IN THE

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 98-CO-907

Billy D. Littlejohn,

Appellant,

vs.

United States,

Appellee.

On Appeal from the District of Columbia Superior Court
F 2740-84

Brief of Appellant

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QUESTIONS PRESENTED

1. Whether Appellant's adult sentence of 8- to 24-years imprisonment is illegal because the Trial Court, in violation of 18 U.S.C. § 5010, made no finding that he would not benefit from treatment under the Federal Youth Corrections Act and, in fact, implicitly determined that he would benefit; and whether, because the Trial Court deprived him 13 years ago of the benefit of 18 U.S.C. § 5021, this Court should vacate Appellant's conviction and issue a certificate to that effect?

2. Whether the Trial Court abused its discretion by denying as a successive motion, and as procedurally barred because it had not been raised previously, Appellant's collateral attack on the legality of his sentence on the first occasion it was presented to the Court, without addressing the merits of Appellant's claim?

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IN THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BILLY D. LITTLEJOHN, **APPELLANT,** vs. **UNITED STATES,** **APPELLEE.**	No. 98-CO-907 (F 2740-84)

BRIEF OF APPELLANT

This appeal arises from a series of unfortunate events, both for the District of Columbia judicial system and for Mr. Littlejohn personally. Initially the case was assigned to Chief Judge H. Carl Moultrie, who presided over it until his death. It was reassigned to Judge Robert M. Scott, who similarly presided until his death. Mr. Littlejohn's trial lawyer was Melvin Dildine, who also has died, and whose case file was destroyed when his residence was damaged in a storm nearly a decade ago.

Further complicating understanding of what has transpired since this case began more than 15 years ago is the fact that no transcripts were ordered of at least two highly relevant proceedings held by Judge Scott before the notes were destroyed in compliance with ordinary practice in the Court Reporter Service to dispose of such materials after 10 years.

As a result of these factors, Mr. Littlejohn, who was 19 years old when the crimes occurred and 20 when he pleaded guilty in February 1985, and who in 1987 successfully completed the treatment recommended in a study prepared under the Federal Youth Corrections Act, 18 U.S.C. § 5005 et seq., remains in prison today, serving an illegal 8- to 24-year sentence, rather than the maximum of six years that could have been imposed under the FYCA. *See* 18 U.S.C. § 5017(c).[1]

[1] 18 U.S.C. § 5017 states in relevant part:

Release of youth offenders

Continued on next page …

STATEMENT OF THE CASE

Billy D. Littlejohn was arrested April 12, 1984 on a charge of taking indecent liberties with a minor in violation of D.C. Code § 22-3501 sometime in September 1983. R. 3.[2] He 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 incidents between July 1, 1983 and April 7, 1984. R. 8. The allegations involved two girls, N.J. and K.F. Mr. Littlejohn was arraigned November 7, 1984 before Chief Judge H. Carl Moultrie and entered a plea of not guilty. R. 2, 1.

At a hearing February 25, 1985 Appellant 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 Youth Act sentence if one were recommended by youth authorities." Tr. 2/25/84, 2-3 (Supp. R. A).[3] At the conclusion of the hearing the Trial Court ordered preparation of a Presentence Investigation Report and released Mr. Littlejohn on his own recognizance. R. 2, 1.

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

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… Continued from previous page.

> (a) The Commission may at any time after reasonable notice to the Director release conditionally under supervision a committed youth offender in accordance with the provisions of section 4206 of this title. When, in the judgment of the Director, a committed youth offender should be released conditionally under supervision he shall so report and recommend to the Commission.
>
> (b) The Commission may discharge a committed youth offender unconditionally at the expiration of one year from the date of conditional release.
>
> (c) A youth offender committed under section 5010(b) of this chapter shall be released conditionally under supervision on or before the expiration of four years from the date of his conviction and shall be discharged unconditionally on or before six years from the date of his conviction.

[2] 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.

[3] In an order issued April 16, 1999 the Court 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 2/25/85; 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."

did not specifically request sentencing under the 18 U.S.C. § 5010.[4] The Presentence Investigation Report prepared by the Probation Department recommended incarceration. Supp. R. B. The Judge committed Mr. Littlejohn to the Youth Center for evaluation pursuant to 18 U.S.C. § 5010(e) when the case came up for sentencing May 9, 1985.[5] R. 2 and R. 15.

Judge Moultrie 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, instead of issuing a commitment order, the Judge continued the case until mid-January 1986 and released Mr. Littlejohn on his own recognizance to

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[4] 18 U.S.C. § 5010 states:

> (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.
>
> (e) If the court desires additional information as to whether a youth offender will derive benefit from treatment under subsections (b) or (c) 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 to the court its findings.

[5] Counsel has determined that no transcript of this proceeding exists. Until undersigned counsel was appointed August 19, 1998, no one had requested preparation of any transcripts related to this case other than the plea hearing, which Judge Scott ordered. The Court Reporter Service routinely destroys reporters' notes and tapes 10 years after the proceedings to which they relate, and counsel was informed, in response to a Motion for Preparation of Transcripts, that only proceedings occurring in 1988 or later could be produced. Counsel located a copy of the plea hearing transcript in the chambers file maintained by Judge Ellen S. Huvelle.

continue therapy at the Human Sexuality Institute. R. 2, 1. Judge Moultrie again continued the case at the January 15, 1986 hearing until July 16, 1986.[6] *Id.* at 1-2.

