABA STANDARDS RELATING TO THE DEFENSE FUNCTION § 8.2 (Approved Draft 1971).

[121] FED. R. CRIM. P. 32(a)(2) note (1974 Advisory Comm. Note).

[122] *See id.* The Committee ignored Supreme Court decisions setting forth procedures by which federal courts could protect themselves against frivolous appeals:

> Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivo-

overturning plea convictions on various grounds.[123]

The Advisory Committee's concern about "attendant expense to the defendant or the taxpayers" appears to be directed primarily to the costs of additional appeals and particularly to appeals by indigents, who comprise forty-four percent of federal plea-convicted defendants.[124] The Supreme Court has held that the government must provide indigent appellants with assistance of counsel[125] and necessary transcripts.[126]

In attempting to further justify this amendment, the Advisory Committee noted that "[f]ormer Rule 32(a)(2) imposes a duty only upon conviction" after trial.[127] The Committee conveniently ignored the fact that it had imposed that duty on judges in 1966 because trial counsel was not a reliable source of the vital information.[128] The 1974 note never mentions the right to appeal a plea conviction or the obligation of trial counsel to advise the defendant of that right.[129]

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lous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal.

Anders v. California, 386 U.S. 738, 744 (1967). In his dissent in Douglas v. California, 372 U.S. 353 (1963), Justice Harlan wrote:

> Although that decision [*Coppedge* v. *United States,* 369 U.S. 438 (1962)] established stringent restrictions on the power of federal courts to reject an application for leave to appeal *in forma pauperis,* it nonetheless recognized that the federal courts could prevent the needless expenditure of public funds by summarily disposing of frivolous appeals.

Id. at 366.

[123] *See* notes 6-12 and accompanying text *supra.*

[124] Statistics for the fiscal year 1976 furnished to the author by the Administrative Office of the United States Courts reveal that assigned counsel represented indigent defendants in 15,042 (45%) of the 34,042 convictions entered by a plea of guilty or nolo contendere. Letter from James A. McCafferty, Chief, Statistical Analysis and Reports Branch, Administrative Office of the United States Courts to Author (May 17, 1977) (copy on file at the *Cornell Law Review*). This percentage is likely to increase on appeal because some defendants able to retain counsel at the trial or plea level may find it necessary to seek leave to appeal *in forma pauperis.*

[125] *See* Douglas v. California, 372 U.S. 353 (1963).

[126] *See* Griffin v. Illinois, 351 U.S. 12 (1956) (plurality opinion).

[127] FED. R. CRIM. P. 32(a)(2) note (1974 Advisory Comm. Note).

[128] *See id.* (1966 Advisory Comm. Note). The 1974 Advisory Committee Note stated that the few federal cases interpreting rule 32(a)(2) found that "the court has no duty to advise defendant of his right to appeal after conviction following a guilty plea." *Id.* (1974 Advisory Comm. Note). None of the three pre-1971 cases cited by the Committee, however, addressed the constitutionality of advising only one category of defendants of the right to appeal. Those decisions merely confirmed that the pre-1975 language of the rule required the judge to advise only trial-convicted defendants.

[129] The working papers of the Advisory Committee reveal that, despite the urging of Committee Member Judge Walter Hoffman, Senior District Judge, E.D. Va., the Committee refused to take a stand on the following two issues: (1) the right *vel non* to appeal a sentence imposed after a plea conviction, and (2) the duty *vel non* of the defense attorney to advise a plea-convicted defendant of the right to appeal his sentence. With regard to the

Thus, the literal language of the 1975 amendment, the silence in the accompanying note with regard to the right to appeal, and the implication in the note that there can never be a valid appeal from a plea conviction, are likely to mislead many to believe there is no right to appeal a plea conviction.

IV.
CONSTITUTIONAL ISSUES RELEVANT TO THE RIGHT TO DIRECT APPEAL FROM A PLEA CONVICTION

Three constitutional issues emerge from the foregoing discussion of rule 32(a)(2) and the right to appeal a plea conviction: due process, equal protection, and ineffective assistance of counsel.

A. *Due Process*

> "Due process" emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated.[130]

Under traditional due process analysis, the issue is whether the effect of governmental conduct or a statute is "so arbitrary or unreasonable, *in the context of the particular appellate procedure* . . . as to require . . . invalidation."[131] Justice Harlan, dissenting in *Griffin v. Illinois*[132] and *Douglas v. California,*[133] and writing for the Court in *Boddie v. Connecticut,*[134] developed a suitable framework for due process analysis of an individual's ability to exercise his right of access to court. In *Griffin,* the Court, on a combined due

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first issue, Judge Hoffman referred to Haynes v. United States, 390 U.S. 85 (1968), and McCarthy v. United States, 394 U.S. 459 (1969), as indicative of a right to appeal. With regard to the second issue, Judge Hoffman preferred that the Committee specifically eliminate the obligation of the attorney to advise the plea-convicted defendant of his right to appeal. Absent adoption of this proposal, he urged that the Committee require the sentencing judge to advise the plea-convicted defendant: "[U]nless we can protect the defense attorney who ordinarily would never discuss any possibility of an appeal from a guilty plea sentence, I would favor making it mandatory that the judge advise the defendant of his right to appeal." Letter from Judge Walter Hoffman to Professor Frank L. Remington, Reporter to the Advisory Committee on Criminal Rules (Apr. 20, 1970), *attached to* Memorandum on Rule 32(a)(2) from the Reporter to the Committee (May 20, 1970) (on file at Administrative Office of the United States Courts, Washington, D.C.).

[130] Ross v. Moffitt, 417 U.S. 600, 609 (1974).

[131] Douglas v. California, 372 U.S. 353, 365 (1963) (dissenting opinion, Harlan, J.) (emphasis in original).

[132] 351 U.S. 12 (1956) (plurality opinion).

[133] 372 U.S. 353 (1963).

[134] 401 U.S. 371 (1971).

process-equal protection rationale,[135] ordered the state to provide a transcript for an indigent defendant seeking to appeal. Justice Harlan argued that due process protections apply only when an appeal has been denied "for arbitrary or capricious reasons."[136] He reasoned that denial of a transcript did not amount to denial of an appeal. Dissenting in *Douglas,* which held, on grounds similar to *Griffin*, that the state must provide counsel to an indigent on his first appeal as of right, Justice Harlan pointed out that "even if counsel is denied, a full appeal on the merits is accorded to the indigent appellant."[137] In both *Griffin* and *Douglas,* the defendant could have pursued his appeal and, in Justice Harlan's framework, had thereby been afforded due process. Focus on the individual's access to the judicial process was central to the Court's decision in *Boddie v. Connecticut. Boddie* held unconstitutional on due process grounds a state fee procedure that denied "access to its courts to individuals who seek judicial dissolution of their marriages."[138] Writing for the Court, Justice Harlan deemed this situation more compelling than that of *Griffin* because the consequence of not paying the fee was denial of access to court:

> While in *Griffin* the transcript could be waived as a convenient but not necessary predicate to court access, here the State invariably imposes the costs as a measure of allocating its judicial resources. Surely, then, the rationale of *Griffin* covers this case.
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> ... [T]he Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce ....[139]

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[135] The precise rationale for the *Griffin* and *Douglas* line of cases has never been explicitly stated, some support being derived from the Equal Protection Clause of the Fourteenth Amendment, and some from the Due Process Clause of that Amendment. Neither Clause by itself provides an entirely satisfactory basis for the result reached, each depending on a different inquiry which emphasizes different factors.

Ross v. Moffitt, 417 U.S. 600, 608-09 (1974) (footnote omitted).

[136] 351 U.S. at 37.

[137] 372 U.S. at 364.

[138] 401 U.S. at 374. In Fuentes v. Shevin, 407 U.S. 67 (1972), the Court stated: "The Fourteenth Amendment's protection of 'property,' however, has never been interpreted to safeguard only the rights of undisputed ownership. Rather, it has been read broadly to extend protection to 'any significant property interest,' ... including statutory entitlements." *Id.* at 86 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)). The right to direct appeal from a federal criminal conviction is a statutory entitlement. *See* note 14 and accompanying text *supra.*

[139] 401 U.S. at 382.

Dissenting in *Boddie,* Justice Black, author of the *Griffin* plurality opinion, implies a stronger justification for finding a due process violation when a *criminal* defendant is denied access to court:

> [I]n *Griffin* the Court studiously and carefully refrained from saying one word or one sentence suggesting that the rule there announced to control rights of criminal defendants would control in the quite different field of civil cases. And there are strong reasons for distinguishing between the two types of cases.
>
> . . . [T]he United States Constitution has provided special protections for people charged with crime.[140]

Thus under both Justice Harlan's and Justice Black's analyses the effective denial of a plea-convicted defendant's access to his appeal as of right raises a substantial claim of unconstitutionality.

