NO. ______________

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2000

Billy D. Littlejohn,

Petitioner,

vs.

United States,

Respondent.

On Petition for Writ of Certiorari
To the District of Columbia Court of Appeals

Petition for Writ of Certiorari

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QUESTION PRESENTED

1. Whether Petitioner's adult sentence of 8- to 24-years imprisonment is illegal because the Sentencing Court, in violation of 18 U.S.C. § 5010 and the directive of this Court in *Dorszynski v. United States*, 418 U.S. 424, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974) , failed to make a finding that he would not benefit from treatment under the Federal Youth Corrections Act and, in fact, implicitly determined that he would benefit?

LIST OF PARTIES

Petitioner and Respondent are the only parties to this case.

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OPINION BELOW

The Opinion of the District of Columbia Court of Appeals in *Littlejohn v. United States* is reported at 749 A.2d 1253 and is reproduced in the Appendix to this Petition. App. 1 – 5.

JURISDICTION OF THE COURT

The judgment of the D.C. Court of Appeals was entered April 20, 2000. That Court denied Petitioner's Petition for Rehearing and Suggestion of Rehearing *en Banc* August 11, 2000. App. 6. The jurisdiction of this court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

At issue in this case is the proper interpretation of the Federal Youth Corrections Act, 18 U.S.C. 5005 *et seq.*, specifically 18 U.S.C. § 5010, which states in pertinent part:

> (a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017(c) of this chapter; or

(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017(d) of this chapter.

(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision.

STATEMENT OF THE CASE

Billy D. Littlejohn was indicted October 17, 1984 on six counts of carnal knowledge in violation of D.C. Code § 22-2801 and seven counts of taking indecent liberties with a minor child in violation of D.C. Code § 22-3501 arising from alleged incidents between July 1, 1983 and April 7, 1984, when he was 19 years old. R. 8.[1] Mr. Littlejohn pleaded not guilty November 7, 1984. R. 2, 1.

At a hearing February 25, 1985 Petitioner pleaded guilty to one count each of carnal knowledge and taking indecent liberties. *Id.* As part of the plea agreement the government dropped all other charges, waived step-back and agreed not to "oppose a Federal Youth Corrections Act sentence if one were recommended by youth authorities." Tr. 2/25/84, 2-3 (Supp. R. A).[2] At the conclusion of the hearing the Trial Court ordered preparation of a Presentence

[1] References to the Record on Appeal will be designated by "R" followed by the relevant document number and, where applicable, page number within that document. References to transcripts of proceedings will be designated by "Tr." followed by the date of the proceeding and page number.

[2] In an order issued April 16, 1999 the D.C. Court of Appeals granted Appellant's motion to augment the record and to file the additional materials under seal as a supplemental record. The documents included as attachments to the motion were: A) Transcript of plea hearing February 25, 1985; B) Presentence Investigation Report; C) Youth Act Study; D) Letter from Human Sexuality Institute dated June 17, 1987; and E) D.C. Probation Department memorandum dated July 14, 1987 requesting review of treatment. Each will be identified as "Supp. R." followed by its letter designation and, where applicable, the relevant page number, i.e. "Supp. R. B, 3."

Investigation Report and released Mr. Littlejohn on his own recognizance. R. 2, 1. The report noted that Mr. Littlejohn had no prior juvenile or adult criminal record and recommended continued psychological counseling, family counseling, drug testing and incarceration for no specific time period. Supp. R. 7-8.

Prior to sentencing, defense counsel filed a Memorandum in Aid of Sentencing and an evaluation of Mr. Littlejohn performed by the Human Sexuality Institute, which recommended that he be placed on probation in an intensive psychotherapy program. R. 14, 8-9. Trial counsel did not specifically request sentencing under the Youth Act, 18 U.S.C. § 5010, but the Judge committed Mr. Littlejohn to the Youth Center for evaluation pursuant to § 5010(e) when the case came up for sentencing May 9, 1985. R. 2 and R. 15.

The Trial Judge received the Youth Act Study dated June 27, 1985 prior to a second sentencing hearing July 9, 1985. According to the study:

> [W]e see a youth who is experiencing his first arrest and confinement. He appears to be the victim in an unfortunate situation which seems to have been perpetuated, in part, by religious beliefs and accepted practices of some family members. It is the opinion of the Classification Committee that Billy would be no problem in the community since he is already meeting the role of his ego ideal through employment and the life he has planned for himself. He should continue in therapy and he should continue the goals he has set for himself. Services to meet his needs are available in the community.

Supp. R. C, 2. At the sentencing hearing the Trial Judge continued the case until mid-January 1986 and released Mr. Littlejohn on his own recognizance to continue therapy. R. 2, 1. He again continued the case at the January 15, 1986 hearing until July 16, 1986. *Id.* at 1-2.

In April 1986, after the Trial Judge's death, the case was reassigned to the Sentencing Judge, and when it came up for review in July, the Sentencing Judge imposed an adult sentence on Mr. Littlejohn. He sentenced Petitioner to consecutive sentences of 5 to 15 years for carnal knowledge and 3 to 9 years for taking indecent liberties. The Sentencing Judge then suspended execution of the sentences and placed Mr. Littlejohn on adult probation for 5 years with the condition that he "continue treatment with Human Sexuality Ins. until Court approves termination of treatment." R. 16.

In a letter dated June 17, 1987, Mr. Littlejohn's therapist at the Human Sexuality Institute informed the Probation Department that he had successfully completed treatment. Supp. R. D. At a hearing October 15, 1987 the Sentencing Judge terminated the therapy requirement, continued probation, and ordered Mr. Littlejohn to pay the Human Sexuality Institute $90. R. 2, 2.

The Sentencing Judge held a Show Cause Hearing July 13, 1988 in response to a violation report in which Mr. Littlejohn's probation officer stated that he failed to keep appointments with the probation officer, had three positive drug tests, failed to report to the Human Sexuality Institute every two months and failed to pay the $90 assessment.[3] The Sentencing Judge ruled August 3, 1988 that Mr. Littlejohn had violated his probation by using cocaine, Tr. 8/3/88, 8, and he subsequently revoked probation and imposed the original sentence of 8 to 24 years. Tr. 9/16/88, 3-4.

Early in 1989 Mr. Littlejohn began a lengthy series of *pro se* attempts to challenge his conviction and sentence in the Superior Court. The Sentencing Judge treated seven letters as a single D.C. Code § 23-110 motion and denied it April 30, 1990.[4] R. 25. Mr. Littlejohn continued writing letters raising many of the same issues, and after the Sentencing Judge's death the case was reassigned to the Collateral Attack Judge, who issued a Memorandum and Order December 2, 1992, again denying Petitioner's § 23-110 motion. R. 31. The Collateral Attack Judge ruled

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[3] No transcript is available of the October 15, 1986 hearing. There is no written order amending Mr. Littlejohn's probation conditions. The docket notation lists payment to the Human Sexuality Institute as the only new condition, but the Show Cause Order the Sentencing Judge issued July 25, 1988 states that one of the violations of probation to be considered at a hearing was Mr. Littlejohn's failure to report to the Human Sexuality Institute every two months. R. 18, 2.