In April 1986, after Judge Moultrie's death, the case was reassigned to Judge Robert M. Scott, and when it came up for review in July, the Judge imposed an adult sentence on Mr. Littlejohn. He sentenced Appellant to 5 to 15 years for carnal knowledge and 3 to 9 years for taking indecent liberties, the terms to run consecutively. The 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."[7] 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, and in a memorandum to Judge Scott dated July 14, 1987, the Probation Department asked that a hearing be held "to determine if further therapeutic treatment is needed." Supp. R. E. Judge Scott sent a letter to Mr. Littlejohn dated September 8, 1987, informing him of the recommendation and setting a hearing date. R. 17. At the hearing October 15, 1987 the Judge was satisfied with the report, terminated the therapy requirement, continued probation, and ordered Mr. Littlejohn to pay the Human Sexuality Institute $90.[8] R. 2, 2.

In response to a violation report prepared by Mr. Littlejohn's probation officer July 13, 1988, the Judge issued an Order to Show Cause citing as grounds failure to keep appointments with the probation officer, three positive drug tests, failure to report to the Human Sexuality Institute every two months and failure to pay the $90 assessment. At the hearing August 3, 1988

[6] No transcripts are available of the July 9, 1985 or January 15, 1986 hearings.
[7] No transcript is available of the July 16, 1986 hearing.
[8] No transcript is available of the October 15, 1986 hearing. There is no written order amending Mr. Littlejohn's conditions of release. The docket notation lists payment to the Human Sexuality Institute as the only new condition of release, but the Show Cause Order Judge Scott 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.

the Judge ruled that Mr. Littlejohn had violated his probation by using cocaine and stepped him back for further proceedings in September.[9] Tr. 8/3/88, 8.

At a continuation of the show cause hearing the following colloquy occurred:

> THE COURT: All right. This matter is a show cause which I revoked his probation on August 3rd and deferred the sentencing until today.
> …
> When I originally sentenced him, he got five to fifteen years on the carnal knowledge conviction and three to nine on taking indecent liberties with a minor child.
>
> [DEFENSE COUNSEL]: If I may, that was the Late Chief Judge Moultrie.
>
> THE COURT: I beg your pardon. You are right. It was. So he has eight to twenty-four.
>
> [DEFENSE COUNSEL]: I agree.
> …
> … He plead guilty to very serious offenses back in 1985. … We arranged for a program of therapy for him. He had a very difficult childhood, as is not uncommon in these cases. He, himself, was the victim of sexual abuse and considering all these factors, Chief Judge Moultrie held off sentencing him for a long time to see how he would do. He wasn't ultimately sentenced until, I think, July of '86. Judge Moultrie then placed him on probation with, of course, certain strict conditions.

Tr. 9/16/88, 3-4. Although defense counsel had apparently made no motion for reduction of sentence, the Judge noted that one of the purposes of the hearing was to consider a sentence reduction. *Id.* at 4. After Judge Scott said he would not reduce the sentence and, in fact, directed enforcement of the 8- to 24-year sentence he imposed in July 1986, counsel made a half-hearted request that the sentences run concurrently, which the Judge also rejected. *Id.* at 8.

Early in 1989 Mr. Littlejohn began a lengthy series of *pro se* attempts to challenge his conviction and sentence in the Superior Court. He sent the Trial Court seven letters between January 28, 1989 and April 8, 1990.[10] In them he requested a sentence reduction, claimed that he did not commit some of the crimes with which he was charged, claimed ineffective assistance of

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[9] In the hearing the Judge referred to a defense motion to reduce the sentence, but there is no motion in the file or entry in the docket indicating such a motion was filed, and defense counsel made no such motion verbally at the hearing. At the beginning of the hearing, as Judge Scott was reviewing the record verbally, defense counsel incorrectly informed him that Judge Moultrie, not he, had issued the adult sentence. Tr. 8/3/88, 2. Defense counsel repeated the error in a subsequent hearing on the show cause order September 16, 1988 and Judge Scott erroneously agreed with him. Tr. 9/16/88, 3.

[10] Six of the letters are included in the record as part of R. 25.

counsel, and argued that the charge of carnal knowledge was not explained to him prior to the plea. Citing D.C. Code § 23-113(a), he claimed that his prosecution was barred by the statute of limitations and, citing the revised child sexual abuse statute, D.C. Code § 22-4108 et seq., argued that the two charges to which he pleaded guilty merged and, therefore, he could not receive consecutive sentences for them.

