CHAPTER 16

SECTION 2255 MOTIONS AND OTHER FEDERAL POSTCONVICTION REMEDIES

by

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1.01 INTRODUCTION

Although today the writ of habeas corpus is a federal remedy primarily used by *state* prisoners, habeas corpus was also the primary postconviction remedy for *federal* prisoners until 1948, when Congress adopted 28 U.S.C. § 2255. Congress intended section 2255 to supersede habeas corpus as the means by which federal prisoners could challenge the lawfulness of their incarceration, but nonetheless "afford federal prisoners a remedy identical in scope to federal habeas corpus." *Davis v. United States*, 417 U.S. 333, 343, 94 S. Ct. 2298, 2304, 41 L.Ed.2d 109 (1974).[1]

Section 2255 was enacted primarily for *procedural* reasons – to divert federal prisoner petitions into the district in which the prisoner was originally sentenced. *See United States v. Hayman*, 342 U.S. 205, 219, 72 S. Ct. 263, 272, 96 L.Ed.2d 232 (1952). Prior to the enactment of section 2255, great practical difficulties were caused by the fact that a habeas corpus proceeding must be brought in the district of confinement. As an increasing number of habeas petitions were filed by federal prisoners, those few district courts with major federal prisons within their jurisdiction were required to handle an inordinate number of habeas cases, and to do so relying on the record of a distant sentencing court. *Id.*, 342 U.S. at 212-14, 72 S. Ct. at 268-69. Section 2255, which requires a motion to be filed in the sentencing court, largely alleviated these problems by spreading federal prisoner collateral proceedings evenly over the entire federal court system.

Section 2255 allows a federal prisoner to move to "vacate, set aside or correct" a federal sentence upon the ground that "the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." 28 U.S.C. § 2255 ¶ 1. Thus, like the habeas corpus remedy from whence it sprang, relief is available under section 2255 "on the ground that '[a person] is in custody in violation of the Constitution or laws or treaties of the United States.'" *Davis*, 417 U.S. at 344, 94 S. Ct. at 2304

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[1] This identity between the habeas corpus and section 2255 remedies has caused many aspects of section 2255 jurisprudence to mimic that governing state prisoner habeas corpus proceedings under 28 U.S.C. § 2254. This chapter intermingles section 2255 and habeas corpus authority when the courts have interpreted the standards or procedures being discussed in concert with one another.

(emphasis in original omitted). Moreover, section 2255 provides federal prisoners relief for *additional* types of claims – claims that the federal court acted outside its limited jurisdiction, that the sentence was in excess of that allowed by law, and that "the conviction or sentence is otherwise subject to collateral attack." *See* § 2255 ¶ 1.

Not all claims encompassed by section 2255's statutory language, however, are cognizable in a section 2255 proceeding. For "an error which is neither jurisdictional nor constitutional," the Supreme Court has read a "fundamentality" requirement into the statutory language. Under this interpretation, for a violation of federal law or treaty, a sentence in excess of the statutory maximum, or a claim that the conviction or sentence is otherwise subject to collateral attack, section 2255 relief is available only if the error constitutes "a fundamental defect which inherently results in a complete miscarriage of justice," or "an omission inconsistent with the rudimentary demands of fair procedure," *Hill v. United States*, 368 U.S. 424, 428, 82 S. Ct. 468, 471, 7 L.Ed.2d 417 (1962); *see Peguero v. United States*, 526 U.S. 23, 27-28, 119 S. Ct. 961, 964-65, 143 L.Ed.2d 18 (1999).

1.02 EXHAUST APPELLATE REMEDIES BEFORE FILING

In general, a section 2255 motion should not be filed until after appellate remedies have been exhausted. This is because federal courts generally will not allow a section 2255 motion and a direct appeal brought by the same prisoner to be pending at the same time. Although "there is no jurisdictional barrier to a district court entertaining a § 2255 motion while a direct appeal is pending," this general rule has been adopted for reasons of judicial economy. *United States v. Prows*, 448 F.3d 1223, 1228 (10th Cir. 2006). Disposition of the direct appeal could render the section 2255 motion moot. *See id.*; Rules Governing § 2255 Proceedings, Advisory Committee Note to Rule 5. District courts will therefore dismiss without prejudice any section 2255 motion filed while a direct appeal is ongoing, except in extraordinary circumstances. *See, e.g., Prows*, 448 F.3d at 1228; *Capaldi v. Pontesso*, 135 F.3d 1122, 1124 (6th Cir. 1998) (collecting cases).

1.03 HOW TO FILE A TIMELY MOTION: THE STATUTE OF LIMITATIONS

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1214 (1996), which worked many changes to habeas corpus practice, created a "1-year period of limitation" for section 2255 motions. § 2255 ¶ 6. This was a dramatic change. Prior to the AEDPA, a motion could be made "at any time." 28 U.S.C. § 2255 (1994).

Calculation of the date on which the limitations period runs is one of the first things that must be done before filing a section 2255 motion. If the motion is filed even one day late, the results are harsh and complete – the court will dismiss it with prejudice. *See United States v. Marcello*, 212 F.3d 1005, 1010 (7th Cir. 2000). Do NOT wait until the very end of the one-year period to file.

The one-year time limit for filing a section 2255 motion is not jurisdictional, but an affirmative defense. *See Day v. McDonough*, 547 U.S. 198, 205, 126 S. Ct. 1675, 1681, 164 L.Ed.2d 376 (2006). It can therefore be "waived" by the government. *See Green v. United States*, 260 F.3d

78, 85 (2d Cir. 2001). That said, the district court has the discretion to dismiss a motion as untimely *sua sponte* notwithstanding any government waiver. *See Day*, 547 U.S. at 209, 126 S. Ct. at 1684.

For a section 2255 motion to be timely, it must be filed within one year of the "latest" of one the four triggering dates described in paragraph 6 of section 2255. Paragraph 6 states:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –
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> (1) the date on which the judgment of conviction becomes final;
>
> (2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;
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> (3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
>
> (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

§ 2255 ¶ 6.

The main triggering date for filing a section 2255 motion is that found in ¶ 6(1) – "the date on which the judgment of conviction becomes final." The three other triggering dates – those found in ¶¶ 6(2), 6(3) and 6(4) – "reset[] the limitations period's beginning date, moving it from the time when the conviction became final . . . to the later date on which the particular claim accrued." *Wims v. United States*, 225 F.3d 186, 190 (2d Cir. 2000). As discussed below, however, these latter three triggering dates apply only in *extremely* limited circumstances.

Moreover, the circuits are split as to when the limitation period begins to run if a motion contains multiple claims with different triggering dates. *Compare Walker v. Crosby*, 341 F.3d 1240, 1245 (11th Cir. 2003) (existence of one claim that has been filed within one year of *any* of the triggering dates is enough to render the *entire motion* timely), *with Fielder v. Varner*, 379 F.3d 113, 117-118 (3d Cir. 2004) (for motion filed more than a year after judgment of conviction becomes final, *only* those claims filed within a year of the other three triggering dates are timely), *cert. denied*, 543 U.S. 1067, 125 S. Ct. 904, 160 L.Ed.2d 801 (2005). Until this split is resolved, the safest course is to file all potential claims in a single application within one year of the main triggering date found in ¶ 6(1) – "the date on which the judgment of conviction becomes final." The other triggering dates should be relied upon only when it is clear that ¶ 6(1) does not apply.

1.03.01 ¶ 6(1): When the Judgment of Conviction Becomes Final

So when does "the judgment of conviction become[] final" under ¶ 6(1)? It depends. If the prisoner filed a petition for writ of *certiorari* following affirmance on direct appeal, the judgment

becomes final when the Supreme Court either denies *certiorari* or affirms on the merits. *See Clay v. United States*, 537 U.S. 522, 527, 123 S. Ct. 1072, 1076, 155 L.Ed.2d 88 (2003). If *certiorari* is not sought following affirmance on direct appeal, the judgment becomes "final" when the 90-day period for filing a *certiorari* petition expires. *Id*., 537 U.S. at 527, 123 S. Ct. at 1076.

Where the appellate court wholly or partially reverses a defendant's conviction or sentence, the "limitations period [does] not begin until both his conviction *and* sentence 'became final.'" *Burton v. Stewart*, ___ U.S. ___, 127 S. Ct. 793, 799, 166 L.Ed.2d 628 (2007) (emphasis in original). Thus, in cases where a defendant is convicted on multiple counts, and the court of appeals affirms as to some counts, but remands as to others, the "judgment of conviction" is not final until both the conviction and sentence are final for *all* counts, unless the appellate court simply "remands for a ministerial purpose that could not result in a valid second appeal." *See United States v. Dodson*, 291 F.3d 268, 272, 275 (4th Cir. 2002); *Burrell v. United States*, 467 F.3d 160, 164-66 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 2031 (2007). *But see United States v. Colvin*, 204 F.3d 1221, 1225 (9th Cir. 2000) (any remand delays finality).

There is a split in the circuits as to when a judgment of conviction becomes final under ¶ 6(1) if no notice of appeal is filed. The majority have held that "the judgment becomes final upon the expiration of the period in which the defendant could have appealed to the court of appeals." *Sanchez-Castellano v. United States*, 358 F.3d 424, 427 (6th Cir. 2004). *Accord United States v. Prows*, 448 F.3d 1223, 1227-28 (10th Cir. 2006); *Moshier v. United States*, 402 F.3d 116, 118 (2d Cir. 2005); *Mederos v. United States*, 218 F.3d 1252, 1253 (11th Cir. 2000); *Kapral v. United States*, 166 F.3d 565, 577 (3d Cir. 1999). In most cases, that is ten days after the entry of judgment, when the time to file a notice of appeal has expired. *See* Fed. R. App. P. 4(b); *Sanchez-Castellano*, 358 F.3d at 427. In contrast, the Fourth Circuit has held that if no appeal is filed, the judgment of conviction becomes final under ¶ 6(1) on the date that the district court entered judgment. *See United States v. Sanders*, 247 F.3d 139, 142 (4th Cir. 2001).

1.03.02 ¶ 6(2): Removal of An Unconstitutional or Unlawful Impediment

Under ¶ 6(2) of section 2255, a motion is timely if filed within one year of "the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action." Because the word "impediment" implies that an obstacle, obstruction, or hindrance is required, ¶ 6(2) is available only if the government's actions prevented the motion from being filed. *See Minter v. Beck*, 230 F.3d 663, 666 (4th Cir. 2000); *United States v. Cottage*, 307 F.3d 494, 500 (6th Cir. 2002). The government's actions must also be either unconstitutional or unlawful in order to trigger a new limitation period under ¶ 6(2). *See Akins v. United States*, 204 F.3d 1086, 1090 (11th Cir. 2000); *United States v. Cicero*, 214 F.3d 199, 204 (D.C. Cir. 2000). For example, an "unconstitutional impediment" may be found if the government, in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed.2d 215 (1963), withheld exculpatory evidence that forms the basis for a claim. *See Cottage*, 307 F.3d at 499-500.

