10-1978

United States v. Addonizio

Lewis F. Powell Jr.

There are - as this memo states - three other cases similar to this here or on the way. Ask Legal Officer for advice as to which to take & which to hold.

Q is propriety of using § 2255 (fed. collateral review) rather than H/C under § 2254 where a prisoner claims denial of parole.

The DC undertook to modify - in a § 2255 proceeding - Petr.'s sentence after Parol Bd had declined to release Petr. But CA 9 reversed, holding ~~[redacted]~~ a sentence cannot be modified - no juris - to accomodate a denial of probation.

PRELIMINARY MEMORANDUM

Dec. 8, 1978
~~Summer list 15, Sheet 1~~

No. 77-1665-CFY

Cert to CA 9 (Merrill, Cummings, Sneed; memo)

Bonanno (fed pris)

v.

United States

Federal/Criminal

Timely

SUMMARY: Petr contends that he is entitled to relief under § 2255 from the Board of Parole's denial of parole, which petr and the DC (Peckham) say frustrated the DC's intentions in sentencing petr.

FACTS: Petr was sentenced to 5 years on each of four counts, the sentences to run concurrently. sentence was imposed under what is now 18 U.S.C. § 4205(b)(2)(1976) [that portion of Title 18 was recodified by the Parole Comm'n & Reorganization Act of 1976; this memo gives the current section numbers, the original section was 4208(a)(2)]. That section is one of three available to DJs. Under § 4205(a) the

DJ imposes a definite sentence and the prisoner is eligible for parole after serving one third of his sentence or ten years. Under § 4205(b)(1)(1976) the DJ imposes both a minimum and a maximum sentence; the prisoner is eligible for parole at any time after serving the minimum and less than one third of the maximum. Under § 4205(b)(2) the DJ sets only the maximum sentence; the prisoner is IMMEDIATELY eligible for parole at the discretion of the Board of Parole. Petr's sentence was imposed under the latter section. Petr now argues that the DJ's expectation was that he would be paroled if he showed satisfactory adaptation to prison life.

Petr began serving his sentence in Aug 1972. In Nov 1973 the Bd of Parole published its new guidlines, 38 Fed Reg 31942 [28 CFR § 2.20 which did not treat sentencing under § 4205(b)(2) as significant. The Bd refused to recommend parole in Jan 1975, after having denied an earlier hearing in Nov 1974. After petr served one third of his sentence the Bd again denied parole. Petr then filed this § 2255 action in DC, claiming that he had been denied due process by the increased severity of his sentence. The DC agreed that the Bd's actio thwarted his intentions; so, the DC vacated the original sentence, resentenced petr to four, concurrent five-year sentences, suspended th sentences and imposed a probation term of five years.

HOLDING BELOW: CA 9 reversed, holding that the DC had no jurisdiction under § 2255 to modify the sentence. The CA relied upon its previous decision in Andrino v. United States, 550 F.2d 519 (1977), in which it had held that habeas corpus was the proper procedure for obtaining judicial review of the parole board's decision.

CONTENTIONS: Petr contends that the DJ had misapprehended the implications of the sentence for later parole. According to petr ther was a general understanding that by sentencing under § 4205(b)(2) the

DJ would ensure that the parole board considered only the prisoner's conduct while in prison. In particular, the DJ thought that the Bd would not take into account the type of illegal act and the prisoner's prior record. When the Bd introduced its salient factors for determining eligibility for parole it included the very considerations which the DJ had assumed would be excluded. Petr contends that that inclusion of additional factors thwarted the DJ's intent, thereby dening petr due process.

Petr also contends that there is a conflict among the circuits. The 9th Cir is aligned with the 1st in holding that section 2255 cannot be used to challenge the Bd's action. See United States v McBride, 560 F.2d 7 (CA 1 1977). Opposing those cases are the 3rd and 8th Cirs. See also, United States v. Salerno, 538 F.2d 1005 (CA3 1976); Kortness v. United States, 514 F.2d 167 (CA8 1975).

SG does not oppose cert, but suggests that the better course would be to hold this case pending disposition of two others which pose similar issues. United States v. Addonizio, 573 P.2d 147 (CA3 1978) (Aldisert, Hunter; Cahn, DJ), cert applied for, docket no. 78-156, involved a sentence under § 4205(a). The DJ found that his intentions had been frustrated by the Bd's actions. The CA affirmed, based upon its decision in Salerno. United States v. Edwards, 574 F.2d 937 (CA8 1978) (Bright; Henley, concur; Stephenson, dissent), cert applied for, docket no 78-157, involved a sentence under § 4205(b)(2). The DJ found that the Bd's actions had not frustrated his intentions. Nevertheless, the CA reversed, saying that the Bd had not given meaningful consideration to the prisoner's application for parole. Without meaningful consideration, the DJ's intentions could not have been followed.

SG suggests that in Addonizio and Edwards the Court is confronted

with the full diversity of issues that arise because of the Bd's policies with respect to parole. As a result, the SG does not think that a grant of cert is warranted in a third case involving the same issues. SG does not discuss the question of the propriety of § 2255 for making this challenge.

DISCUSSION: With the split among the circuits there is need for this Court to resolve the question of whether a sentence may be revised in response to a decision of the parole board. In spite of the SG's description, this case presents the additional question of the propriety of the use of § 2255 as opposed to habeas corpus. With the CA's decision in this case there is now an additional split over the procedural route to follow in reviewing the parole board's action. Since there are at least three similar cases before the Court, they should be discussed together; and, possibly, the Legal Office should be asked to review these and any other similar cases to determine which should be argued orally.

There is a response.

8/21/78 Pratt Ops in petn

I agree that it would be helpful to have the legal offices look at the related cases to identify clearly what issues are involved.

E.G.

Dissent with 77-1665 and 78-157. Grant one (probably this one) & Hold others

Grant

Imp. case. There is a conflict

Case is not moot. See SG's Brief

These consolidated cases involve the paroling of the former Mayors of Newark & Jersey City.

They were sentenced to specified terms (10 & 15 yrs, respectively) at a time when a prisoner, who served one third of his term with good behavior, would be paroled automatically. Subsequently, Congress amended the parole provision to require Parole Commission to consider the "seriousness of the offense". In light of this, the Commission refused to parole Respts. They then filed § 2255 suits. CA3 agreed, in effect, that sentencing expectation at time - by judicial & Δ - controlled, & that Respts were entitled to be freed after serving 1/3 of term.

PRELIMINARY MEMORANDUM

Summer List 19, Sheet 3

No. 78-156-CFH Cert. to CA 3 (Aldisert, Hunter, Cahn, DJ)

UNITED STATES

v.