Recently, the Court in *Ross v. Moffitt,*[141] although rejecting the petitioner's claim of entitlement to assistance of counsel in proceedings beyond the first appeal as of right, cited its opinion in *Douglas* and Justice Harlan's dissent in reaffirming that meaningful access to the appellate system requires a meaningful first appeal.[142]

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[140] *Id.* at 390 (dissenting opinion, Black, J.). Two subsequent Supreme Court decisions have upheld filing fee requirements in civil proceedings against due process and equal protection claims asserted by indigents. In United States v. Kras, 409 U.S. 434 (1973), the Court upheld the fees required as a condition to a discharge in voluntary bankruptcy. The Court limited *Boddie* to the following principle: "[A] state cannot deny access, simply because of one's poverty, to a 'judicial proceeding [that is] the only effective means of resolving the dispute at hand.'" *Id.* at 443 (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)). The Court found: "Resort to the court . . . is not Kras' sole path to relief. *Boddie*'s emphasis on exclusivity finds no counterpart in the bankrupt's situation." *Id.* at 446. The Court further stated: "The rational basis for the fee requirement is readily apparent." *Id.* at 447.

In Ortwein v. Schwab, 410 U.S. 656 (1973), the Court upheld an Oregon appellate court civil filing fee. The appellant had first appealed a county welfare agency decision to the Oregon Public Welfare Division, which bad conducted a hearing and upheld the county agency's decision. The Court pointed out tbat *Boddie* was not concerned with post-hearing review and held that "*Kras,* rather than *Boddie,* governs the present appeal." *Id.* at 659.

[141] 417 U.S. 600 (1974).

[142] *Id.* at 611. Writing for the Court, Justice Rehnquist found that the *Griffin* and *Douglas* line of cases drew support from both the due process clause and the equal protection clause. In concluding that neither clause required the state to provide assistance of counsel beyond the first appeal as of right, Justice Rehnquist noted a preference for equal protection analysis in considering whether the state had unfairly singled out indigents and denied them "meaningful access to the appellate system because of their poverty."

Although all of the aforementioned cases arose from claims of indigent defendants, the requirement of fairness within the criminal appellate process applies to all defendants. Thus, the critical issue for due process analysis is whether, in the following situations, the plea-convicted defendant, indigent or not, has been unfairly denied access to his statutory right of first appeal.

1. *The Judge Informs a Defendant Erroneously That a Guilty Plea Waives the Right to Appeal*

Twenty-six percent of the federal district judges responding to the author's survey inform a defendant that a guilty plea waives the right to appeal.[143] This advice is erroneous. In so misleading a defendant, the judge has acted unfairly. If this misinformation causes a plea-convicted defendant to lose his right to direct appeal, he is denied due process.[144] A court could fashion appropriate relief by creating a new, ten-day period within which the plea-convicted defendant could perfect a direct appeal or apply for leave to appeal *in forma pauperis.*[145]

2. *The Judge Does Not Inform a Plea-Convicted Defendant of the Right to Appeal*

Eighty-five percent of the federal district judges responding to the author's survey indicated that, at sentencing, they do not advise a plea-convicted defendant of any right to appeal.[146] This telling silence is consistent with the language of rule 32(a)(2), which states that there is no duty to so advise. Assuming, as the Advisory Committee did in 1966,[147] that defense counsel cannot be relied upon to advise of the right to appeal, and recognizing that the Criminal Justice Act plans direct court-appointed counsel

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[143] *See* Appendix.

[144] Fundamental fairness, as a concept of due process of law, requires when an accused has entered a plea of guilty based upon a promise by a judge who thereafter, whatever the reason, fails to adhere to his promise, that the judge on his own motion, reinstate the not guilty plea and reinvest the defendant with the fundamental rights accorded him under our accusatory system of justice.

United States *ex rel.* Elksnis v. Gilligan, 256 F. Supp. 244, 249 (S.D.N.Y. 1966) (footnote omitted).

[145] In an analogous situation, where the trial judge had erroneously failed to advise a trial-convicted defendant of his right to appeal, the Supreme Court ordered the judgment reversed and remanded the case "to the District Court where petitioner should be resentenced so that he may perfect an appeal in the manner prescribed by the applicable rules." Rodriquez v. United States, 395 U.S. 327, 332 (1969).

[146] *See* Appendix.

[147] FED. R. CRIM. P. 32(a)(2) note (1966 Advisory Comm. Note).

to so advise only *trial-convicted* defendants,[148] plea-convicted defendants are likely to remain uninformed of their right to appeal.

The Supreme Court has recently held, on grounds broader than due process, that, when a government establishes a criminal appellate process, there is a fundamental constitutional right of access to that process. In *Bounds v. Smith,*[149] the Court interpreted this right to require state prison authorities "to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries or adequate assistance from persons trained in the law."[150] The Court rebuffed a challenge to *Younger v. Gilmore,*[151] its cryptic, per curiam affirmance of a three-judge district court decision.[152] The district court in *Younger* had required California to provide indigent prisoners "adequate means of obtaining the legal expertise necessary to obtain"[153] access to the courts. In reaffirming *Younger,* the Court in *Bounds* relied primarily upon its decisions in *Johnson v. Avery*[154] and *Wolff v. McDonnell.*[155] Those cases had invalidated state regulations that prevented inmates from receiving legal assistance from fellow inmates. In *Wolff,* the Court had tied the right of access to the courts to the due process clause: "The right of access to the courts, upon which *Avery* was premised, is founded in the Due Process Clause and assures that no person will be denied the opportunity to present to the judiciary allegations concerning violations of fundamental constitutional rights."[156]

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[148] *See* note 26 and accompanying text *supra.*

[149] 430 U.S. 817 (1977).

[150] *Id.* at 828 (footnote omitted).

[151] 404 U.S. 15 (1971).

[152] Gilmore v. Lynch, 319 F. Supp. 105 (N.D. Cal. 1970), *aff'd per curiam sub nom.* Younger v. Gilmore, 404 U.S. 15 (1971). The Court stated: "Having heard the case on its merits, we ... affirm the judgment of the District Court for the Northern District of California. *Johnson v. Avery,* 393 U.S. 483 (1969)." 404 U.S. at 15.

[153] 319 F. Supp. at 112. Access to the courts, said the district court, "encompasses all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievances alleged by him." *Id.* at 110.

[154] 393 U.S. 483 (1969).

[155] 418 U.S. 539 (1974).

[156] *Id.* at 579. Justice Douglas, concurring in *Johnson v. Avery,* quoted Hatfield v. Bailleaux, 290 F.2d 632, 636 (9th Cir. 1961): "'Reasonable access to the courts is ... a right [secured by the Constitution and laws of the United States], being guaranteed as against state action by the due process clause of the fourteenth amendment ....'" 393 U.S. at 498 n.24 (brackets in original). *Bounds* found support in Procunier v. Martinez, 416 U.S. 396 (1974), which had "invalidated [state] regulations barring law students and paraprofessionals employed by lawyers representing prisoners from seeing inmate clients." 430 U.S. at 824 n.11. *Procunier* had beld: "The constitutional guarantee of due process of law bas as a corollary the requirement that prisoners be afforded access to the courts in order to challenge unlawful convictions ...."416 U.S. at 419.

The duties imposed on the state by *Bounds, Younger, Johnson* and *Wolff* extend to all inmates regardless of their financial status.[157] Furthermore, although *Bounds* involved collateral proceedings, the Court indicated that the "fundamental constitutional right of access to the courts"[158] also guarantees access to direct appeals: "[R]ecent decisions have struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful. Thus, in order to prevent 'effectively foreclosed access,' indigent prisoners must be allowed to file appeals ... without payment of docket fees."[159] As authority, Justice Marshall cited *Burns v. Ohio,*[160] which employed the combined due process-equal protection rationale of *Griffin v. Illinois.*[161]

Bounds also drew support from *Griffin* and *Douglas v. California.*[162] Justice Marshall stated:

> Because we recognized that "adequate and effective appellate review" is impossible without a trial transcript or adequate substitute, we held that States must provide trial records to inmates unable to buy them. *Griffin v. Illinois*.... Similarly, counsel must be appointed to give indigent inmates "a meaningful appeal" from their convictions. *Douglas v. California*. ...[163]

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[157] *See* Bounds v. Smith, 430 U.S. 817, 825 n.17 (1977).

[158] *Id.* at 822.

[159] *Id.* (quoting Burns v. Ohio, 360 U.S. 252, 257 (1959)).

[160] 360 U.S. 252 (1959).