1.03.03 ¶ 6(3): Newly Recognized and Collaterally Applicable Right

Under ¶ 6(3) of section 2255, a motion is timely if filed within one year of "the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review." Either a statutory right or a constitutional right that has been newly recognized can trigger a renewed limitation period under ¶ 6(3). *See United States v. Lopez*, 248 F.3d 427, 430 (5th Cir. 2001); *Ashley v. United States*, 266 F.3d 671, 672 (7th Cir. 2001). However, the right asserted must have been recognized *by the Supreme Court* – lower court decisions do not suffice. *See Nichols v. United States*, 285 F.3d 445, 447 (6th Cir. 2002). The one-year limitation period runs from the date on which the Supreme Court initially recognized the right asserted, *not* from the date on which the right asserted was made retroactively applicable to cases on collateral review. *Dodd v. United States*, 545 U.S. 353, 357, 125 S. Ct. 2478, 2482, 162 L.Ed.2d 343 (2005).

1.03.04 ¶ 6(4): Newly Discovered Evidence

Under ¶ 6(4), the one-year period runs from "the date upon which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence." A movant relying on ¶ 6(4) must prove his claim through facts that he could have discovered only in the year before he filed his section 2255 motion. *See Wims*, 225 F.3d at 189-90. For this reason, ¶ 6(4) generally does not apply where the facts supporting the claims presented were known to the applicant at the time of trial. *See United States v. Battles*, 362 F.3d 1195, 1198 (9th Cir. 2004).

For purposes of ¶ 6(4), the "facts" supporting a claim may include court rulings or the legal consequences of known facts, including the vacatur of a prior conviction used to enhance a later sentence. *Johnson v. United States*, 544 U.S. 295, 308, 125 S. Ct. 1571, 1580, 161 L.Ed.2d 542 (2005). In such circumstances, the one year is triggered by notice of the order vacating the prior conviction, so long as the prisoner has shown due diligence in seeking that order. *Id.*, 544 U.S. at 308-09, 125 S. Ct. at 1580-81. To meet the "due diligence" requirement, the *latest* a movant can begin the process of vacating any priors is *immediately after sentencing* in the federal case; if the movant waits until after an appeal of the enhanced sentence is completed, the due diligence standard likely will not be met. *Id.*, 544 U.S. at 308-09, 125 S. Ct. at 1580-81.

1.03.05 Actual Innocence and the Statute of Limitations

In the Eleventh Circuit, a showing of actual innocence "serves . . . to lift the procedural bar caused by [the movant's] failure timely to file his § 2255 motion." *United States v. Montano*, 398 F.3d 1276, 1284 (11th Cir. 2005). As discussed below, other circuits have considered a showing of innocence to be a circumstance that warrants equitable tolling of the limitations period. § 1.03.06.

1.03.06 Equitable Tolling of the Limitation Period

Where applicable, equitable tolling can extend a limitation period. The Supreme Court has

not yet decided whether the statute of limitations in ¶ 6 of section 2255 is subject to equitable tolling. *See Pace v. DiGuglielmo*, 544 U.S. 408, 418 n.8, 125 S. Ct. 1807, 1814 n.8, 161 L.Ed.2d 669 (2005). Nonetheless, every circuit to decide the question has held that it is. *See United States v. Martin*, 408 F.3d 1089, 1092 (8th Cir. 2005) (collecting cases).

"Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way." *Pace*, 544 U.S. at 418, 125 S. Ct. at 1814. Given that equitable tolling is available only in "extraordinary" circumstances, you cannot assume that a court will equitably toll section 2255's one-year limitation period in your case. Indeed, the Seventh Circuit has stated that equitable tolling is such "exceptional relief" that it has "yet to identify a circumstance that justifies equitable tolling in the collateral relief context," including a case where the movant asked that the limitation period be tolled for just *one day*. *Poe v. United States*, 468 F.3d 473, 476 n.5 (7th Cir. 2006) (internal quotation marks omitted); *see Marcello*, 212 F.3d at 1010. You must therefore make every possible effort to timely file your section 2255 motion under ¶ 6(1) – that is, within one year of the date on which the judgment of conviction became final. Equitable tolling should be relied upon only when more than one year has passed from the date of finality, and none of the other three triggering dates in ¶¶ 6(2), 6(3) or 6(4) apply.

In general, the following are NOT sufficient to warrant equitable tolling: (1) mere error, or excusable neglect, whether by counsel or by movant, *see Baldayaque v. United States*, 338 F.3d 145, 151-52 (2d. Cir. 2003); *United States v. Riggs*, 314 F.3d 796, 799 (5th Cir. 2002); *Marcello*, 212 F.3d at 1010; (2) ignorance of the law, lack of legal training, or lack of legal representation, *see United States v. Sosa*, 364 F.3d 507, 512 (4th Cir. 2004) (collecting cases); (3) reliance on an inmate law clerk, *see Marsh v. Soares*, 223 F.3d 1217, 1218 (10th Cir. 2000); (4) the fact of incarceration, including an inadequate law library, *see United States v. Wynn*, 292 F.3d 226, 230 (5th Cir. 2002);or (5) the fact that the prisoner is pursuing other forms of postconviction relief, *see Trenkler v. United States*, 268 F.3d 16, 21-22 (1st Cir. 2001) (motion under Fed. R. Civ. P. 33).

Equitable tolling MAY be available if the motion was not timely filed due to: (1) judicial error, including reliance on then-binding circuit precedent, *see, e.g., Harris v. Carter*, ___ F.3d ___, 2008 WL 341712 (9th Cir. Feb. 8, 2008); *United States v. Patterson*, 211 F.3d 927, 931-32 (5th Cir. 2000); *cf. Pliler v. Ford*, 542 U.S. 225, 235, 124 S. Ct. 2441, 2448, 159 F.3d 338 (2004) (O'Connor, J., concurring); (2) government misconduct or interference, *see Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 96, 111 S. Ct. 453, 458, 112 L.Ed.2d 435 (1990); *cf. Pliler*, 542 U.S. at 235, 124 S. Ct. at 2448 (O'Connor, J., concurring); *Solomon v. United States*, 467 F.3d 928, 934 (6th Cir. 2006); (3) counsel's serious errors or misconduct, *see, e.g., Martin*, 408 F.3d at 1093 (collecting cases); (4) the movant's mental incompetence, *see, e.g., Laws v. LeMarque*, 351 F.3d 919, 923 (9th Cir. 2003); or (5) the movant's timely filing of a defective pleading, *see, e.g., Irwin*, 498 U.S. at 96, 111 S. Ct. at 457-58; *De Aza-Paez v. United States*, 343 F.3d 552, 553 (1st Cir. 2003). Equitable tolling may also be available where the movant has made a showing of actual innocence, *see Gibson v. Klinger*, 232 F.3d 799, 808 (10th Cir. 2000); *cf. Montano*, 398 F.3d at 1284.

1.04 FILE A TIMELY *AND* COMPLETE MOTION: RELATION BACK

A section 2255 motion may be amended in the same manner as any other civil pleading under Federal Rule of Civil Procedure 15(a), which provides that a court "should freely give leave [to amend] when justice so requires." Fed. R. Civ. P. 15(a)(2); 28 U.S.C. § 2242. Section 2255's statute of limitations, however, complicates the amendment process. Any attempt to amend a section 2255 motion with a new claim will be timebarred unless the claim (1) is itself independently timely because filed within one year of one of the four triggering dates listed in ¶ 6 of section 2255; or (2) "relates back" to the date of the earlier motion, and the earlier motion was timely filed.

"'Relation back' causes an otherwise untimely claim to be considered timely by treating it as if it had been filed when the timely claims were filed." *Davenport v. United States*, 217 F.3d 1341, 1344 (11th Cir. 2000). Federal Rule of Civil Procedure 15(c) allows relation back when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out – or attempted to be set out – in the original pleading." Fed. R. Civ. P. 15(c)(1)(B). Under Rule 15(c), an amendment "relates back" only if it clarifies a claim in the initial motion – that is, when the original motion and amendment contain claims that involve a "common core of operative facts." *Mayle v. Felix*, 545 U.S. 644, 664, 125 S. Ct. 2562, 2574, 162 L.Ed.2d 582 (2005). If the amendment depends upon events separate both in time and type from those upon which the original claims depended, it will not "relate back," even though it arises from the same conviction and sentence. *See id.*, 545 U.S. at 657, 125 S. Ct. at 2571.

Given the limited reach of the relation-back doctrine, once the one-year statute of limitations under ¶ 6(1) has run, it will be impossible to amend a motion with any *new* claims except in those rare circumstances where a claim is independently timely under one of the difficult standards articulated in ¶¶ 6(2), 6(3) or 6(4), or equitable tolling is warranted. Accordingly, "it is essential that [movants] include in their first [motion] *all* potential claims for which they might desire to seek review and relief." *Mason v. Meyers*, 208 F.3d 414, 417 (3d Cir. 2000) (emphasis in original).

1.05 JURISDICTION: THE"CUSTODY" REQUIREMENT

Section 2255 requires that the movant be "[a] prisoner in custody under sentence of a court established by Act of Congress." § 2255 ¶ 1. This is a jurisdictional requirement. *See Heflin v. United States*, 358 U.S. 415, 418, 79 S. Ct. 451, 453, 3 L.Ed.2d 407 (1959). It is satisfied if the movant is "in custody" at the time the motion is filed. *See Spencer v. Kemna*, 523 U.S. 1, 7, 118 S. Ct. 978, 983, 140 L.Ed.2d 43 (1998).

1.05.01 Types of Restraint that Constitute Custody

The most common form of custody is incarceration pursuant to a criminal conviction. *See, e.g., Duncan v. Walker*, 533 U.S. 167, 176, 121 S. Ct. 2120, 2126, 150 L.Ed.2d 251 (2001). "Custody" also includes other restraints on liberty that are "not shared by the public generally," *Jones v. Cunningham*, 371 U.S. 236, 240, 83 S. Ct. 373, 376, 9 L.Ed.2d 285 (1963), such as involuntary

commitment to a mental health facility or a special penal facility, such as one for sexually violent predators. *See Duncan*, 533 U.S. at 176, 121 S. Ct. at 2126; *Brock v. Weston*, 31 F.3d 887, 890 (9th Cir. 1994).

"Custody," however, "has not been restricted to situations in which the applicant is in actual, physical custody." *Jones*, 371 U.S. at 240, 83 S. Ct. at 376. A movant is in "custody" if, at the time of filing the motion, she is: (1) on supervised release, *e.g., United States v. Cervini*, 379 F.3d 987, 989 n.1 (10th Cir. 2004); (2) on parole, *e.g., Jones*, 371 U.S. at 242-43, 83 S. Ct. at 376-77; (3) on probation, *e.g., United States v. Lopez*, 704 F.2d 1382, 1384 n.2 (5th Cir. 1983); (4) ordered to participate in certain rehabilitation programs, *e.g., Dow v. Circuit Court of the First Circuit,* 995 F.2d 922, 923 (9th Cir. 1993); *Barry v. Bergen County Probation Dept.*, 128 F.3d 152, 162 (3d Cir. 1997); or (5) released on bail, bond, or personal recognizance, *e.g., Hensley v. Municipal Court*, 411 U.S. 345, 348-49, 93 S. Ct. 1571, 1573-74, 36 L.Ed.2d 294(1973); *Justices of Boston Municipal Court v. Lydon*, 466 U.S. 294, 300-01, 104 S. Ct. 1805, 1809, 80 L.Ed.2d 311 (1984); *Lefkowitz v. Newsome*, 420 U.S. 283, 286 n.2, 95 S. Ct. 886, 888 n.2, 43 L.Ed.2d 196 (1975).