[4] D.C. Code § 23-110 states in pertinent part:

> (a) A prisoner in custody under sentence of the Superior Court claiming the right to be released upon the ground that (1) the sentence was imposed in violation of the Constitution of the United States or the laws of the District of Columbia, … (3) the sentence was in excess of the maximum authorized by law, (4) the sentence is otherwise subject to collateral attack, may move the court to vacate, set aside, or correct the sentence.
>
> …
>
> (c) Unless the motion and 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 prosecuting authority, 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 … (2) the sentence imposed was not authorized by law or is otherwise open to collateral attack, (3) 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, resentence him, grant a new trial, or correct the sentence, as may appear appropriate.

that, pursuant to § 23-110(e), the Court was not required to entertain successive motions for similar relief, and that she concurred with the Sentencing Judge's prior ruling concerning the plea hearing.

In a Motion to Vacate Illegal Sentences filed July 12, 1996 Mr. Littlejohn for the first time argued that the Sentencing Judge acted illegally in imposing an adult sentence on him. R. 32. Mr. Littlejohn filed a petition for writ of *habeas corpus* August 20, 1997, clearly stating his claim of entitlement to a Youth Act sentence. R. 36, 5. In its response the government did not address the merits of Mr. Littlejohn's petition. Rather, relying on rulings of the Sentencing Judge and the Collateral Attack Judge on his previous motions, it argued that the motion should be denied pursuant to § 23-110(e) as duplicative and as an abuse of the writ. R. 48, 5 – 6.

The Court denied Petitioner's petition April 8, 1998 on the grounds suggested by the government, that it was a "successive claim for collateral relief," and that it was an abuse of the writ because "defendant has already filed several prior § 23-110 motions without raising the 'no benefit' argument." R. 49, 2 – 3. In a footnote the Court added that "[the Sentencing Judge's] alleged failure to make a 'no benefit' finding arguably goes to the manner in which the sentence was imposed, rather than the legality of the sentence." *Id.* at 5 n 2.

The D.C. Court of Appeals received Petitioner's hand-written notice of appeal April 15, 1998. R. 56. In an opinion issued April 20, 2000 the Panel affirmed Mr. Littlejohn's adult sentence, holding for the first time that failure to make an explicit no-benefit finding prior to imposing an adult sentence on a person eligible for treatment under the FYCA would cause the sentence to be illegally-imposed, not illegal. The Panel ruled that because Mr. Littlejohn did not challenge the sentence within 120 days of its imposition, the Superior Court lacked jurisdiction in 1996 and 1997 to consider his motion pursuant to D.C. Crim. R. 35(a).[5] *Littlejohn, supra*, 749 A.2[d] at 1258. Petitioner filed a Petition for Rehearing and Suggestion of Rehearing *en Banc*, which the Court of Appeals denied August 11, 2000.

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[5] When Mr. Littlejohn pleaded guilty D.C. Crim. R. 35(a) was identical to Fed. R. Crim. P. 35(a) and the D.C. Court of Appeals has ruled that it will look to decisions of federal appellate courts in interpreting the local rule. *Norman v. United States*, 623 A.2d 1165, 1167 n. 9 (D.C. 1993)

STATEMENT OF FACTS

The prosecutor set out the facts of this case in the plea hearing February 25, 1985. He stated that sometime during the summer of 1983 Mr. Littlejohn had sexual intercourse with his 11-year-old cousin N.J. The indecent liberties count related to an incident later that summer in which Mr. Littlejohn allegedly pulled down N.J.'s pants and for a brief period put his penis in her vagina. Tr. 2/25/85, 8 – 9. Petitioner agreed to this proffer. *Id.* at 9 – 10.

The indictment alleged two incidents involving another cousin, K.F., for which Mr. Littlejohn was charged with both carnal knowledge and taking indecent liberties, and one for which he was charged only with taking indecent liberties. R. 8, 2 – 3. Under the plea agreement all of these counts were dismissed.

REASONS FOR GRANTING THE PETITION

THE LOWER COURT RULING THAT PETITIONER'S ADULT SENTENCE IMPOSED IN THE ABSENCE OF A "NO-BENEFIT FINDING" IS NOT AN ILLEGAL SENTENCE CONFLICTS WITH THE TERMS OF THE FEDERAL YOUTH CORRECTIONS ACT, THE HOLDING OF THIS COURT IN *DORSZYNSKI V. UNITED STATES* AND HOLDINGS OF LOWER FEDERAL APPELLATE COURTS INTERPRETING THE YOUTH ACT

The Federal Youth Corrections Act, 18 U.S.C. § 5005 *et seq*., was enacted in 1950 to provide a sentencing alternative for offenders between the ages of 18 and 22. It was designed to foster rehabilitation and reduce recidivism. *Dorszynski v. United States*, 418 U.S. 424, 433, 94 S. Ct. 3042, 41 L. Ed. 2d 855 (1974). Two years later Congress amended the FYCA to cover youthful offenders convicted in the District of Columbia courts,[6] and a 1967 amendment turned supervision of D.C. offenders sentenced under it to the D.C. Department of Corrections. *Id.* at 435 n. 20. *See, also, United States v. Stokes*, 365 A.2d 615, 616 n. 1 (D.C. 1976).

The FYCA's sentencing provision, 18 U.S.C. § 5010, provided trial judges four sentencing choices: placing the defendant on probation, imposing an indeterminate sentence for treatment of up to six years, imposing an indeterminate sentence for treatment in excess of six years but no more than the penalty prescribed for adults convicted of the same crime, and sentencing the defendant as an adult. Before a judge could elect the fourth option, he or she was required to make an explicit finding that the defendant would not benefit from a Youth Act sentence. *Dorszynski, supra*, at 443-4.

The Supreme Court ruled in *Dorszynski* that so long as the sentence imposed by a trial court is within statutory limits, it is immune from appellate review. *Id.* at 440-1. However,

> Appellate modification of a statutorily-authorized sentence … is an entirely different matter than the careful scrutiny of the judicial process by which the particular punishment was determined. Rather than an unjustified incursion into the province of the sentencing judge, this latter responsibility is, on the contrary, a necessary incident of what has always been appropriate appellate review of criminal cases.

Id. 418 U.S. at 443 (citation omitted).

[6] The D.C. Youth Rehabilitation Act, D.C. Code § 24-801 *et seq.*, replaced the FYCA effective December 7, 1985, nearly 10 months after Appellant's guilty plea and, therefore, does not apply in this case..