ADDONIZIO (fed. prisoner) (former Mayor of Newark)

UNITED STATES

v.

former Mayor of Jersey City, also convicted member of

WHELAN and FLAHERTY (fed. prisoners) Federal/Civil (Habeas) Timely

SUMMARY: The SG seeks review of a decision of the CA 3 holding that, on a motion for relief under 28 U.S.C. § 2255, a sentencing court may reduce an otherwise lawful sentence upon a showing that the sentencing judge's expectations were frustrated by a subsequent change in Parole Commission policy.

SG's suppl. memo - comment on back.

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*/ Time for filing extended by Mr. Justice Brennan to July 27.

I recommend discussion with a view to granting the petn. (comment on back)

Brm

FACTS AND DECISIONS BELOW: Federal trial courts may rely on three different statutory provisions in sentencing an offender, each having different implications for parole. The judge may impose a straight sentence, with eligibility for parole after service of one-third of the sentence. 18 U.S.C. § 4205(a). Alternatively, the judge may impose an indeterminate sentence with minimum and maximum period of confinement specified. Id. § 4205(b)(1). Finally, the judge may impose an indeterminate sentence with no minimum and only a maximum period of confinement specified. Id. § 4205(b)(2). Once a prisoner is eligible for parole, the Parole Commission has broad discretion in deciding whether to release the prisoner. Id. § 4206(a).

The prisoners in this case, described more fully below, were sentenced under the first provision, § 4205(a). Prior to 1973, trial courts apparently assumed that prisoners sentenced under this provision would be released upon completion of one-third of the sentence, given a good institutional record and no finding of probable recidivism. After 1973, however, the Commission began relying on published guidelines in making parole decisions. These guidelines focussed not only on institutional behavior and the liklihood of recidivism, but also on the nature of the crime the prisoner had committed. In 1976, Congress passed the Parole Commission and Reorganization Act, amending § 4206(a) to make it explicit that the Commission should consider whether release on parole would "depreciate the seriousness of [the] offense or promote disrespect for the law."

This case involves three district court decisions consolidated

together on appeal.

The first case, United States v. Addonizio, involved the former Mayor of Newark, New Jersey, who had been convicted of conspiracy and extortion in violation of the Hobbs Act, 18 U.S.C. § 1951, and sentenced to 10 years imprisonment and a $25,000 fine. Resp. Addonizio became eligible for parole on July 3, 1975, after serving on-third of his sentence. However, although Addonizio had been a model prisoner and was considered to present no danger of recidivism, he was not released on parole. The Commission explained that Addonizio's crimes had demonstrated such a breach of public trust that to release him would depreciate the seriousness of his offenses and promote disrespect for the law.

Addonizio then filed this motion for resentencing pursuant to 28 U.S.C. § 2255. The DC (Barlow) expressly stated that, in sentencing Addonizio, he had anticipated that, with good behavior, Addonizio would remain in prison only 3 1/2 to 4 years. The judge had considered this the appropriate length of confinement given the severity of Addonizio's offenses. Under the law of the CA 3, the DC found that he had jurisdiction to consider Addonizio's grievance under § 2255. Accordingly, the court reduced the sentence to time served.

The second and third cases involved resps. Whelan, the former Mayor, and Flaherty, a former city councilman, of Jersey City, New Jersey. They too had been convicted of conspiracy and extortion in violation of the Hobbs Act, and had been sentenced by DJ Shaw to 15 years imprisonment. They became eligible for parole in 1976 after serving one-third of their sentences. However, the Commission refused to release Whelan and Flaherty on parole, explaining that their offenses were

part of large-scale organized criminal activity and involved a breach of the public trust.

Whelan and Flaherty then filed two suits challenging their confinement. The first, a motion for relief under § 2255, was assigned to Judge Biunno, Judge Shaw having died. Resps. argued that the denial of parole had frustrated Judge Shaw's expectations, and thus that their sentences should be reduced. The DC found that he had no jurisdiction to consider this claim under § 2255, the proper avenue of relief being general habeas corpus, 28 U.S.C. § 2241. United States v. Salerno, 538 F.2d 1005 (CA 3 1976), upholding such jurisdiction under § 2255, was distinguished as a case where the denial of parole violated the explicit statements of the sentencing judge. Even if jurisdiction was available under § 2255, the DC would deny the relief sought, since the "spectacle of Whelan and Flaherty being paroled and free to escape with their ill-gotten gains" was "revolting."

The second suit was a § 2241 petition filed in the district of confinement. The DC (Muir) found that the proper mode of relief was a § 2255 motion, and since Judge Biunno's decision was likely to be reversed on appeal, the DC declined to address the frustration of expectations argument. Turning to the question whether the denial of probation was arbitrary and capricious under § 2241, the DC held that in light of the nature of Whelan's and Flaherty's crimes it was not.

The CA affirmed Addonizio, vacated and remanded Whelan's and Flaherty's § 2255 action, and affirmed Whelan's and Flaherty's § 2241 action. The court reaffirmed the holding of Salerno, supra, and United States v. Somers, 552 F.2d 108 (CA 3 1977), that "the intent and expectation of the district court judge who sentenced

under [§ 4205(a)]...are controlling and ...must be searched out to determine if relief may be ordered under 28 U.S.C. § 2255." The court ruled that Fed. R. Crim. P. 35, which authorizes a sentencing judge to reduce a sentence within 120 days after sentence or final unsuccessful appeal, was not the exclusive avenue for sentence reduction, but merely an alternative to the § 2255 route. Speaking in rather broad, jurisprudential terms, the court stated that its decision was grounded in the "moral" principle that "a sentencing judge's intent and probable expectations should be vindicated to the fullest extent possible." Accordingly, where a prisoner is required to serve an appreciably longer term of imprisonment because subsequently adopted parole guidelines effect a provable frustration of the intentions and expectations of the trial court, "regard for the integrity of the sentencing court, as well as concepts of decency and fair play, dicatate that that court should be in a position to vindicate those original intentions and expectations." Petn 9a.

Turning to the Addonizio case, the court found that the Commission's consideration of the nature and circumstances of the offense, after the sentencing judge had considered these factors in setting the maximum punishment, amounted in effect to double punishment. "Society cannot have it both ways; it cannot expose one to a harsh maximum...and then, years later, for precisely the same reason which caused the harsh maximum to be imposed, impose a doubly harsh minimum." Petn. 18a. Despite the potentially broad implication of the "frustration of expectations" theory, the court observed in a footnote that rule of the CA 3 was confined to cases where the sentencing had occured prior to an unforeseen change in Parole Commission policy. Petn. 18a. n. 10.

With respect to Whelan's and Flaherty's appeals, the court remanded Judge Biunno's denial of their § 2255 petition for reconsideration in light of the Addonizio ruling. The court found that Judge Muir had stated the correct standard of review under § 2241, and could see no basis to upset the application of that standard to the facts.

