Sentencing Mulligans After Collateral Review: Scope of Resentencing Following a 28 U.S.C. § 2255 Motion to "Vacate, Set Aside or Correct the Sentence"

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I. INTRODUCTION

Cody enters the sentencing phase after he is convicted of a criminal violation in federal court. Cody does not object to any factual material information in the presentence report ("PSR") at sentencing because he faces a statutory minimum penalty pursuant to the Armed Career Criminal Act of 1984 ("ACCA") and just wants his case to be over so he can move on. The district court judge finds that Cody's three prior convictions for aggravated burglary qualify as "crimes of violence" as stated in the ACCA and sentences Cody to 180 months of imprisonment. Cody then exhausts all direct appeals, and the judgment becomes final. Subsequently, the United States Supreme Court determines that certain acts of aggravated burglaries, like those previous convictions used in Cody's sentencing, do not qualify as "crimes of violence." Cody, who is now incarcerated in a federal prison, files a motion to vacate, set aside, or correct a sentence under 28 U.S.C. § 2255 because of the recent Supreme Court decision that would lower his sentence on collateral review. Cody prevails on the motion, and the district court judge orders him to be resentenced. Cody thinks he finally sees a light at the end of the tunnel because of this new Supreme Court decision.

However, the resentencing requires the probation office to prepare a new PSR, and this new report contains materially different fac-

tual information than the PSR used in Cody's initial sentencing. Cody objects to the information found in the new PSR, but the judge refuses to address his objections because, according to the judge, Cody waived his rights to object to the PSR when he failed to raise the issues in the original sentencing or on direct appeal. The new information allowed the judge to justify a new sentencing enhancement that resulted in Cody receiving approximately the same length of incarceration as he was sentenced to before his 28 U.S.C. § 2255 motion. If Cody was permitted to object to the new information in the PSR and the judge found in his favor, his sentence length would have been cut nearly in half.

The disparity, between the sentence Cody actually received at resentencing and the sentence he would have received if the judge allowed him to object to the new information in the PSR, causes a crisis for hundreds of petitioners who find themselves in the same unfortunate position as Cody. Section 2255 is silent in terms of resentencing procedure.[1] Congress has not directly resolved this problem, as it could, by expressly mandating what information a court must consider, may consider, or cannot consider when a judge chooses to resentence an individual after a 28 U.S.C. § 2255 motion. In fact, there is not much guidance on collateral review resentencing at all. This lack of direction leads to different resentencing approaches between the circuits, ultimately resulting in inconsistent sentences. The circuit division on the appropriate scope of resentencing during collateral review highlights the need for an intervening solution to ensure a more fair and predictable sentencing system.

This Note argues that a defendant's resentencing following a successful 28 U.S.C. § 2255 motion should be subject to the same requirements, rules, and standards employed as when a case is remanded for resentencing. Accordingly, courts resentencing after collateral review should use the more favorable de novo sentencing approach that allows courts to consider any factors and any information that is authorized under the sentencing guidelines, regardless of the fact that an issue was not raised at the original sentence, on direct appeal, or in the 28 U.S.C. § 2255 motion. Courts should find that an individual who is being resentenced on collateral review has not waived or forfeited his right to object to the new PSR because that individual failed

1. *See* 28 U.S.C. § 2255 (2012).

to raise the objection in a previous proceeding where the objected material was nonexistent.

Part II of this Note explores the history of the writ of habeas corpus and the reasons behind the enactment of 28 U.S.C. § 2255. Part III explores how courts approach sentencing at the different phases of a case and the intricacies that exist in the initial sentencing phase, on direct appeal, and at resentencing following a remand from a court of appeals. Part IV analyzes the resentencing phase after a successful 28 U.S.C. § 2255 motion and argues that courts should apply the de novo resentencing approach to allow defendants to raise new objections to PSRs. Part V offers a proposal to add clarity to the proper procedures courts should follow when resentencing after a 28 U.S.C. § 2255 motion.

II. HABEAS CORPUS AND THE ENACTMENT OF 28 U.S.C. § 2255

Section 2255's roots are embedded in the rich history of the writ of habeas corpus. Looking at the development of habeas corpus can help develop an understanding behind the United States' new congressionally created statute.

A. The History of Habeas Corpus and 28 U.S.C. § 2255

The writ of habeas corpus developed in English law and can be traced back to King John's Magna Carta.[2] Its purpose is to protect individuals against arbitrary and wrongful imprisonment.[3] In colonial

2. *See Magna Carta: Muse and Mentor*, LIBRARY OF CONGRESS, https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/writ-of-habeas-corpus.html (last visited Feb. 21, 2018). Origins of the writ of habeas corpus can be found in British common law that predates the Magna Carta; however, it wasn't enacted into law until Parliament passed the Habeas Corpus Act of 1679. *Id.* It has been said that habeas corpus is "the most celebrated writ in English law." 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 328 (1899).

3. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 922 (Vicki Been et al. eds., 6th ed. 2012). The protection that habeas corpus provides has earned it the nickname the "great writ of liberty" or simply "The Great Writ." *See* WILLIAM F. DUKER, A CONSTITUTIONAL HISTORY OF HABEAS CORPUS 3–7 (1980) (discussing the history of habeas corpus); Stephen I. Vladeck, *The New Habeas Revisionism*, 124 HARV. L. REV. 941, 944–45 (2011) (reviewing PAUL D. HALLIDAY, HABEAS

America, before the United States adopted the U.S. Constitution, habeas corpus was available in many of the colonies.[4] The Framers of the U.S. Constitution recognized the importance of habeas corpus and created a provision in the U.S. Constitution that restricts the suspension of the writ.[5] United States federal courts gained power to issue writs of habeas corpus in the late eighteenth century through the passage of the Judiciary Act of 1789—the same Act that created the federal court system.[6] The writ was available to prisoners who were confined by federal officials in violation of the Constitution, treaties, or laws of the United States.[7] The codification of habeas corpus bound the federal courts to only the authority Congress vested in them.[8]

CORPUS: FROM ENGLAND TO EMPIRE (2010)) (providing a general overview of the history of the writ of habeas corpus).

4. DUKER, *supra* note 3, at 98–99. Many colonies made the writ of habeas corpus available by recognizing it as a common law right, while other colonies created statutes or incorporated the availability of the writ into their colonial charters. *Id.*

5. U.S. CONST. art. I, § 9, cl. 2 ("The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."). The Constitutional Framers were well aware of the threat a government could pose to its own people by abusing its power to suspend the writ of habeas corpus. English Parliament suspended the writ of habeas corpus on multiple occasions between the seventeenth and eighteenth centuries. *See* DUKER, *supra* note 3, at 126–156. This suspension resulted in a lack of legal protection for the imprisoned. *See id.* It is suggested that America's Constitutional Framers added the suspension clause to ensure that Congress does not act in a tyrannical manner and suspend the States' ability to grant the writ of habeas corpus. *Id.* While the U.S. Constitution provides that the writ of habeas corpus cannot be suspended unless for an enumerated exception, the Constitution does not specifically create a federal constitutional right to habeas corpus. CHEMERINSKY, *supra* note 3, at 930.

6. Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (codified at 28 U.S.C. §§ 1651, 2254 (2012)); CHARLES DOYLE, CONG. RESEARCH SERV., RL33391, FEDERAL HABEAS CORPUS: A BRIEF LEGAL OVERVIEW 3 (2006).

7. *See* Judiciary Act of 1789, ch. 20, § 14, 1 Stat. 73, 81–82 (1789) (codified at 28 U.S.C. §§ 1651, 2254 (2012)). Although the writ of habeas corpus was codified for the first time in American history since the drafting of the U.S. Constitution, the power of the federal courts was very limited: while an individual who was held by the federal government without admission to bail or trial could seek habeas corpus relief, an individual who sought to contest the validly of their confinement following a conviction handed down by a federal court—even if that judgment was in error—could not. *See Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

8. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93–94 (1807).