The D.C. Circuit has interpreted this statement as requiring *de novo* review of the sentencing process to ensure that trial courts consider the treatment options afforded by the FYCA before resorting to imposing adult sentences under § 5010(d). *United States v. Dancy*, 510 F.2d 779, 784 (D.C. Cir. 1975). In carrying out their limited role in reviewing the sentencing process, appellate courts must scrutinize not only the judge's statements but "the documents that served as a foundation for the punishment imposed" to ensure that the information the judge relied upon in sentencing is not "unreliable, improper or grossly insufficient." *United States v. Hopkins*, 531 F.2d 576, 580 (D.C. Cir. 1976).

THE SENTENCE IMPOSED ON PETITIONER IN JULY 1986 WAS ILLEGAL, NOT MERELY ILLEGALLY IMPOSED

An adult sentence pursuant to 18 U.S.C. § 5010(d), imposed without first making an explicit finding that the defendant will not benefit from a Youth Act sentence, is an illegal sentence, not merely a sentence imposed in an illegal manner. *Goodwin v. United States*, 602 F.2d 107, 108 (6th Cir. 1979).

A sentence is illegal if the court that imposed it exceeded its authority either because it lacked jurisdiction or because it "impos[ed] a sentence in excess of the statutory maximum provided." *Robinson v. United States*, 454 A.2d 810, 813 (D.C. 1982). A sentence is illegally-imposed if the court had jurisdiction and the sentence is within the maximum provided by law, but the judge committed a procedural error in imposing sentence. *Id.* If a sentence is illegal, it may be challenged at any time under D.C. Crim. R. 35(a).[7] However, a sentence that is merely illegally-imposed must be challenged within 120 days of imposition. *Id. See Robinson, supra*, at 813. The D.C. Court of Appeals has ruled that paragraph (a) is identical to its federal counterpart and will be construed in light of the interpretation given to the latter by the federal courts. *See*

[7] Rule 35. Correction or reduction of sentence or collateral; setting aside forfeiture

(a) Correction of sentence. — 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.

(b) Reduction of sentence. — A motion to reduce a sentence may be made not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 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 or probation revocation….

McDaniels v. United States, 385 A.2d 180 (D.C. 1978); *United States v. Nunzio*, 430 A.2d 1372 (D.C. 1981); *Robinson, supra*; *Allen v. United States*, 495 A.2d 1145 (D.C. 1985).

Disregarding controlling local precedent,[8] in Mr. Littlejohn's case the D.C. Court of Appeals ruled that "where the trial court imposes an otherwise legal adult sentence on a FYCA-eligible defendant without making the 'no benefit' finding required by § 5010(d) of the FYCA, the sentence is imposed in an illegal manner but is not an 'illegal sentence' for purposes of Rule 35(a)." *Littlejohn, supra*, 749 A.2[d] at 1257. In reaching this conclusion the Panel did not cite a single case in which this Court or any federal court in the 50 years since the FYCA went into effect had concluded that an adult sentence imposed in the absence of a no-benefit finding was merely illegally-imposed.[9] In addition, without explanation it chose to reject the holding in the one cited case that squarely addressed the issue and reached the opposite conclusion.[10] *Goodwin, supra*, at 108.

The Tenth Circuit, in *United States v. Ahgoom*, 596 F.2[d] 433 (10th Cir. 1979), implicitly came to the same conclusion as the Sixth Circuit. In *Ahgoom* the Court, ruling on denial of a

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[8] In *Cole v. United States*, 384 A.2d 651, 652 (D.C. 1978), the government had conceded that a sentence that did not comply with the requirements of § 5010 was an illegal sentence and the D.C. Court of Appeals agreed. *Id.* It held that regardless of the maximum adult sentence for a crime, in the absence of an explicit finding that an eligible defendant will not benefit from a Youth Act sentence, the only sentencing options open to the trial court are embodied in § 5010(a), (b) and (c), which are mutually exclusive. *Cole, supra*, 384 A.2d at 653. The Court held that on remand for resentencing the Trial Court could not impose an adult sentence because "The imposition of an illegal sentence cannot give the trial court the authority to do now what it could not have done originally." *Id.* at 652

[9] The Panel's reliance on *United States v. Ramsey*, 655 F.2[d] 398, 401 (D.C. Cir. 1981), is misplaced. In that case the government had failed to file an information required to support a recidivist sentence enhancement, a procedural error. But, despite that error, in taking the plea and imposing an enhanced sentence the Trial Court had obtained Appellant's admission that he had previously been convicted of a drug crime. Contrary to the situation in the case at bar, in *Ramsey* the factual predicate supporting the enhancement had been established.

[10] With good reason the D.C. Court of Appeals did not cite the one case that might have supported its holding, *United States v. Abushaar*, 761 F.2[d] 954 (3[d] Cir. 1985). In that case the Court ruled that a sentencing judge was not required to make a no-benefit finding before imposing a sentence of adult probation because such a sentence would not fall within the terms of § 5010(b) or (c). The error in this logic is that a sentencing judge could impose adult probation on an FYCA-eligible defendant, and then upon revocation an adult prison term, without ever making a no-benefit finding. In that way a judge could thwart Congress's intent in passing the FYCA. That is exactly what happened in Mr. Littlejohn's case, and at oral argument one member of the D.C. Court of Appeals panel acknowledged that error in the reasoning of the *Abushaar* court. Other federal appellate courts have concluded that a Youth Act-eligible defedand could be sentenced to adult probation under § 5010(d) after the Trial Court made a no-benefit finding on the record. *See, e.g., United States v. Kurzyna*, 485 F.2[d] 517, 518 (2[d] Cir. 1973), *cert. denied*, 415 U.S. 949, 94 S. Ct. 1472, 39 L. Ed. 2[d] 565 (1974); *United States v. Jarratt*, 471 F.2[d] 226, 229 (9th Cir. 1972), *cert. denied*, 411 U.S. 969, 93 S. Ct. 2161, 36 L. Ed. 2[d] 691 (1973).

motion pursuant to 28 U.S.C. § 2255, remanded for resentencing because the Trial Court had not made an explicit no-benefit finding when the defendant originally came up for sentencing several months after this Court decided *Dorszynski*. *Id.* at 434. The panel ruled, long after expiration of the 120-day period for correction of an illegally-imposed sentence, that "[s]entencing proceedings, as here, where the 'no benefit' finding is ascertained only by an implication from a suggestion outside the sentencing record that the FYCA had been considered and rejected, are unacceptable." *Id.*

To reach its conclusion that Mr. Littlejohn's sentence was merely illegally-imposed, the Court focused on the process — the failure to make a finding — rather than on the substance, the absence of facts that must be found before an adult sentence may be imposed. As the D.C. Circuit recognized:

> While the District Court does have discretion to sentence a 19-year-old "youth offender" under either the applicable statutory offense provision or the Youth Corrections Act, we believe that this discretion is circumscribed by the findings of fact in the individual case which the District Judge is required to make whether explicitly or implicitly…. [T]he Court may sentence under the following subsection (d), but only if the applicable facts in the individual case meet the statutory requirements.