The following do NOT satisfy the custody requirement: (1) payment of a fine or restitution, *e.g., Williamson v. Gregoire*, 151 F.3d 1180, 1183 (9th Cir. 1998) (collecting cases); (2) revocation of a license, *e.g., id.* (collecting cases); or (3) registration as a sex offender, *see id*. at 1183-84.

1.05.02 Custody Under Consecutive Sentences and Sentences Already Served

For a prisoner serving consecutive sentences, the custody determination can be complicated. In general, "consecutive sentences should be treated as a continuous series;" that is, a prisoner "remains 'in custody' under all of his sentences until all are served." *Garlotte v. Fordice*, 515 U.S. 39, 40-41, 115 S. Ct. 1948, 1949, 132 L.Ed.2d 36 (1995). Thus, a prisoner serving the sentence for one conviction may challenge a different conviction via section 2255 if the challenged conviction adds in some way to "the aggregate of the consecutive sentences" the movant eventually must serve. *Peyton v. Rowe*, 391 U.S. 54, 64-65, 88 S. Ct. 1549, 1555, 20 L.Ed.2d 426 (1968).

For a prisoner with a federal sentence that runs consecutive to a state or federal sentence currently being served, the prisoner is considered to be "in custody" on the future federal sentence and may attack that sentence before completely serving the current sentence. *See* Rule 1(b), Rules Governing Section 2255 Proceedings; *Peyton*, 391 U.S. at 64-65, 88 S. Ct. at 1555. Indeed, given that the one-year statute of limitations for filing a section 2255 motion may elapse before the future federal sentence begins to run, a movant *must* attack that future federal sentence even though it has not yet begun to be served. *See Ospina v. United States*, 386 F.3d 750, 752 (6th Cir. 2004). Similarly, a prisoner serving some part of a series of consecutive sentences is also "in custody" under any sentences which have already expired, so long as invalidation of the expired sentence "would advance the date of [the movant's] eligibility for release from present incarceration." *Garlotte*, 515 U.S. at 47, 115 S. Ct. at 1952. Thus, if an expired sentence "persist[s] to postpone" the date of eligibility for release under the unexpired sentences, a movant may file a section 2255 motion challenging the expired sentence. *Id*., 515 U.S. at 41, 115 S. Ct. at 1949.

Unless the sentence being challenged is one of an aggregate of consecutive sentences, section 2255 cannot be used to challenge the legality of a conviction where the sentence has been fully served. This is because a prisoner is no longer "'in custody' under a conviction after the sentence imposed for it has fully expired" by the time the motion was filed. *Maleng v. Cook,* 490 U.S. 488, 492, 109 S. Ct. 1923, 1926, 104 L.Ed.2d 540 (1989). This is true even if the conviction is later used as a "prior" to enhance a sentence imposed pursuant to a subsequent conviction.

In addition, a prisoner whose current sentence has been enhanced by a prior conviction that has already been fully served may NOT use section 2255 to challenge the legality of the *current* sentence by arguing that the prior conviction was unlawful. Although a prisoner in this situation technically satisfies the "in custody" requirement, if the prior conviction "is no longer open to direct or collateral attack in its own right because the defendant failed to pursue those remedies while they were available (or because the defendant did so unsuccessfully), then that defendant is without recourse," unless the prior was obtained in violation of the right to counsel. *Daniels v. United States*, 532 U.S. 374, 382, 121 S. Ct. 1578, 1583, 149 L.Ed.2d 590 (2001). If, however, the prior conviction *is* still "open to direct or collateral attack in its own right," and the prisoner successfully challenges that conviction, then section 2255 *can* be used to attack the current sentence as wrongly enhanced by the now-invalidated prior conviction. *Id*., 532 U.S. at 382, 121 S. Ct. at 1583.

1.06 OBSTACLES TO RELIEF

Notwithstanding the breadth of the section 2255 remedy, the courts have created a number of jurisprudential doctrines that limit the ability to obtain relief in a section 2255 proceeding. They may be asserted by the government in its answer, or by the court *sua sponte*.

1.06.01 The "Law of the Case" Doctrine

Generally, a section 2255 proceeding may not be used to relitigate questions that were raised and considered on direct appeal. *See United States v. Wiley*, 245 F.3d 750, 752 (8th Cir. 2001). This is simply an application of the "law of the case" doctrine to section 2255 cases. *See Davis*, 417 U.S. at 342, 94 S. Ct. at 2303. There are two limited exceptions to this rule: (1) where there has been an intervening change in the law; *see id*., 417 U.S. at 342, 94 S. Ct. at 2303; or (2) the movant is actually innocent, *see Wiley*, 245 F.3d at 752. Note, however, that even though an intervening change in the law allows a section 2255 motion to be used to relitigate an issue already rejected on direct appeal, that does not necessarily mean that section 2255 relief is available. As discussed below, *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), generally bars section 2255 relief on any claim based on a new rule of criminal procedure promulgated since the case was on direct review. *See* § 1.07.02.04, *infra*.

1.06.02 The Procedural Default Doctrine

In general, if a section 2255 movant could have raised a claim at trial or on direct appeal but

did not, section 2255 relief on that claim is deemed waived – barred by the "procedural default" doctrine. *See United States v. Frady*, 456 U.S. 152, 168, 102 S. Ct. 1584, 1594, 71 L.Ed.2d 816 (1982). A claim is "procedurally defaulted" if it is the type of claim that "can be fully and completely addressed on direct review based on the record created" in the trial court, but was not raised on direct appeal. *Bousley v. United States*, 523 U.S. 614, 622, 118 S. Ct. 1604, 1611, 140 L.Ed.2d 828 (1998).

The procedural default doctrine's effect is harsh. It completely bars relief on a defaulted claim unless the movant can demonstrate either: (1) "cause" for the failure to raise the claim at the proper time and actual "prejudice," *Frady*, 456 U.S. at 168, 102 S. Ct. at 1594, or (2) that the denial of relief would be a "fundamental miscarriage of justice," *Murray v. Carrier*, 477 U.S. 478, 495-96, 106 S. Ct. 2639, 2649, 91 L.Ed.2d 397 (1986). These hurdles are intentionally high ones to surmount, as the Supreme Court has concluded that respect for the finality of judgments demands that "a collateral challenge may not do service for an appeal," except in exceptional circumstances. *See Frady*, 456 U.S. at 165, 167-68, 102 S. Ct. at 1593-94.

The procedural default doctrine applies only to claims that *could* have been raised at trial or on direct appeal. It does not apply to claims that require development of facts outside the trial record. *See Bousley*, 523 U.S. at 621, 118 S. Ct. at 1610. Importantly, the procedural default doctrine *never* bars a claim of ineffective assistance of counsel raised in a section 2255 proceeding, even if that claim could have been, but was not, raised on direct appeal. *See Massaro v. United States*, 538 U.S. 500, 503-04, 123 S. Ct. 1690, 1693, 155 L.Ed.2d 714 (2003). You should therefore consider whether an ineffective assistance of counsel claim may provide an avenue by which to litigate record-based claims which might otherwise be deemed procedurally defaulted.

The procedural default doctrine is not jurisdictional, but an affirmative defense; as such, the government may waive its application. *See Trest v. Cain*, 522 U.S. 87, 89, 118 S. Ct. 478, 480, 139 L.Ed.2d 444 (1997). A government waiver, however, does not necessarily mean that the court will reach the merits of the claim. Federal courts may invoke a procedural bar *sua sponte* if the movant has notice of the court's intention to apply the bar, and a reasonable opportunity to argue against it. *See, e.g, Oakes v. United States*, 400 F.3d 92, 97-99 (1st Cir. 2005) (collecting cases).

1.06.03 The *Stone* Doctrine

Under *Stone v. Powell*, 428 U.S. 465, 482, 96 S. Ct. 3037, 3046, 49 L.Ed.2d 1067 (1976), federal habeas corpus relief is not available to redress the admission at trial of evidence obtained in a violation of the Fourth Amendment *unless* the state courts denied the petitioner "an opportunity for full and fair litigation of a Fourth Amendment claim" at trial or on direct appeal. Under *Stone*, a federal court may not relitigate a Fourth Amendment issue tried fully and fairly in a state court, regardless the correctness of the state decision. *Siripongs v. Calderon*, 35 F.3d 1308, 1321 (9th Cir. 1994). Moreover, *Stone* requires only an "opportunity" for full and fair litigation. If the movant had the opportunity to raise a Fourth Amendment claim and failed to do so, *Stone* bars relief, even if the opportunity was squandered due to the failings of counsel. *See Jennings v. Rees*, 800 F.2d 72, 77

(6th Cir. 1986); *United States v. Hearst*, 638 F.2d 1190, 1196 (9th Cir. 1980).

The Supreme Court has implied that the *Stone* doctrine applies to section 2255 motions, *see United States v. Johnson*, 457 U.S. 537, 562 n.20, 102 S. Ct. 2579, 2594 n.20, 73 L.Ed.2d 202 (1982), and the circuits to consider the question have determined that it does, *see United States v. Ishmael*, 343 F.3d 741, 742 (5th Cir. 2003) (collecting cases). For this reason, you must assume that *Stone* will apply to any Fourth Amendment claim asserted in a section 2255 motion.

Although *Stone* bars relief on the vast majority of Fourth Amendment claims raised in section 2255 proceedings, the Supreme Court has "repeatedly declined to extend the rule in *Stone* beyond its original bounds." *Withrow v. Williams*, 507 U.S. 680, 687, 113 S. Ct. 1745, 1750, 123 L.Ed.2d 407 (1993). Thus, *Stone* does not bar collateral relief on separate constitutional claims arising out of the same facts that comprise the Fourth Amendment violation, including claims challenging the voluntariness of a confession under the Fifth Amendment, *Cardwell v. Taylor*, 461 U.S. 571, 573, 103 S. Ct. 2015, 2016, 76 L.Ed.2d 333 (1983), and claims that trial counsel was ineffective in failing to object to the admission of evidence seized in violation of Fourth Amendment, *Kimmelman v. Morrison*, 477 U.S. 365, 383-84, 106 S. Ct 2574, 2587, 91 L.Ed.2d 305 (1986). Look closely to determine if your facts support any other claim for relief.

Stone is "not jurisdictional in nature." *Withrow*, 507 U.S. at 686, 113 S. Ct. at 1750. Nonetheless, some circuits have expressed an inclination to apply the *Stone* bar *sua sponte*. *See Ishmael*, 343 F.3d at 743; *Woolery v. Arave*, 8 F.3d 1325, 1326-28 (9th Cir. 1993).

1.06.04 The *Teague* Doctrine

Teague v. Lane, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989), dramatically narrowed the habeas remedy by holding that a new rule of criminal procedure announced in a Supreme Court decision will generally not apply retroactively to cases that are already final. "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review." *Whorton v. Bockting*, ___ U.S. ___, 127 S. Ct. 1173, 1180, 167 L.Ed.2d 1 (2007) (citing *Griffith v. Kentucky*, 479 U.S. 314, 107 S. Ct. 708, 93 L.Ed.2d 649 (1987)). *Teague* is not a two-way street. It does not bar retroactive application of *restrictions* of constitutional rights; only the retroactive broadening of such rights. *See Lockhart v. Fretwell*, 506 U.S. 364, 372-373, 113 S. Ct. 838, 844, 122 L.Ed.2d 180 (1993).