[161] 351 U.S. 12 (1956) (plurality opinion), *discussed in* text accompanying note 132 *supra.* "[A]s *Griffin* holds, once the State chooses to establish appellate review in criminal cases, it may not foreclose indigents from access ...." Burns v. Ohio, 360 U.S. at 257. This is one of several citations in *Bounds* to cases decided on grounds broader than due process. For example, *Bounds* cites Smith v. Bennett, 365 U.S. 708 (1961), which struck down a docket fee requirement barring indigent prisoners from filing habeas corpus petitions. 430 U.S. at 822. The Court decided *Smith* on equal protection grounds: "We hold that to interpose any financial consideration between an indigent prisoner of the State and his exercise of a state right to sue for his liberty is to deny that prisoner the equal protection of the laws." 365 U.S. at 709. *Bounds* also referred to Cochran v. Kansas, 316 U.S. 255 (1942), where, on equal protection grounds, the Court had enjoined state interference with inmate access to the courts. 430 U.S. at 822.

[162] 372 U.S. 353 (1963).

[163] 430 U.S. at 822-23 (citations omitted). The Court was concerned with the importance of providing assistance in original actions, which necessarily include the first appeal as of right:

> [I]n this case, we are concerned in large part with original actions seeking new trials, release from confinement, or vindication of fundamental civil rights.... The need for new legal research or advice to make a meaningful initial presentation to a trial court ... is far greater than is required to file an adequate petition for discretionary review.

Id. at 827-28. Justice Rehnquist did not agree with the Court's categorization of these claims as original actions and argued that under Ross v. Moffitt, 417 U.S. 600 (1974), these defendants were not entitled to assistance:

Although this statement from *Bounds* implies that *Griffin* and *Douglas* guarantee these benefits only to imprisoned indigents, both cases clearly set forth a duty owing to all indigent defendants.[164]

Bounds also relied upon *Ross v. Moffitt*,[165] which had reaffirmed that assistance of counsel was an integral component of meaningful access to the courts for *all* indigent defendants pursuing their first appeal as of right: "And even as it rejected a claim that indigent defendants have a constitutional right to appointed counsel for discretionary appeals, the [*Ross*] Court reaffirmed that States must 'assure the indigent defendant an adequate opportunity to present his claims fairly.' . . . '[M]eaningful access' to the courts is the touchstone."[166]

Although *Bounds* held that North Carolina must provide a library or legal assistance to prisoners, the opinion does not limit the fundamental constitutional right of access to the criminal postconviction process to imprisoned or indigent defendants. *Bounds* indicates that the fundamental right exists for the benefit of every convicted defendant and that, where necessary, the government must act to ensure meaningful, postconviction access to the courts.[167] Direct appeal, the most advantageous federal postconviction remedy, is lost if notice of appeal is not filed within ten

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> The prisoners here in question have all pursued all avenues of direct appeal available to them . . . .
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> . . . .
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> . . . It would seem, *a fortiori*, to follow from [*Ross v. Moffitt*] that an incarcerated prisoner who has pursued all his avenues of direct review would have no constitutional right whatever to state appointed counsel to represent him in a collateral attack on his conviction, and none of our cases has ever suggested that a prisoner would have such a right. . . . Yet this is the logical destination of the Court's reasoning today.

Id. at 839-41 (dissenting opinion).

[164] In *Griffin*, Justice Black stated for the plurality: "Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts." 351 U.S. at 19. In *Douglas*, Justice Douglas framed the issue as "whether or not an indigent shall be denied the assistance of counsel on appeal." 372 U.S. at 355.

[165] 417 U.S. 600 (1974).

[166] Bounds v. Smith, 430 U.S. at 823 (quoting Ross v. Moffitt, 417 U.S. 600, 616 (1974)) (citation omitted).

[167] That Justice Marshall, author of the *Bounds* opinion, would not favor limiting the availability of this right to the indigent or imprisoned is evident from his dissenting opinion in San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973):

> It is true that *Griffin* and *Douglas* also involved discrimination against indigents, that is, wealth discrimination. But, as the majority points out . . . the Court has never deemed wealth discrimination alone to be sufficient to require strict judicial scrutiny; rather, such review of wealth classifications has been applied only where the discrimination affects an important individual interest

days after sentencing. Paper, pen, library, and even the potential assistance of counsel proposed by the Supreme Court in *Younger v. Gilmore* and *Bounds v. Smith,*[168] are of no use in filing a direct appeal if the ten-day period has passed. If the sentencing judge is the sole effective source of information about the right to appeal, as the Advisory Committee concluded in 1966,[169] a strong argument can be made that *Bounds* requires that the judge ensure the opportunity for access to direct appeal by advising the plea-convicted defendant of that right.

3. *The Defendant Is Misled by Rule 32(a)(2)*

Rule 32(a)(2) and the Advisory Committee Note accompanying the 1975 amendment do not deny the existence of a right to direct appeal from a plea conviction. Nevertheless, they are likely to mislead the plea-convicted defendant or his counsel to believe that there is no right to appeal.

Although every defendant sentenced in federal district court is entitled to an appeal, this right is not plainly stated by any federal provision.[170] Rule 32(a)(2) is the sole federal provision to distinguish between trial convictions and plea convictions.[171] One might well assume that, if the right to appeal a plea conviction did exist, evidence of that right would appear in the rule or in the accompanying note. Yet none of the bodies responsible for the rule—the Judicial Conference, the Supreme Court, and

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> .... Thus, *I believe Griffin and Douglas can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.*

Id. at 102 n.61 (emphasis added).

[168] It is indisputable that indigent inmates must be provided at state expense with paper and pen to draft legal documents, with notarial services to authenticate them, and with stamps to mail them. States must forgo collection of docket fees otherwise payable to the treasury and expend funds for transcripts. State expenditures are necessary to pay lawyers for indigent defendants at trial, ... and in appeals as of right ....

430 U.S. at 824-25. Although dissenting from the requirement that states provide assistance to inmates seeking collateral remedies, Chief Justice Burger strongly reaffirmed the importance of access to courts for direct appeals from criminal convictions:

> [T]he access to the courts which these respondents are seeking is not for the purpose of direct appellate review of their criminal convictions. Abundant access for such purposes has been guaranteed by our prior decisions .... [C]onstitutional principles of due process and equal protection form the basis for the requirement that States expend resources in support of a convicted defendant's right to appeal.

Id. at 834.

[169] *See* FED. R. CRIM. P. 32(a)(2) note (1966 Advisory Comm. Note).

[170] *See* notes 14-15 and accompanying text *supra.*

[171] *See* note 16 and accompanying text *supra.*

Congress—redrafted the original proposal or amended the note to verify the right to appeal a plea conviction.[172]

The rule directs the sentencing judge to inform all trial-convicted defendants of the appropriate right of appeal, and then emphatically denies the existence of any similar obligation to plea-convicted defendants.[173] The Advisory Committee Note accompanying the 1975 amendment fails to mention the duty of defense counsel to inform the defendant of his right to appeal, and belittles the concept of appeal from a plea conviction as frivolous and wasteful.[174]

Twenty-six percent of the federal district court judges responding to the author's survey erroneously inform a defendant that a guilty plea waives the right to appeal.[175] Although no evidence establishes that rule 32(a)(2) induces this misadvice, no other federal provision provides any basis for the error. The rule is likely to confuse plea-convicted defendants and defense counsel.[176] If a reasonable reading of rule 32(a)(2) causes a plea-

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[172] For discussion of the process of promulgation of rule 32(a)(2), see notes 92-95 and accompanying text *supra*. Because "the deliberations of the Advisory Committee, which makes the basic decisions, are private . . . [and it] holds no public hearings" (Weinstein, *supra* note 95, at 908-09 (footnote omitted)), it is unfortunate that the Advisory Committee Note does not include concurring or dissenting opinions of Committee members. Publication of the 1975 amendment accompanied by a note totally supportive of the proposal provides the misleading appearance of unanimous support for both the rule and the note's analysis.

Inclusion in the note of Judge Walter Hoffman's view that if defense counsel had a duty to advise their clients of a right to appeal, then that same information should be provided by the court (*see* note 129 *supra*), would have highlighted the fact that the proposed amendment did not address itself to either the right to appeal or the unjustified reliance on defense counsel to advise plea-convicted defendants of that right. Had the Standing Committee on Practice and Procedure, the Supreme Court, or Congress been made aware of this, there might have been a change in the amendment or the addition of commentary addressing those matters. Professor Howard Lesnick raised this problem in the 1974 House hearings: "[N]o disclosure is made of any division within the Advisory Committee, Standing Committee or Conference itself, which might alert interested lawyers and legislators that matters of controversy are being resolved." *House Criminal Justice Hearings, supra* note 92, at 205 (statement of Professor Howard Lesnick, University of Pennsylvania Law School).

[173] *See* FED. R. CRIM. P. 32(a)(2).

[174] *See id.* note (1974 Advisory Comm. Note).

[175] *See* Appendix.

[176] Professor Frank Remington, Reporter to the Committee during the period when the amendment was drafted, has stated that there was no intention to mislead judges, defense counsel or plea-convicted defendants to believe that there is no right to appeal a plea conviction. The issue, however, is not the intention of the Committee but the impact of the rule.