CONTENTIONS: The SG contends that the circuits are deeply divided over the extent to which sentencing courts may revise sentences in response to parole decisions. The CA 3, in the present case, appears to have adopted the view that a sentencing court can vindicate its expectations whenever the Commission alters the standards under which it exercises discretion. The CA 8, in Edwards v. United States, 574 F.2d 937 (1978), cert. pending, No. 78-157, has taken the view that courts may revise sentences imposed before 1973 under § 4205(b)(2), which makes the offender immediately eligible for parole. The CA 1, CA 2, CA 6, CA 7, and CA 9 have held that setencing courts have no authority to revise lawful sentences in response to parole decisions. These courts hold that it makes no difference that the sentence was imposed before a change in Commission policy, or that the judge's sentencing expectations were frustrated. See, e.g., United States v. McBride, 560 F.2d 7 (CA 1 1977).

On the merits, the SG argues that the CA 3's position is grounded in three erroneous legal and factual assumptions. First, the court erred in assuming that sentencing expectations may be vindicated on a § 2255 motion. This section requires a claim that the sentence was in violation of the Constitution or laws of the United States, or that the sentencing court was without jurisdiction, or that the sentence was in excess of

the maximum authorized by law, or that the sentence "is otherwise subject to collateral attack." The "subject to collateral attack" provision is not a carch-all that authorizes courts to do whatever they believe is required in the interests of justice. "[T]he appropriate inquiry [is] whether the claimed error of law [is] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" Davis v. United States, 417 U.S. 333, 346 (1974). The SG maintains that the denial of parole in these cases did not amount to a "complete miscarriage of justice." Moreover, the SG repeats the argument made below that Fed. R. Crim P. 35 provides the only basis by which a sentencing court can reduce an otherwise lawful sentence.

Second, the SG maintains that the CA erred in assuming that it is properly within province of the sentencing court to have "expectations" about how the Commission will exercise its discretion within the limits established by the sentence. The SG points out that sentencing authority is divided between the three branches of the Government: the Legislature fixes the ranges within which sentence may be imposed; the Judiciary imposes sentence in each case, selecting a maximum and minimum punishment within the range authorized by Congress; and the Executive, acting through the Parole Commission, determines the exact date of release. As the CA 1 put it, permitting a district court to revise a sentence whenever the Parole Commission's decision is inconsistent with the court's intent "divest[s] the Commission of its discretionary power under the law, and defeat[s] the objectives of placing the parole decision in a separate body." United States v. DiRusso, 548 F.2d 372,

375 (1976).

Finally, the SG presents statistics purporting to show that the CA erred in assuming that prior to 1973 the Commission paid little or no attention to the gravity of the offense in determining whether to release prisoners on parole. Figures derived by the Commission from computer coded information reveal that in 1970, the year Addonizio was sentenced, of persons with no prison disciplinary infractions, 21.8% were released after one-third of their sentences, 16.7% were released sometime after the one-third point, and 61.5% were held until mandatory release. If the sample is confined to first offenders, 42.2% were released at one-third, 27.9% were released after one-third, and 29.9% were held until mandatory release. According to the SG, these figures indicate that, if the courts below had an "expectation" that prisoners with good institutional records and little danger of recidivism were invariably paroled at one-third of their sentence, they were mistaken.

Resp. Addonizio concedes that there is a conflict among the circuits. However, he argues that the rule of the CA 3 is confined to the circumstances created by the new parole guidelines, and as such the rule will effect an ever decreasing number of inmates. The impact of the decision below is therefore narrow and does not warrant this Court's attention. In addition, resp. notes that, because this Court reinstated the order of the DC releasing Addonizio after it was stayed by the CA, 431 U.S. 909 (1977), he has been out of prison since May 12, 1977. Under the circumstances, it would be "unjust and unreasonable" to subject him again to uncertainty about his future.

DISCUSSION: This petn. should be considered together with United States v. Edwards, No, 78-157, and Bonanno v. United States, No. 77-1665. The circuits are split over the general question whether a sentencing court may vindicate its sentencing expectations after a change in Parole Commission policy (Addonizio); over whether sentencing review is available in § 4205(b)(2) cases, if not § 4205(a) and § 4205(b)(1) cases (Edwards); and over whether sentencing expectations can be vindicated in § 2241 proceedings, if not § 2255 proceedings (Bonanno).

The present case appears to present an important issue concerning the appropriate allocation of responsibility in the federal system of sentencing and parole. Resp.'s suggestion that the impact of the decision below will be quite limited should be greeted with scepticism in light of the experience of the CA 8, which was inundated with "a flood of pro se § 2255 motions" after a similar decision. Jacobson v. United States, 542 F.2d 725, 727 (1976). Moreover, as the SG notes, the Commission's guidelines are subject to periodic study and revision, and under the rationale of the CA 3, every future modification in the guidelines would lead to a new wave of collateral attacks on parole decisions.

Grant. There is a response from resp. Addonizio.

9/13/78 Merrill DC, CA ops. in petn.

Three cases:
① 78-157 U.S. v Edwards (CA 8) — SG will move to dismiss. See below.
② 77-1665, Bonnano
③ 78-156 Addonizio (this case)
Probably grant 78-156 & hold 77-1665

BB 12/1/78

SUPPLEMENTAL MEMORANDUM

To: Mr. Justice Powell

Re: No. 78-156, United States v. Addonizio

The SG has filed a Second Supplemental Memorandum in the case. In it, he calls the attention of the Court to a recent decision of the CA 8, en banc. In that case, the CA 8 adhered to its position that courts may reduce sentences in response to changes in Parole Comm'n policies. But the CA 8 limited this authority to reduce sentences to cases in which defendants had been sentenced prior to the adoption of the Parole Comm'n's guidelines, under 18 U.S.C. §4205(b)(2) (maximum but no minimum sentence).

The SG reads this decision as an overruling of the CA 8 panel's decision in United States v. Edwards, petn for cert. No. 78-157. In Edwards, the court held that a sentence imposed under 18 U.S.C. §4205(b)(1) (minimum sentence set by sentencing judge at less than one-third of maximum sentence) must be reduced if changes in Parole Comm'n policy frustrate the sentencing court's intent. The SG reports that he will be filing a Rule 60 Motion for dismissal of the petn in No. 78-157.

The SG points out that the resps in the present case were sentenced under 18 U.S.C. §4205(a) (sentencing judge sets maximum sentence, and defendant is eligible for parole only after serving one-third of the sentence, or ten years of a sentence greater than 30 years). He points out that the decision of the CA 3 that such sentences could be reduced on account of subsequent changes in Parole Comm'n policy is in conflict with the recent en banc decision of the CA 8.

The SG also comments that if this case is granted along with Bonnano, No. 77-1665, the cases could be consolidated and argued in a single hour.

December 8, 1978

Court	*Voted on* ....., *19*...		
Argued ....., *19*...	*Assigned* ....., *19*...	No.	78-156
Submitted ....., *19*...	*Announced* ....., *19*...		

UNITED STATES

vs.