Judge Scott treated the letters as a single D.C. Code § 23-110 motion and denied it April 30, 1990. R. 25. The Court ruled that Appellant's requests for a sentence reduction were barred by D.C. Crim. R. 35(b) because they were not made until more than 120 days after his probation was revoked. *Id.* at 1. The Court concluded that Mr. Littlejohn's claims of innocence concerning alleged crimes against K.F. would not justify vacation of his conviction because all charges identifying K.F. as the victim were dismissed as part of the plea agreement and, therefore, even if he were innocent of those charges his conviction would stand. *Id.* at 3. Appellant's ineffectiveness claim did not justify vacation of the conviction because Trial Counsel filed a motion in aid of sentencing urging that Mr. Littlejohn be place on probation to receive treatment and the Court followed that recommendation. "Therefore, it is readily apparent that trial counsel's representation at defendant's sentencing was well within the prevailing professional norms." *Id.* at 4. The Judge rejected Appellant's post-sentencing claim of entitlement to a new trial because the crime of carnal knowledge was not fully explained, on grounds that there was no defect in the D.C. Crim. R. 11 proceeding and Appellant had proffered no support for a claim that he would suffer "manifest injustice" if the plea were allowed to stand. *Id*. at 6. Noting that the limitation period under § 23-113(a) for crimes other than first- and second-degree murder is six years, the Judge ruled that the prosecution began well within the statute's limits. *Id.* at 5. Finally, the Judge stated that the carnal knowledge and indecent liberties charges to which Appellant pleaded guilty arose from two separate incidents, so they would not merge, even under the revised child sexual abuse statute. *Id*. at 6.

Judge Scott did not appoint counsel to represent Mr. Littlejohn and concluded that no hearing on the motion was require, citing *Pettaway v. United States*, 390 A.2d 981 (D.C. 1978).

In November 1987 Mr. Littlejohn filed a Petition for Writ of Habeas Corpus pursuant to D.C. Code § 16-1901, which was referred to Judge Nan R. Huhn. R. 24, 3. In it he alleged ineffective assistance of counsel prior to the plea and that he had been arrested illegally. Judge Huhn ruled that she lacked jurisdiction to consider the petition because Mr. Littlejohn was housed in a facility outside the District not run by the D.C. Department of Corrections, *Id.* Finding that his claims were more properly presented in a § 23-110 motion, she forwarded the petition to Judge Scott, who ruled June 15, 1990 that this motion was duplicative of the motion the Court had denied in April and again denied Appellant's ineffectiveness claims. R. 26.

Between January 6, 1991 and November 27, 1992 Mr. Littlejohn wrote 17 more letters to Judge Scott and the Superior Court Clerk raising many of the same issues.[11] After Judge Scott's death the case was reassigned to Judge Ellen S. Huvelle, who issued a Memorandum and Order December 2, 1992 again denying Appellant's § 23-110 motion. R. 31. She denominated the issues raised in this series of letters as follows:

> (1) he believed his plea agreement included only a plea to one count of carnal knowledge, and not to an additional count of taking indecent liberties with a minor; (2) there was insufficient evidence to support the count of taking indecent liberties with a minor to which he plead guilty; (3) his counsel, Melvin Dildine, Esq., was ineffective because he failed to instruct defendant about how to challenge his sentence and to warn him about the 120-day jurisdictional limit established in Super. Ct. Crim. R. 35; and (4) he was incompetent at the time of the probation revocation hearing due to his drug addiction.

Id. at 4. The Judge ruled that, pursuant to § 23-110(e), the Court was not required to entertain successive motions for similar relief, and that she concurred with Judge Scott's prior ruling concerning the propriety of the plea hearing. Judge Huvelle ruled that Mr. Littlejohn validly waived his right to trial and could not challenge the sufficiency of the evidence against him. *Id.* at 5. Because a criminal defendant has no Sixth Amendment right to counsel in seeking post-conviction relief, the Judge said it was irrelevant whether Trial Counsel had failed to inform Mr. Littlejohn of the 120-day limit on seeing a reduction of sentence. *Id.* at 5 – 6. She further found that Judge Scott acted legally when, following a show cause hearing, he revoked Appellant's

[11] These letters are included in the Record on Appeal as R. 30.

probation and imposed the original sentence, and that the fact that Mr. Littlejohn was addicted to cocaine did not render him incompetent for purposes of such a proceeding. *Id.* at 6. Once again, his § 23-110 motion was denied without a hearing.

Mr. Littlejohn was released on parole June 13, 1994 and was rearrested for technical violations June 18, 1996. The D.C. Parole Board revoked his parole September 17. 1996.

In a Motion to Vacate Illegal Sentences filed July 12, 1996 Mr. Littlejohn for the first time argued that Judge Scott acted illegally in imposing an adult sentence on him. R. 32. Judge Huvelle treated the pleading as a § 23-110 motion, rather than as a motion to correct an illegal sentence pursuant to Rule 35(a) , and ruled that this claim was based on "several factual inaccuracies." R. 33, 1. She concluded that because Judge Scott sentenced Mr. Littlejohn as an adult, he was not required to "apply Youth Act guidelines to the revocation of probation." She denied the motion, again without first appointing counsel to investigate the claim and without a hearing.

Mr. Littlejohn wrote two letters to Judge Huvelle, one in August 1996 asking for a sentence reduction under Rule 35 and the other in early 1997 captioned "{D.C. Code § 23-110} Motion to Impose Concurrent Sentences." The Judge responded to both by letter, stating that she lacked jurisdiction to alter the sentence imposed by Judge Scott because the requests were filed more than 120 days after the probation revocation.