After being informed of the results of the author's survey, Professor Remington stated that if the Committee had the opportunity to redo its work, he would recommend that it carefully spell out in the notes the obligation of defense counsel to inform his plea-

convicted defendant who is unadvised of his rights by the court to forego his direct appeal,[177] then the government has denied him due process of law.[178]

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convicted client of the right to appeal. Professor Remington would also seek to develop a procedure to make counsel aware of his responsibility. Finally, Professor Remington would seek to develop a procedure whereby the sentencing judge would advise the plea-convicted defendant of his right to attack his sentence under rule 35. Telephone conversation with Professor Frank Remington, University of Wisconsin Law School (Feb. 14, 1978).

[177] Both the experience of the plea-convicted defendant at bis sentencing, and his subsequent contact with sentenced, trial-convicted defendants are likely to foster the belief that he does not possess the right to direct appeal, or if indigent, the right to seek leave to appeal *in forma pauperis*. Multiple defendants from various trial and plea convictions are often present in the courtroom at a time designated by the judge for sentencing proceedings. The plea-convicted defendant is likely to notice that the judge has informed only trial-convicted defendants of the right to appeal. Even if the plea-convicted defendant is not present in the courtroom for the sentencing of others, he is likely to hear from trial-convicted defendants at the lockup, on the bus to prison, or in prison, that the judge had informed them of the right to appeal. Finally, if the imprisoned, plea-convicted defendant seeks to ascertain his rights under the Federal Rules of Criminal Procedure, he will likely read rule 32(a)(2), which reinforces the belief that only trial-convicted defendants have a right to appeal. The plea-convicted defendant could logically conclude that if he had a right to direct appeal, the judge would have so advised him.

[178] Although botb rule 32(a)(2) and the 1975 amendment were prescribed by the Supreme Court (*see* note 94 and accompanying text *supra*) and enacted without change by Congress (*see* note 95 and accompanying text *supra*), they remain open to constitutional attack: "The fact that this Court promulgated the rules as formulated and recommended by the Advisory Committee does not foreclose consideration of their validity, meaning or consistency." Mississippi Publishing Corp. v. Murphee, 326 U.S. 438, 444 (1946). *Accord*, United States v. Carden, 428 F.2d 1116, 1117 (8th Cir. 1970). *See* Goldberg, *The Supreme Court, Congress, and Rules of Evidence*, 5 SETON HALL L. REV. 667, 679 n.70 (1974); Lesnick, *The Federal Rule-Making Process: A Time for Reexamination*, 61 A.B.A.J. 579 (1975).

On the other hand, it should not be presumed that the Court would view a federal rule as a complete stranger:

> When a situation is covered by one of the Federal Rules, the question facing the court is a far cry from the typical, relatively unguided *Erie* choice: the court has been instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Hanna v. Plumer, 380 U.S. 460, 471 (1965).

Lower courts, however, might confer on federal rules an implied presumption of constitutionality:

> The Court must approach the challenge to the Bankruptcy Rule with the history of the rules in mind. The rules were adopted by the Supreme Court of the United States after long and careful study not only by the Court, but by panels of outstanding attorneys and citizens expert in the field. They were then submitted to the Congress for review, and only after such review did they become effective. There is a *strong presumption* that the Supreme Court did not abridge or modify any substantive right by the rules. There is also a *strong presumption* that, had the Court so overstepped the authority delegated by the Congress, such transgression would have been noted and the offending rule modified or deleted upon review.

In re Wall, 403 F. Supp. 357, 360 (E.D. Ark. 1975) (emphasis added) (footnote omitted). The Fifth Circuit has stated: "The fact that the rule [FED. R. CRIM. P. 7(a)-(b) (amended

B. *Equal Protection*

> 'Equal protection' . . . emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable.[179]

The requirement that the federal government provide equal protection of the law to its citizens is implicit in the due process clause of the fifth amendment.[180] Although the federal government need not provide a right to appeal from a criminal convic-

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1966)] was approved and proposed by the Supreme Court also supplies it with an armor of great, but not complete, invincibility." Barkman v. Sanford, 162 F.2d 592, 593 (5th Cir. 1947). It is unlikely that a lower federal court will declare a federal rule unconstitutional: "[O]nly the Supreme Court which, acting pursuant to section 30 of the Bankruptcy Act (11 USCA § 53), prescribed the general order should declare it unlawful. We certainly cannot with propriety hold General Orders promulgated by the Supreme Court unlawful." *In re* Bronx Ice Cream Co., 66 F.2d 620, 624 (2d Cir. 1933) (A. Hand, L. Hand, Chase, JJ.). *Accord*, Harris v. Zion's Sav. Bank & Trust Co., 127 F.2d 1012, 1015 (10th Cir. 1942). *See* Weinstein, *supra* note 95, at 935. Although one district court limited the effect of a federal rule of criminal procedure on constitutional grounds (*see* United States v. Bink, 74 F. Supp. 603 (D. Ore. 1947) (construing rule 20)), that decision has not been followed (*see* Hilderbrand v. United States, 304 F.2d 716, 717 (10th Cir. 1962); Earnest v. United States, 198 F.2d 561, 562 (6th Cir. 1952); United States v. Gallagher, 183 F.2d 342, 345 (3d Cir. 1950); Levine v. United States, 182 F.2d 556, 558 (8th Cir. 1950)).

It is questionable whether the rules prescribed by the Court deserve any presumption of constitutionality:

> [T]his court does not write the Rules, nor supervise their writing, nor appraise them on their merits, weighing the pros and cons. The Court concededly is a mere conduit. Those who write the Rules are members of a Committee named by the Judicial Conference. The members are eminent; but they are the sole judges of the merits of the proposed Rules, our approval being merely perfunctory. In other words, we are merely the conduit to Congress. Yet the public assumes that our imprimatur is on the Rules, as of course it is.

Rules of Evidence for United States Courts and Magistrates, 56 F.R.D. 184, 185 (1972) (dissenting opinion, Douglas, J.). *See* Amendments to the Federal Rules of Criminal Procedure, 416 U.S. 1001, 1003 (1974) (dissenting opinion, Douglas, J.); Amendments to Federal Rules of Criminal Procedure, 406 U.S. 979, 981 (1972) (dissenting opinion, Douglas, J.); Amendments to Rules of Criminal Procedure for the United States District Courts, 383 U.S. 1089, 1089 (1966) (dissenting opinion, Douglas, J.); Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 865, 865 (1963) (separate statement, Black and Douglas, JJ.). *See generally* Friedenthal, *The Rulemaking Power of the Supreme Court: A Contemporary Crisis*, 27 STAN. L. REV. 673, 685 (1975). One solution would be to remove the rulemaking function from the Supreme Court: "Transfer of the function to the Judicial Conference would relieve us of the embarrassment of having to sit in judgment on the constitutionality of rules which we have approved and which as applied in given situations might have to be declared invalid." Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. at 870 (separate statement, Black and Douglas, JJ.). *Accord*, Lesnick, *supra*, at 582; Weinstein, *supra* note 95, at 962. *Contra*, Moore & Bendix, *Congress, Evidence and Rulemaking*, 84 YALE L.J. 9, 38 (1974).

[179] Ross v. Moffitt, 417 U.S. 600, 609 (1974).

[180] *See* United States v. Antelope, 430 U.S. 641 (1977); Bolling v. Sharpe, 347 U.S. 497 (1954).

tion, having done so, the appellate process must be "free of unreasoned distinctions that can only impede open and equal access to the courts."[181]

Rule 32(a)(2) divides convicted defendants into two classes: trial-convicted and plea-convicted. By requiring the court to give notice of the right to appeal to the former, but not to the latter class, the rule discriminates on its face against plea-convicted defendants.[182] By rendering it less likely that plea-convicted defendants will learn of their right to appeal, rule 32(a)(2) interferes with the exercise of that right. In evaluating differential treatment against the requirement of equal protection, the Court has employed three levels of scrutiny: strict scrutiny, intermediate scrutiny, and the rational basis test.

Strict scrutiny is ordinarily applied if the "classification impermissibly interferes with the exercise of a fundamental right,"[183] *e.g.*, the rights to travel,[184] bear children,[185] or participate on an equal level in a state-created electoral process;[186] "or operates to the peculiar disadvantage of a suspect class,"[187] *e.g.*, race.[188] Under strict scrutiny, a legislative classification is invalid absent a showing that it is necessary to accomplish a compelling

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[181] Rinaldi v. Yeager, 384 U.S. 305, 310 (1966), *quoted with approval in* Ross v. Moffitt, 417 U.S. 600, 612 (1974).