Federal courts were unable to issue habeas corpus writs based on common law or inherent authority.[9] Over the next two centuries, the availability and scope of the writ of habeas corpus was greatly expanded.[10] With this expansion came a flood of new habeas corpus petitions, which caused an increased burden on some federal courts.[11]

In 1948, to combat the increased habeas corpus load, Congress enacted 28 U.S.C. § 2255 with the intention of alleviating the procedural difficulties that were occurring in federal courts because of habeas corpus filings.[12] The statute now requires federal prisoners to

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9. *See id.*

10. Shortly after the Civil War, through a provision in the Reconstruction Act, Congress extended habeas corpus relief to state prisoners who were unlawfully detained. Max Rosenn, *The Great Writ—A Reflection of Societal Change*, 44 OHIO ST. L.J. 337, 341–42 (1983); *see also* Act of Feb. 5, 1867, ch. 28, 14 Stat. 385 (codified as 28 U.S.C. § 2241–2255) (providing the congressionally made and codified habeas corpus relief). Congress feared that Southern states would unlawfully persecute former slaves and detain them in violation of the Constitution. Rosenn, *supra*, at 341. Over the next century, courts progressively expanded the reach of the habeas corpus statutes, which resulted in federal courts having jurisdiction over more habeas corpus petitions. CHEMERINSKY, *supra* note 3, at 929–33. It wasn't until the mid-1970s that the Supreme Court began narrowing the availability of habeas corpus. *Id.* at 933. More recently, Congress's narrowing of habeas corpus can be seen in the Antiterrorism and Effective Death Penalty Act. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (adding, among other provisions, a one-year statute of limitations to 28 U.S.C. § 2255 motions). See generally CHEMERINSKY, *supra* note 3, at 929–33; DOYLE, *supra* note 6, at 3; and DUKER, *supra* note 3, at 126–156, for a historical overview of the expansion of the availability of habeas corpus.

11. United States v. Hayman, 342 U.S. 205, 213–14 (1952).

12. Prior to the enactment of 28 U.S.C. § 2255, federal prisoners could file an application for habeas corpus in a federal district court to determine if they had been deprived of liberty in violation of their constitutional rights. CHARLES ALAN WRIGHT ET AL., 3 FEDERAL RULES OF CRIMINAL PROCEDURE IN FEDERAL PRACTICE AND PROCEDURE § 621 (4th ed. 2017) [hereinafter FEDERAL PRACTICE]. These habeas corpus applications were filed with the district court in the jurisdiction in which they were currently in custody. *See* 28 U.S.C. § 2241 (2012); FEDERAL PRACTICE, *supra*, § 621. As the number of habeas corpus applications grew in number every year, the district courts that were located next to populated penal institutions began to face administrative difficulties. FEDERAL PRACTICE, *supra*, § 621. Courts hearing these habeas corpus cases often did not have convenient access to the trial records nor did they have knowledge of all the pertaining issues. *Id.* 28 U.S.C. § 2255 was Congress's response to correcting these issues. *See* 28 MOORE'S FEDERAL

file their post-conviction collateral claims with the district court that originally sentenced the prisoner, instead of filing in the district where the prisoners were currently in custody.[13] The drafters of 28 U.S.C. § 2255 did not intend to diminish any rights that were previously afforded by the writ of habeas corpus.[14] In fact, courts have interpreted 28 U.S.C. § 2255 as allowing for a wide range of grounds for relief.[15] The broad discretion that 28 U.S.C. § 2255 gives to the district court when determining the appropriate remedy is consistent with Congress's general sentencing policies.[16]

B. 28 U.S.C. § 2255 Application, Limitations, and Requirements

Section 2255 provides federally incarcerated individuals with a statutory tool to challenge the validity of their sentences and convictions.[17] A federal prisoner usually files a motion to vacate, set aside, or correct the sentence after all appellate review opportunities have been exhausted and the conviction becomes final.[18] As long as the

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PRACTICE—CRIMINAL PROCEDURE § 672.02 (3d ed. 2017) [hereinafter MOORE'S FEDERAL PRACTICE].

13. *See* 28 U.S.C. § 2255(a) (2012); *see also* RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS, R. 4(a) [hereinafter SECTION 2255 RULES] ("The clerk must promptly forward the motion to the judge who conducted the trial and imposed sentence or, if the judge who imposed sentence was not the trial judge, to the judge who conducted the proceedings being challenged."). Requiring the prisoner to file the § 2255 motion with the district judge who originally sentenced the prisoner resolved a number of issues such as habeas corpus docket congestion, lack of resources, and limited sentencing record. *See* MOORE'S FEDERAL PRACTICE, *supra* note 12, § 672.02.

14. *See* Hill v. United States, 368 U.S. 424, 427 (1962).

15. *See id.* at 428 n.5 (observing that courts have usually provided 28 U.S.C. § 2255 the same scope of remedies as that of habeas corpus). Courts have noted the broad discretion that 28 U.S.C. § 2255 gives the district judge in terms of crafting the most appropriate remedy after a successful motion. *Id.*

16. *See infra* Section III.A.

17. *See* MOORE'S FEDERAL PRACTICE, *supra* note 12, § 672.02.

18. *See* 28 U.S.C. § 2255 (2012); *see also* Clay v. United States, 537 U.S. 522, 525 (2003) (noting a judgment becomes final when the Supreme Court affirms conviction, denies petition for *certiorari*, or time for filing a petition for *certiorari* expires); *V. Review Proceedings*, 42 GEO. L.J. ANN. REV. CRIM. PROC. 1033 (2013).

petitioner provides a cognizable claim[19] to the original sentencing court, that court must grant a hearing to "determine the issues and make findings of fact and conclusions of law with respect thereto."[20] If the court determines that the original judgment violated jurisdictional requirements, constitutional protections, or the court made a fundamental error related to the sentence or conviction, the court must vacate, set aside, or correct the sentence.[21]

The statute includes specific requirements that petitioners must meet to qualify for relief. The statute states that the petitioner must be "[a] prisoner in custody under sentence of a court established by Act of Congress" to be eligible for relief.[22] This requirement makes it

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19. 28 U.S.C. § 2255(b) (2012). A § 2255 motion may include claims such as: failure of the sentencing court to allow the petitioner to allocate at the original sentencing as the Federal Rules of Criminal Procedure require, or the petitioner's due process rights were violated because of the way the court conducted the sentencing proceeding. Sarah French Russell, *Reluctance to Resentence: Courts, Congress, and Collateral Review*, 91 N.C. L. REV. 79, 89 (2012) (depicting "procedural" errors). A petitioner may also claim that the sentencing court relied on an erroneous interpretation of a statute or that the sentence received was excessively harsh under the Eighth Amendment. *Id.* (depicting "substantive" errors). Motions may also assert that the defendant's lawyer provided ineffective assistance of counsel such as not objecting to an erroneous enhancement that is within the PSR. *See id.*; *see also, e.g.*, Glover v. United States, 531 U.S. 198, 203–04 (2001) (finding the ineffective assistance of counsel led to a sentencing error constituting a constitutional violation); United States v. Booth, 432 F.3d 542, 550 (3d Cir. 2004) (same).

20. 28 U.S.C. § 2255(b) (2012).

21. *Id.* Courts have held that the sentencing court has broad authority to choose the appropriate scope of § 2255 remedial proceedings such as resentencing or correcting the sentencing. *See* United States v. Jones, 114 F.3d 896, 897 (9th Cir. 1997) ("[T]he statute gives district judges wide berth in choosing the proper scope of post-2255 proceedings."); United States v. Moore, 83 F.3d 1231, 1234–35 (10th Cir. 1996) (same).

22. 28 U.S.C. § 2255(a) (2012). Courts look to the time of filing to determine whether a petitioner was in custody or not. *See* Torzala v. United States, 545 F.3d 517, 521 (7th Cir. 2008) (finding the custody requirement was met, despite the fact the petitioner was no longer in prison because the petitioner filed the motion while in custody). While what constitutes as "in custody" is not necessarily limited to imprisonment in a federal penitentiary, not every punishment imposed as part of a criminal sentence meets the necessary standard. *Compare* Maleng v. Cook, 490 U.S. 488, 491 (1989) (citing Jones v. Cunningham, 371 U.S. 236, 242 (1963)) (holding a prisoner still subject to a period of supervised release is considered in custody for purposes of § 2255), United States v. Cervini, 379 F.3d 987, 989 n.1 (10th Cir.

clear that the prisoner must be in *federal* custody and must be seeking relief from a judgment or sentence that a *federal* court issued. Moreover, the prisoner must file the motion with the court that sentenced the prisoner.[23] Other provisions of the *United States Code*, which are outside the scope of this Note, provide habeas corpus remedies for individuals who do not meet these requirements.[24]

In addition to the requirements that the petitioner must be a prisoner in federal custody[25] and that the motion must be filed with the original sentencing judge,[26] 28 U.S.C. § 2255 contains limitations that may prevent a petitioner from obtaining the desired § 2255 remedy.[27] Congress has imposed filing deadlines requiring the prisoner to file a motion within one year of their conviction becoming final.[28]

2004) (same), *and* SECTION 2255 RULES, *supra* note 13, at r. 1(b) (stating § 2255's custody requirement is met if the petitioner is "in custody under a judgment of a state court or another federal court, and subject to future custody under a judgment of the district court"), *with* United States v. Esogbue, 357 F.3d 532, 534 (5th Cir. 2004) (holding a § 2255 motion is not cognizable because petitioner is no longer in custody), *and* United States v. Bernard, 351 F.3d 360, 361 (8th Cir. 2003) (holding a restitution order does not meet § 2255 custody requirement).