The Supreme Court has never expressly held that *Teague* applies to section 2255 motions, but the courts of appeal agree that it does. *See United States v. Sanchez-Cervantes*, 282 F.3d 664, 667 & n.9 (9th Cir. 2002) (collecting cases). The *Teague* doctrine is not jurisdictional and, accordingly, may be waived by the government if not asserted in a timely manner. *See, e.g., Caspari v. Bohlen*, 510 U.S. 383, 389, 114 S. Ct. 948, 953, 127 L.Ed.2d 236 (1994). The government's failure to raise *Teague*, however, does not preclude the court from applying it *sua sponte*. *Id.*, 510 U.S. at 389, 114 S. Ct. at 953; *see United States v. Ishmael* 343 F.3d 741, 743 (5th Cir. 2003).

The court must address the question of whether relief is barred by *Teague* as a "threshold" matter *before* it addresses the merits of the claim, *Teague*, 489 U.S. at 300-01, 109 S. Ct. at 1070, but not until *after* it considers other matters that are antecedent to a decision on the merits, such as whether the movant is "in custody," and whether a claim is procedurally defaulted, *see Lambrix v. Singletary*, 520 U.S. 518, 524, 117 S. Ct. 1517, 1523, 137 L.Ed.2d 771 (1997).

A four-step analysis must be undertaken to determine whether *Teague* bars relief. First, "because *Teague* by its terms applies only to procedural rules," the court must determine if the rule on which the movant relies is one of substance or procedure. *Bousley*, 523 U.S. at 620, 118 S. Ct. at 1610. Second, if the rule is one of criminal procedure, "the court must ascertain the date on which the defendant's conviction and sentence became final for *Teague* purposes." *Caspari*, 510 U.S. at 390, 114 S. Ct. at 953. Third, the court must determine whether the rule is "new," that is, it must survey the legal landscape at the time the movant's conviction became final and determine whether a court at that time "would have felt compelled by existing precedent" to apply the rule the movant propounds. *Id*., 510 U.S. at 390, 114 S. Ct. at 953. Fourth, if the court concludes the rule the movant seeks is both one of criminal procedure and "new," then the court must determine whether either of the two *Teague* exceptions apply. *Id*., 510 U.S. at 390, 114 S. Ct. at 953.

The two *Teague* exceptions are *extremely* narrow. Under the first, a new rule applies retroactively if it places "a class of private conduct beyond the power of the state to proscribe" or prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Graham v. Collins*, 506 U.S. 461, 477, 113 S. Ct. 892, 903, 122 L.Ed.2d 260 (1993). The Eighth Amendment's prohibition on the execution of the mentally retarded falls within this exception. *See Penry v. Lynaugh*, 492 U.S. 302, 329-330, 109 S. Ct. 2934, 2952-53, 106 L.Ed.2d 256 (1989), *abrogated on other grounds*, *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L.Ed.2d 335 (2002). The second exception applies when the new rule is a "watershed rule of criminal procedure." *Teague*, 489 U.S. at 311, 109 S. Ct. at 1076. These "watershed" rules are only "a small core of rules," most of which have long been recognized as law. *Graham*, 506 U.S. at 478, 113 S. Ct at 903. Indeed, it is unlikely that any of these watershed rules has yet to emerge. *Tyler v. Cain*, 533 U.S. 656, 666 n.7, 121 S. Ct. 2478, 2484 n.7, 150 L.Ed.2d 632 (2001).

1.07 THE MOTION: PLEADING REQUIREMENTS

A section 2255 motion must be filed in the district court "which imposed the sentence" being challenged. 28 U.S.C. § 2255 ¶ 1. The formal pleading requirements for section 2255 motions are contained in Rules 2 and 3 of the Rules Governing Section 2255 Proceedings, and the Model Form for Motions Under 28 U.S.C. § 2255 ("Model Form"), which is appended to the Section 2255 Rules. Additional pleading requirements may be set out in local district court rules, and some district courts have their own model forms that conform to their local rules. Model forms are available from the district court clerk without charge, and many district courts have the forms posted on their websites.

The contents of a section 2255 motion should substantially conform with the Model Form or the form prescribed by the local rules, *see* Rule 2(c), Rules Governing Section 2255 Proceedings,

and must: (1) specify all available grounds for relief; (2) state the facts supporting each ground for relief; (3) state the relief requested; (4) be typed or legibly handwritten; and (5) be signed under penalty of perjury by the movant or by a person authorized to sign it for the movant (for example, movant's attorney). Rule 2(b), Rules Governing Section 2255 Proceedings; Advisory Committee Notes to Rule 2; *see also* 28 U.S.C. § 2242.

Importantly, unlike the "notice pleading" rules which govern most federal civil actions, "*fact*-pleading" is required for section 2255 motions. *Taylor v. United States*, 287 F.3d 658, 661 (7th Cir. 2002). The motion *must* "state the facts supporting each ground" for relief. Rule 2(b), Rules Governing § 2255 Proceedings; *see* § 2242. Although this fact-pleading requirement does not compel a movant to state every relevant fact or item of relevant evidence, it *does* mean that the motion must contain something more than non-specific, conclusory allegations. As to each claim, sufficient facts must be alleged in order to show an entitlement to relief if those facts are proven.

A section 2255 motion is a pleading, not a legal brief. It should therefore simply list the claims for relief and the facts supporting each claim. In crafting the motion, however, carefully consult the relevant substantive law to ensure that the motion pleads sufficient facts to state a *prima facie* case for relief as to each claim presented. For many of the claims typically found in section 2255 motions – claims of ineffective assistance of counsel, for example – a particularized factual showing of prejudice is required in order to state a *prima facie* case for relief. For such claims, take care to specify in detail the facts supporting the "prejudice" element of the claim.

Because a section 2255 motion is a pleading, no exhibits demonstrating the *bona fides* of the facts alleged need be attached to it. If, however, such exhibits exist, you will usually want to submit them with the motion. That way, the district court can better evaluate the strength of the claims, as well as other matters, such as whether to hold an evidentiary hearing. For the same reasons, you need not, but should, file a memorandum of law with the motion. Without a legal framework, the court may not understand the compelling nature, or even the relevance, of your factual allegations.

1.08 THE GOVERNMENT'S RESPONSE AND THE MOVANT'S REPLY

The Government is "not required to answer the motion unless a judge so orders." Rule 5(a), Rules Governing Section 2255 Proceedings. It is the judge who determines the date on which the answer is due. Rule 4(b), Rules Governing Section 2255 Proceedings. Rule 5 of the Rules Governing Section 2255 Proceedings controls the answer's contents, and requires that the answer "address the allegations in the motion." Rule 5(b), Rules Governing Section 2255 Proceedings. The answer must also state whether the movant "has used any other federal remedies, including any prior post-conviction motions," and whether the movant "received an evidentiary hearing." *Id*. Neither Rule 5, nor the Advisory Committee Notes, set out any further restrictions on the answer's contents. If the answer refers to "briefs or transcripts of the prior proceedings that are not available in the court's records," the court "must order" the Government "to furnish them within a reasonable time that will not unduly delay the proceedings." Rule 5(c), Rules Governing Section 2255 Proceedings.

A section 2255 movant "may," but need not, "submit a reply to the respondent's answer or other pleading." Rule 5(d), Rules Governing Section 2255 Proceedings. The rules do not specify a time to reply. Instead, any reply must be filed "within a time fixed by the judge." *Id*. Although a reply (sometimes called a "traverse") is not required, in most cases one should be filed. Certainly, a reply should be filed if the answer contains misleading or inaccurate information, or raises any of the obstacles to relief described above. § 1.07.02, *supra*. The failure to file a reply in such circumstances may invite denial of the claim by the court.

1.09 EXPANSION OF THE RECORD, DISCOVERY, AND EVIDENTIARY HEARINGS

The proceedings before the district court will usually be the last and best opportunity to develop facts and present evidence in support of the claims raised in a section 2255 motion. This is especially true given that it is nearly impossible to obtain relief on a second or successive section 2255 motion. *See* § 1.12, *infra*. Therefore, as early in the process as possible, you should endeavor to develop the facts to support your claims using as many of the available fact-development tools as possible, and to present those facts to the court in a timely manner.

1.09.01 Expansion of the Record.

The record before the district court need not be limited to the record of the prior criminal proceeding. Rule 7 of the Rules Governing Section 2255 Proceedings explicitly allows the district court to "expand the record" to include additional materials submitted by the parties. Expansion of the record is a relatively uncomplicated way to place favorable evidence before the court, given that it allows the record to be expanded with many kinds of documentary evidence that would constitute inadmissible hearsay in other federal proceedings. Moreover, even if the district court denies the motion to expand the record, the materials presented therewith "are part of the record on appeal." *See Schlup v. Delo*, 513 U.S. 298, 308 n.18, 115 S. Ct. 851, 858 n.18, 130 L.Ed.2d 808 (1995).

Under Rule 7, either on a party's motion or *sua sponte*, "the judge may direct the parties to expand the record by submitting additional materials relating to the motion." Rule 7(a), Rules Governing Section 2255 Proceedings. Rule 7 further provides that the record can be expanded to "include letters predating the filing of the motion, documents, exhibits, and answers under oath to written interrogatories propounded by the judge. Affidavits also may be submitted and considered as part of the record." Rule 7(b), Rules Governing Section 2255 Proceedings. Under Rule 7, virtually *any* materials relating to the motion can be added to the record in order "to clarify the relevant facts." *Vasquez v. Hillery*, 474 U.S. 254, 258, 106 S. Ct. 617, 620, 88 L.Ed.2d 598 (1986). *See, e.g., id*, 474 U.S. at 258, 106 S. Ct. at 620 (statistical analysis); *United States v. Chacon-Palomares*, 208 F.3d 1157, 1160 (9th Cir. 2000) (affidavits); *United States v. Nieuwsma*, 779 F.2d 1359, 1360 n.3 (8th Cir. 1985) (presentence investigation report). Moreover, the materials submitted need not "relat[e]" only to the *merits* of the claims in the motion; the record may also be expanded with materials that relate to other issues involving the motion, such as whether it is timely filed. *See* Advisory Committee Notes to Rule 7, Rules Governing Section 2255 Proceedings (referencing Advisory Committee Note to Rule 7 of Rules Governing Section 2254 Cases).

When filing a motion to expand the record, the materials you seek to include in the record should accompany the motion, as should a brief memorandum of law. The memorandum should discuss how the proffered materials relate to the motion, and reasons why the court should expand the record. The court *may*, but need not, require the authentication of any materials proffered for inclusion in the record. *See* Rule 7(a), Rules Governing Section 2255 Proceedings.

Rule 7(c) requires the court to afford the party against whom the additional materials are offered "an opportunity to admit or deny their correctness." Rule 7(c), Rules Governing Section 2255 Proceedings. If affidavits are admitted by the district court, any party has "the right to propound written interrogatories to the affiants, or to file answering affidavits." 28 U.S.C. § 2246. If the parties submit contradictory affidavits or other evidence, and the court must determine the credibility of the proffered evidence, an evidentiary hearing is generally required. *See* Advisory Committee Note to Rule 7, Rules Governing Section 2255 Proceedings (referencing Advisory Committee Note to Rule 7, Rules Governing Section 2254 Cases, which states that "[w]hen the issue is one of credibility, resolution on the basis of affidavits can rarely be conclusive").