[182] If rule 32(a)(2) were neutral on its face, an equal protection challenge would require a showing that the rule was intended to discriminate. *See, e.g.*, Washington v. Davis, 426 U.S. 229, 240-48 (1976). It could be argued, however, that because rule 32(a)(2) does not forbid informing the plea-convicted defendant of his right to appeal, it is neutral as to those defendants. This argument wholly fails to deal with the rule's explicit discrimination in establishing a duty to advise trial-convicted defendants and not establishing a duty to advise plea-convicted defendants. Even if this argument is accepted, however, the note to the 1975 amendment clearly shows the Committee's determination to grant knowledge of the right to appeal to trial-convicted defendants and deny it to plea-convicted defendants, and even explains the reason for this discrimination. *See* notes 107-29 and accompanying text *supra*. This is clearly sufficient to show discriminatory purpose under the tests suggested by the Court in Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 266-68 (1977).

[183] Massachusetts Bd. of Educ. v. Murgia, 427 U.S. 307, 312 (1975).

[184] *See* Shapiro v. Thompson, 394 U.S. 618 (1969).

[185] *See* Skinner v. Oklahoma, 316 U.S. 535 (1942). *Cf.* Zablocki v. Redhail, 434 U.S. 374 (1978) (right to marry); Roe v. Wade, 410 U.S. 113 (1973) (right of privacy encompassing right to terminate pregnancy).

[186] *See* American Party v. White, 415 U.S. 767 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972).

[187] Massachusetts Bd. of Educ. v. Murgia, 427 U.S. 307, 312 (1975).

[188] *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184 (1964). *Cf.* Graham v. Richardson, 403 U.S. 365 (1971) (alienage); Oyama v. California, 332 U.S. 633 (1948) (ancestry).

governmental interest.[189] Few classifications survive this intensive scrutiny.[190]

Although there is no constitutional right to vote in state elections, and although voters have not been designated a suspect class, the Court has applied the strict scrutiny test to classifications impinging on the fundamental right of equal access to the electoral process.[191] The Court has held that once an electoral process is adopted by a state there is an implicit *"constitutionally protected right* to participate in elections on an equal basis with other citizens in the jurisdiction."[192] Similarly, Congress has created an appellate process and the Supreme Court appears to have recognized a fundamental right of access to that process.[193] By analogy to the right to vote decisions, one would argue that rule 32(a)(2) denies equal protection of the law to plea-convicted defendants by providing notice of the right to appeal only to trial-convicted defendants and thus impeding knowledge of and use of the appellate process by plea-convicted defendants.[194]

Although the Court might refuse to apply the strict scrutiny test to a challenge brought by a class composed of all plea-convicted defendants, it is not likely to resort to the minimum

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[189] *See* Zablocki v. Redhail, 434 U.S. 374, 388 (1978); Shapiro v. Thompson, 394 U.S. 618, 634 (1969).

[190] *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-6, at 1000 (1978); Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 HARV. L. REV. 1, 8 (1972).

[191] *See, e.g.,* American Party v. White, 415 U.S. 767 (1974); Dunn v. Blumstein, 405 U.S. 330 (1972).

[192] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 34 n.74 (1973) (quoting Dunn v. Blumstein, 405 U.S. 330, 336 (1972)) (emphasis added by Court). *See id.* at 59 n.2 (concurring opinion, Stewart, J.). The principal voting rights cases discussed in *Rodriguez* were Dunn v. Blumstein, 405 U.S. 330 (1972) and Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

[193] *See* Bounds v. Smith, 430 U.S. 817, 821-28 (1977); Ross v. Moffitt, 417 U.S. 600, 607-15 (1974).

[194] *Douglas v. California* and *Griffin v. Illinois* may not support the use of strict scrutiny in analyzing rule 32(a)(2). Those cases emphasized the invidious character of wealth classifications in the context of criminal procedure. *See* Douglas v. California, 372 U.S. 353, 355-58 (1963); Griffin v. Illinois, 351 U.S. 12, 16-19 (1956) (plurality opinion). Professor Gunther has made the following assessment:

> [T]he presence of the fundamental interest [in participation in the electoral process] triggered strict scrutiny whether or not economic distinctions were present: It served to invalidate not only poll taxes and fee barriers to ballot access but also restrictions turning on party allegiance and length of residence, for example. The thrust of the Griffin-Douglas principles, by contrast, has been more limited. Intense scrutiny has been exercised only where the interest in access to the criminal process was combined with differential economic impacts.

G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 820 (9th ed. 1975).

scrutiny approach—the rational basis test.[195] The Court, without labeling it as such, has developed an intermediate level of scrutiny in recent years: " 'Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny . . . .' "[196] This level of scrutiny has been applied either openly or implicitly to classes based on gender[197] or illegitimacy,[198] cases involving receipt of important governmental benefits such as food stamps,[199] or cases involving substantial deprivations of rights such as commitment to a state mental institution.[200]

A strong argument can be made for invoking the intermediate scrutiny test in examining the claim of an unadvised, plea-convicted defendant who has lost his right to appeal. Appel-

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[195] Although the rule affects the class composed of all plea-convicted defendants, there is some basis for arguing that the impact is more severe on the subclass composed of indigent, plea-convicted defendants. This suggests that more intense scrutiny should be used in evaluating equal protection claims raised by such defendants.

The 1966 Advisory Committee Note accompanying rule 32(a)(2) stated that indigent, trial-convicted defendants "are most likely to be without effective assistance of counsel at this point in the proceedings" (FED. R. CRIM. P. 32(a)(2) note), and thereby are at the greatest disadvantage in seeking to perfect a direct appeal. There is no reason to assume that counsel representing an indigent, plea-convicted defendant will outperform counsel for an indigent, trial-convicted defendant.

The indigent, plea-convicted defendant is also at a disadvantage in comparison with the nonindigent, plea-convicted defendant. The nonindigent can perfect an appeal after learning of the right to appeal, but the indigent must become aware of both the right to appeal and the right to apply for leave to appeal *in forma pauperis*. This explains why rule 32(a)(2) requires the sentencing judge to advise the trial-convicted defendant not only of his right to appeal, but also of "the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis" *Id.* 32(a)(2). Further, to deny to indigent, plea-convicted defendants information vital to the exercise of the right to appeal undermines the *Griffin-Douglas* line of decisions, which held that the Constitution requires the government to provide counsel and transcript(s) to assist indigents on their first appeals as of right. *See* notes 135-137 and accompanying text *supra*. Nevertheless, this discriminatory *impact* upon indigents is not likely, without more, to sustain an equal protection claim. "Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." Village of Arlington Heights v. Metropolitan Housing Dev. Auth., 429 U.S. 252, 265 (1977).

[196] Trimble v. Gordon, 430 U.S. 762, 767 (1977) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972)). *See* Craig v. Boren, 429 U.S. 190, 210-11 (1976) (concurring opinion, Powell, J.); Gunther, *supra* note 190, at 20; Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 42 n.226 (1977).

[197] *See, e.g.*, California v. Goldfarb, 430 U.S. 199 (1977); Craig v. Boren, 429 U.S. 190 (1976); Stanton v. Stanton, 421 U.S. 7 (1975); Reed v. Reed, 404 U.S. 71 (1971).

[198] *See, e.g.*, Trimble v. Gordon, 430 U.S. 762 (1977); Jimenez v. Weinberger, 417 U.S. 628 (1974); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972).

[199] *See, e.g.*, Department of Agriculture v. Murry, 413 U.S. 508, 514 (1973).

[200] *See, e.g.*, Jackson v. Indiana, 406 U.S. 715 (1972) (invalidating provisions for pretrial commitment of incompetent criminal defendants).

late review is an integral part of the federal criminal justice system.[201] Two recent Supreme Court opinions have reaffirmed the importance of direct appeal. In *Ross v. Moffitt*,[202] the Court rejected petitioner's claim to counsel for a second discretionary appeal, but, in reaffirming the right to assistance of counsel on first appeal, stressed the importance of meaningful access to the criminal appellate process.[203] In *United States v. MacCollom*,[204] the Court refused to hold that government must provide every defendant with a free transcript of earlier proceedings for a collateral attack, but stressed that respondent had foregone his opportunity for direct appeal and attendant free transcript.[205] Because both cases appear to ascribe near-fundamental importance to direct appeal within the criminal appellate process, intermediate scrutiny would be warranted for analysis of equal protection claims raised by a class composed of plea-convicted defendants.

Although the Supreme Court has failed to articulate the nature of inquiry called for by intermediate review, Professor Laurence Tribe has catalogued five general techniques employed by the Court: (1) the challenged classification must serve "important" although not necessarily "compelling" governmental interests; (2) the means selected by the government must be substantially related to the achievement of its objectives; (3) the government must articulate a valid current rationale for the classification—the Court will not supply a rationale from judicial imagination or legislative history; (4) the language, structure and legislative history of the rule must clearly indicate the objective of the classification—the objective cannot be the product of afterthought; and (5) in place of striking down the challenged rule, the court will alter it to permit rebuttal in individual cases.[206]

Application of these five intermediate scrutiny techniques to rule 32(a)(2) is likely to uncover a denial of equal protection. Of the various rationales proffered by the Advisory Committee for

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[201] *See generally* Abney v. United States, 431 U.S. 651, 656 (1977). In Griffin v. Illinois, 351 U.S. 12 (1956), one of the major considerations in requiring a state to furnish a transcript to an indigent criminal appellant was the fact that "[a]ppellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant." *Id.* at 18 (plurality opinion). This same consideratiou influenced the decision of the Court in requiring states to provide counsel for an indigent on his first appeal of right. *See* Douglas v. California, 372 U.S. 353, 357 (1963).