23. 28 U.S.C. § 2255(a) (2012) ("A prisoner in [federal] custody . . . may move *the court which imposed the sentence* to vacate, set aside or correct the sentence.") (emphasis added); *see also supra* note 12 and accompanying text.

24. *See, e.g.*, 28 U.S.C. § 2254 (2012) (collateral review statute for prisoners in state custody); *id.* § 2241 (general habeas corpus statute). A federal prisoner is prohibited from filing a § 2241 habeas corpus petition if they are authorized to apply for relief pursuant to § 2255. *Id.* § 2255(e).

25. *See supra* note 22 and accompanying text.

26. *See supra* notes 12, 23 and accompanying text.

27. Some of these limitations have been subsequently added to the statute by Congress because of the political opinions of habeas corpus at that time. *See, e.g.*, 28 U.S.C. § 2255(f) (2012) ("A 1-year period of limitation shall apply to a motion under this section."). Generally, conservative and liberal lawmakers have disagreed on the necessity of habeas corpus remedies. *See* CHEMERINSKY, *supra* note 3, at 922–23. While conservatives believe that habeas corpus is an avenue guilty criminals use to escape their convictions, liberals believe that the availability of habeas corpus is vital to the protection of those who are imprisoned in violation of the Constitution. *Id.* Conservatives would like to further limit the availability of habeas corpus and liberals would prefer to make the remedy as available as possible. *Id.*

28. 28 U.S.C. § 2255(f) (2012). The statute provides a few exceptions to the one-year period of limitations in cases where there was an impediment from making a motion by fault of the government in violation of the Constitution or laws of the United States; a newly recognized right is made available to cases on collateral re-

Additionally, courts have held that certain procedural bars may prevent a prisoner from seeking relief such as: (A) the movant failed to raise the claim before trial, at trial, or on direct appeal;[29] (B) the movant expressly waived his right to file a § 2255 motion;[30] or (C) the

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view by the Supreme Court; or when new facts supporting the claim presented have been discovered for the first time despite exercising due diligence in the past. *See id.* § 2255(f)(2)–(4). In these types of situations, the one-year limitation period begins running once the limitation is removed or the newly created right or newly discovered information is available. *See id.* A petitioner cannot claim that a § 2255 motion is an inadequate remedy merely because the petitioner is unable to meet the one-year period of limitation or another procedural requirement. *See* Gilbert v. United States, 640 F.3d 1293, 1307–08 (11th Cir. 2011) (en banc).

29. *See* United States v. Frady, 456 U.S. 152, 162–66 (1982) (stating that courts may procedurally bar a § 2255 motion if the petitioner did not previously raise the claim at trial or on direct appeal). Courts have found that movants have waived their challenges when a movant failed to challenge the sufficiency of evidence on direct appeal, United States v. Thorn, 659 F.3d 227, 234 (2d Cir. 2011), failed to properly object to jury instructions at trial and on direct appeal, United States v. Pelullo, 399 F.3d 197, 223 (3d Cir. 2005), failed to raise a challenge to the sentence at trial or on direct appeal, United States v. Pettiford, 612 F.3d 270, 284 (4th Cir. 2010), or failed to raise a challenge to a guilty plea based on an alleged due process violation on direct appeal, Vanwinkle v. United States, 645 F.3d 365, 369 (6th Cir. 2011). A movant must show both cause for his failure to assert the claim in an earlier proceeding and actual prejudice from the alleged error to obtain § 2255 relief despite a procedural error. *See Frady*, 456 U.S. at 167–68, 170–171. However, a movant is not required to show cause and prejudice if:

> (1) the movant seeks § 2255 relief based on a constitutional violation that may have resulted in a fundamental miscarriage of justice, such as the conviction of an innocent person; (2) the government fails to object to the consideration of newly raised issues; or (3) the § 2255 motion raises certain constitutional claims that may be adequately addressed only on collateral review.

V. Review Proceedings, 43 GEO. L.J. ANN. REV. CRIM. PROC. 1043–45 (2014) (internal citations omitted).

30. *See, e.g.*, Ackerland v. United States, 633 F.3d 698, 702 (8th Cir. 2011); United States v. Marby, 536 F.3d 231, 238–39 (3d Cir. 2008); United States v. Sharp, 442 F.3d 946, 949–50 (6th Cir. 2006). "A waiver of the right to appeal in a plea agreement, however, does not completely foreclose review in cases where the agreement was involuntary, the trial court relies on a constitutionally impermissible factor, the sentence exceeds the statutory maximum, or the challenge is based on ineffective assistance of counsel." *V. Review Proceedings*, *supra* note 29, at 1043 n.2950.

claim was previously decided on direct appeal.[31] The Supreme Court, in a plurality opinion, stated that non-retroactive rules will usually bar a court from hearing a § 2255 motion.[32] Finally, § 2255's availability for relief through second or successive motions is sparse.[33] These limitations are intended to preserve the justice system's interest in finality.[34]

III. SENTENCING, DIRECT APPEAL, AND RESENTENCING

Original sentencing procedures and the standards of appellate review are important to understanding a petitioner's rights during resentencing.[35] Furthermore, the manner in which courts resentence following an appellate court's remand can provide a persuasive analogy that can be used to support resentencing procedures implemented on collateral review. Lastly, the *Sentencing Guidelines* and the policies that are entangled within them provide a glimpse into Congress's intent.

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31. *See, e.g.*, Wright v. United States, 182 F.3d 458, 467 (6th Cir. 1999) (movant barred from raising evidentiary challenge because the issue was resolved on direct appeal). Although, a district court may still hear the motion "if the movant relies on: (1) newly discovered evidence; or (2) a new rule of criminal procedure, and the new rule falls within an exception to the nonretroactivity rule of *Teague v. Lane*." *V. Review Proceedings*, *supra* note 29, at 1045–46 (internal citations omitted).

32. Teague v. Lane, 489 U.S. 288, 301, 310 (1989) (plurality opinion) (stating that relief is generally not available when "new constitutional rules of criminal procedure" are needing to be applied or if the rule would "break[] new ground or impose[] a new obligation on the States or the Federal Government").

33. *See* 28 U.S.C. § 2255(h) (2012) ("A second or successive motion must be certified as provided in [28 U.S.C. § 2244] by a panel of the appropriate court of appeals to contain—(1) newly discovered evidence . . . ; or (2) a new rule of constitutional law, made retroactive . . . by the Supreme Court . . . .").

34. *See* Ryan W. Scott, *In Defense of the Finality of Criminal Sentences on Collateral Review*, 4 WAKE FOREST J.L. & POL'Y 179, 188 (2014) ("Many limits on the collateral review of criminal judgments derive from concerns about finality.").

35. Original sentencing procedures and the standard of appellate review should be viewed and analyzed together because a certain application of the former typically dictates the scope of the latter. *See infra* Section III.C.I.

A. Sentencing General Policy and History

Prior to the Sentencing Reform Act of 1984 ("Sentencing Reform Act"), the sentencing system within the United States was criticized as being unjust and unfair.[36] To address these valid concerns, Congress enacted the Sentencing Reform Act, which abolished the parole board and provided a framework that was intended to provide a more fair and predictable system.[37] The *U.S. Sentencing Commission Federal Sentencing Guidelines Manual* ("*Sentencing Guidelines*") also explicitly provides Congress's intent at the time it passed the Sentencing Reform Act. The *Sentencing Guidelines* state, "[t]he [Sentencing Reform Act's] basic objective was to enhance the ability of the criminal justice system to combat crime through an effective, fair sentencing system."[38] To achieve a fair sentencing system, Congress set out to achieve three goals: (1) promoting honesty in the sentencing system; (2) uniformity; and (3) proportionality.[39]

First, Congress wanted to repair the reputation of the sentencing system by promoting honesty in sentencing.[40] This concern derived from the fact that a parole commission previously had broad authority to determine how much of a sentence an offender had to actually serve in prison.[41] The sentencing judge would impose an indeterminate sentence of imprisonment, but that sentence was usually substantially reduced by the parole commission; thus, creating distrust

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36. *See* NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., THE GROWTH OF INCARCERATION IN THE UNITED STATES: EXPLORING CAUSES AND CONSEQUENCES 72 (Comm. on Causes & Consequences of High Rates of Incarceration ed., 2014) ("Critics accused the system of lacking procedural fairness, transparency, and predictability.") (citation omitted); *see also* David Robinson, Jr., *The Decline and Potential Collapse of Federal Guideline Sentencing*, 74 WASH. U. L.Q. 881, 890–92 (1996) (indicating that the sentencing system in the United States prior to the Sentencing Reform Act—indeterminate sentencing—became the subject of intense criticism).