1.09.02 Discovery: "Good Cause" Is Required

A section 2255 movant, unlike the usual civil litigant, is not entitled to discovery as a matter of course. Rather, discovery in section 2255 proceedings requires leave of the court, and is controlled by Rule 6 of the Rules Governing Section 2255 Proceedings. Rule 6(a) allows a section 2255 movant to use, in the court's discretion and "for good cause," all of the discovery procedures available under the Federal Rules of Criminal Procedure *and* the Federal Rules of Civil Procedure. Rule 6(a), Rules Governing Section 2255 Proceedings. If the government seeks discovery, it must also meet the "good cause" standard articulated in Rule 6(a). *See id*.

"Good cause" for discovery under Rule 6(a) has been shown "where specific allegations before the court show reason to believe that the petitioner may, if the facts are fully developed, be able to demonstrate that he is . . . entitled to relief." *Bracy v. Gramley*, 520 U.S. 899, 908-909, 117 S. Ct. 1793, 1799, 138 L.Ed.2d 97 (1997) (internal quotation marks omitted). Movants need not state a *prima facie* case for relief prior to seeking discovery. Rather, Rule 6(a)'s "good cause" standard permits the use of discovery to *establish* a *prima facie* case for relief. That is, "good cause" is shown even if the movant's allegations support "only a theory . . . [that] is not supported by any solid evidence" at the time of the discovery request. *Bracy*, 520 U.S. at 908, 117 S. Ct. at 1799. Indeed, "[i]t may well be. . . that [the movant] will be unable to obtain evidence sufficient to" establish the claim, but if specific allegations are made which suggest that the movant *may* be able to demonstrate a right to relief, "good cause" is established, and the district court has a "duty" to allow discovery. *Id.*, 520 U.S. at 908-909, 117 S. Ct. at 1799.

If good cause is shown, discovery is available "regardless of whether there is to be an evidentiary hearing." *Jones v. Wood*, 114 F.3d 1002, 1009 (9th Cir. 1997). Nonetheless, if a hearing is granted, and prior discovery requests were denied or granted on a limited basis, consider renewing or expanding upon these requests, arguing that the grant of a hearing demonstrates "good cause" has

been shown. Courts may also use discovery as a means for narrowing the issues for presentation at a hearing, or as a substitute for the hearing itself. *See Blackledge v. Allison*, 431 U.S. 63, 81-82, 97 S. Ct. 1621, 1633, 52 L.Ed.2d 136 (1977). If a hearing is desired, be prepared to demonstrate that certain discovery procedures – especially depositions – are inadequate substitutes.

One cannot demonstrate "good cause" for discovery without first "provid[ing] reasons for the request" related to the "essential elements" of the claim. Rule 6(b), Rules Governing Section 2255 Proceedings; *Bracy*, 520 U.S. at 904, 117 S. Ct at 1797. Accordingly, the discovery motion should specifically explain how the items requested are directly relevant to at least one of the elements of one of the legal claims contained in the motion. Generalized statements about the possible existence of discovery material are insufficient; Rule 6 "does not . . . authorize fishing expeditions." *Harris v. Johnson*, 81 F.3d 535, 540 (5th Cir. 1996). Once a movant has demonstrated "good cause" for discovery, "the scope and extent of such discovery is a matter confided to the discretion of the District Court." *Bracy*, 520 U.S. at 909, 117 S. Ct. at 1799.

The discovery request must "include any proposed interrogatories and requests for admission, and . . . specify any requested documents." Rule 6(b), Rules Governing Section 2255 Proceedings. The failure to submit these specific items with the discovery motion will cause the request to be denied. A deposition request should include a list of documents the applicant will ask the deponent to produce, and indicate those matters on which movant seeks to question the deponent.

1.09.03 Evidentiary Hearings

Paragraph 2 of section 2255 states, "Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto." 28 U.S.C. § 2255 ¶ 2. This language incorporates the standards governing evidentiary hearings in habeas corpus cases that was articulated in *Townsend v. Sain*, 372 U.S. 293, 83 S. Ct. 745, 9 L.Ed.2d 770 (1963). *See* Advisory Committee Notes to Rule 8, Rules Governing Section 2255 Proceedings (incorporating Advisory Committee Notes to Rule 8, Rules Governing Section 2254 Cases).

Under *Townsend*, a hearing is *required* where the facts alleged, if true, would entitle the movant to relief, and the facts have not yet been reliably found after a full and fair hearing. *Id.*, 372 U.S. at 312-313, 83 S. Ct. at 757. Actual proof of those facts alleged in the motion is not required in order to demonstrate entitlement to a hearing. "The law is clear that, in order to be entitled to an evidentiary hearing, a petitioner need only *allege* – not prove – reasonably specific, non-conclusory facts that, if true, would entitle him to relief." *Aron v. United States*, 291 F.3d 708, 715 n.6 (11th Cir. 2002) (emphasis in original).

Thus, if the record of the case does not "'conclusively show' that under no circumstances could the [movant] establish facts warranting relief under § 2255," the movant must be afforded a hearing in the district court. *Fontaine v. United States*, 411 U.S. 213, 215, 93 S. Ct. 1461, 1463, 36

L.Ed. 2d 169 (1973). As a result, a hearing is generally required if the motion presents a colorable claim that arises from matters outside the record. *See United States v. Magini*, 973 F.2d 261, 264 (4th Cir. 1992); *Shah v. United States*, 878 F.2d 1156, 1158 (9th Cir. 1989). Indeed, evidentiary hearings are more likely to be granted in section 2255 cases to resolve those types of claims – such as the ineffectiveness of counsel or the prosecutor's failure to disclose exculpatory evidence – which generally involve factual disputes regarding matters outside the record.

If the court determines a hearing is warranted, it must appoint counsel if the movant qualifies for appointment of counsel under the Criminal Justice Act. Rule 8(c), Rules Governing Section 2255 Proceedings. The hearing is to be conducted "as soon as practicable after giving the attorneys adequate time to investigate and prepare." *Id*. In setting the date for the hearing, the court must consider "the complexity of the case, the availability of important materials, the workload of [counsel for the government], and the time required by appointed counsel to prepare." Advisory Committee Notes to Rule 8, Rules Governing Section 2255 Proceedings (incorporating by reference Advisory Committee Notes to Rule 8, Rules Governing Section 2254 Cases).

The hearing will be governed by the Federal Rules of Evidence. *See* Fed. R. Evid. 1101(e); Rule 12, Rules Governing Section 2255 Proceedings. Moreover, Rule 8(d) of the Rules Governing Section 2255 Proceedings explicitly authorizes the court to order the production of the prior statements of any witness who testifies at an evidentiary hearing by extending the scope of Federal Rules of Criminal Procedure 26.2(a)-(d) and (f) to apply to section 2255 proceedings. Rule 8(d), Rules Governing Section 2255 Proceedings. If the court orders production of a prior witness statement and a party refuses to comply, "the court must not consider that witness's testimony." *Id*.

1.10 RELIEF

The section 2255 remedy is "broad and flexible, and entrusts to the courts the power to fashion an appropriate remedy." *United States v. Hadden*, 475 F.3d 652, 661 (4th Cir. 2007) (internal quotation marks omitted). Paragraph 2 of section 2255 lists the four remedies that are appropriate: (1) "discharge the prisoner," (2) "grant [the prisoner] a new trial," (3) "resentence [the prisoner]," or (4) "correct the [prisoner's] sentence." § 2255 ¶ 2. Accordingly, the end result of a successful section 2255 proceeding "must be the vacatur of the prisoner's unlawful sentence (and perhaps one or more of his convictions) and one of the following: (1) the prisoner's release, (2) the grant of a future new trial to the prisoner, (3) or a new sentence, be it imposed by (a) a resentencing or (b) a corrected sentence." *Hadden*, 475 F.3d at 661.

1.11 PERFECTING AN APPEAL

Before the AEDPA was enacted in 1996, a prisoner's appeal from a district court order denying section 2255 relief was perfected simply by timely filing a notice of appeal. That is no longer true. Now, a section 2255 movant seeking to perfect an appeal must both timely file a notice of appeal *and* secure a "certificate of appealability." *See* 28 U.S.C. § 2253(c). Once an appeal is perfected, section 2255 appeals proceed in generally the same manner as other appeals, so only the

procedures required to *perfect* a section 2255 appeal are discussed here.

1.11.01 The Notice of Appeal

For purposes of calculating the time to appeal, a section 2255 case is considered "civil" in nature and therefore governed by Federal Rule of Appellate Procedure 4(a). *See United States v. Hayman*, 342 U.S. 205, 209 n.4, 72 S. Ct. 263, 267 n. 4, 96 L.Ed. 232 (1952); Rule 11, Rules Governing Section 2255 Proceedings. Because the United States is a party, the time allowed to appeal under Rule 4(a) is 60 days. Fed. R. App. P. 4(a)(1)(B). This 60-day limit is mandatory and jurisdictional. *Browder v. Director*, 434 U.S. 257, 264, 98 S. Ct. 556, 561, 54 L.Ed.2d 521 (1978); *United States v. Feuver*, 236 F.3d 725, 727 (D.C. Cir. 2001).

The 60-day time period for filing an appeal starts to run when the district court issues a "final decision." *See* 28 U.S.C. § 1291. If the district court either (1) denied section 2255 relief, or (2) granted relief, vacated the movant's *conviction*, and ordered a new trial, then that decision is final and appealable. *See Hadden*, 475 F.3d at 662-63 (collecting cases). If, however, the district court granted section 2255 relief and its order requires the *resentencing* of the movant, that order is not a "final" order, and no appeal will be allowed, until after the movant has been resentenced. *See Andrews v. United States*, 373 U.S. 334, 339-40, 83 S. Ct. 1236, 1239-40, 10 L.Ed.2d 383 (1963); *United States v. Martin*, 226 F.3d 1042, 1048 (9th Cir. 2000).

1.11.02 The Certificate of Appealability

In addition to timely filing a notice of appeal, a prisoner seeking to appeal the denial of section 2255 relief must also obtain a "certificate of appealability" (COA), either from the district court or the court of appeals. § 2253(c)(1)(B). No COA is required for a government appeal. Fed. R. App. P. 22(b)(3).

The COA requirement is jurisdictional in nature; that is, the absence of a COA will preclude an appeal. *See United States v. Cepero*, 224 F.3d 256, 267-68 (3d Cir. 2000) (*en banc*); *Krantz v. United States*, 224 F.3d 125, 127 (2d Cir. 2000). A COA is required for a movant to appeal any order that is "the final order in a proceeding under section 2255." § 2253(c)(1)(B). This includes orders other than those denying the motion. For example, a COA is required to appeal a final collateral order, such as the district court's denial of bond pending resolution of the motion. *See Pagan v. United States*, 353 F.3d 1343, 1346 (11th Cir. 2003).

Moreover, "[a] COA is an issue-by-issue jurisdictional prerequisite to a merits determination on appeal." *United States v. Magallanes*, 301 F.3d 1267, 1269 (10th Cir. 2002). The certificate of appealability must "indicate which specific issue or issues satisfy the showing required." § 2253(c)(3). Issues not specified in a COA cannot be addressed on appeal. *See Dunham v. United States*, 486 F.3d 931, 934 (6th Cir. 2007) (collecting cases). Thus, a movant must obtain a COA as to *every* issue on which an appeal is sought. For example, even if the district court has *granted* section 2255 relief as to one or more claims, a COA is required to appeal the *denial* of relief on any

other claims. *See Rios v. Garcia*, 390 F.3d 1082, 1087-88 (9th Cir. 2004).