[202] 417 U.S. 600 (1974).

[203] *Id.* at 612-15.

[204] 426 U.S. 317 (1976) (plurality opinion).

[205] *See id.* at 325-26.

[206] L. TRIBE, *supra* note 186, at § 16-30.

the 1975 amendment to rule 32(a)(2), only the husbanding of prosecutorial and judicial resources could constitute an "important" governmental interest. Yet, even as to this goal, the legislative means fails the test of substantial relation. Singling out the class of plea-convicted defendants and effectively ensuring that they remain ignorant of their statutory rights is not reasonably, let alone substantially, related to the goal of conserving state resources.

If the class composed of plea-convicted defendants is denied the advantages of strict or intermediate scrutiny, the equal protection analysis must proceed under the rational basis test: whether there is "some rationality in the nature of the class singled out."[207] The Supreme Court has been reluctant to hold that challenged legislation has no rational, legitimate basis. Furthermore, the Court has held that the complainant challenging the practice or rule under the rational basis test has the burden of proving that the test has not been met.[208] Several arguments can be advanced in favor of sustaining rule 32(a)(2). None, however, is persuasive.

First, the government may argue that the length and complexity of a trial creates a greater potential for error than does a plea proceeding. But the greater potential for error at trial does not mean that there is no potential for error at a plea proceeding or the subsequent sentencing. Nor is there any basis for concluding that the right to appeal from a trial containing multiple errors merits greater protection than the right to appeal from a plea proceeding containing one error. A plea of guilty does not compel the conclusion that the defendant must endure, without challenge, an unconstitutional or otherwise improper conviction or sentence.

Second, the government may argue that it would confuse the defendant, who has previously confessed guilt to the court, for the judge to inform him of a right to appeal. It is unlikely that a plea-convicted defendant would be confused by this information if the government has not carried out its obligations under the plea bargain, if the judge has not sentenced him properly, or if some other error has occurred. Even if judicial notification of the right to appeal may in some instances confuse the plea-convicted defendant, his confusion, easily dispelled by consulting his lawyer, is preferable to his remaining ignorant of the right to appeal.

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[207] Rinaldi v. Yeager, 384 U.S. 305, 308-09 (1966), *quoted with approval in* Fuller v. Oregon, 417 U.S. 40, 49 (1974).

[208] *See* Coppedge v. United States, 369 U.S. 438 (1962).

Third, the government may argue that advising plea-convicted defendants of the right to appeal is likely to add to the number of appeals, in particular the number of frivolous appeals, and increase the expenses of the federal criminal justice system. The plea-convicted defendant has little to lose in appealing. If he succeeds, on remand he can generally proceed to trial on that same charge,[209] and if convicted, he is generally protected against the imposition of a more severe sentence.[210] Further, the indigent, plea-convicted defendant can proceed on appeal without any personal expenditure of funds; he is entitled to free counsel and transcripts.

Although increasing the number of appeals is likely to increase the number of frivolous appeals, and although there is a greater opportunity for error at a trial than at a plea proceeding, there is no rational basis for assuming that more frivolous appeals will arise from plea convictions than from trial convictions.[211] The Supreme Court has held that a generalized fear of frivolous appeals cannot justify a governmental procedure that denies the right of appeal to a class of defendants. In *Rinaldi v. Yeager,*[212] the Supreme Court rejected, on equal protection grounds, a governmental procedure requiring prisoners who had taken an unsuccessful appeal to reimburse the state for the cost of furnishing a trial transcript. The court pointed out that:

> [a]part from its fiscal objective, the only other purpose of this law advanced by the appellees is the deterrence of frivolous appeals. Assuming a law enacted to perform that function to be otherwise valid, the present statutory classification is no less vulnerable under the Equal Protection Clause when viewed in relation to that function. By imposing a financial obligation only upon inmates of institutions, the statute inevitably burdens many whose appeals, though unsuccessful, were not frivolous,

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[209] *But see* Borman, *The Chilled Right to Appeal From A Plea Conviction: A Due Process Cure,* 69 NW. L. REV. 663 (1975). "The general view in remanding a vacated 'offense bargain' plea conviction to one or some of several offenses is that the prosecutor may reinstate all of the original charges and may choose whether to again offer the bargain." *Id.* at 711.

[210] *See* North Carolina v. Pearce, 395 U.S. 711, 725-26 (1969).

[211] If adopted, the assumption may violate equal protection:

> Thus, for all that is shown in this record, the two subclasses . . . stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment.

Jimenez v. Weinberger, 417 U.S. 628, 637 (1974).

[212] 384 U.S. 305 (1966).

> and leaves untouched many whose appeals may have been frivolous indeed.[213]

Thus, the generalized fear of frivolous litigation if plea-convicted defendants were informed of the right to appeal does not provide a rational basis for rule 32(a)(2). Moreover, the Court has held that the party alleging frivolity has the burden of showing abuse of the right to appeal.[214] The number of legitimate reasons for appealing a plea conviction should prevent the government from sustaining its burden. This is not to disparage attempts to reduce the number of frivolous appeals within the criminal justice system. Rule 32(a)(2), however, is not a rational means of accomplishing this goal.

Thus, although the equal protection claim envisaged in this discussion appears to deserve more intense scrutiny than the rational basis test, the rule is not likely to survive even that minimum test.

V.

Ineffective Assistance of Counsel

Failure of defense counsel properly to advise an otherwise unadvised, plea-convicted defendant of the right to appeal provides a colorable sixth amendment claim of ineffective assistance of counsel. In *Mempa v. Rhay*,[215] the Supreme Court extended the right to assistance of counsel to sentencing proceedings. The Court noted the role of counsel in protecting the right to appeal of that plea-convicted defendant:

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[213] *Id.* at 310. The Court in Coppedge v. United States, 369 U.S. 438 (1962), stated: "Indigents' appeals from criminal convictions cannot be used as a convenient valve for reducing the pressures of work on the courts. If there are those who insist on pursuing frivolous litigation, the courts are not powerless to dismiss or otherwise discourage it." *Id.* at 450.

Rinaldi did not turn on the fact that the state statute had required indigents to bear part of the cost of unsuccessful appeals, but rather on the fact that the statute discriminated unreasonably against a particular class of indigents—prisoners. 384 U.S. at 307-08. *See* Shapiro v. Thompson, 394 U.S. 618, 633 n.11 (1969). The Court's decisions in Dowd v. United States *ex rel.* Cook, 340 U.S. 206 (1951), and Cochran v. Kansas, 316 U.S. 255 (1942), also protected prisoners' rights on equal protection grounds. Those cases struck down rules permitting prison officials to suppress appeals papers and thus prevent prisoners from properly filing direct appeals.

[214] "Since our statutes and rules make an appeal in a criminal case a matter of right, the burden of showing that that right has been abused through the prosecution of frivolous litigation should, at all times, be on the party making the suggestion of frivolity." Coppedge v. United States, 369 U.S. 438, 447-48 (1962).

[215] 389 U.S. 128 (1967).

> [C]ertain legal rights may be lost if not exercised at this stage. For one, Washington law provides that an appeal in a case involving a plea of guilty followed by probation can only be taken after sentence is imposed following revocation of probation. . . . [A]bsence of counsel . . . might well result in loss of the right to appeal. While ordinarily appeals from a plea of guilty are less frequent than those following a trial on the merits, the incidence of improperly obtained guilty pleas is not so slight as to be capable of being characterized as *de minimis.*[216]

Mempa has established that counsel still has a role to play after sentence has been pronounced. If "absence of counsel . . . might well result in loss of the right to appeal,"[217] then the duty of counsel is to protect his client's right of appeal by notifying him of that right, and, where appeal is desired, filing the necessary papers within the ten-day period.[218] Failure to carry out these obligations should result in a determination of ineffective assistance of counsel—assistance below "the range of competence demanded of attorneys in criminal cases."[219]

Although the Supreme Court has not addressed the issue, several courts of appeals have held that failure of counsel to inform trial-convicted defendants of the right to appeal amounts to ineffective assistance of counsel.[220] By contrast, the Fifth Cir-

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[216] *Id.* at 135-36 (footnotes omitted)(citation omitted).

[217] *Id.* at 136. "Cases are accumulating, mainly through post-conviction litigation, where defendants have been substantially abandoned by their lawyers at the conclusion of the trial proceedings so that the defendants lost the opportunity in normal course to have appellate review." ABA STANDARDS RELATING TO CRIMINAL APPEALS § 2.2 note a (Approved Draft 1970).