United States v. Waters, 437 F.2d 722, 725-6 (D.C. Cir. 1970).[11] "Only if the court found that the appellant youth offender would not derive benefit from rehabilitative treatment under the Youth Corrections Act did the District Court have discretion to sentence appellant under the regular adult statutory provision." *Id.* at 727. *See, also, Cox v. United States*, 473 F.2d 334, 344 (4th Cir.)(*en banc*), *cert. denied*, 414 U.S. 869, 94 S. Ct. 183, 38 L. Ed. 2d 116 (1973)(adopting the reasoning of *Waters, supra*). It is not sufficient that the Trial Court considered the FYCA; it is empowered to impose an adult sentence only after making the necessary factual finding that the defendant will not "derive benefit from treatment under the Act."[12] *United States v. Hopkins*, 531 F.2d 576, 579 (D.C. Cir. 1976). *See, also, United States v. Amidon*, 627 F.2d 1023,1024 (9th Cir.

[11] To the extent that *Waters* permitted imposition of an adult sentence on the basis of implicit findings it was overruled by *Dorszynski, supra*.

[12] This is so even when the relevant criminal statute imposes a mandatory-minimum life sentence. *United States v. Howard*, 449 F.2d 1086, 1092-3 (D.C. Cir. 1971).

1980)(appellant "could have filed a motion in the district court pursuant to Fed. R. Crim. P. Rule 35 to correct an illegal sentence"); *Brooks v. United States*, 497 F.2d 1059 (6th Cir. 1974)(Court agreed with appellant that an adult sentence imposed in the absence of a no-benefit finding was an illegal sentence); *United States v. Fortes*, 619 F.2d 108, 125 (1st Cir. 1980).

A series of decisions that arose in federal courts across the country in the wake of the *Dorszynski* decision clarifies that an adult sentence imposed without making a no-benefit finding is an illegal sentence, not merely an illegally-imposed sentence.[13] In 1977 the D.C. Circuit ruled that *Dorszynski* did not apply retroactively to require an explicit no-benefit finding in a case involving a defendant sentenced as an adult in 1961 who challenged his sentence in 1969. *United States v. Brackett*, 567 F.2d 501 (D.C. Cir. 1977), *cert. denied*, 433 U.S. 968, 98 S. Ct. 1605, 56 L. Ed. 2d 58 (1978).

The Fourth Circuit, applying *Dorszynski* retroactively, granted a defendant's 28 U.S.C. § 2255 motion seeking remand because the judge who sentenced him as an adult in 1969 had not made a no-benefit finding. *McCray v. United States*, 542 F.2d 1246 (4th Cir. 1976).

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[13] The appeals in these cases were brought under § 2255, not federal Rule 35, but that distinction is not relevant in this case. The D.C. Court of Appeals has only occasionally addressed the relationship between § 23-110 and D.C. Rule 35(a), but it has concluded that each is very similar to its federal counterpart, 28 U.S.C. § 2255 and federal Rule 35(a), respectively. *Pettaway v. United States*, 390 A.2d 981, 983 (D.C. 1978)(§ 23-110); *Norman, supra*, 623 A.2d at 1167 n. 9 (Super. Ct. Crim. R. 35(a) to be construed in light of interpretation given its federal counterpart).

In *United States v. Mathews*, 833 F.2d 161 (9th Cir. 1987), the Court delineated when it is appropriate to apply § 2255 as opposed to Rule 35. "The purpose of a Rule 35 motion is to challenge the sentence imposed, not to review errors that occurred before sentencing." *Id.* at 164. It went on to say that a Rule 35 motion attacking the jurisdiction of the sentencing court may be construed as a § 2255 motion because "a Rule 35 proceeding contemplates the correction of a sentence of a court having jurisdiction [while] jurisdictional defects … must ordinarily be presented under 28 U.S.C. § 2255." *Id.* According to the Sixth Circuit:

> Rule 35 presupposes a conviction and affords a procedure for bringing an improper sentence under it into conformity with the law. … Sec. 2255, Title 28, U.S. Code, on the other hand, covers the broader field of a collateral attack upon the validity of a judgment of conviction by reason of matters *dehors* the record.

Duggins v. United States, 240 F.2d 479, 484 (6th Cir. 1957)(citations omitted).

Particularly when dealing with *pro se* motions under Rule 35 and § 2255, the federal courts have a longstanding policy of interpreting such motions liberally to protect unlearned defendants from defeating their own claims by inartful drafting. For example, in *United States v. Coke*, 404 F.2d 836, 847 (2d Cir. 1968), the Court noted its approval of the fact that "Although Coke's application was labeled as under 28 U.S.C. § 2255, Judge Cooper, with the liberality proper in dealing with *pro se* motions, treated it alternatively as a motion under Rule 35." (citing *Heflin v. United States*, 358 U.S. 415, 418, 422, 79 S. Ct. 451, 3 L. Ed. 2d 407 (1959); *Hill v. United States*, 368 U.S. 424, 430. 82 S. Ct. 468, 7 L. Ed. 2d 417 (1962)).

The Fifth Circuit addressed the retroactivity question in a series of decisions beginning with *Hoyt v. United States*, 502 F.2d 562 (5th Cir. 1974), but it is difficult to tell in any of them the amount of time that elapsed between the sentencings and the filing of petitions to vacate adult sentences.[14] Arguably, by stating that under *Dorszynski* "18 U.S.C. § 5101(d) requires an explicit finding of 'no benefit' as a condition precedent to sentencing an eligible offender as an adult," the *Hoyt* court was saying that an adult sentence imposed in the absence of a no-benefit finding is an illegal sentence. *Id.* at 108. The Court noted in *United States v. James*, 528 F.2d 999, 1023 (5th Cir. 1976), that in *Hoyt* "the rule [established by *Dorszynski*] was applied, without comment on the retroactivity question, to a sentence which had become final."

The decision in *Goodwin, supra*, which the D.C. Court of Appeals specifically refused to credit, *see Littlejohn, supra*, 749 A.2d at 1258 n. 11, arose from a case in which defendant pled guilty in 1970 and served his entire one-year sentence many years before petitioning to vacate his adult sentence by retroactive application of *Dorszynski*. *Goodwin, supra*. at 108. In *Lawary v. United States*, 599 F.2d 218 (7th Cir. 1979) the defendant pled guilty in 1973 and 1974 and was sentenced as an adult. In 1978 he filed a motion pursuant to § 2255 claiming that he had been deprived of a Youth Act sentence because the Trial Judge improperly considered his prior convictions. The judge *sua sponte* concluded that he had not made the no-benefit finding in 1974 and did so in denying the § 2255 motion. The Seventh Circuit ruled that *Dorszynski* did not apply retroactively. *Id*. at 225.