1.11.02.01 Substantive Standard for Issuance of a COA

A COA may issue only upon "a substantial showing of the denial of a constitutional right." § 2253(c)(2). To obtain a COA, the applicant must show "that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1603-04, 146 L.Ed.2d 542 (2000) (internal quotation marks omitted). A prisoner need show only that the issues raised are debatable among reasonable jurists: a court "should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief." *Miller-El v. Cockrell*, 537 U.S. 322, 337, 123 S. Ct. 1029, 1039, 154 L.Ed.2d 931 (2003). Because a COA is necessarily sought after the prisoner has lost on the merits, a movant is "not require[d]. . . to prove, before the issuance of a COA, that some jurists would grant [relief]. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that [movant] will not prevail." *Id.*, 537 U.S. at 338, 123 S. Ct at 1040.

A COA "may issue . . . only if the applicant has made a substantial showing of the denial of a *constitutional* right." § 2253(c)(2) (emphasis added). A court *cannot* grant a COA on non-constitutional claims, such as those asserting: (1) <u>a misapplication of the Sentencing Guidelines</u>, *see Cepero*, 224 F.3d at 267-68; *Buggs v. United States*, 153 F.3d 439, 443 (7th Cir. 1998); (2) <u>the denial of a federal statutory right</u>, *see United States v. Christensen*, 456 F.3d 1205, 1206 (10th Cir. 2006); *United States v. Taylor*, 454 F.3d 1075, 1079 (11th Cir. 2006); (3) <u>a violation of the Federal Rules of Criminal Procedure</u>, *see United States v. Brooks*, 230 F.3d 643, 646 (3d Cir. 2000); (4) <u>a violation of treaty rights</u>, *see Murphy v. Netherland*, 116 F.3d 97, 99-100 (4th Cir. 1997). For these and other non-constitutional issues, the district court's denial of relief cannot be appealed.

Because a COA may issue only for the denial of a constitutional right, what happens when the district court denies relief based on a preliminary procedural ruling, such as that the motion is time-barred or contains procedurally defaulted claims? In such circumstances, a two-part inquiry is required: "one directed at the underlying constitutional claims and one directed at the district court's procedural holding." *Slack*, 529 U.S. at 484-85, 120 S. Ct. at 1604. Thus, when the district court denies a section 2255 motion on procedural grounds without reaching the prisoner's underlying constitutional claim, "a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the [motion] states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*, 529 U.S. at 484, 120 S. Ct. at 1604. Where the movant has made a substantial showing with respect to the procedural issue, however, the inquiry into the merits of the underlying claims is not searching: the court need only take a "quick look" at the motion to determine whether it contains at least one claim that, on its face, alleges the denial of a constitutional right. *See Mateo v. United States*, 310 F.3d 39, 41 (1st Cir. 2002).

If the district court relies on a preliminary procedural question, such as timeliness, to deny relief, but nonetheless issues a COA only as to the merits of the underlying claims, the court of appeals can assume that the COA also encompasses any procedural issues that must be addressed before reaching the merits. *See United States v. Howard*, 381 F.3d 873, 877 n.3 (9th Cir. 2004).

1.11.02.02 COA Procedures

Any application for a COA must first be considered by the district court. *See* Fed. R. App. 22(b)(1). Moreover, the district court must construe a notice of appeal as an application for a COA. *Id*. Accordingly, a COA need not be formally requested from the district court; a notice of appeal will suffice. *See Castro v. United States*, 310 F.3d 900, 902-03 (6th Cir. 2002). You are, however, strongly urged to file a formal COA request. Without guidance, the district court may overlook issues on which an appeal is warranted.

Neither section 2253 nor Federal Rule of Appellate Procedure 22(b) specify a time period within which to file a COA request in the district court. Check your local rules to see if they specify any time limits in your jurisdiction. If the local rules do not specify a time limit, a COA application should be filed in the district court at the same time as the notice of appeal.

If the district court grants a certificate on *all issues* on which the movant wishes to appeal, the appeal may proceed and the movant need not seek a second certificate from the court of appeals. If the district court *denies* a COA as to *all issues*, the court of appeals will automatically consider whether it should grant a COA, even if no express request is made to the appellate court. *Jones v. United States*, 224 F.3d 1251, 1255 (11th Cir. 2000); Fed. R. App. P. 22(b)(1). "Under the plain language of the rule, an applicant . . . gets two bites at the appeal certificate apple; one before the district judge, and if that one is unsuccessful, he gets a second one before a circuit judge." *Hunter v. United States*, 101 F.3d 1565, 1575 (11th Cir. 1996) (*en banc*), *overruled in part on other grounds by Lindh v. Murphy*, 521 U.S. 320, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997). Although no formal request to the court of appeals is required if the district court denies a COA on *all* issues, you should strongly consider filing one. A formal COA request allows you to craft the issues for appeal, and to respond fully to the district court's reasons, if any, for denying a certificate.

If the district court grants a COA as to *some, but not all* of the issues on which certification is sought, the court of appeals has jurisdiction to consider the remaining issues *only* if it expands the COA to include them. The circuits are divided as to whether a movant must expressly ask the court of appeals to expand a COA. In some circuits, the court of appeals will construe the inclusion in the briefing on appeal of an issue denied certification by the district court to be a request to expand the COA; in others, an express request to expand the COA, separate from any briefing, must be filed in the court of appeals. *See Jones*, 224 F.3d at 1255-56 (discussing split).

The timing and procedures governing a COA application or motion to expand the COA in the court of appeals also varies by circuit, so you should consult your local rules, and local practitioners. Depending on the circuit, a COA request may first be considered by a single judge,

two-judge panel, or three-judge panel. *See, e.g.,* 11th Cir. R. 27-1(d)(2) (single judge); *In Re Certificates of Appealability*, 106 F.3d 1306, 1307 (6th Cir. 1997) (same); *Thomas v. United States*, 328 F.3d 305, 307 (7th Cir. 2003) (two judges); *Bui v. DiPaolo*, 170 F.3d 232, 238 n.2 (1st Cir. 1999) (three-judge panel). A movant may seek reconsideration of the denial of a COA, and rehearing by the court *en banc*. *See Thomas*, 328 F.3d at 308-09; *Jones*, 224 F.3d at 1256; *Salgado v. United States*, 384 F.3d 769, 775 (9th Cir. 2004); *Gonzalez v. Sec'y for the Dept. of Corrections*, 366 F.3d 1253 (11th Cir. 2004) (*en banc*).

If both the district court and the court of appeals deny a COA as to all issues, a petition for writ of *certiorari* seeking review of that denial may be filed in the Supreme Court. *Hohn v. United States*, 524 U.S. 236, 118 S. Ct. 1969, 141 L.Ed.2d 242 (1998).

1.12 SECOND OR SUCCESSIVE MOTIONS

The AEDPA changed both the substantive standard governing when relief may be granted on a second or successive section 2255 motion, and the procedures governing such motions. Before the AEDPA, relief could be obtained on any issue presented in a second or successive motion unless it was an "abuse of the writ." *See McCleskey v. Zant*, 499 U.S. 467, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991); Rule 9(b), Rules Governing Section 2255 Proceedings (2003). It was *very* difficult to obtain relief on a second or successive motion under the abuse-of-the writ standard; the changes wrought by the AEDPA now make it nearly impossible.

Importantly, however, the AEDPA's harsh restrictions on relief come into play *only if* a subsequent motion is truly "second or successive." *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 118 S. Ct. 1618, 140 L.Ed.2d 849 (1998). They do NOT apply where: (1) <u>the prior motion was not adjudicated and decided on the merits</u>, *see, e.g., Muniz v. United States*, 236 F.3d 122, 123 (2d Cir. 2001); (2) <u>the prior motion was voluntarily dismissed or dismissed without prejudice</u>, unless the reason for dismissal was movant's concession that the claims were meritless, *see Haro-Arteaga v. United States*, 199 F.3d 1195, 1196-97 (10th Cir. 1999); (3) <u>the subsequent motion is a motion to amend under Federal Rule of Civil Procedure 15</u>, *see Johnson v. United States*, 196 F.3d 802, 805 (7th Cir. 1999); (4) <u>the subsequent motion was filed while the initial motion was still pending</u>, *see Ching v. United States*, 298 F.3d 174, 177 (2d Cir. 2002); (5) <u>the subsequent motion presents a claim that was not ripe at the time of the first motion</u>; *see Martinez-Villareal*, 523 U.S. at 644-45, 118 S. Ct. at 1622; (6) <u>the prior motion was dismissed for want of jurisdiction, or some other technical deficiency unrelated to the substantive claims for relief</u>, *see Phillips v. Seiter*, 173 F.3d 609, 610 (7th Cir. 1999); (7) <u>the district court prevented the applicant from presenting all substantive claims in the prior proceeding</u>, *see Reeves v. Little*, 120 F.3d 1136, 1139-40 (10th Cir. 1997); (8) <u>the prisoner obtained relief on a prior motion and the subsequent motion raised only claims that originated from the retrial or resentencing</u>, *see Sustache-Rivera v. United States*, 221 F.3d 8, 13 (1st Cir. 2000); *Esposito v. United States*, 135 F.3d 111, 111 (2d Cir. 1997); (9) <u>the prior motion was incorrectly dismissed as untimely or as successive</u>, *see Muniz*, 236 F.3d at 123; *In re Moore*, 196 F.3d 252, 255 (D.C. Cir. 1999); (10) <u>the movant used his first motion solely to reinstate his right to direct appeal</u>, *see McIver v. United States*, 307 F.3d 1327, 1330 (11th Cir. 2002) (collecting cases).

The harsh restrictions on second or successive section 2255 motions also do not apply if the prior or subsequent motion was not a section 2255 motion. *See United States v. Esogbue*, 357 F.3d 532, 534 (5th Cir. 2004); *Jacobs v. McCaughtry*, 251 F.3d 596, 597 (7th Cir. 2001); *Gitten v. United States*, 311 F.3d 529, 531-32 (2d Cir. 2002). This does not mean that simply re-labeling a filing will suffice. The court will determine whether a later filing is indeed a second or successive section 2255 motion, and *sua sponte* apply the restrictions on such motions to a mislabeled filing, no matter whether it is called a: (1) habeas corpus petition under 28 U.S.C. § 2241, *see Stephens v. Herrera*, 464 F.3d 895, 897-98 (9th Cir. 2006); *In re Gregory*, 181 F.3d 713, 714 (6th Cir. 1999); (2) petition for writ of error coram nobis, *see Matus-Leva v. United States*, 287 F.3d 758, 761 (9th Cir. 2002); (3) motion under Federal Rule of Criminal Procedure 33, *see United States v. Evans*, 224 F.3d 670, 672 (7th Cir. 2000); (4) motion under Federal Rule of Criminal Procedure 35(a), *see United States v. Canino*, 212 F.3d 383, 384 (7th Cir. 2000); (5) Federal Rule of Civil Procedure 60(b) motion, *see Gonzalez v. Crosby*, 545 U.S. 524, 125 S. Ct. 2641, 162 L.Ed.2d 480 (2005); (6) motion to reopen, *see Malone v. Vasquez*, 167 F.3d 1186, 1187 (8th Cir. 1999); or (7) motion to recall the mandate, *Calderon v. Thompson*, 523 U.S. 538, 553, 118 S. Ct. 1489, 1500, 140 L.Ed.2d 720 (1998).