Mr. Littlejohn filed a petition for writ of *habeas corpus* August 20, 1997, clearly stating his claim of entitlement to a Youth Act sentence.

> In order to be given adult sentences the Judge would have to have sufficient information that would entitle a no benefit finding and would have to have written reasons stating his findings. Since I know that I am within the Federal guidelines and Federal criminal law to receive the treatment under the FYCA. The Department of Justice has taken the position that the Youth Act is still available to all offenders (otherwise eligible) who are charged with crimes which are alleged to have occurred on or before October 12, 1984. In cases in which the crime occurred before October 12, 1984, but in which the sentencing occurred after that date. The constitutional ban against ex post facto legislation might be violated by the denial of Youth Act consideration.

R. 36, 5. In this petition Appellant incorrectly stated that Judge Moultrie had sentenced him to probation under the Youth Act and Judge Scott imposed an adult sentence when he revoked Mr.

Littlejohn's probation in 1988. *Id.* The petition claimed violation of his equal protection right and again claimed that trial counsel had been ineffective in failing to oppose the adult sentence. Judge Huvelle, for the first time, ordered the government to respond.

In its response the government did not address the merits of Mr. Littlejohn's petition. Rather, relying on rulings of Judges Scott and Huvelle 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 Appellant'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. It added that this claim, even if viewed as an attack on the original sentencing by Judge Scott in 1986, rather than on imposition of an adult sentence at the probation revocation in 1988, was procedurally barred because Mr. Littlejohn had not raised it in any of the three previous § 23-110 motions. In a footnote the Court concluded there was yet another reason to deny the petition. It stated: "Judge Scott'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. Noting that under Rule 35(a) an illegal sentence may be corrected at any time, the Court said a claim that a sentence was imposed in an illegal manner may only be challenged within 120 days after the sentence is imposed. "It is not alleged that Judge Scott lacked jurisdiction to impose the sentence or that the sentence was in excess of the statutory maximum prescribed by the statute." *Id.*

The D.C. Court of Appeals received Appellant's hand-written notice of appeal April 15, 1998. R. 56.

STATEMENT OF FACTS

The prosecutor set out the facts of this case in the plea hearing February 25, 1985 as follows:

> MR. GORHAM: … [I]f this case had gone to trial, on these two counts, the two counts that Mr. Littlejohn has stated that he would enter a guilty plea to, the Government's evidence would have shown first that Mr. Littlejohn is cousins to [N.J.] who at the time of the two incidents in Count 1 and Count 4 was eleven years old.
>
> That sometime during the summer of 1983 between the 1st of July and the end of August Mr. Littlejohn visited [N.J.'s] home, stayed there. She recalled that event as being a time when her brother Joe had come down to visit her from South Carolina and that Mr. Littlejohn one evening during that period slept over at her house. She would have stated that she awoke to find Mr. Littlejohn in her room. When she woke up, he was on top of her, and she would have testified that he had sexual intercourse with her for a short period of time. That evening there was some noise or something and he got off her and left the room. That would be the Government's proffer in relation — in regard to the first count in the indictment.
>
> In regard to the fourth count, the indecent acts account, [N.J.] would have testified that, again, sometime that summer at a later date, but, again, in that same time period between July l and August 31 Mr. Littlejohn was over playing basketball. She was in the house and that at some point during the afternoon came into the house. He started tickling her, pulled down her pants. She would have testified that he put her — put his penis in her vagina and began to hump, as she said. And then he left the house and went back outside.

Tr. 2/25/85, 8 – 9. Appellant agreed to this proffer. *Id.* at 9 – 10.

The indictment alleged two incidents involving 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. There were two alleged incidents involving K.F., Mr. Littlejohn's 5-year-old cousin, which resulted in charges of carnal knowledge and taking indecent liberties. *Id.* at 2. Under the plea agreement all of these counts were dismissed.

SUMMARY OF THE ARGUMENT

Appellant pleaded guilty to one count each of carnal knowledge and taking indecent liberties with a minor in February 1985, and the government agreed not to oppose imposition of a Federal Youth Corrections Act sentence if recommended by the Lorton Youth Center. Based on the recommendation of the Youth Act study and therapists at the Human Sexuality Institute, who had been treating Mr. Littlejohn since shortly after his arrest, Judge Moultrie released him on his own recognizance for a year subject to the condition that he remain in treatment.

After the case was reassigned upon Judge Moultrie's death, Judge Scott imposed consecutive adult sentences totaling 8 to 24 years, suspended execution of sentence, and placed Mr. Littlejohn on adult probation for five years with orders to continue therapy until the Court determined that he no longer needed it. On the recommendation of the Human Sexuality Institute in mid-1987 that Appellant had successfully completed treatment, Judge Scott terminated the therapy. But, as a result of probation violations which did not result in criminal charges and had nothing to do with sexual misconduct, the Court revoked probation in mid-1988, ordering that Appellant serve the 8- to 24-year sentence.