37. *See* S. REP. NO. 98–225, at 37 (1984), *as reprinted in* 1984 U.S.C.C.A.N 3182, 3222–32.

38. U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A.3 (U.S. SENTENCING COMM'N 2016).

39. *Id.*

40. *Id.*

41. *Id.*

and confusion in the federal justice system.[42] To achieve honesty, the Sentencing Reform Act abolished the parole commission and made the sentence imposed by the court the actual sentence the offender would usually be required to serve.[43]

Second, Congress wanted to create uniformity.[44] Prior to the Sentencing Reform Act, judges had broad authority to issue a sentence they believed was appropriate for the offense.[45] Although the crimes and offenders were nearly similar, if not identical, differing sentencing ideologies among judges led to a wide disparity in sentences.[46] To reduce the incongruent sentences, the Sentencing Reform Act created the new federal *Sentencing Guidelines*, which provided a sentencing range based on specific information about the offense and the offender that the judge uses to impose a sentence.[47]

Third, Congress wanted to promote proportionality in sentencing.[48] Congress attempted to tackle this issue by creating a system that "impose[d] appropriately different sentences for criminal conduct of differing severity."[49] For example, after examining crack cocaine sentencing, the sentencing commission determined that the sentences were disproportionate to the seriousness of the offense because there

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42. *Id.* (claiming that the parole commission often reduced offender's sentences to one-third of the sentence imposed by the court).

43. *Id.* Under the new *Sentencing Guidelines*, an offender may be able to obtain a fifteen percent sentence reduction for good behavior. *Id.*

44. *Id.*

45. Koon v. United States, 518 U.S. 81, 96 (1996) (describing how federal judges had the authority to choose any sentence as long as it was within the statutory limits).

46. *See* U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A (U.S. SENTENCING COMM'N 2016).

47. *See* KATE STITH & JOSÉ A. CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 51–52 (1998) (providing that the Sentencing Reform Act led to the creation of the federal *Sentencing Guidelines*). The federal *Sentencing Guidelines* were mandatory until the United States Supreme Court ruled that the guidelines must be merely "advisory" and must not be interpreted to be mandatory. *See* United States v. Booker, 543 U.S. 220, 245–46 (2005).

48. U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A. (U.S. SENTENCING COMM'N 2016).

49. *Id.* at 3–5 (stating that the Commission used empirical data to develop a system that departed from the guidelines when certain individualizing factors of the offense made it appropriate; satisfying both "just deserts" and "crime control" considerations).

was no scientific justification to impose a greater sentence for an offense involving crack cocaine than an offense involving the same amount of powder cocaine.[50] Accordingly, the commission drafted reports and made recommendations to Congress to decrease the length of sentences for this particular offense so that it would be proportional to the severity of the crime.[51]

B. Sentencing Procedures and Rules

Original sentencing procedures and rules provide the framework needed to understand the reasoning behind resentencing approaches. The plain language of the federal rules, statutes, and guidelines provides insight into congressional intent. Furthermore, reconizing the importance of different phases of sentencing proceedings assists in grasping policy concerns. Finally, identifying the information that an original sentencing court can consider will assist in comparing the different phases of sentencing.

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50. *See* Judge Patti Saris, *Proportionality, Disparity, and Recidivism*, 51 JUDGES' J. 7 (2012). Although crack cocaine and powder cocaine are the same drug, just in different forms, there was a vast disparity "in the average length of sentences for comparable offenses." *Fair Sentencing Act*, AM. CIV. LIBERTIES UNION, https://www.aclu.org/issues/criminal-law-reform/drug-law-reform/fair-sentencing-act (last visited Feb. 27, 2019) (noting that the majority of people arrested for crack cocaine offenses were African American, which consequently resulted in racial sentencing disparities based solely on the form of the cocaine).

51. *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (Feb. 1995) (recommending to Congress that the "100-to-1 quantity ratio is too great" for crack cocaine sentences); *see also* Saris, *supra* note 50, at 8 (noting the Commission submitted four reports and "ultimately recommended that the powder/crack ratio be no greater than 20:1"). Following the Sentencing Commission's decision in 2007 to reduce the *Sentencing Guidelines* by two levels of severity for crack defendants, Congress passed the Fair Sentencing Act of 2010 and "reduced the crack to powder cocaine ratio from 100:1 to 18:1." Saris, *supra* note 50, at 8; *see* Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372.

1. Rules that Govern Sentencing

The Sentencing Reform Act provided the framework for how the sentencing phase of a trial should be governed.[52] Courts must use the *Sentencing Guidelines* to create an advisory sentencing range that is then used to help craft the appropriate sentence.[53] The *Sentencing Guidelines* direct the sentencing court to consider each factor outlined in 18 U.S.C. § 3553(a) when sentencing a defendant.[54] Additionally, courts must abide by Rule 32 of the Federal Rules of Criminal Procedure, which provides specific standards that apply to the sentencing phase of a case.[55] Finally, courts should follow all controlling judicial precedent when using the *Sentencing Guidelines* to calculate sentencing ranges or when procedural steps are necessary.[56]

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52. Prior to the Sentencing Reform Act of 1984, which created the *U.S. Sentencing Guidelines*, sentencing judges had almost unbridled authority to craft a federal criminal sentence. "The prior system was criticized for creating disparities in sentences imposed on similarly situated defendants and uncertainty in the length of time defendants actually served in prison." *IV. Sentencing*, *supra* note 29, at 745 n.2099 (citing S. REP. NO. 98–225 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3222–32).

53. *See* United States v. Booker, 543 U.S. 220, 245–46 (2005) (mandating courts to use the *Sentencing Guidelines* in an advisory manner); U.S. SENTENCING GUIDELINES MANUAL ch.1, pt. A. (U.S. SENTENCING COMM'N 2016).

54. 18 U.S.C. § 3553(a) (2012). The § 3553(a) factors a court must consider at sentencing are:

> (1) the "nature and circumstances of the offense" and the defendant's "history and characteristics"; (2) the general purposes of the Sentencing Reform Act; (3) the "kinds of sentences available"; (4) the "pertinent policy statements issued by the U.S. Sentencing Commission"; (5) the "need to avoid unwarranted sentence disparities" between defendants convicted of similar conduct; (6) the "need to provide restitution to any victims"; and (7) the applicable sentence range recommended by the Guidelines.

IV. Sentencing, *supra* note 29, at 746–47 (footnotes omitted) (quoting 18 U.S.C. § 3553(a)(1)–(7) (2012)). See 18 U.S.C. § 3553(a)(2)(A)–(D) (2012), for the general purposes of the Sentencing Reform Act mentioned in factor two of § 3553(a)(2).

55. FED. R. CRIM. P. 32; *see also infra* Section III.B.2.

56. *See, e.g.*, *Booker*, 543 U.S. at 245–46 (dictating the *Sentencing Guidelines* are to be advisory, not mandatory).

2. Aspects of the Sentencing Phase

A federal-criminal defendant will be sentenced by the district judge after a guilty plea or verdict. At the sentencing hearing, the judge will consider all material evidence and will make the determination of the appropriate sentence.[57] The *Sentencing Guidelines* mandate that the sentencing judge consider each factor in 18 U.S.C. § 3553(a) when developing a criminal defendant's sentence.[58]

In addition, a PSR must be created pursuant to Rule 32(c)(1) of the Federal Rules of Criminal Procedure.[59] Over time, the role of the PSR has changed as the structure of the criminal justice system has evolved.[60] Today, the PSR is used by the sentencing judge to determine the appropriate *Sentencing Guidelines*.[61] Rule 32 of the Federal Rules of Criminal Procedure requires the PSR to include information such as the defendant's history and characteristics, prior criminal record, financial condition, circumstances that affect the defendant's behavior, and other relevant factors that are related to the defendant and the appropriate sentence.[62] The PSR also identifies the "applicable guidelines and policy statements of the Sentencing Commission"; calculates the appropriate "offense level and criminal history category"; provides the sentencing range and the sentences available; and identi-

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57. *Id.* (holding that a sentencing judge's application of the *Sentencing Guidelines* must be as advisory and not a mandatory requirement); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (ruling that, to avoid Sixth Amendment issues, a criminal defendant is entitled to have a jury make material factual determinations if that fact will be used to enhance the criminal defendant's penalty above the statutory maximum). Material evidence means "evidence, fact, statement, or information that, if believed, would tend to influence or affect the issue under determination." U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 application n.6 (U.S. SENTENCING COMM'N 2016). "To label evidence as material is to claim that it is more than just relevant and to suggest that its exclusion would amount to irreparable harm to the proceeding." *Material Evidence*, BOUVIER LAW DICTIONARY (desk ed. 2012).