1.12.01 Substantive Standards for Second or Successive Motions

Paragraph 8 of section 2255 delineates the narrow grounds on which a second or successive motion will be allowed. A second or successive motion will be *dismissed* unless it contains "(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or (2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2255 ¶¶ 8(1) & (2). These requirements are nearly impossible to meet.

1.12.01.01 ¶ 8(1): Newly Discovered Evidence of Innocence

To file a second or successive motion under ¶ 8(1) of section 2255, the movant must show newly discovered evidence that would demonstrate clearly and convincingly that the no reasonable factfinder would have found him guilty of the underlying offense. Evidence is not "newly discovered" if the facts could have been found before the movant filed the first motion, *In re Nailor,* 487 F.3d 1018, 1023 (6th Cir. 2007); *Villanueva v. United States*, 346 F.3d 55, 64 (2d Cir. 2003), or at least by the time the district court denied relief on the first motion, *In re McGinn*, 213 F.3d 884, 884 (5th Cir. 2000). The language "guilty of the underlying offense" in ¶ 8(1) forecloses claims unrelated to guilt or innocence, including claims asserting: (1) sentencing error, *see In re Dean*, 341 F.3d 1247, 1249 (11th Cir. 2003); *In re Vial*, 115 F.3d 1192, 1198 (4th Cir. 1997) (*en banc*); or (2) the bias of a judge or juror, *see Villafuerte v. Stewart*, 142 F.3d 1124, 1126 (9th Cir. 1998) (judge); *In re Magwood*, 113 F.3d 1544, 1552 (11th Cir. 1997) (juror).

1.12.01.02 ¶ 8(2): a New Retroactive Rule of Constitutional Law

If a movant cannot demonstrate that his second or successive motion is based on newly

discovered evidence of innocence under ¶ 8(1), then he may obtain relief only if he can demonstrate under ¶ 8(2) that the motion relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255 ¶ 8(2).

Paragraph 8(2) first requires that the rule of law upon which movant relies be "new." There is no "new" rule of law when the Supreme Court simply "applied a long-established principle . . . to a particular claim," *Outlaw v. Sternes*, 233 F.3d 453, 455 (7th Cir. 2000), or clarified the application of an earlier decision, *see In re Garza*, 253 F.3d 201, 202-03 (5th Cir. 2001). Paragraph 8(2) also requires that the Supreme Court decision relied upon by the movant involve a new rule of "constitutional" law. ¶ 8(2). If no new rule of *constitutional* law is announced, even a recent Supreme Court decision is of no help. *See Gray-Bey v. United States*, 209 F.3d 986, 988-89 (7th Cir. 2000); *Vial*, 115 F.3d at 1195. Moreover, a new rule of constitutional law does not come within paragraph 8(2) unless it was "made retroactive" to cases on collateral review *by the Supreme Court* – a lower court opinion will not do. *See* ¶ 8(2); *Tyler v. Cain*, 533 U.S. 656, 663, 121 S. Ct. 2478, 2482, 150 L.Ed.2d. 632 (2001). A new rule may be "made retroactive" only if the Supreme Court has held that the rule applies retroactively. *Tyler*, 533 U.S. at 662, 121 S. Ct. at 2482. A new rule may also be "made retroactive" "if Supreme Court holdings dictate th[at] conclusion." *In re Turner*, 267 F.3d 225, 229 (3d Cir. 2001). Finally, even if a new rule of constitutional law has been made retroactive by the Supreme Court, no relief is available under ¶ 8(2) unless the rule was "previously unavailable," that is, it was not announced until *after* proceedings on the first motion were completed. *See Villafuerte*, 142 F.3d at 1125; *In re Hill*, 113 F.3d 181, 182-183 (11th Cir. 1997).

1.12.02 Procedures Governing Second or Successive Motions

In addition to its stringent substantive requirements for second or successive section 2255 motions, the AEDPA also created an elaborate pre-filing procedure – a so-called "gatekeeping" mechanism – requiring a movant to receive permission from the court of appeals to file a second or successive motion before being able to proceed in the district court. *See* 28 U.S. C. § 2244(b)(3); *Felker v. Turpin*, 518 U.S. 651, 657, 116 S. Ct. 2333, 2337, 135 L.Ed.2d 827 (1996). Without pre-authorization from the court of appeals, a district court has no jurisdiction to address the merits of a second or successive motion. *See Potts v. United States*, 210 F.3d 770, 771 (7th Cir. 2000); *United States v. Gallegos*, 142 F.3d 1211, 1212 (10th Cir. 1998).

A court of appeals will not grant leave to file a second or successive motion in the district court unless the movant has made a "prima facie showing" that the motion satisfies the stringent substantive requirements contained in ¶ 8(1) or ¶ 8(2). § 2244(b)(3)(C). A "prima facie showing" is "simply a sufficient showing of possible merit to warrant a fuller exploration by the district court. . . . If in light of the documents submitted with the application it appears reasonably likely that the application satisfies the stringent requirements for the filing of a second or successive petition, we shall grant the application." *Bennett v. United States*, 119 F.3d 468, 469-470 (7th Cir. 1997). The decision of a court of appeals exercising its "gatekeeping" function is not appealable and may not be the subject of a petition for rehearing nor a petition for writ of *certiorari*. § 2244(b)(3)(E); *see Felker v. Turpin*, 518 U.S. 651, 661, 116 S. Ct. 2333, 2339, 135 L.Ed.2d 827 (1996). Rather, a

petition for writ of habeas corpus in the original jurisdiction of the Supreme Court may be filed. *See Felker*, 518 U.S. at 660, 116 S. Ct. at 2338.

If the court of appeals determines that the application makes a prima facie showing that a claim meets the requirements of ¶ 8, it should "authorize the prisoner to file the *entire* application in district court." *United States v. Winestock*, 340 F.3d 200, 205 (4th Cir. 2003) (emphasis added). The district court must thereafter review the motion claim by claim to determine if the requirements of ¶ 8 are met. *Id*. If the district court finds that the movant has not satisfied these requirements, the district court must dismiss any motion the court of appeals has allowed to be filed, without reaching its merits. *Reyes-Requena v. United States*, 243 F.3d 893, 899 (5th Cir. 2001); *Bennett*, 119 F.3d at 470. In other words, "the movant must get through two gates before the merits of the motion can be considered." *Bennett*, 119 F.3d at 470.

1.13 OTHER POSTCONVICTION REMEDIES FOR FEDERAL PRISONERS

Section 2255 is not the exclusive postconviction remedy for federal prisoners. Where section 2255 does not provide a remedy, federal prisoners may resort to residual common-law remedies, or to statutory remedies, such as a motion to correct sentence under 18 U.S.C. § 3582.

It is critical to determine whether the claims at issue must be raised in a section 2255 motion or another postconviction remedy. Procedures differ depending on which remedy is pursued. Moreover, section 2255's statute of limitations, certificate of appealability requirement, and restrictions on second or successive motions do not apply to other postconviction remedies. But do not seek relief under some other remedy in an attempt to avoid application of section 2255's procedural restrictions. Courts will disregard mislabeled filings and determine whether the application is, in fact, a section 2255 motion when considering the availability of relief:

> Any motion filed in the district court that imposed the sentence, and substantively within the scope of § 2255 ¶ 1, *is* a motion under § 2255, no matter what title the prisoner plasters on the cover. Call it a motion for a new trial, arrest of judgment, mandamus, prohibition, coram nobis, coram vobis, audita querela, certiorari, capias, habeas corpus, ejectment, quare impedit, bill of review, writ of error, or an application for a Get-Out-Of-Jail Card; the name makes no difference. It is substance that controls.

United States v. Lloyd, 398 F.3d 978, 979-80 (7th Cir. 2005) (internal citation omitted).

As a result, any claim that falls substantively within the scope of section 2255 ¶ 1 – that is, any claim that collaterally attacks the validity of a federal conviction or sentence – **must** be filed as a section 2255 motion. *See id*. at 980; *United States v. Holt*, 417 F.3d 1172, 1175 (11th Cir. 2005). If the pleading is found to be a section 2255 motion even though not styled as such, the movant may lose the ability to obtain relief as a result of the motion's failure to comply with section 2255's procedures. *See Lloyd*, 398 F.3d at 980; *Holt*, 417 F.3d at 1175. To avoid this trap, keep in mind

the differences between section 2255 and other postconviction remedies for federal prisoners.

1.13.01 Habeas Corpus Petitions Under 28 U.S.C. § 2241

Section 2255 expressly states that a federal prisoner may file a writ of habeas corpus under 28 U.S.C. § 2241 when it "appears that the remedy by [section 2255] motion is inadequate or ineffective to test the legality of his detention." § 2255 ¶ 5. Because of the breadth of the section 2255 remedy, the situations in which it has been found "inadequate or ineffective" are few. They are, however, important.

Claims that attack the *execution* of a federal sentence by prison officials are not cognizable in section 2255 proceedings. *See United States v. Addonizio*, 442 U.S. 178, 185-86, 99 S. Ct. 2235, 2243, 60 L.Ed.2d 805 (1979). Accordingly, section 2241, *not* section 2255, should be used to attack such things as: (1) the denial of sentence credits for items such as good time or pretrial detention, *e.g., Reno v. Koray*, 515 U.S. 50, 52-53, 115 S. Ct. 2021, 2023, 132 L.Ed.2d 46 (1995) (pretrial detention in treatment center); *Rogers v. United States*, 180 F.3d 349, 358 & n.16 (1st Cir. 1999) (time served in state prison); *Graham v. Lanfong*, 25 F.3d 203, 204 (3d Cir. 1994) (good time); *Bell v. United States*, 48 F.3d 1042, 1043-44 (8th Cir. 1995) (time served under "no bond" order); *McClain v. Bureau of Prisons*, 9 F.3d 503, 504-505 (6th Cir. 1993) (*per curiam*) (time spent in federal prison while on state parole); (2) transfers or other changes in the type of detention, *e.g., Rogers*, 180 F.3d at 357 (failure to designate state prison as place of confinement); *Dunne v. Keohane*, 14 F.3d 335, 336-37 (7th Cir. 1994) (transfers between state and federal facilities); *United States v. Harris*, 12 F.3d 735, 736 (7th Cir. 1994) (disciplinary segregation); *United States v. Fuller*, 86 F.3d 105, 106 (7th Cir. 1996) (transfer to another facility for competency evaluation); (3) prison disciplinary procedures, *e.g., Kingsley v. U.S. Bureau of Prisons*, 937 F.2d 26, 30 n.5 (2d Cir. 1991); or (4) parole determinations, *e.g., Sherman v. U.S. Parole Com'n*, 502 F.3d 869 (9th Cir. 2007); *Fazzini v. Northeast Ohio Correctional Center*, 473 F.3d 229 (6th Cir. 2006).

In addition, section 2255 cannot be used to challenge custody that is not the result of a criminal court's judgment. § 2255 ¶1. Thus, section 2241 should also be used to challenge: (1) certain immigration orders, *e.g., Nadarajah v. Gonzales*, 443 F.3d 1069, 1075-76 (9th Cir. 2006); *Nnadika v. Attorney General*, 484 F.3d 626, 632 (3d Cir. 2007); (2) extradition to a foreign country, *e.g., Ordinola v. Hackman*, 478 F.3d 588, 595 (4th Cir. 2007); *Hoxha v. Levi*, 465 F.3d 554, 560 (3d Cir. 2006); (3) other detention orders issued by the Executive Branch, *e.g.*, *Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L.Ed.2d 548 (2004) (foreign nationals at Guantanamo); *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L.Ed.2d 578 (2004) ("enemy combatant").