The Eighth Circuit ruled in 1975 that the failure of two trial judges to make no-benefit findings in 1970 required a remand to determine whether appellant would benefit from treatment under the Youth Act. *Brager v. United States*, 527 F.2d 895 (8th Cir. 1975)(relying on *Sappington v. United States*, 518 F.2d 28 (8th Cir. 1975), for the proposition that *Dorszynski* applied retroactively). In *Rewak v. United States*, 512 F.2d 1184 (9th Cir. 1975), a defendant who completed his sentence in 1965 filed a writ of error *coram nobis* challenging his adult sentence imposed in 1963. The Ninth Circuit remanded the case for resentencing, stating that "*Dorszynski* noted that

[14] Hoyt's trial was in 1971 and the Fifth Circuit remanded for resentencing in 1975.

the benefits of sentencing under the Act extend even to those whose previous sentences had expired, for they could request resentencing under the Act and perhaps achieve early termination and expungement of their records." *Id*. at 1186 (citing *Dorszynski, supra*, 418 U.S. at 429 n. 6).

The Tenth Circuit ruled that an *ex post facto* ruling of no-benefit rendered by a trial judge considering a § 2255 motion to vacate an adult sentence would satisfy the requirements of *Dorszynski*. *Jackson v. United States*, 510 F.2d 1335, 1337 (10th Cir. 1975). In that case the defendant was sentenced in 1972 and his conviction was affirmed on appeal the following year.

In the Second Circuit the only decision in this area appears to be the District Court opinion in *Ferguson v. United States*, 447 F. Supp. 1213 (S.D.N.Y. 1978), in which the sentencing judge ruled that 10 years earlier he had reviewed the characteristics of the defendant and the crime and concluded implicitly that Ferguson would not benefit from a Youth Act sentence. The Judge embarked on this review in the belief that failure to have made such a finding would have rendered the sentence illegal. *Id.* at 1214-15.

In *Owens v. United States*, 383 F. Supp. 780 (M.D. Pa. 1974), *aff'd without op.* 515 F.2d 507 (3d Cir.), *cert. denied*, 423 U.S. 996, 96 S. Ct. 425, 46 L. Ed. 2d 371 (1975), the Court denied a petition challenging a 1962 adult sentence, ruling that *Dorszynski* did not apply retroactively.

Prior to repeal of the FYCA, Fed. R. Crim. P. 35(a) was identical to D.C. Crim. R. 35(a), permitting a challenge to an illegal sentence at any time, but limiting a challenge to an illegally-imposed sentence to the 120 days following sentencing, probation revocation or affirmance on appeal or *certiorari*.

With the exception of the Fifth Circuit, where the opinions do not indicate how much time elapsed between sentencing and the filing of motions attacking adult sentences, all of these federal cases involved appellants who challenging adult commitments more than 120 days after sentencing. Yet none of these federal courts resorted to the expedient the D.C. Court of Appeals applied in Mr. Littlejohn's case of declaring that an adult sentence imposed in the absence of a no-benefit finding is merely illegally-imposed and, therefore, the trial court lacked jurisdiction to reconsider the sentence. All of these courts, like the Sixth Circuit in *Goodwin, supra*, apparently

recognized that failure to make a no-benefit finding rendered the sentence illegal and subject to challenge at any time under federal Rule 35(a).

THE RECORD CONTAINS NO EVIDENTIARY SUPPORT FOR A NO-BENEFIT FINDING

The Supreme Court clearly said in *Dorszynski, supra*, that trial judges are not required to state the reasons behind their decisions not to impose Youth Act sentences. *Id.* at 441-2. But that holding does not stand for the proposition that a trial judge is free, once he or she has "considered" the Youth Act, to impose an adult sentence in the absence of evidence that the defendant is not amenable to treatment under the FYCA.

As the D.C. Circuit recognized in *Hopkins, supra*, it is not sufficient that a judge considered the FYCA prior to imposing an adult sentence. "The requirement of an express finding of no benefit ensures not only that the sentencing court is aware of the FYCA, but also that it focused on amenability to treatment in making its sentencing determination." *Id.* at 531 F.2d 579.

> The wisdom of this approach may be best illustrated by example. In *United States v. Van Buren*[, No. 72-1605 (D.C. Cir. Oct. 2, 1974)] we remanded for resentencing because the trial judge failed to make an explicit no benefit finding, although he did rely on a host of negative findings in the § 5010(e) report in denying FYCA sentencing. On remand the same trial judge — unable to make that finding — sentenced Van Buren to a Youth Act term.

Hopkins, supra, at 579. The judge must have a reason for the decision, even if it is unstated. In the absence of such a finding, the judge lacks authority to impose an adult sentence. *Waters, supra.*

The Second Circuit ruled in *United States v. Menghi*, 641 F.2d 72, 76 (2d Cir. 1981), that "The district judge here did make the required 'no benefit' ruling. However, the judge further stated that 'the court regards the Youth Corrections Act as absolutely no benefit in your case specifically or in any case that this Court will ever have and will never sentence under that Act.' " Such a policy on the part of sentencing judges would "effectively nullify an Act of Congress," the Court held. *Id.*

Applying this principle the Fourth Circuit, in *United States v. Ingram*, 530 F.2d 602 (4th Cir. 1976), vacated an adult sentence even though the Trial Court made an explicit finding that

the defendant would not benefit from a Youth Act sentence. The Court found that the Trial Judge believed, as a matter of policy, that defendants who committed armed robbery would not benefit from Youth Act sentences, and although he made an explicit finding, he did not consider "any factors peculiar to [the defendant] or his case." *Id.* at 603.

Similarly, the Fifth Circuit has ruled that a trial judge cannot insulate from review a decision not to impose a Youth Act sentence merely by stating that he considered and rejected such treatment.

> It is clear that the sentencing judge was of the opinion that anyone nineteen years of age, no longer a juvenile since he can both vote and sit on a jury, would not be benefited by the FYCA. Such a position is flagrantly contrary to the congressional intent to provide sentencing judges with discretion as to any defendant under the age of twenty-one.

United States v. Sparrow, 673 F.2^{d} 862, 866 (5th Cir. 1982). In that case appellant argued that his adult sentence was imposed in an illegal manner, and in vacating the adult sentence the Court of Appeals did not question that assertion.

In Mr. Littlejohn's case neither the government, which had agreed to imposition of a Youth Act sentence, nor the D.C. Court of Appeals adverted to any evidence tending to show that Petitioner would not have benefited from a Youth Act sentence. Rather, employing the presumption of regularity, the Panel assumed that the Trial Judge must have had some reason for denying Petitioner Youth Act treatment.[15] That is exactly the approach the Supreme Court rejected in *Dorszynski* when it rejected the government's argument that a finding of no benefit could be inferred from the trial judge's decision to impose an adult sentence.