58. *See supra* notes 52–54 and accompanying text.

59. FED. R. CRIM. P. 32(c)(1).

60. Prior to the Sentencing Reform Act of 1984, the PSR was used by the Parole Board.

61. *See IV. Sentencing*, *supra* note 29, at 793 n.2200 (citing S. REP. NO. 98–225 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182).

62. FED. R. CRIM. P. 32(d).

fies "any basis for departing from the applicable sentencing range."[63] Criminal defendants and their attorneys must be given an opportunity to review the PSR and file timely objections, if necessary, before the court imposes a sentence.[64]

The court is required to make a factual finding for each contested factor of the PSR.[65] This helps to ensure that the information in the PSR is accurate and provides a clear record for appeal.[66] Failure to rule on the controverted matter or make a determination that no finding is necessary[67] could be cause for resentencing.[68] However, if the defendant fails to object to contradicted findings in the PSR, the defendant may have waived his or her only opportunity to contest the findings in the report, and the court may accept the undisputed facts of the PSR as finding of fact.[69] After taking into consideration the advisory guideline range and all the evidence and facts presented, the court will impose a sentence and advise the criminal defendant of any right to appeal.[70]

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63. *Id.*

64. *See* FED. R. CRIM. P. 32(f).

65. *See* FED. R. CRIM. P. 32(i)(3)(B).

66. *See* United States v. Tackett, 113 F.3d 603, 613–14 (6th Cir. 1997) (requiring "literal compliance" with FED. R. CRIM. P. 32(i)(3)(B) "to ensure that defendants are sentenced on the basis of accurate information"). Other provisions in Rule 32, such as deadline requirements, ensure that the probation officers have an opportunity to investigate and reply to any objections to ensure the document is accurate for sentencing. *See generally* United States v. Aguilar-Ibarra, 740 F.3d 587 (11th Cir. 2014) (discussing subsection (f) of Rule 32).

67. A court may refrain from making a determination upon a controverted issue when the court expresses that it will not be relying on the controverted information in making the sentencing determination. *See* FED. R. CRIM. P. 32(i)(3)(B).

68. *See, e.g.*, United States v. Zehrung, 714 F.3d 628, 631–32 (1st Cir. 2013) (resentencing required when the court did not make a factual finding for objections to the PSR); United States v. White, 492 F.3d 380, 417–18 (6th Cir. 2007) (same); United States v. Gricco, 277 F.3d 339, 356 (3d Cir. 2002) (same).

69. *See* FED. R. CRIM. P. 32(i)(3)(A).

70. *See* FED. R. CRIM. P. 32(j)(1)(A).

3. Information the Court Will Consider

The original sentencing court must consider a wide array of available information.[71] Courts consider, among other things, the defendant's relevant conduct, acts and omissions, witness testimony, proffered physical evidence, victim statements, and information contained within the PSR.[72] At the sentencing phase, a district court is not bound to the Federal Rules of Evidence.[73] A court has the discretion to credit or discredit any proffered evidence and rely on statements containing double-hearsay.[74] If a court must make a determination on contested issues of fact, however, the court can consider only legally sufficient evidence to determine if the facts are established by a preponderance of the evidence.[75] The PSR itself is not sufficient evidence to be used in the consideration of disputed facts.[76] The sentencing court is given broad discretion in deciding what information it will consider and how that information should affect the defendant's ultimate sentence.[77]

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71. *See* Tracy Friddle & Jon M. Sands, *"Don't Think Twice, It's All Right": Remands, Federal Sentencing Guidelines & the Protect Act—A Radical "Departure"?*, 36 ARIZ. ST. L.J. 527, 530–31 (2004) (discussing the variety of information that a sentencing court considers when determining an appropriate sentence).

72. *See id.*

73. *See* United States v. Isom, 635 F.3d 904, 907 (7th Cir. 2011) (citations omitted) (finding the Confrontation Clause does not apply to the sentencing phase). Because the same evidentiary rules do not restrain the court as in trial, the court is able to consider a wide array of evidence in determining the appropriate sentence.

74. *Id.* at 907–08 ("As this court has repeatedly observed, a sentencing judge is free to credit testimony that is 'totally uncorroborated,' 'comes from an admitted liar, convicted felon, . . . large scale drug-dealing, paid government informant,' or 'self-interested co-conspirator[].'" (quoting United States v. Johnson, 489 F.3d 794, 797 (7th Cir. 2007))).

75. United States v. Webster, 788 F.3d 891, 892 (8th Cir. 2015).

76. *Id.*

77. *See* Gall v. United States, 552 U.S. 38, 51 (2007) (indicating that district courts are given great latitude and deference in sentencing and an appellate court will only review the sentencing decision for an abuse of discretion).

C. Direct Appeal and Remand for Resentencing

1. Direct Appeal

After a trial judge imposes a sentence against a criminal defendant, that defendant has a right to challenge his sentence on direct appeal. A criminal defendant may appeal on the grounds that the sentence was: (1) imposed in violation of law; (2) an incorrect application of the *Sentencing Guidelines*; (3) "plainly unreasonable for an offense for which no Guideline has been established"; or (4) was greater than the maximum length specified in the *Sentencing Guidelines*.[78] If the appellate court finds that the sentencing court erred in any of these promulgated ways, that the sentence imposed is now unreasonable because of that error, and the error was not the result of a harmless mistake, the appellate court will remand the proceeding back to the sentencing court with instructions for resentencing.[79] If the criminal defendant did not retain the ability to raise an issue on appeal because of a failure to object at the original sentencing, the appellate court will review only for plain error.[80] However, if the defendant did retain the ability to raise an issue on appeal by objecting at the original sentencing, the appellate court will review for abuse of discretion.[81]

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78. *See V. Review Proceedings*, *supra* note 29, at 967–68 (footnotes omitted).

79. *See* FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded."). The court of appeals has broad authority when reviewing a lower court's decision. *See* 18 U.S.C. § 3742(f)(1)–(2)(B) (2012) (stating that if the court of appeals finds a sentencing error, it shall "remand the case for further sentencing proceedings with such instructions as the court considers appropriate"); United States v. Skipper, 74 F.3d 608, 612 n.1 (5th Cir. 1996) ("[A] Court of Appeals may 'affirm, modify, vacate, set aside or reverse any judgment, decree, or order . . . and may remand the cause and direct the entry of such . . . further proceedings to be had as may be just under the circumstances.'" (quoting 28 U.S.C. § 2106 (2012))).

80. *See V. Review Proceedings*, *supra* note 29, at 970–71 (footnote omitted); *see also* United States v. Doe, 705 F.3d 1134, 1153–56 (9th Cir. 2013) (discussing plain error review).

81. *See* United States v. Weaver, 126 F.3d 789, 792 (6th Cir. 1997). While appellate courts give great deference to trial courts on discretionary decisions because they are in the best position to make the determinations, if the trial courts fail to exercise their discretion, that equates to legal error and the appellate courts should reverse and remand for a new determination. Koon v. United States, 518 U.S. 81, 100 (1996).

2. Resentencing Following a Remand from the Court of Appeals

Courts of appeals have the "discretion to issue a general or limited remand" to effectuate the court's mandate to the district court.[82] General remands "give district courts authority to address all matters as long as remaining consistent with the remand."[83] On the other hand, "[l]imited remands explicitly outline the issues to be addressed by the district court and create a narrow framework within which the district court must operate."[84] The circuits are in agreement that if the appellate court issues limiting instructions, the sentencing court is restricted to resentencing only on the issues that the appellate court has permitted, and the court will not be able to consider any information or arguments that fall outside that scope.[85] However, circuits are split on what the standard of review should be on a general remand from an appellate court.[86] In other words, circuits are in disagreement about what information a district court can consider at resentencing following a remand from the court of appeals that did not include any specific instructions limiting the district court's scope of sentencing.[87] Some courts believe that a district court resentencing on a general remand should be able to consider any information it deems relevant without regard to the issues raised on direct appeal.[88] This

82. United States v. Foster, 765 F.3d 610, 613 (6th Cir. 2014); *see* 28 U.S.C. § 2106 (2012).

83. United States v. Campbell, 168 F.3d 263, 265 (6th Cir. 1999) (citing United States v. Moore, 131 F.3d 595, 597 (6th Cir. 1997)).