ADDONIZIO

Relisted. (Note response requested in ~~No. 78-157 - however Sol. Gen. to~~ dismiss this case pursuant to Rule 60.)

Grant & set with Bonanno 77-1665

	HOLD FOR	CERT. G	CERT. D	JURISDICTIONAL STATEMENT N	JURISDICTIONAL STATEMENT POST	JURISDICTIONAL STATEMENT DIS	JURISDICTIONAL STATEMENT AFF	MERITS REV	MERITS AFF	MOTION		ABSENT	NOT VOTING
Burger, Ch. J.	✓												
Brennan, J.	✓												
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.	✓	●											
Stevens, J.		✓											

6 Dec. here.

December 8, 1978

Court .....
Argued ....., 19...
Submitted ....., 19...

Voted on....., 19...
Assigned ....., 19...
Announced ....., 19...

No. 77-1665

BONANNO

vs.

UNITED STATES

Relisted.

Grant
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78-156

	HOLD FOR	CERT.		JURISDICTIONAL STATEMENT				MERITS		MOTION		ABSENT	NOT VOTING
		G	D	N	POST	DIS	AFF	REV	AFF	G	D		
Burger, Ch. J.													
Brennan, J.		✓											
Stewart, J.		✓											
White, J.		✓											
Marshall, J.		✓											
Blackmun, J.		✓											
Powell, J.		✓											
Rehnquist, J.		✓											
Stevens, J.		✓											

out letter

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: MAY 22 79

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78-156

United States, Petitioner, v. Hugh J. Addonizio et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[May —, 1979]

Out

Absent because of my surgery

MR. JUSTICE STEVENS delivered the opinion of the Court.

Three prisoners have alleged that a postsentencing change in the policies of the United States Parole Commission has prolonged their actual imprisonment beyond the period intended by the sentencing judge. The question presented is whether this type of allegation will support a collateral attack on the original sentence under 18 U. S. C. § 2255.[1] We hold that it will not.

I

With respect to the legal issue presented, the claims before

[1] 28 U. S. C. § 2255 provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

. . . . .

"If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

us are identical. To bring this issue into sharp focus, we accept for purposes of decision Addonizio's view of the facts and the relevant aspects of the Parole Commission's practices.

After his conviction in the United States District Court for the District of New Jersey, on September 22, 1970, Addonizio was sentenced to 10 years imprisonment and a fine of $25,000. Factors which led the District Judge to impose that sentence included the serious character of Addonizio's offenses,[2] and the Judge's expectation that exemplary institu-

[2] At the time he imposed sentence, Judge Barlow stated:

"Weighed against these virtues, [Mr. Addonizio's record of public service] . . . is his conviction by a jury in this court of crimes of monumental proportion, the enormity of which can scarcely be exaggerated and the commission of which create the gravest implications for our form of government.

"Mr. Addonizio, and the other defendants here, have been convicted of one count of conspiring to extort and 63 substantive counts of extorting hundreds of thousands of dollars from persons doing business with the City of Newark. An intricate conspiracy of this magnitude, I suggest to you, Mr. Hellring [defense counsel], could have never succeeded without the then-Mayor Addonizio's approval and participation.

"These were no ordinary criminal acts. . . . These crimes for which Mr. Addonizio and the other defendants have been convicted represent a pattern of continuous, highly-organized, systematic criminal extortion over a period of many years, claiming many victims and touching many more lives.

"Instances of corruption on the part of elected and appointed governmental officials are certainty not novel to the law, but the corruption disclosed here, it seems to the Court, is compounded by the frightening alliance of criminal elements and public officials, and it is this very kind of totally destructive conspiracy that was conceived, organized and executed by these defendants.

". . . It is impossible to estimate the impact upon—and the cost of—these criminal acts to the decent citizens of Newark, and, indeed, to the citizens of the State of New Jersey, in terms of their frustration, despair and disillusionment.

. . . . .

"Their crimes, in the judgment of this Court, tear at the very heart of our civilized form of government and of our society. The people will not

tional behavior would lead to Addonizio's release when he became eligible for parole after serving one-third of his sentence.[3] The judge did not contemplate that the Parole Commission might rely on the seriousness of the offense as a reason for refusing a parole which Addonizio would otherwise receive.

In 1973 the Parole Commission markedly changed its policies.[4] Under its new practices the seriousness of the offense became a significant factor in determining whether a prisoner should be granted parole. Addonizio became eligible for parole on July 3, 1975. After hearings, the Parole Com-

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tolerate such conduct at any level of government, and those who use their public office to betray the public trust in this manner can expect from the courts only the gravest consequences.

"It is, accordingly, the sentences of this Court that the defendant Hugh J. Addonizio shall be committed to the custody of the Attorney General of the United States for a term of ten years, and that, additionally, the defendant Hugh J. Addonizio shall pay a fine of $25,000. That is all." 573 F. 2d, at 154.

[3] In his opinion granting Addonizio relief under § 2255 in 1977, Judge Barlow stated:

"At the time sentence was imposed, this Court expected that petitioner would receive a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism—upon the completion of one-third (⅓) of his sentence. The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to four years of the ten-year sentence, in view of the fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the Court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970." Pet. for Cert. 28a–29a.

[4] The Commission commenced using guidelines on a trial basis in 1972 and started to apply them throughout the nation in November 1973. See 38 Fed. Reg. 31942. The Commission's present guidelines are codified at 28 CFR § 2.20. The use of guidelines is now required by statute. See 18 U. S. C. §§ 4203 (a)(1) and 4206 (a).

mission twice refused to release him, expressly basing its refusal on the serious character of his crimes.[5]

Thereafter, Addonizio invoked the District Court's jurisdiction under 28 U. S. C. § 2255 and moved for resentencing. Following the Third Circuit's decision in *United States* v. *Salerno*, 538 F. 2d 1005, 1007 (1976), the District Court accepted jurisdiction, found that the Parole Commission had not given Addonizio the kind of "meaningful parole hearing" that the judge had anticipated when sentence was imposed, and reduced his sentence to the time already served. The judge stated that he had "anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that [Addonizio] would be actually confined for a

[5] As Judge Aldisert noted in his opinion for the Third Circuit, the comments made by the Parole Commission on January 13, 1977, explaining its denial of parole are remarkably similar to the reasons given by the trial judge at the time sentence was imposed. The Commission stated:

"Your offense behavior has been rated as very high severity. Your silent factor score is 11. You have been in custody a total of 57 months at time of hearing. Guidelines established by the Commission for adult cases which consider the above factors suggest a range of 25–36 months to be served before release for cases with good institutional adjustment. After careful consideration of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense was part of an ongoing criminal conspiracy lasting from 1965 to 1968, which consisted of many separate offenses committed by you and approximately 14 other co-conspirators. As the highest elected official in the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct, and otherwise thwart construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects.