In initially sentencing Appellant as an adult, the Trial Court did not make the finding required by 18 U.S.C. § 5010(d) that Mr. Littlejohn would not benefit from a Youth Act sentence. In fact, both judges' decisions prior to the probation revocation can be interpreted only as indications that he would, and in fact did, benefit considerably from treatment. Therefore, the Trial Court's 1986 decision to sentence Appellant as an adult was illegal and its subsequent imposition in 1988 of the adult sentence without first finding that Mr. Littlejohn would not benefit from the Youth Act was equally illegal.

The Trial Court's actions deprived Mr. Littlejohn not only of his liberty, which he still does not have 13 years after the sentence was imposed, but of the benefit of 18 U.S.C. § 5021, under which a youthful offender's conviction was automatically set aside if he was unconditionally released before the completion of his Youth Act sentence.

When Mr. Littlejohn first brought the illegality of his sentence to the Trial Court's attention in 1997, the Judge refused to consider the merits of his claim because he had previously filed collateral attacks on his conviction and had not raised the sentencing issue previously. The Court abused its discretion by treating his August 1997 petition as a § 23-110 motion, rather than a Rule 35(a) motion to correct an illegal sentence. It concluded that under § 23-110(e) it did not have to entertain his successive motion, even though the petition raised an issue not previously presented to the Court. The Judge's second ground for denying the petition was one that apparently conflicted with the first — that the petition was an abuse of the writ and was procedurally barred because Mr. Littlejohn had not raised the sentencing issue in any of his prior challenges to his conviction and requests for resentencing under Rule 35(b).

Having erroneously established procedural grounds for denying the motion, the Trial Court refused to reach the merits of Mr. Littlejohn's claim that his sentence was illegal even though, by its plain language, Rule 35(a) permits a defendant to challenge an illegal sentence "at any time." This Court has interpreted the rule as precluding application of the procedural bar because an illegal sentence is a "nullity." It has said a Trial Court may deny a Rule 35(a) motion as successive only when a the defendant files a motion raising a claim that has previously been adjudicated. The Trial Court's finding that Mr. Littlejohn had not previously attacked his sentence as illegal precluded it from ruling that his motion was successive.

ARGUMENT

BECAUSE THE TRIAL COURT NEVER DETERMINED APPELLANT WOULD NOT BENEFIT FROM TREATMENT UNDER THE FEDERAL YOUTH CORRECTIONS ACT, THE 8- TO 24-YEAR ADULT SENTENCE IMPOSED IN THIS CASE WAS ILLEGAL

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,[12] 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.

Standard of Review

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).

[12] 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 its 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).

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.

The Sentence Imposed 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. *Cole v. United States*, 384 A.2d 651, 652 (D.C. 1978).

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.*

Robinson provides a clear example of the latter. In that case the appellant challenged imposition of an enhanced sentence pursuant to D.C. Code § 22-104, the recidivist statute. He claimed that the Trial Court violated D.C. Code § 23-111 by failing to inform him "that any

challenge … to his prior convictions would be precluded if not made before sentence was imposed." *Id.* at 812.

If a sentence is illegal, it may be challenged at any time under Rule 35(a). However, a sentence that is merely illegally imposed must be challenged within 120 days of imposition. *Id. See Robinson, supra*, at 813.

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,[13] 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.

> If the court finds that the youthful offender does not need commitment, it may utilize only subsection (a) to impose probation. Treatment under subsection (b) is exclusive of treatment under subsection (c), because commitment under the latter requires a finding that the offender will not derive maximum benefit from a commitment of less than six years.

Id. It should be noted that in *Cole* the government conceded that imposition of an adult sentence in the absence of an explicit no benefit finding is illegal. *Id*. at 652.

Under the plain language of § 5010(d), a sentence of a youthful offender to adult probation is impossible as a matter of law. That section states that "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." But subsections (b) and (c) are applicable only if the court finds that the defendant requires incarceration. No provision permits the court to rule that adult probation may be imposed in lieu of Youth Act probation.

Implicit in the procedural history of Mr. Littlejohn's case are findings by Judge Moultrie and Judge Scott that he would benefit from Youth Act probation. Those findings are no less clear an indication that imposition of an adult sentence was illegal than the explicit findings in *Cole, supra*, at 652 (Trial court ruled defendant would benefit from FYCA sentence but believed "adult

[13] *Cole, supra*, at 652 (citing *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970)).

sentence was the only method of guaranteeing adequate supervision of appellant should he violate an eventual FYCA parole." Adult sentence ruled illegal.)

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 government agreed not to oppose a Youth Act sentence if the classification team recommended it.

The Judge clearly did not believe incarceration was warranted at that time. He allowed Mr. Littlejohn to remain in the community without probation supervision, as he had since the case began. All the while, Appellant remained in treatment at the Human Sexuality Institute, which he had begun in May 1984.

When the case first came up for sentencing May 9, 1985, Judge Moultrie had received the Presentence Investigation Report recommending incarceration. But at that hearing Judge Moultrie ordered Appellant 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 Judge Moultrie did not sentence Mr. Littlejohn that day or January 15, 1986, when it next came up on his calendar. But the only inference that can be draw from his decisions to permit Appellant to remain in the community and in treatment for a year is that he believed incarceration of any type was unnecessary.