The evidence available to the Sentencing Judge in 1986 is that Mr. Littlejohn was a first-time offender who sought psychological therapy immediately after his arrest in this case. By the time he was sentenced he had been in treatment at the Human Sexuality Institute for over two

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[15] Whether the Sentencing Judge considered application of the FYCA is unknown. Under operating procedures of the D.C. Court Reporter Service, untranscribed notes and tape recordings of proceedings are destroyed 10 years after the proceedings. Mr. Littlejohn did not appeal the ruling denying review of his sentence until 1998, 12 years after the sentencing. However, had the Collateral Attack Judge seriously considered the merits of Petitioner's motion in 1996 she could have ordered the transcripts or she could have ordered a response from the government, which would then have had to obtain the transcripts. Mr. Littlejohn's appellate counsel located a transcript of the plea hearing, which the Sentencing Judge had ordered, in the Superior Court chambers file.

years. The probation officer who prepared the Presentence Investigation Report was well aware that Petitioner was eligible for a Youth Act sentence and could have recommended an adult sentence if she believed he was not amenable to treatment. Her recommendation of psychological counseling in a structured environment, family counseling and incarceration therefore must be read as contemplating treatment at the Youth Center, the only D.C. correctional facility to offer such services. The Classification Team that performed the Youth Act study recommended that Mr. Littlejohn receive therapy while in the community, concluding that he was not a danger to others and would benefit greatly from treatment under the Youth Act.

Implicit in the procedural history of Mr. Littlejohn's case are findings by the Trial Judge and the Sentencing Judge that he would benefit from Youth Act probation. There is no question that Mr. Littlejohn was eligible for sentencing under the FYCA when he pleaded guilty February 25, 1985 because he was only 20 years old at the time. The Trial Judge clearly did not believe incarceration was warranted at that time. He allowed Mr. Littlejohn to remain in the community under treatment without probation supervision, as he had since the case began.

When the case first came up for sentencing May 9, 1985, the Trial Judge had received the Presentence Investigation Report recommending incarceration. But at that hearing the Judge ordered Petitioner to be committed to the Youth Center under § 5010(e) for a Youth Act study, which he received prior to the next sentencing hearing July 9, 1985. There is nothing in the record indicating why the Trial Judge did not sentence Mr. Littlejohn that day or January 15, 1986, when the case next came up on his calendar. But the only inference that can be draw from his decisions to permit Petitioner to remain in the community and in treatment for a year is that he believed incarceration of any type was unnecessary.

Mr. Littlejohn's, apparently was complying with all conditions of his release when his case was reassigned in April 1986. The Sentencing Judge first reviewed the case July 15, 1986, the date the Trial Judge had set for continuation of the sentencing hearing, and illegally imposed two adult sentences to run consecutively, but suspended execution of both sentences. The Judge placed Petitioner on probation for five years with the condition that he remain in the intensive

therapy program at the Human Sexuality Institute until the Court terminated his therapy. Despite the adult sentence, the Sentencing Judge's decision to permit Mr. Littlejohn to reside in the community and obtain treatment in compliance with the recommendation of the Youth Act study is tantamount to a finding that Petitioner would benefit from treatment under § 5010(a), Youth Act probation.

Mr. Littlejohn's successful completion of the therapy program a year later and the Sentencing Judge's decision October 15, 1987 to terminate the therapy confirms that Petitioner benefited from the opportunities that should have been afforded him under § 5010(a).

Given this set of facts it is hard to imagine how the Sentencing Court, taking into account the unique characteristics of the defendant before it, could have found that Mr. Littlejohn would not have benefited from a Youth Act sentence. Under these circumstances the government is not entitled to any presumption that the sentence imposed conformed to the requirements of the FYCA.

CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Court grant his Petition for Writ of Certiorari, declare that his adult sentence imposed without an explicit no-benefit finding is an illegal sentence, and remand the case with direction that he be resentenced in compliance with 18 U.S.C. § 5010 of the Federal Youth Corrections Act.

Respectfully submitted,

____

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A P P E N D I X

BILLY D. LITTLEJOHN, APPELLANT, v. UNITED STATES, APPELLEE.

No. 98-CO-907

DISTRICT OF COLUMBIA COURT OF APPEALS

749 A.2d 1253; 2000 D.C. App. LEXIS 93

March 20, 2000, Argued

April 20, 2000, Decided

JUDGES:
Before REID and GLICKMAN, Associate Judges, and BELSON, Senior Judge.

OPINION:

[*1253]

REID, *Associate Judge*: In this case, appellant Billy D. Littlejohn asserts that the trial court imposed an illegal sentence on him in 1986, because **[*1254]** of its failure to make a "no benefit" determination under the Federal Youth Corrections Act ("the FYCA" or "the Youth Act"), *18 U.S.C. § 5010* (d) n1 prior to sentencing. We affirm the conviction.

n1 Section 5010 (d) provided: "If the court shall find that a youth offender will not derive a benefit from treatment under subsection (b) or (c) [of FYCA], then the court may sentence the youth offender under any other applicable provision." The FYCA was repealed in 1984, but continues to be applicable to persons like Littlejohn whose crimes took place prior to October 12, 1984.

FACTUAL SUMMARY

In 1985, Littlejohn, then twenty years of age, entered a plea of guilty to one count of carnal knowledge, in violation of D.C. Code § 22-2801 (1973), and one count of taking indecent liberties with a minor, in violation of § 22-3501 (a). Prior to his sentencing, the Honorable H. Carl Moultrie I, now deceased, ordered a study under the FYCA, *18 U.S.C. § 5010* (e) n2 to determine whether Littlejohn would benefit from treatment and supervision as a youth. In July 1986, however, after Chief Judge Moultrie's death, another judge sentenced Littlejohn as an adult to two terms of incarceration, but the sentences were suspended and he was placed on probation. n3

n2 Section 5010 (e) stated:

If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) [of the FYCA], it may order that he be committed to the custody of the Attorney General for observation and study at an appropriate classification center or agency. Within sixty days from the date of the order, or such additional period as the court may grant, the Commission shall report its findings. **[**3]**

n3 The Honorable Robert M. Scott, now deceased, sentenced Littlejohn to a term of five to fifteen years in prison on the carnal knowledge count, and a consecutive term of three to nine years on the indecent liberties count. His sentence was suspended and he was placed on supervised probation for five years. In 1988, Littlejohn's probation was revoked after he tested positive for drugs on three occasions, and failed to keep appointments with his probation officer and a human sexuality clinic, as required by his probation agreement.

Subsequent to the revocation of his probation in 1988, Littlejohn filed seven *pro se* post-conviction relief motions in the trial court between the years 1989 and 1997. n4 For example, on July 10, 1996, he sent a "Motion to vacate illegal sentence" to the trial court. In that motion he

argued that when he was placed on five years probation in 1985, he was sentenced under the Youth Act and was illegally re-sentenced as an adult in 1988 after his probation was revoked. He asserted that "Judge Scott did not follow the Youth Act guidelines for Youth Act violators." **[**4]** The motions judge, the Honorable Ellen Segal Huvelle, denied Littlejohn's motion. After referencing his revocation of probation, Judge Huvelle stated:

Judge Scott imposed the original sentences of 5-15 years and 3-9 years to run consecutively.