"Because of the magnitude of this crime (money extorted totalling approximately $241,000) its economic effect on innocent citizens of Newark, and because the offense involved a serious breach of public trust over a substantial period of time, a decision above the guidelines is warranted. Parole at this time would depreciate the seriousness of the offense and promote disrespect for the law." 573 F. 2d, at 153–154.

period of approximately three and one-half to four years of the ten-year sentence." This "sentencing expectation" was frustrated by the Parole Commission's subsequent adoption of new standards and procedures.

The Court of Appeals affirmed. 573 F. 2d 147. Because of a conflict with the decision of the Ninth Circuit holding that § 2255 does not give district courts this type of resentencing authority,[6] we granted the Government's petition for certiorari in Addonizio's case and in the consolidated case of two other prisoners in which similar relief was granted.[7]

II

We decide only the jurisdictional issue. We do not consider the Government's alternative argument that the significance of the changes in the Parole Commission's procedures has been exaggerated because it always attached some weight to the character of the offense in processing parole applications. Nor do we have any occasion to consider whether the new guidelines are consistent with the Parole Commission and

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[6] *Bonanno* v. *United States*, Civ. No. — (CA9 1978), cert. granted, — U. S. — (Dec. 11, 1978), cert. dismissed pursuant to Rule 60, — U. S. — (Feb. 1, 1979).

[7] In *United States* v. *Whelan & Flaherty*, two federal prisoners filed motions under §§ 2241 and 2255 challenging their confinement. The § 2241 motion was denied by the District Court; the Court of Appeals affirmed, 573 F. 2d 147, and Whelan and Flaherty did not seek further review. In the § 2255 motion, which is at issue here, the respondents claimed that the Parole Commission's action frustrated the intent of Judge Shaw, who had originally sentenced them and who had since died. The case was assigned to Judge Biunno, who took the position that "the real issue is whether the Parole Commission's denial of parole was arbitrary and capricious," Pet. App., at 35a, and concluded that it was not. The Court of Appeals vacated that decision and directed Judge Biunno to reconsider the case to determine whether Judge Shaw's sentencing intent had been frustrated. Proceedings on remand have resulted in the release of both respondents.

Reorganization Act of 1976, 90 Stat. 219; [8] or whether their enforcement may violate the Ex Post Factor Clause of the Clause of the Constitution.[9]

III

When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.[10] The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.[11] The question in this case is whether an error has occurred that is sufficiently fundamental to come within those narrow limits.

Under § 2255, the sentencing court is authorized to discharge or resentence a defendant if it concludes that it "was without jurisdiction to impose such sentence, or that the

[8] See *Geraghty* v. *United States Parole Commission*, 579 F. 2d 238 (CA3 1978).

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[11] Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. See, *e. g.*, Bator, Finality In Criminal Law And Federal Habeas Corpus For State Prisoners, 76 Harv. L. Rev. 441, 451–453 (1963). Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful. See *Stone* v. *Powell*, 428 U. S. 465, 491 n. 31; *Henderson* v. *Kibbe*, 431 U. S. 145, 154 n. 13.

sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack." This statute was intended to alleviate the burden of habeas corpus petitions filed by federal prisoners in the district of confinement, by providing an equally broad remedy in the more convenient jurisdiction of the sentencing court. *United States* v. *Hayman*, 342 U. S. 205, 216–217.

While the remedy is in this sense comprehensive, it does not encompass all claimed errors in conviction and sentencing. Habeas corpus has long been available to attack convictions and sentences entered by a court without jurisdiction. See, *e. g.*, *Ex parte Watkins*, 3 Pet. 193, 202–203 (MARSHALL, C. J.). In later years, the availability of the writ was expanded to encompass claims of constitutional error as well. See *Waley* v. *Johnston*, 316 U. S. 101, 104–105; *Brown* v. *Allen*, 344 U. S. 443. But unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited. *Stone* v. *Powell*, 428 U. S. 465, 477 n. 10. The Court has held that an error of law does not provide a basis for collateral attack unless the claimed error constituted "a fundamental defect which inherently results in a complete miscarriage of justice." *Hill* v. *United States*, 368 U. S. 424, 428.

Similar limitations apply with respect to claimed errors of fact. The justification for raising such errors in a § 2255 proceeding, as *amicus* here points out,[12] is that traditionally they could have been raised by a petition for a writ of *coram nobis*, and thus fall within § 2255's provision for vacating sentences that are "otherwise subject to collateral attack." But *coram nobis* jurisdiction has never encompassed all errors of fact; instead, it was of a limited scope, existing "in those cases where the errors were of the most fundamental character, that is, such as rendered the proceeding itself irregular and invalid." *United States* v. *Mayer*, 235 U. S. 55, 69.

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Thus, the writ of *coram nobis* was "available to bring before the court that pronounced the judgment errors in matters of fact which had not been put in issue or passed upon, and were material to the validity and regularity of the legal proceeding itself; as where the defendant, being under age, appeared by an attorney, or the plaintiff or defendant was a married woman at the time of commencing the suit, or dies before verdict of interlocutory judgment." *Id.*, at 68.

The claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

The absence of any error of this nature or magnitude distinguishes Addonizio's claim from those in prior cases, upon which he relies, in which collateral attacks were permitted. *Davis* v. *United States*, 417 U. S. 333, for example, like this case, involved a claim that a judgment that was lawful when it was entered should be set aside because of a later development. The subsequent development in that case, however, was a change in the substantive law that established that the conduct for which petitioner had been convicted and sentenced was lawful. To have refused to vacate his sentence would surely have been a "complete miscarriage of justice" since the conviction and sentence were no longer lawful. The change in Parole Commission policies involved in this case is not of the same character: this change affected the way in which the court's judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself—then or now. Nor is *United States* v. *Tucker*, 404 U. S. 443, analogous to the present case. In that case, the Court ordered resentencing of a defendant whose original sentence

had been imposed at least in part upon the basis of convictions secured without the assistance of counsel. But the error underlying the sentence in *Tucker*, as the Court emphasized, was "misinformation of constitutional magnitude." *Id.*, at 447. We have held that the constitutional right to the assistance of counsel is itself violated when uncounseled convictions serve as the basis for enhanced punishment. *Burgett* v. *Texas*, 389 U. S. 109, 115. Whether or not the Parole Commission action in this case was constitutional, a question not presented here, there is no claim that the action taken by the sentencing judge was unconstitutional, or was based on "misinformation of constitutional magnitude."

Our prior decisions, then, provide no support for Addonizio's claim that he is entitled to relief under § 2255. According to all of the objective criteria—federal jurisdiction, the Constitution, and federal law—the sentence was and is a lawful one. And in our judgment, there is no basis for enlarging the grounds for collateral attack to include claims based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge.