When Mr. Littlejohn's case was reassigned in April 1986 he apparently was complying with all conditions of his release. Judge Scott first reviewed his case July 15, 1986, the date Judge Moultrie 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 Appellant 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, Judge Scott'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 Appellant would benefit from treatment under § 5010(a), Youth Act probation.

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

Judge Scott compounded the illegality of his 1986 sentence when he revoked Appellant's probation September 16, 1988 and imposed the 8- to 24-year adult sentence. Because he assumed the adult sentence he had imposed two years earlier was valid, he never considered that he needed to make a no benefit finding before ordering Mr. Littlejohn to prison.[14]

Appellant's Conviction Should Be Set Aside Pursuant to 18 U.S.C. § 5021 (a)

The primary objectives of the Federal Youth Corrections Act were correction and rehabilitation. *Dorszynski, supra*, 418 U.S. at 433. "An important element of the program was that once a person was committed for treatment under the Act, the execution of sentence was to fit the person, not the crime for which he was convicted." *Id.* at 434. "A powerful tool available to the Division was its discretion to discharge committed persons unconditionally before it was required to do so, for upon such discharge the conviction upon which the sentence rested would be automatically set aside." *Id*. at 435 (citing 18 U.S.C. § 5021(a)).[15] If a judge placed the defendant on probation under § 5010(a), he could discharge the defendant unconditionally and, by doing so cause the conviction to be set aside. § 5021(b).

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[14] This Court need not address whether, on remand, the Trial Court may impose an adult sentence. Rather, it should order his unconditional release from custody. Because the sentence Judge Scott imposed in 1986 was illegal it is a "nullity." *Prince v. United States*, 432 A.2d 720, 721 (D.C. 1981) . Thus, the maximum sentence that could have been imposed upon Mr. Littlejohn was an indeterminate term of up to six years. Because Youth Act sentences were calculated from the date of conviction, *see Royster v. United States*, 361 A.2d 165 and n..2 (D.C. 1976)(statute requires computation of FYCA sentence from date of conviction), Mr. Littlejohn's latest unconditional release date was February 24, 1991. In fact, he should be considered to have been on Youth Act probation for 3 ½ years from February 25, 1985 until September 16, 1988, when his probation was revoked. He then served an adult prison term of nearly 6 years, from September 16, 1988 to June 13, 1994, when he was paroled. He was rearrested for technical parole violations June 18, 1996 and has remained in prison since then, an additional three years.

[15] 18 U.S.C. § 5021 stated:

> (a) Upon the unconditional discharge by the division of a committed youth offender before the expiration of the maximum sentence imposed upon him, the conviction shall be automatically set aside and the division shall issue to the youth offender a certificate to that effect.
>
> (b) Where a youth offender has been placed on probation by the court, the court may thereafter, in its discretion, unconditionally discharge such youth offender from probation prior to the expiration of the maximum period of probation therefore fixed by the court, which discharge shall automatically set aside the conviction and the court shall issue to the youth offender a certificate to that effect.

There have been numerous cases in which defendants sentenced under the Youth Act to indeterminate sentences up to six years claimed that, If they had been sentenced as adults they would have received shorter sentences. *See, e.g., Moore (James) v. United States*, 468 A.2d 1331, 1334 (D.C. 1983), and cases cited therein. Appellate courts consistently ruled that those Youth Act sentences were not more severe punishment, in large part because of the benefit imparted by § 5021. "The opportunity to earn this certificate has been called by the Supreme Court a 'particularly valuable benefit for the offender sentenced under the YCA…' " *United States v. Robinson (Thomas M.)*, 720 F.2d 203, 205 (D.C. Cir. 1983)(citing *Durst v United States*, 434 U.S. 524, 98 S.Ct. 849, 55 L.Ed.2d 14 (1978)).

Based on the procedural history of this case it is clear that had Mr. Littlejohn been sentenced appropriately under the FYCA, he would have been placed on probation pursuant to § 5010(a). He successfully completed his treatment in mid-1987 and arguably should have been discharged, at least conditionally, at that point. Even if the Court takes into account his probation violations, none of which resulted in criminal charges being brought, it is likely that, at most, the Trial Court could have revoked probation and committed Mr. Littlejohn under § 5010(b). From that point forward Appellant's continued treatment would have been supervised by the Department of Corrections, not the Court, and it might well have discharged him unconditionally before February 25, 1991.

Thus, by sentencing him illegally, the Trial Court deprived Mr. Littlejohn of an important benefit accorded youthful offenders under the FYCA, and this Court should correct that error by issuing the certificate required by § 5021.

DENIAL OF APPELLANT'S RULE 35 MOTION WAS AN ABUSE OF DISCRETION

Under the unambiguous wording of D.C. Crim. R. 35(a) "the Court may correct an illegal sentence at any time." Thus, even though Mr. Littlejohn first claimed that he was illegally sentenced as an adult over a decade after the sentence was imposed and in the intervening years he filed numerous challenges to his conviction which did not raise that issue, the Trial Court was required to fully consider and rule on his motion filed in August 1997. In denying his motion on

procedural grounds, rather than on the merits, the Trial Court provided conflicting rationales for its decision. The Judge ruled that the motion was a successive motion which the Court was not required to entertain, and at the same time that it was procedurally barred because Mr. Littlejohn had not raised the issue previously.