In short, the sentences imposed were exactly the same as the original suspended sentences and defendant was not sentenced pursuant to the Youth Act, so there was no need for Judge Scott to apply Youth Act guidelines to the revocation of probation. There is thus no basis for any challenge to the legality of defendant's sentence.

Littlejohn's most recent collateral attack on his sentence occurred on August 12, 1997, when he filed a petition which the motions judge, again Judge Huvelle, construed as a "*pro se* habeas corpus petition pursuant to D.C. Code [] § 23-110 (1996)." Littlejohn stated, *inter alia*, that Judge Moultrie had sentenced him in 1985 to five years probation under the FYCA, and that **[*1255]** his probation was revoked after "a technical violation." He complained that he was sentenced as an adult, rather than as a youth offender. As relief, he sought treatment as a youth offender under *18 U.S.C. § 5010* (b) **[**5]** or (c). n5 In essence, he argued that the trial court failed to make a "no benefit" determination. The government maintained that Littlejohn's "petition should be denied as a successive petition."

> n4 Littlejohn was paroled in June 1994, and subsequently, the South Carolina Department of Probation, Parole and Pardon Services accepted him for parole supervision. His parole was revoked in 1996 for violation of his parole conditions. He returned to the District from South Carolina without reporting to District authorities.
>
> n5 Section 5010 (b) provided:
>
> If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under the applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Commission as provided in section 5017 (c) of this chapter.
>
> Section 5010 (c) specified:
>
> If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Commission prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Commission as provided in section 5017 (d) of this chapter.

On April 8, 1998, Judge Huvelle denied Littlejohn's petition. She recognized that: "The [FYCA] requires that a sentencing court make a finding that a young defendant will not benefit from Youth Act treatment before sentencing him as an adult." However, she denied Littlejohn's petition on the grounds that it was "a successive claim for collateral relief" under § 23-110 (e), and constituted "an abuse of the writ because [Littlejohn] had already filed several prior § 23-110 motions without raising the 'no benefit' argument." Judge Huvelle also noted that Littlejohn had not been sentenced by Judge Moultrie in 1985, but that his sentencing had been continued several times until he was finally sentenced as an adult on July 22, 1986, by Judge Scott. Furthermore, Judge Huvelle stated in a footnote that:

Judge Scott's alleged failure to make a "no benefit" finding arguably goes to the manner in which the sentence was imposed, rather than to the legality of the sentence. Although it is contended that Judge Scott erred procedurally in failing to make a "no benefit" finding prior to sentencing defendant

as an adult, it is not alleged that Judge Scott lacked jurisdiction to impose the sentence **[**7]** or that the sentence was in excess of the statutory maximum prescribed by the statute.

Judge Huvelle decided to address what appeared to be "[Littlejohn's] real challenge ... [—] Judge Scott's alleged failure to make a 'no benefit' finding at the time of sentencing (as opposed to at the probation revocation hearing) ...." In considering Littlejohn's challenge, Judge Huvelle cited *Matos v. United States, 631 A.2d 28 (D.C. 1983)* and concluded that he had not shown the required "cause for his failure to [raise the "no benefit" argument in prior collateral attacks on his sentence] and prejudice as a result of his failure." *631 A.2d at 30* (quoting *Head v. United States, 489 A.2d 450, 451 (D.C. 1985)* (citation omitted)). Therefore, she determined that Littlejohn was procedurally barred from making his August 1997 attack on his sentence. The trial court denied Littlejohn's motion for reconsideration.

ANALYSIS

The essence of Littlejohn's argument on appeal is that his August 1997 petition should have been treated as a motion to vacate an illegal sentence under Super. Ct. Crim. R. 35 (a) n6 and that the motions **[*1256]** court **[**8]** abused its discretion in denying his petition. The government primarily argues that the motions court properly denied Littlejohn's petition under § 23-110, and that even if his petition had been construed as a request for Rule 35 (a) relief, he could not prevail because the petition was untimely.

> n6 Rule 35 (a) provides: *"Correction of sentence*. 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." Rule 35 (b) states in relevant part:
>
> *Reduction of sentence*. A motion to reduce a sentence may be made not later than 120 days after the sentence is imposed or probation is revoked, or not later than 120 days after receipt by the Court of a mandate issued upon affirmance of the judgment or dismissal of the appeal, or not later than 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 or probation revocation.

In *Neverdon v. District of Columbia, 468 A.2d 974 (D.C. 1983),* we said: "An illegal sentence may be corrected at any time, whether the challenge to the sentence is by motion under Super. Ct. Crim. R. 35 (a) or under D.C. Code § 23-110." *Id. at 975.* Furthermore, we declared:

Because the sentencing court may correct an illegal sentence under Rule 35 "at any time," we think it clear that the trial court would have the power to entertain and grant appellant's second motion, notwithstanding its denial of the earlier motion to the same effect. However, as with relief under D.C. Code § 23-110 and its federal analogue, *28 U.S.C. § 2255,* certain preclusion principles do apply to Rule 35 motions. A trial court may, in the exercise of discretion, refuse to entertain a second Rule 35 motion relying on objections previously advanced unsuccessfully. *Id*. (citing *United States v. Quon, 241 F.2d 161, 163* (2d Cir.), *cert. denied*, *354 U.S. 913, 1 L. Ed. 2d 1431, 77 S. Ct. 1302 (1957)).* We added: "Thus, although strict principles of res judicata do not apply to motions seeking relief from an illegal **[**10]** sentence, 'this does not mean that a prisoner may again and again call upon a court to repeat the same ruling. ...'" *Id*. (citing *United States ex rel. Gregoire v. Watkins, 164 F.2d 137, 138 (2d Cir. 1947)). See also Moore v. United States, 608 A.2d 144, 145-46 (D.C. 1992).*

Putting aside, without deciding, the issue of a successive claim, and assuming, again without deciding, that the trial court should have treated Littlejohn's petition as a motion under Rule 35, we conclude that, based on the information before us, n7 Littlejohn was sentenced in 1986, not 1985, and that under the majority decision in *Robinson v. United States, 454 A.2d 810 (D.C. 1982),* his sentencing was not illegal. In *Robinson* we distinguished between an illegal sentence and an illegally imposed sentence:

Where the sentence is "illegal" in the sense that the court goes beyond its authority by acting without jurisdiction or imposing a sentence in excess of the statutory maximum provided, then such sentence — because of the gravity of the error, the unqualified deprivation of one's liberty — may be changed at any time. However, where

a court of competent **[**11]** jurisdiction imposes a sentence within the limits authorized by the relevant statute, but commits a procedural error in doing so, it is not an abuse of discretion nor unreasonable — when balancing concepts of fairness and finality — to characterize this sentence as one imposed in an "illegal manner" under Rule 35 (a) and therefore subject to the 120-day jurisdictional limitation for challenge. *454 A.2d at 813.* The trial court had the jurisdiction to impose sentence on Littlejohn and its sentence was consistent with the statutory penalties for carnal knowledge and taking indecent liberties with a minor. *See United States v. Ramsey, 210 U.S. App. D.C. 285, 288, 655 F.2d 398, 401 (1981)* ("To rule that in the circumstances of this case, the District Court's failure to **[*1257]** follow [the Federal Youth Corrections Act] rendered appellant's sentence an illegal sentence would ignore completely the distinction established by Congress in Rule 35 between an 'illegal sentence' and a sentence imposed in 'an illegal manner.').