As a practical matter, the subjective intent of the sentencing judge would provide a questionable basis for testing the validity of his judgment. The record made when Judge Barlow pronounced sentence against Addonizio, for example, is entirely consistent with the view that the Judge then thought that this was an exceptional case in which the severity of Addonizio's offense should and would be considered carefully by the Parole Commission when Addonizio became eligible for parole. If the record is ambiguous, and if a § 2255 motion is not filed until years later, it will often be difficult to reconstruct with any certainty the subjective intent of the judge at the time of sentencing. Regular attempts to do so may well increase the risk of inconsistent treatment of defendants; on the other hand, the implementation of the Parole Commission's policies may reduce that risk.

Nothing in the statutory scheme directs sentencing courts to engage in this task on collateral attack; quite to the contrary, the proposed system of sentencing review would be inconsistent with that established by Congress. The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission.[13] Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.[14] The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.[15] And once a sentence has

[13] A federal prisoner is entitled to release at the expiration of his maximum sentence less "good time" computed according to 18 U. S. C. § 4161. In addition, any prisoner sentenced to more than five years' imprisonment is entitled to be released on parole after serving two-thirds of each consecutive term or 30 years, whichever is first, unless the Commission determines that the prisoner "has seriously or frequently violated institutional rules" or that there is a reasonable probability that he would commit further crimes. 18 U. S. C. § 4206 (d). The Commission has substantial discretion to determine whether a prisoner should be released on parole, once he is eligible, prior to the point where release is mandated by statute. 18 U. S. C. § 4203 (1970), in effect when Addonizio was sentenced, provided:

"If it appears to the Board . . . that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Under the statute now in effect, 18 U. S. C. § 4206, the Commission is to consider the risk of recidivism and whether "release would . . . depreciate the seriousness of [the] offense or promote disrespect for the law."

[14] See generally S. Conf. Rep. No. 94-648, 94th Cong., 1st Sess., 18 (1975).

[15] The trial court may set a defendant's eligibility for parole at any

been imposed, the trial judge's authority to modify it is also circumscribed. Rule 35 of the Federal Rules of Criminal Procedure now authorizes District Courts to reduce a sentence within 120 days after it is imposed or after it has been affirmed on appeal.[16] The time period, however, is jurisdictional and may not be extended.[17]

The import of this statutory scheme is clear: the judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would sub-

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point up to one-third of the maximum sentence imposed, see 18 U. S. C. § 4205 (a), (b) (1976); 18 U. S. C. §§ 4202, 4208 (1970). Whether the defendant will actually be paroled at that time is the decision of the Parole Commission. See *United States* v. *Grayson*, 438 U. S. 41, 47 ("the extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially-fixed term."). The trial judge is precluded from effectively usurping that function by splitting a lengthy sentence between a stated period of probation and imprisonment: probation may not be combined with a sentence entailing incarceration of more than six months. 18 U. S. C. § 3651 (2) (1976).

[16] Prior to the adoption of Rule 35, the trial courts had no such authority: "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." *United States* v. *Murray*, 275 U. S. 347, 358. This rule was applied even though the change related only to the second of a pair of consecutive sentences which itself was not being served at the time. *Affronti* v. *United States*, 350 U. S. 79.

[17] See Fed. Rule Crim. Proc. 45 (b); *United States* v. *Robinson*, 361 U. S. 220.

stantially undermine the congressional decision to entrust release determinations to the Commision and not the courts. Nothing in § 2255 supports—let alone mandates—such a frustration of congressional intent.

Accordingly, without reaching any question as to the validity of the Parole Commission's actions, either in promulgating its new guidelines or in denying Addonizio's applications for parole, we hold that subsequent actions taken by the Parole Commission—whether or not such actions accord with a trial judge's expectations at the time of sentencing—do not retroactively affect the validity of the final judgment itself. The facts alleged by the prisoners in these cases do not provide a basis for a collateral attack on their respective sentences pursuant to § 2255.

The judgments of the Court of Appeals are therefore reversed.

May 22, 1979

78-156 U.S. v. Addonizio

Dear John:

Please show on the next draft of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice Stevens

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 22, 1979

No. 78-156 - United States v. Addonizio

Dear John,

Please join me.

Sincerely yours,

Mr. Justice Stevens

Copies to the Conference

cmc

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

May 23, 1979

Re: 78-156 - United States v. Addonizio

Dear John:

Please join me.

Sincerely,

H.A.B.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

May 23, 1979

Re: 78-156 - United States v. Addonizio

Dear John:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.
1.

Mr. Justice Stevens

Copies for the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 25, 1979

Re: No. 78-156 - United States v. Addonizio

Dear John:

Please join me.

Sincerely,

Mr. Justice Stevens

Copies to the Conference

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: Mr. Justice Stevens

Circulated: _____

Recirculated: MAY 28 '79

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 78–156

United States, Petitioner, v. Hugh J. Addonizio et al. | On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[June —, 1979]

MR. JUSTICE STEVENS delivered the opinion of the Court.

Three prisoners have alleged that a postsentencing change in the policies of the United States Parole Commission has prolonged their actual imprisonment beyond the period intended by the sentencing judge. The question presented is whether this type of allegation will support a collateral attack on the original sentence under 18 U. S. C. § 2255.[1] We hold that it will not.

I

With respect to the legal issue presented, the claims before

[1] 28 U. S. C. § 2255 provides:

"A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

. . . . .

"If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate."

us are identical. To bring this issue into sharp focus, we accept for purposes of decision Addonizio's view of the facts and the relevant aspects of the Parole Commission's practices.

After his conviction in the United States District Court for the District of New Jersey, on September 22, 1970, Addonizio was sentenced to 10 years imprisonment and a fine of $25,000. Factors which led the District Judge to impose that sentence included the serious character of Addonizio's offenses,[2] and the Judge's expectation that exemplary institu-

[2] At the time he imposed sentence, Judge Barlow stated:

"Weighed against these virtues, [Mr. Addonizio's record of public service] . . . is his conviction by a jury in this court of crimes of monumental proportion, the enormity of which can scarcely be exaggerated and the commission of which create the gravest implications for our form of government.

"Mr. Addonizio, and the other defendants here, have been convicted of one count of conspiring to extort and 63 substantive counts of extorting hundreds of thousands of dollars from persons doing business with the City of Newark. An intricate conspiracy of this magnitude, I suggest to you, Mr. Hellring [defense counsel], could have never succeeded without the then-Mayor Addonizio's approval and participation.

"These were no ordinary criminal acts. . . . These crimes for which Mr. Addonizio and the other defendants have been convicted represent a pattern of continuous, highly-organized, systematic criminal extortion over a period of many years, claiming many victims and touching many more lives.

"Instances of corruption on the part of elected and appointed governmental officials are certainty not novel to the law, but the corruption disclosed here, it seems to the Court, is compounded by the frightening alliance of criminal elements and public officials, and it is this very kind of totally destructive conspiracy that was conceived, organized and executed by these defendants.