Standard of Review

This Court reviews denials of Rule 35 motions for abuse of discretion. *Neverdon v. District of Columbia*, 468 A.2d 974, 975 (D.C. 1983). In *Neverdon* the Court held that a Trial Court acts within its discretion when it denies a successive Rule 35 motion that raises only issues previously adjudicated. It has never ruled that a Trial Court has discretion to refuse to reach the merits of a challenge under Rule 35(a) to an illegal sentence the first time that issue is raised.

The Trial Court should have treated Appellant's petition as seeking relief under Rule 35(a)

Appellant initiated his most recent litigation, which is the subject of this appeal, by filing a "Motion To Vacate Illegal Sentence" dated July 10, 1996, which did not state the legal basis for his request for relief. That was followed by several additional pleadings, including one captioned "Sentence Reduction Rule 35" dated August 5, 1996, another captioned "{D.C. Code § 23-110} Motion to Impose Concurrent Sentences" dated March 12, 1997, and a *habeas corpus* petition dated August 12, 1997.

The Trial Court treated the first as a § 23-110 motion, despite its caption. It treated the second and third as Rule 35 motions, disregarding the reference to § 23-110 in the caption of the third, and denied all three without requiring the government to respond. Only after receiving the petition and two letters from Mr. Littlejohn did the Court require a government response. Then, it treated the petition as a § 23-110 motion and denied it.

In rejecting Appellant's challenge to his adult sentence the Trial Court committed three errors. Its initial error was that it disregarded the directives of this Court concerning handling of *pro se* motions and that Rule 35, rather than § 23-110, is the appropriate tool for evaluating a claim that a sentence is illegal. *Norman v. United States*, 623 A.2d 1165, 1167 (D.C. 1993). Its second error was in denying the motion as successive, pursuant to § 23-110(e). Its third error was

in ruling that the motion was an abuse of the writ and procedurally barred because Mr. Littlejohn had not raised the sentencing issue in a previous collateral attack on his sentence. *Id.* n. 9.

This Court has ruled that,

> [a]lthough the general provisions of the statute authorizing challenges to a sentence, D.C. Code 1981, § 23-110, could be construed to permit a motion for relief of any kind to be brought at any time, we conclude that Rule 35 imposes a rational complementing limitation on the court's jurisdiction to grant remedies for the different kinds of sentencing error.

Robinson, supra, 454 A.2d at 813. Because Rule 35(a) is designed specifically to address whether a sentence is illegal or was illegally imposed, it is not only a "rational complementing limitation," it, rather than the general provisions of § 23-110, is the appropriate means of addressing the issue Appellant's petition raised.

The Court has only occasionally addressed the relationship between § 23-110 and Rule 35(a), but it has concluded that each is very similar to its federal counterpart, 18 U.S.C. § 2255 and Fed. R. Crim. P. 35(a), respectively.[16] *Pettaway, supra*, at 390 A.2d 983 (§ 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. Matthews*, 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.

[16] The federal rule was amended in 1987 to be more relevant in addressing issues arising under the federal sentencing guidelines. Prior to those amendments the wording of federal Rule 35(a) was identical to the wording of D.C. Rule 35(a).

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)).

In Mr. Littlejohn's case the Trial Court at every opportunity chose the avenue most likely to bring about Appellant's defeat. Although his pleading was captioned as a petition for writ of *habeas corpus*, its main thrust was an attack on his adult sentence, not on the validity of his conviction or the jurisdiction of the court to sentence him. In ruling on Appellant's *habeas corpus* petition, although it reached the wrong conclusion, the Trial Court recognized that the central issue was whether Appellant's sentence was illegal when first imposed in 1986 or whether it was merely illegally imposed. *See supra* at 9. But instead of applying Rule 35(a) the Court invoked § 23-110 to deny the motion.

To the extent that the pleading alleged ineffective assistance of counsel, it focused on counsel's failures in sentencing proceedings to oppose imposition of an illegal adult sentence, not on counsel's failures to provide adequate representation prior to the plea. More importantly, counsel's performance is largely irrelevant because, whether he provided effective representation or not, the Court imposed an illegal sentence. Appellant cannot be deemed to have waived his right to challenge the sentence because counsel failed to raise the issue at sentencing.

Appellant's challenge to his illegal sentence could not be denied under § 23-110(e) as a successive motion

Unlike § 23-110, Rule 35 does not include a provision permitting trial courts to deny successive motions. *Neverdon, supra*, 468 A.2d at 975 (Trial court has power to entertain Rule 35 motion despite denial of previous one). Nonetheless, "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, 77 S.Ct. 1302, 1 L.Ed.2d 1431 (1957)(emphasis added).

In giving reasons for denial of Mr. Littlejohn's petition, the Trial Court stated:

> First, it is a successive claim for collateral relief that does not need to be entertained by this Court, and second, this most recent § 23-110 motion is an abuse of the writ because defendant has already filed several prior § 23-110 motions without raising the "no benefit" argument.