[218] The Federal Criminal Justice Act, 18 U.S.C. § 3006A(c) (1976), provides indigent federal defendants with assistance of counsel "through appeal."

[219] McMann v. Richardson, 397 U.S. 759, 771 (1970).

[220] *See* United States v. Neff, 525 F.2d 361, 363 (8th Cir. 1975) (dictum); Goodwin v. Cardwell, 432 F.2d 521, 522 (6th Cir. 1970); Nelson v. Peyton, 415 F.2d 1154, 1156-57 (4th Cir. 1969), *cert. denied*, 397 U.S. 1007 (1970); Wynn v. Page, 369 F.2d 930, 932 (10th Cir. 1966); Dillane v. United States, 350 F.2d 732, 733 (D.C. Cir. 1965).

The Third, Fourth, and Fifth Circuits find a denial of effective assistance of counsel when court-appointed counsel fails to advise an indigent, trial-convicted defendant of the right to appeal. *See, e.g.*, Bonds v. Wainwright, 579 F.2d 317, 319 (5th Cir. 1978) (en banc); Shiflett v. Virginia, 447 F.2d 50, 53-54 (4th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 994 (1972); United States *ex rel.* O'Brien v. Maroney, 423 F.2d 865, 868 (3d Cir. 1970).

The Second Circuit has avoided the need to inquire into the competence of assigned or retained counsel during the postsentencing period by holding, in a case involving an indigent, trial-convicted defendant, that the Constitution requires the state to advise every defendant of the right to appeal:

> We think the only practical, logical and fair interpretation to be given to Douglas v. California is that it imposes upon the state a duty to warn every person convicted of crime of his right to appeal and his right to prosecute his

cuit[221] and several district courts[222] have held that failure of

> appeal without expense to him by counsel appointed by the state, if he is indigent. The right to appeal at the expense of the state is mere illusion if the convicted indigent defendant does not know such a right exists. And the one way to make sure that he does know is to tell him so.[7]

[7] ... [T]his will result in an unequivocal statement by the trial judge or by counsel for the convicted defendant sufficiently comprehensive to be applicable to indigents and non-indigents as well. This ... serves the purpose of cutting off future applications of the same nature, as a convicted defendant is unlikely successfully to assert that no such instructions were given by the trial judge or by his counsel in the face of a court record showing the instructions were given, or a written communication to the same effect from the lawyer to the defendant.

United States *ex rel.* Smith v. McMann, 417 F.2d 648, 654 & n.7 (2d Cir. 1969) (en banc) (emphasis added), *cert. denied*, 397 U.S. 925 (1970). Although this language does not restrict the state's duty to trial-convicted defendants, a subsequent decision of the Second Circuit indicates that the court would not extend the *McMann* holding for the benefit of plea-convicted defendants:

> [I]t is a large step to apply the rationale of these [trial] decisions to convictions based upon the admission in open court by a defendant represented by counsel that he did commit the crime charged. How sizeable the step would be is indicated by the recent proposal of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States that there "be no duty on the court to advise the defendant of any right to appeal after sentence is imposed following a plea of guilty."

United States *ex rel.* Roldan v. Follette, 450 F.2d 514, 516 (2d Cir. 1971).

The Seventh Circuit, in a case arising from a trial conviction, has held that Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1962), impose a constitutional duty on the trial judge to inform an indigent defendant of the right to appeal: "The right to appeal is ineffectual if a defendant is ignorant of this right, and we find it incumbent on the trial judge to inform indigent defendants of this right." United States *ex rel.* Singleton v. Woods, 440 F.2d 835, 836 (7th Cir. 1971).

[221] *See* Williams v. United States, 443 F.2d 1151 (5th Cir. 1971) (per curiam) (affirming on appended opinion of district court). The district court summarily dismissed petitioners claim of ineffective assistance of counsel: "Petitioner complains that his counsel did not inform him of his right to appeal. There is no necessity to advise a defendant of any right to appeal after a guilty plea." *Id.* at 1153-54. The district court relied upon Boyes v. United States, 354 F.2d 31 (5th Cir. 1965) and Dillane v. United States, 350 F.2d 732 (D.C. Cir. 1965). *Boyes* held that rule 37(a)(2), the predecessor to rule 32(a)(2), did not require the court to inform a plea-convicted defendant of any right to appeal. 354 F.2d at 32. *Dillane* did not deal with an appeal from a plea conviction and, in fact, lends support to the proposition that failure to advise a defendant of his right to appeal constitutes ineffective assistance of counsel:

> In the record before us there appear to be allegations that appellant's counsel, retained for his defense at the trial, never apprised him of his right to file a notice of appeal .... If true, and if unexplained, this impresses us as such an extraordinary inattention to a client's interests as to amount to ineffective assistance of counsel cognizable under Section 2255.

350 F.2d at 733 (footnote omitted). Subsequent Fifth Circuit decisions have found ineffective assistance of counsel when counsel has failed to advise trial-convicted defendants of their right to appeal. *See* Arrastia v. United States, 455 F.2d 736 (5th Cir. 1972); Powers v. United States, 446 F.2d 22 (5th Cir. 1971).

[222] *See* Farrington v. North Carolina, 391 F. Supp. 714, 716 (M.D.N.C. 1975); Younger

counsel to so advise plea-convicted defendants does not support a claim of ineffective assistance of counsel. None of the latter cases has considered the constitutionality of advising only one class of convicted defendants; several of them have relied on the language of rule 32(a)(2).[223]

There is no justification for limiting this constitutional protection to trial-convicted defendants. If counsel fails to notify any defendant of his right to appeal, a claim of ineffective assistance of counsel should be sustained. The remedy employed on finding ineffective assistance of counsel has been vacatur of judgment and resentencing of the defendant, thereby creating a new period during which defendant can exercise his right to appeal.[224]

VI.

RECOMMENDATIONS

Although the sentencing proceeding marks the beginning of the brief, ten-day period for filing notice of appeal,[225] only the trial-convicted defendant is assured of being informed of the right to appeal. Further, the language of rule 32(a)(2) and the 1974 Advisory Committee Note could mislead the judge, defense counsel and the plea-convicted defendant to believe that there is no right to appeal a plea conviction. Various constitutional rights of the plea-convicted defendant may have been violated by the misinformation or lack of information provided by judges and defense counsel, and the misleading language of rule 32(a)(2). Adoption of the following proposals would facilitate early resolu-

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v. Cox, 323 F. Supp. 412, 416-17 (W.D. Va. 1971); Burton v. United States, 307 F. Supp. 448, 450 (D. Ariz. 1970).

[223] It is, then, the opinion of the court that there is no constitutional duty, *in all instances*, for either the trial judge or the defense attorney to advise the defendant of his right to appeal after a plea of guilty.... The Supreme Court, in its rule making capacity, has not seen fit in F.R.Cr.P. 32 to require district judges to advise defendants of a right to appeal after a plea of guilty, although the advice is required after a not guilty plea.

Younger v. Cox, 323 F. Supp. 412, 416 (W.D. Va. 1971) (emphasis in original). *Accord*, Burton v. United States, 307 F. Supp. 448, 450 (D. Ariz. 1970).

[224] In Rodriquez v. United States, 395 U.S. 327 (1969), *discussed in* note 145 *supra*, the Court used this remedy after a trial judge failed to advise an indigent, trial-convicted defendant of his right to appeal. *See also* Dillane v. United States, 350 F.2d 732, 733 (D.C. Cir. 1965).

[225] *See* FED. R. APP. P. 4b.

tion by direct appeal of all claims against the plea-conviction or sentence.[226] Further, adoption of these proposals would cure the constitutional defects inherent in the present notification procedure.

1. *Inform Federal Judges That There is a Right to Appeal a Plea Conviction*

The Administrative Office of the United States Courts should immediately move to correct misconceptions about rule 32(a)(2). A letter should be circulated to all federal judges setting forth the ample judicial authority demonstrating the existence of the right to direct appeal from a plea conviction and stating that rule 32(a)(2) does not undermine that right. The letter should also explain the constitutional ramifications of neither the judge nor defense counsel properly advising the plea-convicted defendant of the right to appeal. Dissemination of this letter should eliminate the practice of the many federal district court judges who advise defendants erroneously that a guilty plea waives the right to appeal.[227] The letter may also induce judges to advise plea-convicted defendants of their right to appeal or to make sure that defense counsel performs this function.

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[226] The longer the delay, the less the reliability of the determination of any factual issue giving rise to the attack.... Inability to try the prisoner is even more likely in the case of collateral attack on convictions after guilty pleas, since there will be no transcript of testimony of witnesses who are no longer available.

Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. CHI. L. REV. 142, 147 (1970) (footnotes omitted). The Advisory Committee has stated in regard to habeas corpus proceedings:

> The assertion of stale claims is a problem which is not likely to decrease in frequency.... The grounds most often troublesome to the courts are ineffective counsel, denial of right of appeal, [and] plea of guilty unlawfully induced .... When they are asserted after the passage of many years, both the attorney for the defendant and the state have difficulty in ascertaining what the facts are.... The court reporter's notes may have been lost or destroyed, thus eliminating any exact record of what transpired. If the case was decided on a guilty plea, even if the record is intact, it may not satisfactorily reveal the extent of the defense attorney's efforts in behalf of the petitioner....
>
> The interest of both the petitioner and the government can best be served if claims are raised while the evidence is still fresh.

R. GOVERNING § 2254 CASES 9 note (Advisory Comm. Note) (made applicable to § 2255 by R. GOVERNING § 2255 PROCEEDINGS 9 note (Advisory Comm. Note)). Use of direct appeal may lessen the number of collateral petitions: "There may be some offsetting relief in a decrease in the number of prisoner petitions as the questions raised by those petitions come to be more fully litigated on direct review." Carrington, *Crowded Dockets and the Courts of Appeals: The Threat to the Function of Review and the National Law*, 82 HARV. L. REV. 542, 548 n.35 (1969).

[227] *See* Appendix.

2. *Ensure that Defense Counsel Fulfills the Obligation to Inform Plea-Convicted Defendants of the Right to Appeal*

Should the judge fail to advise the plea-convicted defendant of his right to appeal, defense counsel is obligated to do so. If counsel does not fulfill this obligation, he risks a later claim of ineffective assistance of counsel. Because defense counsel may not be aware either of the plea-convicted defendant's right to appeal or counsel's obligation to so advise him, the Administrative Office of the United States Courts should develop a procedure to ensure that counsel provide effective assistance. Specifically, each defendant should be required to sign a form acknowledging to the court that counsel had notified him of his right to appeal within ten days after sentence and indicating his desire to exercise or waive that right. Counsel should also be required to sign the form verifying that he had provided the aforementioned information. In addition, the Administrative Office should recommend to the chief judges of each circuit and each district that all Criminal Justice Act plans be amended to inform assigned counsel of their obligation to advise plea-convicted defendants of the right of appeal.

3. *Amend Rule 32(a)(2)*

The Advisory Committee on Criminal Rules should immediately begin to revise rule 32(a)(2). The revision should not merely correct the misleading implications of the rule but should require the judge to inform plea-convicted defendants of their right to direct appeal.[228] The following proposed revision would accomplish this.

> (2) *Notification of Right to Appeal.* After imposing sentence in a case which has gone to trial or after a plea of guilty or nolo contendere, the court shall advise the defendant of his right to appeal and the right of an individual who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. If the defendant so requests, the clerk of the court shall prepare and file forthwith a notice of appeal on behalf of the defendant.

This proposal would protect the constitutional right of access to the criminal appellate process. Further, the proposal would eliminate most post-conviction challenges based on misadvice or lack of advice by the court or counsel.

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[228] Moore has proposed expanding the notification required under rule 32(a)(2) to plea-convicted defendants because of the many grounds upon which to challenge the sentencing proceeding. *See* 8A MOORE'S FEDERAL PRACTICE, *supra* note 64, ¶ 32.06, at 32-102.

VII.

A FINAL COMMENT—THE NEED TO RESTRUCTURE FEDERAL PROCEDURES FOR POSTCONVICTION REVIEW

Direct appeal is presently the most advantageous route for challenging a federal conviction or sentence. Appellant benefits from review by a three-judge panel of the court of appeals, and the potential for reversal on a showing of error of less than constitutional, jurisdictional, or fundamental magnitude. The indigent appellant is entitled to both court-appointed counsel and necessary transcripts. These benefits outweigh the sole advantage of collateral remedies[229]—the immediate consideration by the district judge against whom the challenge is directed.[230]

Although the advantages of direct appeal should induce a properly advised defendant to channel his postconviction challenge into direct appeal, the court of appeals may not be the most effective forum to deal with many claims. If many of the principal benefits provided by direct appeal were provided on collateral postconviction challenges directed to the district judge, numerous claims could be resolved fairly at the district court level with significant savings in time and money. For example, if a defendant asserts that the judge, in accepting his plea, did not comply with rule 11, he would file a rule 32(d) motion to withdraw the plea. The judge would then read the transcript of the plea proceeding, and resolve the claim either by denying the motion or by permitting withdrawal of the plea. Currently, an indigent defendant would be foolish to proceed collaterally because he would not be entitled to assistance of counsel and necessary transcripts. Further, any defendant who proceeds collaterally and then seeks to appeal from an unfavorable district court decision does not receive the more advantageous standard of review provided on direct appeal. On direct appeal, a defendant would have his plea conviction vacated if the transcript of the plea proceeding revealed that the judge did not comply with rule 11. On appeal from a district court's denial of a postconviction collateral motion to vacate a plea setting forth the same rule 11 grounds, courts of appeals will generally uphold the conviction because that error will not be deemed of fundamental or constitutional magnitude.[231]

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[229] The principal collateral remedies are rules 32(d) and 35 of the Federal Rules of Criminal Procedure and 28 U.S.C. § 2255.

[230] For discussion of the advantages of direct appeal over collateral proceedings, see notes 80-91 and accompanying text *supra.*

[231] *See* note 63 and accompanying text *supra.*

The Federal Rules of Criminal Procedure should be revised to provide many of the benefits of direct appeal to defendants who, within ten days after sentencing, file notice of an intention to challenge their convictions or sentences at the district court level. The following proposal would provide a more rational procedure for reviewing federal postconviction claims. The sentencing judge should inform the defendant of his right to postconviction review. The court should provide the defendant with a form outlining the alternatives—proceeding to the district court with a right to subsequent appeal or taking an immediate direct appeal—and the ten-day time limit. The form should be reviewed by the defendant with the assistance of counsel; both should sign the form indicating whether defendant wishes to pursue a postconviction challenge and, if so, the manner in which he will proceed. If defendant chooses to proceed with district court review, he would be guaranteed all of the benefits of direct appeal except initial review by a three-judge panel of the court of appeals. In place of this latter benefit, he would receive immediate consideration by the district judge with an opportunity to appeal that decision to the court of appeals. It is likely that many challenges to plea convictions under rule 11 would be finally resolved at the district court level. If defendant appeals the district court decision, the court of appeals would employ the standard of review for a direct appeal rather than an abuse-of-discretion standard.

In conclusion, the Advisory Committee should begin work on three tasks. First, it should redraft rule 32(a)(2) to clarify the right to appeal from a plea conviction. Second, it should recommend to the chief judges of each circuit and each district revisions to the Criminal Justice Act plans. Third, it should develop a more rational and efficient plan for postconviction review of federal criminal convictions which would encourage the use of collateral procedures without penalizing defendants for failing to proceed by direct appeal.

APPENDIX

In May 1977, the author conducted a brief two-question survey of all federal district court judges and senior federal district court judges.

The survey included a brief cover letter setting out rule 32(a)(2) and a stamped, self-addressed postcard bearing the following two questions:

1. At sentencing do you advise a defendant who has plead guilty of a right to appeal, or if indigent of the right to apply for leave to appeal in forma pauperis?

   Yes____ No____

2. If your answer to #1 was No, prior to accepting a guilty plea, do you advise the defendant that pleading guilty waives the right to direct appeal?

   Yes____ No____

RESULTS OF SURVEY

387 (77%) Responses to questionnaires sent to all (501) federal district court judges and senior federal district court judges

23 Cards returned unanswered or nonresponsive: Reasons:

Nine judges had died, become incapacitated, or retired from active service.

Two judges found the questions too general to answer yes or no.

Two judges handled only civil cases.

After answering the first question Yes, despite instructions, ten judges answered the second question Yes. This would result in conflicting advice to a plea-convicted defendant.

364 (73%)
Net responses

54 Fifteen percent of the judges responding advise a defendant who has plead guilty of the right to appeal and, if indigent, of the right to appeal *in forma pauperis.*

310 Eighty-five percent of the judges responding do not advise a plea-convicted defendant of the right to appeal at sentencing.

94 Twenty-six percent of the judges responding do not advise a plea-convicted defendant of the right to appeal at sentencing, and further advise the defendant at the plea proceeding that pleading guilty waives the right to direct appeal. This includes:

a. One judge who had in the past advised plea-convicted defendants of the right to appeal, but because of this survey will, in the future, "advise the defendant that pleading guilty waives the right to appeal."

b. One judge, who, although not presently advising the defendant that pleading guilty waives the right to direct appeal, will do so in future.

216 Fifty-nine percent of the judges responding do not advise a plea-convicted defendant of the right to appeal at sentencing, and do not advise a defendant prior to accepting the plea that pleading guilty waives the right to appeal.