". . . It is impossible to estimate the impact upon—and the cost of—these criminal acts to the decent citizens of Newark, and, indeed, to the citizens of the State of New Jersey, in terms of their frustration, despair and disillusionment.

. . . . .

"Their crimes, in the judgment of this Court, tear at the very heart of our civilized form of government and of our society. The people will not

tional behavior would lead to Addonizio's release when he became eligible for parole after serving one-third of his sentence.[3] The judge did not contemplate that the Parole Commission might rely on the seriousness of the offense as a reason for refusing a parole which Addonizio would otherwise receive.

In 1973 the Parole Commission markedly changed its policies.[4] Under its new practices the gravity of the offense became a significant factor in determining whether a prisoner should be granted parole. Addonizio became eligible for parole on July 3, 1975. After hearings, the Parole Com-

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tolerate such conduct at any level of government, and those who use their public office to betray the public trust in this manner can expect from the courts only the gravest consequences.

. . . . .

"It is, accordingly, the sentences of this Court that the defendant Hugh J. Addonizio shall be committed to the custody of the Attorney General of the United States for a term of ten years, and that, additionally, the defendant Hugh J. Addonizio shall pay a fine of $25,000. That is all." 573 F. 2d, at 154.

[3] In his opinion granting Addonizio relief under § 2255 in 1977, Judge Barlow stated:

"At the time sentence was imposed, this Court expected that petitioner would receive a meaningful parole hearing—that is, a determination based on his institutional record and the likelihood of recidivism—upon the completion of one-third (⅓) of his sentence. The Court anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that petitioner would be actually confined for a period of approximately three and one-half to four years of the ten-year sentence, in view of the fact that he was a first-offender and that there appeared to be little probability of recidivism, given the circumstances of the case and his personal and social history. This sentencing expectation was based on the Court's understanding—which was consistent with generally-held notions—of the operation of the parole system in 1970." Pet. for Cert. 28a–29a.

[4] The Commission commenced using guidelines on a trial basis in 1972 and started to apply them throughout the nation in November 1973. See 38 Fed. Reg. 31942. The Commission's present guidelines are codified at 28 CFR § 2.20. The use of guidelines is now required by statute. See 18 U. S. C. §§ 4203 (a)(1) and 4206 (a).

mission twice refused to release him, expressly basing its refusal on the serious character of his crimes.[5]

Thereafter, Addonizio invoked the District Court's jurisdiction under 28 U. S. C. § 2255 and moved for resentencing. Following the Third Circuit's decision in *United States* v. *Salerno*, 538 F. 2d 1005, 1007 (1976), the District Court accepted jurisdiction, found that the Parole Commission had not given Addonizio the kind of "meaningful parole hearing" that the judge had anticipated when sentence was imposed, and reduced his sentence to the time already served. The judge stated that he had "anticipated—assuming an appropriate institutional adjustment and good behavior while confined—that [Addonizio] would be actually confined for a

[5] As Judge Aldisert noted in his opinion for the Third Circuit, the comments made by the Parole Commission on January 13, 1977, explaining its denial of parole are remarkably similar to the reasons given by the trial judge at the time sentence was imposed. The Commission stated:

"Your offense behavior has been rated as very high severity. Your silent factor score is 11. You have been in custody a total of 57 months at time of hearing. Guidelines established by the Commission for adult cases which consider the above factors suggest a range of 25–36 months to be served before release for cases with good institutional adjustment. After careful consideration of all relevant factors and information presented, a decision above the guidelines appears warranted because your offense was part of an ongoing criminal conspiracy lasting from 1965 to 1968, which consisted of many separate offenses committed by you and approximately 14 other co-conspirators. As the highest elected official in the City of Newark, you were convicted of an extortion conspiracy in which, under color of your official authority, you and your co-conspirators conspired to delay, impede, obstruct, and otherwise thwart construction in the City of Newark in order to obtain a percentage of contracts for the privilege of working on city construction projects.

"Because of the magnitude of this crime (money extorted totalling approximately $241,000) its economic effect on innocent citizens of Newark, and because the offense involved a serious breach of public trust over a substantial period of time, a decision above the guidelines is warranted. Parole at this time would depreciate the seriousness of the offense and promote disrespect for the law." 573 F. 2d, at 153–154.

period of approximately three and one-half to four years of the ten-year sentence." This "sentencing expectation" was frustrated by the Parole Commission's subsequent adoption of new standards and procedures.

The Court of Appeals affirmed. 573 F. 2d 147. Because of a conflict with the decision of the Ninth Circuit holding that § 2255 does not give district courts this type of resentencing authority,[6] we granted the Government's petition for certiorari in Addonizio's case and in the consolidated case of two other prisoners in which similar relief was granted.[7]

II

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Reorganization Act of 1976, 90 Stat. 219; [8] or whether their enforcement may violate the Ex Post Facto Clause of the Constitution.[9]

III

When Congress enacted § 2255 in 1948, it simplified the procedure for making a collateral attack on a final judgment entered in a federal criminal case, but it did not purport to modify the basic distinction between direct review and collateral review. It has, of course, long been settled law that an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment.[10] The reasons for narrowly limiting the grounds for collateral attack on final judgments are well known and basic to our adversary system of justice.[11] The question in this case is whether an error has occurred that is sufficiently fundamental to come within those narrow limits.

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[11] Inroads on the concept of finality tend to undermine confidence in the integrity of our procedures. See, *e. g.*, F. James, Civil Procedure 517–518 (1965). Moreover, increased volume of judicial work associated with the processing of collateral attacks inevitably impairs and delays the orderly administration of justice. Because there is no limit on the time when a collateral attack may be made, evidentiary hearings are often inconclusive and retrials may be impossible if the attack is successful. See *Stone* v. *Powell*, 428 U. S. 465, 491 n. 31; *Henderson* v. *Kibbe*, 431 U. S. 145, 154 n. 13.

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The claimed error here—that the judge was incorrect in his assumptions about the future course of parole proceedings—does not meet any of the established standards of collateral attack. There is no claim of a constitutional violation; the sentence imposed was within the statutory limits; and the proceeding was not infected with any error of fact or law of the "fundamental" character that renders the entire proceeding irregular and invalid.