Order filed April 8, 1998 at 2-3. Thus, the Trial Court recognized that Mr. Littlejohn's pleading raised a new issue and was successive only in the sense that he had filed previous unsuccessful challenges raising other issues.

Had the Trial Court treated Appellant's petition as a Rule 35 motion, as it should have, its finding that Mr. Littlejohn had not previously raised the "no benefit" argument would have precluded it from ruling that this pleading was a successive motion.[17]

Appellant's petition was neither an abuse of the writ nor procedurally barred

The Trial Court asserted two grounds for its ruling that Mr. Littlejohn's "petition" was an abuse of the writ. The Trial Judge stated:

> This Court already considered a previous claim by defendant, in a letter received July 12, 1996, that "Judge Scott did not follow the Youth Act guidelines for Youth Act Violators" in revoking defendant's probation. In its order dated July 23, 1996, this Court ruled that because Judge Scott had sentenced defendant as an adult, there was no need to follow Youth Act guidelines in revoking his probation.

Order, *supra*, at 3. It went on to say that:

> Giving defendant the benefit of the doubt in interpreting his habeas corpus petition and cognizant of the fact that defendant's real challenge may be to Judge Scott's alleged failure to make a "no benefit" finding at the time of sentencing (as opposed to at the probation revocation hearing), the Court must still deny defendant's petition because his successive habeas corpus petitions constitute an abuse of the writ. Where a defendant "has failed to raise an available challenge to his conviction on direct appeal, he may not raise

[17] The Trial Court had treated the August 5, 1996 and March 12, 1997 pleadings as Rule 35 motions, but they both sought sentence reductions and did not challenge the legality of the adult sentence. In letters to Mr. Littlejohn denying both motions the Court appears to have relied on Rule 35(b), telling him it lacked jurisdiction to modify his sentence because his motions were filed more than 120 days after sentencing.

> that issue on collateral attack unless he shows both cause for his failure to do so and prejudice as a result of his failure.

Id. at 3-4 (citations omitted).

The Trial Court is in error on both grounds. In its July 23, 1996 order the Court acknowledges that its ruling focused on imposition of the 8- to 24-year sentence when Judge Scott revoked Mr. Littlejohn's probation in 1988. In doing so it assumed that the adult sentence imposed and suspended two years earlier was legal and, therefore, never reached the real issue in this case.

In concluding that Mr. Littlejohn was procedurally barred from challenging his 1986 sentence as illegal, the Trial Court was, quite simply, wrong.

Because a challenge to an illegal sentence may be raised under Rule 35(a) "at any time," failure to raise the issue on direct appeal does not preclude a subsequent motion in the trial court. *Norman, supra*, 623 A.2d at 1167 n. 9 (citing *United States v. Sutton*, 415 F.Supp. 1323, 1327 (D.D.C. 1976)). *See, also, Moore v. United States*, 608 A.2d 144, 145 (D.C. 1992). Similarly, failure to raise an issue in a prior Rule 35 motion or § 23-110 motion does not bar a defendant from challenging the legality of his sentence.

In *Norman*, this Court reserved the question of whether the cause and prejudice standard applied to § 23-110 motions filed subsequent to appeals should apply to Rule 35(a) motions as well. S*upra* at 1167-8. However, the plain meaning of the phrase "at any time" in Rule 35(a), and this Court's holding in *Prince, supra*, that an illegal sentence is a "nullity," clearly barred the Trial Court from refusing to entertain Mr. Littlejohn's challenge because he did not demonstrate the cause for his delay and the prejudice he would suffer if his motion were not considered.[18]

There is no institutional benefit in incarcerating a defendant for longer than the maximum term authorized by the legislature merely because he did not challenge that incarceration earlier. Furthermore, although the cause for the delay may be unclear in this case, the prejudice resulting

[18] Arguably, had the Trial Court appointed counsel to represent Mr. Littlejohn in seeking post-conviction relief, and had counsel, in the course of competent representation, elected not to raise the sentencing issue, Appellant might be required to demonstrate why he did not challenge his sentence earlier. But this Court has repeatedly held that there is no Sixth Amendment right to counsel in post-conviction proceedings and, despite Appellant's repeated claims that he received ineffective representation after he pleaded guilty, the Trial Court never appointed counsel to assist him.

from failure to correct Mr. Littlejohn's illegal sentence is abundantly clear. Not only has he served many more years than the FYCA allowed, he was deprived of the possibility that his conviction would have been set aside pursuant to 18 U.S.C. § 5021. *See, supra*, at 18.

CONCLUSION

For the reasons stated above and any others that might appear to the Court following oral argument, Appellant respectfully requests that his adult prison sentence of 8- to 24-years be vacated and that he be ordered released unconditionally pursuant to 18 U.S.C. § 5017(c). He further requests that, pursuant to 18 U.S.C. § 5021 this Court order that his conviction be set aside and issue him a certificate to that effect.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Robert S. Becker, counsel for Billy D. Littlejohn, certify that on April 21, 1999 I served a true copy of the attached Brief of Appellant by hand on counsel listed below.

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