Section 2255 and section 2241 have different procedures. A section 2255 motion must be filed in the sentencing court, whereas a section 2241 petition must be filed in the district of confinement. § 2255 ¶ 5; *Rumsfeld v. Padilla*, 542 U.S. 426, 442, 124 S. Ct. 2711, 2722, 159 L.Ed.2d 513 (2004). A prisoner seeking section 2241 relief may have to exhaust administrative remedies before filing. *See Skinner v. Wiley*, 355 F.3d 1293, 1295 (11th Cir. 2004). No such requirement pertains to section 2255 motions. *United States v. Willis*, 273 F.3d 592, 596 (5th Cir.

2001); *George v. Sively*, 254 F.3d 438 (3d Cir. 2001).

Importantly, a federal prisoner seeking habeas corpus relief via section 2241 need not file a petition within the one-year limitations period applicable to section 2255 motions, *see* § 2255 ¶ 6; *Morales v. Bezy*, 499 F.3d 668, 672 (7th Cir. 2007), nor obtain a certificate of appealability to appeal the denial of relief, *see Binford v. United States*, 436 F.3d 1252, 1253 n.2 (10th Cir. 2006); *Murphy v. United States*, 199 F.3d 599, 601 n.2 (2d Cir. 1999). Moreover, a section 2255 motion is not "second or successive" where the prior application sought relief under section 2241; conversely, a section 2241 petition filed after the denial of a section 2255 motion is not considered "second or successive." *See, e.g., Stantini v. United States*, 140 F.3d 424, 426-27 (2d Cir. 1998); *Romandine v. United States*, 206 F.3d 731, 736 (7th Cir. 2000). However, the fact that a prisoner cannot meet section 2255's procedural requirements does not, in general, render the section 2255 remedy so "inadequate" or "ineffective" that resort to section 2241 is appropriate. *See, e.g., United States v. Lurie*, 207 F.3d 1075,1077 (8th Cir. 2000); *Tolliver v. Dobre*, 211 F.3d 876, 878 (5th Cir. 2000).

1.13.02 Writ of Error Coram Nobis

The common-law writ of error coram nobis is an "extraordinary remedy" available only to correct errors "of the most fundamental character." *United States v. Morgan*, 346 U.S. 502, 511-12, 74 S. Ct. 247, 252-53, 98 L.Ed.2d 248 (1954) (internal quotation marks omitted). Given its "extraordinary" nature, coram nobis relief is limited to circumstances in which no statutory remedy is adequate or available. *See United States v. Brown*, 117 F.3d 471, 474-75 (11th Cir. 1997); *Matus-Leva*, 287 F.3d at 761. Accordingly, individuals who are "in custody" pursuant to a federal conviction and sentence are barred from seeking coram nobis relief, because the section 2255 or section 2241 remedies remain available. *See Brown*, 117 F.3d at 475; *Matus-Leva*, 287 F.3d at 761.

Given that it is available only when statutory remedies are not, the situations in which coram nobis relief has been found to be appropriate are few. Generally, it is available only to attack a conviction when the prisoner has already served the entire sentence and is therefore no longer in custody. *United States v. Kwan*, 407 F.3d 1005, 1011 (9th Cir. 2005); *United States v. Peter*, 310 F.3d 709, 712 (11th Cir. 2002).

A petition for writ of error coram nobis must be filed in the sentencing court. *See United States v. Monreal*, 301 F.3d 1127, 1131 (9th Cir. 2002). No statute of limitations applies. *See Kwan*, 407 F.3d at 1012. Rather, a coram nobis petitioner must provide sound reasons explaining why the conviction or sentence was not attacked earlier. *See id*. at 1012-13. Finally, no certificate of appealability is required to appeal the denial of coram nobis relief. *Id*. at 1009.

1.13.03 New Trial Motions Under Federal Rule of Criminal Procedure 33

Federal Rule of Criminal Procedure 33 authorizes the grant of a new trial on motion of a defendant in two circumstances. First, a new trial may be granted based on newly discovered if a motion is filed within three years after the verdict or finding of guilty. Fed. R. Crim. P. 33(b)(1).

Second, a new trial may be granted "on any reason other than newly discovered evidence" if the motion is filed within 7 days after the verdict or finding of guilty. Fed. R. Crim. P. 33(b)(2).

The remedies provided by Rule 33 and section 2255 overlap in some respects, and this overlap creates at least two potential traps for the unwary. The first involves timing: a pending Rule 33 motion does NOT toll the one-year limitation period for a section 2255 motion, unless the Rule 33 motion is filed within 10 days of the entry of the underlying criminal judgment and therefore tolls the time for filing a direct appeal under Federal Rule of Appellate Procedure 4(b). *See, e.g., Barnes v. United States*, 437 F.3d 1074, 1078-79 (11th Cir. 2006) (collecting cases).

The second potential trap arises from the overlap between the types of claims that may be presented in both Rule 33 and section 2255 motions. If the claims presented in a Rule 33 motion do not involve newly discovered evidence, but more closely resemble those typically brought in a section 2255 proceeding – *e.g.*, ineffective assistance of counsel – the court may recharacterize the Rule 33 motion as a section 2255 motion. *See United States v. Evans*, 224 F.3d 670, 674-75 (7th Cir. 2000). Why is this a trap? Because a recharacterized motion filed within Rule 33(b)(1)'s three-year period may be instantly untimely if it was filed outside the one-year limitation period applicable to section 2255 motions.

1.13.04 Motion to Modify Sentence Under 18 U.S.C. § 3582(c)

Under 18 U.S.C. § 3582(c), a district court may modify a term of imprisonment in one of three limited circumstances.

First is the so-called "compassionate release" provision found in § 3582(c)(1)(A). There, upon motion of the Bureau of Prisons, the district court may grant a sentence reduction "in any case" if, after considering the sentencing factors in 18 U.S.C. § 3553(a), it finds either (1) that the defendant is at least 70 years old, has served at least 30 years, and the BOP has determined that he is not a danger to "any other person or the community," § 3582(c)(1)(A)(ii), or (2) "extraordinary and compelling reasons warrant such a reduction," § 3582(c)(1)(A)(i). In a policy statement, the United States Sentencing Commission instructs judges that "extraordinary and compelling reasons" warrant a sentence reduction under § 3582(c)(1)(A)(i) when: "[t]he defendant is suffering from a terminal illness;" or "[t]he defendant is suffering from a permanent physical or medical condition, or is experiencing deteriorating physical or mental health because of the aging process, that substantially diminishes the ability of the defendant to provide self-care within the environment of a correctional facility and for which conventional treatment promises no substantial improvement;" or "[t]he death or incapacitation of the defendant's only family member capable of caring for the defendant's minor child or minor children" has occurred. U.S.S.G. § 1B1.13 (2007). Compassionate release is also appropriate when the BOP decides that some other compelling reason exists that warrants a reduction. *Id*. However, the "rehabilitation of the defendant is not, by itself," a basis for a reduction under § 3582(c)(1)(A). *Id*. Although it is *only* the BOP that may move for a compassionate release, it is the prisoner who starts the process through an internal BOP inmate procedure. *See* BOP Program Statement 5050.46.

Second, under § 3582(c)(1)(B), the court may, "in any case," modify a term of imprisonment "to the extent otherwise expressly permitted by statute or by Rule 35 of the Federal Rules of Criminal Procedure." § 3582(c)(1)(B). Rule 35 allows a court to correct a prisoner's sentence (1) for an "arithmetical, technical, or other clear error" within seven days of sentencing, or (2) if the government files a substantial assistance motion. See Fed. R. Crim. P. 35(a), (b). Other than the circumstances allowed by Rule 35, the district court has no power to modify a sentence under § 3582(c)(1)(B) except as "otherwise expressly permitted by statute" – that is, as is allowed following: a remand from the court of appeals or Supreme Court under 28 U.S.C. § 2106, a grant of relief under section 2255, or a grant of habeas corpus relief under 28 U.S.C. § 2241. *See United States v. Ross*, 245 F.3d 577, 586 (6th Cir. 2001); *United States v. Harrison*, 113 F.3d 135, 137 (8th Cir. 1997); *United States v. Triestman*, 178 F.3d 624, 629 (2d Cir. 1999).

Third, a sentence can be modified under § 3582(c)(2) when the United States Sentencing Commission amends the Sentencing Guidelines and makes that amendment apply retroactively. § 3582(c)(2). This provision applies only when it is an action "by the Sentencing Commission" itself that has reduced the defendant's sentencing range. Reductions based on court decisions, like *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L.Ed.2d 621 (2005), are not allowed. *See United States v. Carter*, 500 F.3d 486, 490 (6th Cir. 2007). Moreover, a defendant is not entitled to a reduction based on an amendment to the Guidelines unless the Sentencing Commission has made the amendment retroactive. *See United States v. Stoneking*, 60 F.3d 399, 403 (8th Cir. 1999). Finally, any retroactive amendment of the Guidelines must actually reduce the defendant's sentencing range – if the defendant is subject to a mandatory minimum sentence, or the Commission's actions otherwise have no effect on the defendant's ultimate sentencing range, relief under § 3582(c)(2) is unavailable. *See United States v. Smartt*, 129 F.3d 539, 542 (10th Cir. 1997).

A defendant has no right to counsel for a proceeding under § 3582, *see United States v. Whitebird*, 55 F.3d 1007, 1010-11 (5th Cir.1995), and has no right to be present for any resentencing pursuant to § 3582, Fed. R. Crim. P. 43(b)(4). Finally, the 10-day period for appeals in criminal cases applies to appeals from the denial of a motion under § 3582(c). *See United States v. Espinosa-Talamantes*, 319 F.3d 1245, 1246 (10th Cir. 2003) (collecting cases).

1.13.05 Recharacterization of a Pleading as a Section 2255 Motion

As discussed above, despite the variety of federal postconviction remedies available, the label placed on a filing will not control its treatment by the court. Rather, courts will determine whether a filing is indeed a section 2255 motion, although not labeled as such. District courts must take steps to mitigate the effect that recharacterization may have on a *pro se* movant's right to bring a future initial application for section 2255 relief. *Castro v. United States*, 540 U.S. 375, 124 S. Ct. 786, 157 L.Ed.2d 778 (2003). Accordingly,

> when a court recharacterizes a *pro se* litigant's motion as a first § 2255 motion . . . the district court must notify the *pro se* litigant that it intends to recharacterize the pleading, warn the litigant that this

> recharacterization means that any subsequent § 2255 motion will be subject to the restrictions on "second or successive" motions, and provide the litigant an opportunity to withdraw the motion or to amend it so that it contains all the § 2255 claims he believes he has. If the court fails to do so, the motion cannot be considered to have become a § 2255 motion for purposes of applying to later motions the law's "second or successive" restrictions.

Id., 540 U.S. at 383, 124 S. Ct at 792.

Castro's "notice before recharacterization" requirement, however, applies only when a court recharacterizes a pleading as a *first* section 2255 motion. When the court recharacterizes a section 2241 or coram nobis petition or other pleading filed by a federal prisoner as a *second or successive* section 2255 motion, no prior notice or opportunity to withdraw the motion is required. In addition, *Castro*'s notice requirement applies only when the pleading at issue was filed by a *pro se* litigant. No such notice is required when the mislabeled pleading is filed by counsel.