The absence of any error of this nature or magnitude distinguishes Addonizio's claim from those in prior cases, upon which he relies, in which collateral attacks were permitted. *Davis* v. *United States*, 417 U. S. 333, for example, like this case, involved a claim that a judgment that was lawful when it was entered should be set aside because of a later development. The subsequent development in that case, however, was a change in the substantive law that established that the conduct for which petitioner had been convicted and sentenced was lawful. To have refused to vacate his sentence would surely have been a "complete miscarriage of justice" since the conviction and sentence were no longer lawful. The change in Parole Commission policies involved in this case is not of the same character: this change affected the way in which the court's judgment and sentence would be performed but it did not affect the lawfulness of the judgment itself—then or now. Nor is *United States* v. *Tucker*, 404 U. S. 443, analogous to the present case. In that case, the Court ordered resentencing of a defendant whose original sentence

had been imposed at least in part upon the basis of convictions secured without the assistance of counsel. But the error underlying the sentence in *Tucker*, as the Court emphasized, was "misinformation of constitutional magnitude." *Id.*, at 447. We have held that the constitutional right to the assistance of counsel is itself violated when uncounseled convictions serve as the basis for enhanced punishment. *Burgett* v. *Texas*, 389 U. S. 109, 115. Whether or not the Parole Commission action in this case was constitutional, a question not presented here, there is no claim that the action taken by the sentencing judge was unconstitutional, or was based on "misinformation of constitutional magnitude."

Our prior decisions, then, provide no support for Addonizio's claim that he is entitled to relief under § 2255. According to all of the objective criteria—federal jurisdiction, the Constitution, and federal law—the sentence was and is a lawful one. And in our judgment, there is no basis for enlarging the grounds for collateral attack to include claims based not on any objectively ascertainable error but on the frustration of the subjective intent of the sentencing judge.

As a practical matter, the subjective intent of the sentencing judge would provide a questionable basis for testing the validity of his judgment. The record made when Judge Barlow pronounced sentence against Addonizio, for example, is entirely consistent with the view that the Judge then thought that this was an exceptional case in which the severity of Addonizio's offense should and would be considered carefully by the Parole Commission when Addonizio became eligible for parole. If the record is ambiguous, and if a § 2255 motion is not filed until years later, it will often be difficult to reconstruct with any certainty the subjective intent of the judge at the time of sentencing. Regular attempts to do so may well increase the risk of inconsistent treatment of defendants; on the other hand, the implementation of the Parole Commission's policies may reduce that risk.

Nothing in the statutory scheme directs sentencing courts to engage in this task on collateral attack; quite to the contrary, the proposed system of sentencing review would be inconsistent with that established by Congress. The decision as to when a lawfully sentenced defendant shall actually be released has been committed by Congress, with certain limitations, to the discretion of the Parole Commission.[13] Whether wisely or not, Congress has decided that the Commission is in the best position to determine when release is appropriate, and in doing so, to moderate the disparities in the sentencing practices of individual judges.[14] The authority of sentencing judges to select precise release dates is, by contrast, narrowly limited: the judge may select an early parole eligibility date, but that guarantees only that the defendant will be considered at that time by the Parole Commission.[15] And once a sentence has

[13] A federal prisoner is entitled to release at the expiration of his maximum sentence less "good time" computed according to 18 U. S. C. § 4161. In addition, any prisoner sentenced to more than five years' imprisonment is entitled to be released on parole after serving two-thirds of each consecutive term or 30 years, whichever is first, unless the Commission determines that the prisoner "has seriously or frequently violated institutional rules" or that there is a reasonable probability that he would commit further crimes. 18 U. S. C. § 4206 (d). The Commission has substantial discretion to determine whether a prisoner should be released on parole, once he is eligible, prior to the point where release is mandated by statute. 18 U. S. C. § 4203 (1970), in effect when Addonizio was sentenced, provided:

"If it appears to the Board . . . that there is a reasonable probability that such prisoner will live and remain at liberty without violating the laws, and if in the opinion of the Board such release is not incompatible with the welfare of society, the Board may in its discretion authorize the release of such prisoner on parole."

Under the statute now in effect, 18 U. S. C. § 4206, the Commission is to consider the risk of recidivism and whether "release would . . . depreciate the seriousness of [the] offense or promote disrespect for the law."

[14] See generally S. Conf. Rep. No. 94-648, 94th Cong., 1st Sess., 16 (1975).

[15] The trial court may set a defendant's eligibility for parole at any

been imposed, the trial judge's authority to modify it is also circumscribed. Rule 35 of the Federal Rules of Criminal Procedure now authorizes District Courts to reduce a sentence within 120 days after it is imposed or after it has been affirmed on appeal.[16] The time period, however, is jurisdictional and may not be extended.[17]

The import of this statutory scheme is clear: the judge has no enforcible expectations with respect to the actual release of a sentenced defendant short of his statutory term. The judge may well have expectations as to when release is likely. But the actual decision is not his to make, either at the time of sentencing or later if his expectations are not met. To require the Parole Commission to act in accordance with judicial expectations, and to use collateral attack as a mechanism for ensuring that these expectations are carried out, would sub-

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point up to one-third of the maximum sentence imposed, see 18 U. S. C. § 4205 (a), (b) (1976); 18 U. S. C. §§ 4202, 4208 (1970). Whether the defendant will actually be paroled at that time is the decision of the Parole Commission. See *United States* v. *Grayson*, 438 U. S. 41, 47 ("the extent of a federal prisoner's confinement is initially determined by the sentencing judge, who selects a term within an often broad, congressionally prescribed range; release on parole is then available on review by the United States Parole Commission, which, as a general rule, may conditionally release a prisoner any time after he serves one-third of the judicially-fixed term."). The trial judge is precluded from effectively usurping that function by splitting a lengthy sentence between a stated period of probation and imprisonment: probation may not be combined with a sentence entailing incarceration of more than six months. 18 U. S. C. § 3651 (2) (1976).

[16] Prior to the adoption of Rule 35, the trial courts had no such authority: "The beginning of the service of the sentence in a criminal case ends the power of the court even in the same term to change it." *United States* v. *Murray*, 275 U. S. 347, 358. This rule was applied even though the change related only to the second of a pair of consecutive sentences which itself was not being served at the time. *Affronti* v. *United States*, 350 U. S. 79.

[17] See Fed. Rule Crim. Proc. 45 (b); *United States* v. *Robinson*, 361 U. S. 220.

stantially undermine the congressional decision to entrust release determinations to the Commision and not the courts. Nothing in § 2255 supports—let alone mandates—such a frustration of congressional intent.

Accordingly, without reaching any question as to the validity of the Parole Commission's actions, either in promulgating its new guidelines or in denying Addonizio's applications for parole, we hold that subsequent actions taken by the Parole Commission—whether or not such actions accord with a trial judge's expectations at the time of sentencing—do not retroactively affect the validity of the final judgment itself. The facts alleged by the prisoners in these cases do not provide a basis for a collateral attack on their respective sentences pursuant to § 2255.

The judgments of the Court of Appeals are therefore reversed.

MR. JUSTICE BRENNAN took no part in the decision of this case.

MR. JUSTICE POWELL took no part in the consideration or decision of this case.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 29, 1979

Re: No. 78-156 - United States v. Addonizio

Dear John:

Please join me.

Sincerely,

T.M.

Mr. Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

May 30, 1979

78-156 - U.S. v. Addonizio

Dear John:

I join.

Regards,

Mr. Justice Stevens

Copies to the Conference