84. *Id.*

85. *Id.*

86. *Compare* United States v. Jennings, 83 F.3d 145, 151 (6th Cir. 1996) ("[T]he only constraint under which the District Court must operate, for the purposes of resentencing, is the remand order itself. Where the remand does not limit the District Court's review, sentencing is to be *de novo*."), *and* United States v. Cornelius, 968 F.2d 703, 705 (8th Cir. 1992) (same), *with* United States v. Marmolejo, 139 F.3d 528, 530–31 (5th Cir. 1998) ("[T]he resentencing court can consider whatever this court directs—no more, no less."), *and* United States v. Whren, 111 F.3d 956, 959–60 (D.C. Cir. 1997) (same).

87. *See* Friddle & Sands, *supra* note 71, at 531–32 (explaining that the scope of resentencing on a general remand varies circuit to circuit).

88. *Jennings*, 83 F.3d at 151.

approach has been coined the de novo sentencing approach.[89] Conversely, other courts hold that resentencing should be limited to the issues that were raised on direct appeal.[90] This is known as the limited sentencing approach.[91]

i. De Novo Resentencing Approach

Under a de novo resentencing approach, a district court on remand can take into account both previously considered and newly discovered evidence.[92] If the sentencing court reasonably concludes the appellate court's mandate does not have any limiting instructions, the court may exercise its broad sentencing authority.[93] For example, in *United States v. Jennings*, the defendant was convicted of multiple drug related charges and sentenced to concurrent prison terms.[94] The defendant subsequently appealed his sentencing, arguing that the district court erred in failing to grant a motion for substitution of counsel and that the base offense level was improperly determined because of a computation error involving the drug weight.[95] The Sixth Circuit held that the district court erred on both arguments and remanded the case for an evidentiary hearing for the purpose of resentencing.[96] On remand, the district court "concluded that [the defendant] failed to show good cause for [his] motion[] to substitute counsel and that the defendant[] [was] capable of producing 210 grams of methamphetamine, a figure from which the defendant['s] base offense level was then recalculated."[97] During the resentencing proceeding, the defendant attempted to object to information in his PSR that had now be-

89. *See id.* ("Where the remand does not limit the District Court's review, sentencing is to be *de novo*.").

90. *See Marmolejo*, 139 F.3d at 530–31 (applying a limited resentencing approach on general remand).

91. *Id.* Although some circuits have called this the *waiver* sentencing approach, *see Whren*, 111 F.3d at 959, this Note will use the term *limited* sentencing approach for consistency purposes.

92. *Jennings*, 83 F.3d at 151.

93. *Id.*

94. *Id.* at 148.

95. *Id.* at 146–48.

96. *Id.* at 148.

97. *Id.*

come relevant due to the fact that his base level calculation changed.[98] Although the information in the PSR had no relevance at the original sentencing, this same information "was now of considerable consequence" and warranted an increase in the defendant's base level "because of the adjustment to [the] defendant's base offense level on account of recalculation of drug quantity [on remand]," which resulted in a higher sentence.[99] The district court refused to review the information in the PSR, claiming the information was outside the scope of the remand and resentenced him to his original sentence.[100] The defendant appealed the resentencing court's decision, arguing that the district court should have heard his objections to the PSR.[101]

Relying on an earlier Sixth Circuit case, the defendant claimed that the district court was permitted to "revisit other findings relating to the previous sentencing proceedings, and reverse its prior findings."[102] Finding the defendant's argument persuasive—along with other favorable case law the court referenced—the Sixth Circuit held, "[o]n remand, the only constraint under which the District Court must operate, for the purposes of resentencing, is the remand order itself. Where the remand does not limit the district court's review, sentencing is to be *de novo*."[103] The Sixth Circuit found that the district court erred by refusing to consider the defendant's objections to the PSR and remanded the case back to the district court for further proceedings.[104]

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98. *Id.* at 151.

99. *Id.* (raising defendant's offense level from twenty-four to twenty-eight). See generally U.S. SENTENCING GUIDELINES MANUAL ch. 1, pt. A (U.S. SENTENCING COMM'N 2016), for a description of "base offense level."

100. *Jennings*, 83 F.3d at 151.

101. *Id.* at 148.

102. *Id.* at 151 (citing United States v. Moored, 38 F.3d 1419 (6th Cir. 1994)). As it turns out, there was case law that was more beneficial to the defendant's cause. *Id.* The court references these cases within the opinion. *See id.*

103. *Id.* The cases that the *Jennings* court found favorable and persuasive were both decided after the case that defendant provided. *Jennings*, 83 F.3d at 151 (citing United States v. Crouse, 78 F.3d 1097 (6th Cir. 1996); and United States v. Duso, 42 F.3d 365 (6th Cir. 1994)).

104. *Id.* at 151–53.

The majority of circuits have adopted the de novo approach as the preferred scope of resentencing following a general remand.[105] These courts believe that the goals of the Sentencing Reform Act are best achieved by resentencing de novo.[106] In reviewing district courts' resentencing practices, the appellate courts have provided strong additional reasoning for the use of the de novo approach such as uniformity and proportionality, judicial economy, and congruency to language in the *Sentencing Guidelines* and relevant federal statutes.[107]

Another reason the majority of circuits are in favor of the de novo approach is because it promotes judicial economy. The *Jennings* Court noted that if it were to bar, on remand, all subsequent inquiry that was not related to the immediate sentencing determination, litigants would be forced to raise every potential issue in the initial sentencing proceedings—despite whether relevant to the sentencing at that time or not—for fear if they do not raise the issue, they will lose the opportunity in the future.[108] The Court went on to say "[s]uch 'front-loading' would unnecessarily increase the burden on district courts and [courts of appeals]."[109]

The *Sentencing Guidelines* are a complex web that the sentencing court must meticulously navigate. Convictions often include multiple counts that are interdependent on each other, requiring the court to weigh each variable.[110] Courts frequently refer to this as "packag-

105. *See* United States v. Campbell, 168 F.3d 263, 265–66 (6th Cir. 1999) (citing the Second, Eight, Ninth, and Tenth Circuits as followers of the de novo resentencing approach). *But see* Friddle & Sands, *supra* note 71, at 531–33 (suggesting that the Second Circuit should now be classified as a limited resentencing jurisdiction after the decision in United States v. Quintieri, 306 F.3d 1217, 1228 (2d Cir. 2002)).

106. *Cf.* Pasquarille v. United States, 130 F.3d 1220, 1222 (6th Cir. 1997) (applying de novo resentencing to ensure the appropriate sentence was given).

107. *See* United States v. Jones, 114 F.3d 896, 897–98 (9th Cir. 1997)*; Jennings*, 83 F.3d at 152; *supra* notes 38–39 and accompanying text.

108. *Jennings*, 83 F.3d at 151.

109. *Id.*

110. *See Campbell*, 168 F.3d at 268 ("[T]he delicate balancing that occurs in the sentencing process in light of the complexity of the *Sentencing Guidelines* leads this court to believe that limited remands are less likely to be desirable or effective when multiple issues require reconsideration."); United States v. Stinson, 97 F.3d 466, 469 (11th Cir. 1996) (stating a district must take a holistic approach and weigh

ing," a "sentencing package," or a "bundle."[111] If one element of the sentencing package is changed—for example, one conviction is overturned in a three conviction case—the entire sentencing scheme could become unraveled, making information that was not determinative to the original sentencing outcome relevant in the present resentencing hearing.[112]

There are no special provisions for resentencing in the *Sentencing Guidelines*. In fact, there is no expressed language in the *Sentencing Guidelines* or federal statutes that advises district courts of the appropriate resentencing scope.[113] The court in *United States v. Jones* identified provisions within federal sentencing statutes and the *Sentencing Guidelines* that empower district courts to consider a plethora of information during sentencing, such as the defendant's background and character.[114] For example, *Sentencing Guidelines'* section 1B1.4 permits the sentencing court to consider any information about the defendants "background, character and conduct" without limitation,[115] and 18 U.S.C. § 3661 prohibits the limitation of "information concerning the background, character, and conduct of a person convicted of an offense which a court . . . may . . . consider for the purpose of imposing an appropriate sentence."[116] The *Jones* court reasoned that because there are no provisions that specifically govern resentencing, Congress must have intended for the rules that apply to the original sentencing to also apply to resentencing hearings.[117]

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all the factors of a criminal sentence to ensure it is consistent with the *Sentencing Guidelines* intent).