> n7 The records pertaining to Littlejohn's 1985 FYCA study and his probation, as well as his 1986 sentencing have been destroyed due to the passage of time. In addition, the judges and defense counsel who participated in those processes have since died.

We are unpersuaded by the authorities on which Littlejohn relies in contending that he was subjected to an illegal sentence. Citing *Cole v. United States, 384 A.2d 651, 653 (D.C. 1978),* Littlejohn argues that: "Regardless of the maximum adult sentence for a crime, in the absence of an explicit finding that an eligible defendant will not benefit from a Youth Act sentence, the only sentencing options open to the trial court are embodied in § 5010 (a), (b) and (c), which are mutually exclusive." n8 He also relies upon *Dorszynski v. United States, 418 U.S. 424, 41 L. Ed. 2d 855, 94 S. Ct. 3042 (1974). Cole*, *supra*, is distinguishable from Littlejohn's case. There the trial judge made an explicit finding that Cole would benefit from a FYCA sentence, but imposed an adult sentence with respect to one of the three counts on which Cole was convicted, and a FYCA sentence with regard to the other two. *Cole*, *supra*, 384 A.2d at 652. Littlejohn was sentenced as an adult on both of his convictions. Moreover, Littlejohn's contention that Judge Moultrie and Judge Scott implicitly made a "benefit" finding under the FYCA is speculative in the absence **[**13]** of a record showing that the judge exercised his discretion to make a "benefit" finding. n9 In addition, we see nothing in *Dorszynski*, *supra*, supporting Littlejohn's assertion that an illegal sentence was imposed on him under the FYCA.

> n8 Section 5010 (a) provided: "If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

> n9 In the absence of evidence to the contrary, the government is entitled to a "'presumption of regularity' that attaches to final judgments, even when the question is waiver of constitutional rights." *Parke v. Raley, 506 U.S. 20, 29, 121 L. Ed. 2d 391, 113 S. Ct. 517 (1992)* (citing *Johnson v. Zerbst, 304 U.S. 458, 464, 468, 82 L. Ed. 1461, 58 S. Ct. 1019 (1938)).* Thus, even when a collateral attack on a final conviction rests on constitutional grounds, the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the defendant.
>
> *506 U.S. at 31* (citing *Johnson*, *supra*, 304 U.S. at 468-69)

The Supreme Court in *Dorszynski* interpreted FYCA as providing "two new alternatives to add to the array of sentencing options previously available to [federal district judges]." n10 *418 U.S. at 433* (footnote omitted). Despite these two new alternatives, however, the Supreme Court declared that: "The legislative history [of the FYCA] clearly indicates that the Act was meant to enlarge, not restrict, the sentencing options of federal trial courts in order to permit them to sentence youth offenders for rehabilitation of a special sort." *Id. at 436.* These new sentencing options were procedural in nature, not substantive. As the Supreme Court stated:

> The authority to sentence a youth offender under "any other applicable penalty provision" is expressly reserved to federal trial courts by § 5010 (d), and thus is within the permissible range of sentences which may be imposed under the Act.

The "no benefit" finding required by the Act is not to be read as a substantive standard which must be satisfied to support a sentence outside the Act, for such a reading would subject **[*1258]** the sentence to appellate review even though the sentence was permitted by the **[**15]** Act's terms, thereby limiting the sentencing court's discretion. *Id. at 441.* Thus, even when a report, completed under § 5010 (e) of the FYCA, recommends youth offender treatment, "the trial judge may accept the recommendation ... [, b]ut he is also free to reject it." *United States v. Dancy, 166 U.S. App. D.C. 399, 405, 510 F.2d 779, 785 (1975).* n11

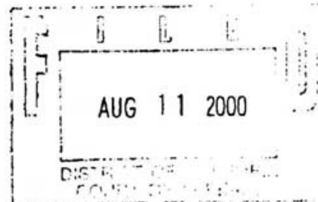
> n10 The new sentencing alternatives were:
>
> First, [federal district judges] were enabled to commit an eligible offender to the custody of the Attorney General for treatment under the Act. *18 U.S.C. § § 5010* (b) and (c). Second, if they believed an offender did not need commitment, they were authorized to place him on probation under the Act. *18 U.S.C. § 5010* (a). If the sentencing court chose the first alternative, the youth offender would be committed to the program of treatment created by the Act.
>
> *418 U.S. at 433.*
>
> n11 Littlejohn also cites *Goodwin v. United States, 602 F.2d 107, 108 (6th Cir. 1979)* in support of his contention that he was subjected to an illegal sentence. We decline to follow the reasoning of this case.

In light of our analysis, we conclude that Littlejohn was not subjected to an illegal sentence. Specifically, we hold that where the trial court imposes an otherwise legal adult sentence on a FYCA-eligible defendant without making the "no benefit" finding required by § 5010 (d) of the FYCA, the sentence is imposed in an illegal manner but is not an "illegal sentence" for purposes of Rule 35 (a).

Because Littlejohn did not assert, within the time limits set forth in Rule 35 (b), that the trial court erred in not making a "no benefit" determination under FYCA before sentencing him as an adult, his petition is untimely. Consequently, the trial court did not err in denying his petition, because "it is settled that the 120-day limitation in Rule 35[] is a grant of jurisdiction and may not be extended." *Robinson*, *supra*, 454 A.2d at 813 n.6 (citing *McDaniels v. United States, 385 A.2d 180 (D.C. 1978)* (other citation omitted)).

Accordingly, for the foregoing reasons, we affirm the judgment of the trial court.
So ordered.

District of Columbia
Court of Appeals



No. 98-CO-907

BILLY D. LITTLEJOHN,
Appellant,
F2740-84

v.

UNITED STATES,
Appellee.

BEFORE: Wagner, Chief Judge; Terry, Steadman, Schwelb, Farrell, Ruiz, *Reid, *Glickman, and Washington, Associate Judges; *Belson, Senior Judge.

ORDER

On consideration of appellant's petition for rehearing or rehearing en banc, and the opposition thereto, it is

ORDERED by the merits division* that the petition for rehearing is denied; and it appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM

Copies to:

Honorable Ellen Segal Huvelle

Clerk, Superior Court

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Assistant United States Attorney

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