111. *See Pasquarille*, 130 F.3d at 1222 ("[T]here is often a 'sentencing package' where sentences imposed on the multiple courts are interdependent.").

112. *See, e.g.*, *Jennings*, 83 F.3d at 151–52 (finding that information in the PSR gained relevancy after the base offense level was modified after a conviction was vacated); *see also* United States v. Atehortva, 69 F.3d 679, 685–86 (2d Cir. 1995) (noting that particular counts in a conviction can be "inextricably tied to other counts [when] determining the sentencing," and "[o]nce this knot is undone, the district court must sentence . . . de novo").

113. Friddle & Sands, *supra* note 71, at 534 (citing United States v. Jones, 114 F.3d 896, 897 (9th Cir. 1997)).

114. *See* United States v. Jones, 114 F.3d 896, 897–98 (9th Cir. 1997).

115. U.S. SENTENCING GUIDELINES MANUAL § 1B1.4 (U.S. SENTENCING COMM'N 2016).

116. 18 U.S.C. § 3661 (2012).

117. *Jones*, 114 F.3d at 897–98.

The majority of circuits believe that a resentencing should be a clean slate if the appellate court remanded for resentencing without any limiting instructions.[118] Courts suggest that a de novo approach allows a sentencing judge to craft the most appropriate aggregate sentence with the remaining counts.[119] Ensuring that the court imposes an appropriate aggregate sentence promotes the proportionality goal of the *Sentencing Guidelines*.[120] Further, courts strive to use factually accurate information to allow the district judge to apply the correct facts and determine the correct sentence.[121] If a goal of the *Sentencing Guidelines* is to ensure uniformity, in that similar defendants with similar actions are sentenced the same, a sentencing judge should be allowed, and even required, to consider all relevant facts associated with that resentencing.[122]

ii. Limited Resentencing Approach

A minority of circuits follow the limited resentencing approach. Under the limited approach, "only [issues] arising out of the correction of the sentence ordered by [the court of appeals] [can] be raised in a subsequent [resentencing]."[123] In other words, a court that follows the limited approach is unable to consider information pursuant to *Sentencing Guidelines* section 1B1.4 or 18 U.S.C. § 3661 if the information is unrelated to the issues leading to the remand.[124] Only

118. *See* United States v. Campbell, 168 F.3d 263, 266 (6th Cir. 1999) (reasoning that a court should start fresh because of the competing elements of the sentencing calculus).

119. *Id.*

120. *See supra* notes 38–39 and accompanying text.

121. *See* United States v. Tackett, 113 F.3d 603, 613–14 (6th Cir. 1997).

122. *See* Pepper v. United States, 562 U.S. 476, 481 (2011) (holding district courts may consider a defendant's post-sentencing rehabilitation when they are being resentenced); *see also* United States v. Rudolph, 190 F.3d 720, 724 (6th Cir. 1999) (indicating that a sentencing judge should be able to consider facts that are pertinent to resentencing, even if they had not yet arisen at the time of the original sentencing). Although it may be implied that this Note will advocate for a certain resentencing scope after general remands, this Note's purpose is only to explain and advocate for a de novo resentencing scope after a 28 U.S.C. § 2255 motion.

123. United States v. Whren, 111 F.3d 956, 959 (D.C. Cir. 1997) (quoting United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996)).

124. *See id.*

if a court of appeals identifies specific issues can the sentencing court then consider all permissible information that the *Sentencing Guidelines* and federal statutes provide.[125] Those courts that have adopted the limited approach reason that there is no need to relitigate issues that have already been decided.[126]

In *United States v. Marmolejo* ("*Marmolejo I*"), the Fifth Circuit, on direct appeal, found that the district court improperly adjusted the defendant's base offense level downward and remanded to the district court for resentencing consistent with its opinion.[127] At resentencing, the defendant raised an issue concerning an enhancement the district court had imposed in his original sentencing.[128] The district court refused to hear the defendant's challenge because it was not within the scope of the remand.[129] Additionally, the district court noted that although the defendant had objected to that enhancement in the original sentencing, he failed to raise the issue on direct appeal.[130] The defendant appealed the district court's decision not to hear his objection to the enhancement and argued that the court erred because the correct scope of resentencing is de novo.[131] The Fifth Circuit ("*Marmolejo II*") disagreed, holding that limited resentencing is the proper scope; therefore, upholding the district court's decision.[132]

The *Marmolejo II* Court, along with the other limited approach circuits, grounded its reasoning on justice, judicial economy, and common-law doctrines. In *United States v. Whren*, the United States Court of Appeals for the District of Columbia Circuit found that a party should not be able to offer new evidence on an issue that it already unsuccessfully argued at the original sentencing.[133] The Court went on to state, "[a]bsent special circumstances . . . we [see] 'no rea-

125. *Id.*

126. *Id.*

127. United States v. Marmolejo (*Marmolejo I*), 106 F.3d 1213, 1215–16 (5th Cir. 1997).

128. United States v. Marmolejo (*Marmolejo II*), 139 F.3d 528, 529 (5th Cir. 1998).

129. *Id.* at 530–31.

130. *Id.* at 530.

131. *Id.*

132. *Id.* at 531.

133. United States v. Whren, 111 F.3d 956, 959 (D.C. Cir. 1997) (citing United States v. Leonzo, 50 F.3d 1086, 1088 (D.C. Cir. 1995)).

son why [the defendant] should get a second bite at the apple.'"[134] The *Marmolejo II* Court used this argument in its decision to follow the limited resentencing scope.[135] The *Whren* Court believed that it is both "anomalous and inefficient" to place a defendant in a better position for failing to raise an issue in either his original sentencing or on direct appeal "than he would be in if he had neglected to raise it only in the district court."[136]

Additionally, the minority circuits claim that the limited approach promotes judicial economy.[137] The limited approach encourages parties to raise all issues at the original sentencing hearing, thus reducing the amount of new claims a defendant will raise on subsequent hearings.[138] In *Whren*, the Court stated, "[*d*]*e novo* resentencing is in essence a license for the parties to introduce issues, arguments, and evidence that they should have introduced at the original sentencing hearing."[139] The Court reasoned that raising all issues at the original sentencing hearing allows both parties to have early notice of the other's position, and the original trial judge can resolve issues while they are fresh in the mind, resulting in fewer issues in subsequent proceedings.[140]

Lastly, some courts that follow the limited resentencing approach say that it is consistent with the law-of-the-case doctrine and the mandate rule.[141] The law-of-the-case doctrine refers to a court's judgment to follow and adopt previously decided issues within that case.[142] The mandate rule is a principle that lower courts typically follow by ruling consistently and deferring to decisions of higher courts within their jurisdiction.[143] These are both common-law doc-

134. *Id.* (quoting *Leonzo*, 50 F.3d at 1088).

135. *See Marmolejo II*, 139 F.3d at 531 (quoting *Whren*, 111 F.3d at 959).

136. *Whren*, 111 F.3d at 960; *see also* United States v. Parker, 101 F.3d 527, 528 (7th Cir. 1996) ("A party cannot use the accident of a remand to raise in a second appeal an issue that he could just as well have raised in the first appeal because the remand did not affect it.").

137. *See Marmolejo II*, 139 F.3d at 531.

138. *See Whren*, 111 F.3d at 960.

139. *Id.* at 959.

140. *Id.* at 959–60.

141. *See* Friddle & Sands, *supra* note 71, at 537–38.

142. *See id.*

143. *See id.*

trines and discretionary rules.[144] Courts that support the limited resentencing approach use these doctrines to minimize defendants' attempts to raise objections for the first time on appeal by reasoning that the court's past decision to recognize that the defendant had waived his right to raise certain issues in subsequent hearings is a past decision made by the court and that decision must be adhered to in the current resentencing.[145]

Critics state the limited approach will require parties to litigate and object to every single claim that may be reviewed for fear that they would lose the ability for reconsideration on that issue on remand, which would be unreasonably time consuming and result in a waste of judicial resources.[146] Some supporters of the limited approach understand this contention from the de novo supporters.[147] In response to this critique, some jurisdictions have stated that a sentencing court can consider anything that is related to the remand *or* that is materially affected—and now relevant for the first time in the case—because of the remand; this way, a party does not need to raise every small issue in sentencing for fear that they will lose the ability to consider it later.[148] In fact, courts that follow the limited resentencing approach have created multiple exceptions to the otherwise stringent limited approach.[149] These exceptions essentially allow the court to

144. *See id.*

145. *See id.* (first citing United States v. Matthews, 312 F.3d 652, 657 (5th Cir. 2002); and then citing United States v. Quintieri, 306 F.3d 1217, 1228 (2d Cir. 2002)).

146. *Id.* at 535 (noting the argument that the de novo approach, in contrast to the limited approach, "spares district courts the burden of 'front-loading' defendants").

147. *See* United States v. Whren, 111 F.3d 956, 960 (D.C. Cir. 1997) (finding that the *Jennings* court was justified in the concern that a defendant may not raise an issue at the original sentencing because the issue was not material at that moment—"only to find at resentencing that the issue had become material").

148. *See id.* ("Under our approach a defendant may argue at resentencing that the court of appeals' decision has breathed life into a previously dormant issue, but he may not revive in the second round an issue he allowed to die in the first.").

149. *See* Friddle & Sands, *supra* note 71, at 537–38 (stating limited resentencing approach jurisdictions have recognized exceptions to the limited approach such as discretionary exceptions to the law-of-the-case doctrine, the sentencing-package doctrine, and when a defendant had no incentive to raise the issue at the original sentencing hearing).

resentence a defendant de novo for that particular issue in the interest of justice.[150] Applying the reasoning and practical applications of sentencings, appeals, and resentencings to resentencings after successful 28 U.S.C. § 2255 motions indicates that a de novo resentencing scope is most appropriate.

IV. RESENTENCING AFTER A SUCCESSFUL 28 U.S.C. § 2255 MOTION

If the district court grants a petitioner's 28 U.S.C § 2255 motion, the court then proceeds with the remedy phase.[151] Although the court has many options to restore justice, this Note will focus on resentencing.[152] If a petitioner surpasses the incredible limitations and obstacles to reach the remedy phase following a 28 U.S.C. § 2255 motion, that resentencing's scope can make a significant difference in the length of their new sentence. Aside from the consideration that this is a collateral proceeding, in general the circuits approach resentencing inconsistently.[153] Taking into account the purpose and text of 28 U.S.C. § 2255, sentencing and resentencing policies and concerns, sentencing statutes and guidelines, and policy reasoning surrounding the conflicting scopes of resentencing, a court resentencing a petitioner after a 28 U.S.C. § 2255 motion should resentence using the de novo approach. This section will explain the rationale behind this determination.

A. Scope of Resentencing for 28 U.S.C. § 2255

Although there are competing views concerning the scope of resentencing, *United States v. Saikaly* provides a thorough analysis exemplifying this pervasive problem and the correct solution.[154] In *Saikaly*, the petitioner successfully petitioned to vacate one of his convictions pursuant to 28 U.S.C. § 2255.[155] Before resentencing, the

150. *Id.* at 538–40.

151. *See* 28 U.S.C. § 2255(b) (2012) (after granting the motion "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").

152. *See id.* (providing the general remedies available).

153. *See supra* Part III.

154. United States v. Saikaly, 207 F.3d 363 (6th Cir. 2000).

155. *Id.* at 366.

district judge ordered the probation office to prepare a new PSR.[156] The second PSR included new, materially different information than the original PSR.[157] The petitioner objected to these findings, but the district court judge dismissed the objections stating that "[t]he purpose of the court . . . is to resentence in conjunction with the [PSR]. And in my opinion that does not open the whole question of sentencing."[158] The petitioner appealed the district judge's ruling regarding the dismissal of his objection to the new information in the second PSR.[159]

The Sixth Circuit found that the district court erred by not considering and ruling on the objection.[160] The Sixth Circuit reasoned that because a court can reconfigure a sentencing package on resentencing, a petitioner should have the ability to ensure that all information before the court is correct.[161] It went on to support the de novo approach by reasoning, logically, that although the petitioner failed to raise the issue at the original sentencing and on direct appeal, this PSR is "new," and there is no way that the petitioner could have objected to a document that had yet to exist.[162] Additionally, the court stated that Federal Rule of Criminal Procedure 32(c)(1) "requires a district court to make a factual finding for each contested factor of the presentence report. This circuit requires 'literal compliance' with the rule."[163] The reasoning behind "literal compliance" was to "'ensure that defendants are sentenced based on accurate information and provide[] a clear record for appellate courts . . . who may later be involved in the case."[164] The Court remanded the case back to the district court to rule on the objection to the new PSR.[165]

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156. *Id.* at 366–67.

157. *Id.*

158. *Id.* at 367.

159. *Id.*

160. *Id.* at 370.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* (quoting United States v. Tackett, 113 F.3d 603, 613–14 (6th Cir. 1997)).

165. *Id.* at 372.

B. Supporting Policy Considerations

An examination of policy concerns clearly supports the uniform acceptance of the de novo approach to resentencing following a successful 28 U.S.C. § 2255 motion. These include judicial economy, absence of direct language governing resentencing, the *Sentencing Guidelines*' language, the packaging doctrine, and the ease with which appellate courts can limit the scope.

Most of the policy arguments that are typically raised in opposition of collateral habeas corpus statutes can be dismissed as irrelevant when analyzed in relation to 28 U.S.C. § 2255. Finality and federalism concerns arise when a state prisoner files a 28 U.S.C. § 2254 petition. Section 2254 requires that the state prisoner exhaust all available state court remedies before pursuing post-conviction relief.[166] Additionally, federalism concerns arise when federal courts intervene in state court matters.[167] A motion to vacate, set aside, or correct the sentence does not have these same issues. First, a federal prisoner filing a § 2255 motion is able to file the motion with a federal district court as soon as their conviction becomes final; there are not additional requirements that must be exhausted first. Second, 28 U.S.C. § 2255 only involves federal prisoners and federal courts, so there are no federalism concerns. In sum, de novo resentencing is the appropriate approach courts should apply. To effectuate just change, courts in every circuit need to apply de novo resentencing consistently.

V. PROPOSAL FOR CONSISTENT AND EFFECTIVE COLLATERAL REVIEW RESENTENCING

The current circuit split regarding the appropriate resentencing scope following a successful 28 U.S.C. § 2255 motion evidences a need for clarification, direction, and uniformity. Courts on both sides of the circuit split have referenced the divide among the jurisdictions yet continue to follow the same path, waiting for courts on the other side of the split to swap.[168] Opposing circuits use the same arguments to bolster their side by merely adding indeterminate twists to their

166. 28 U.S.C. § 2254(b)(1)(A) (2012); *see Scott*, *supra* note 34, at 224–25.

167. *Scott*, *supra* note 34, at 224–25.

168. *See, e.g.*, *Marmolejo II*, 139 F.3d at 531 (rejecting the de novo approach).

theory.[169] Without a solution, courts will continue to follow flawed precedent, subjecting individuals—possibly who are similar in terms of sentencing situations—to different outcomes based on the jurisdiction of their sentencing court. This result is contrary to the sentencing goals established by the Sentencing Reform Act.[170]

Although conservatives and liberals may disagree on the direction of habeas corpus and other post-conviction remedies,[171] there is no logical reason for this battle to move into the remedy phase after a 28 U.S.C. § 2255 motion has been granted. At this point in the post-conviction relief, the petitioner's conviction has been vacated, and he is starting with a "clean slate."[172] In fact, because of the stringent requirements and limitations that have been placed on habeas corpus relief by conservative administrations, the few petitioners who are actually able to meet the requirements to file a 28 U.S.C. § 2255 motion and succeed can surely be considered worthy of a correction to a wrong that the justice system committed against them.[173] A motion to vacate, set aside, or correct a sentence does not raise the same federalism, finality, or separation of powers issues as a habeas corpus statute that deals with a prisoner who is appealing from a state conviction.[174]

The resentencing scope circuit split is a serious issue that courts not only ignore but is also counter-productive to the core initiatives that the Sentencing Reform Act set out to achieve. To solve this

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169. Both de novo resentencing circuits and limited resentencing circuits claim that their approach is better for judicial efficiency. *Compare* United States v. Jennings, 83 F.3d 145, 151 (6th Cir. 1996) (reasoning de novo resentencing is more judicially efficient because the limited approach causes unnecessary "front loading"), *with Marmolejo II*, 139 F.3d at 531 (finding that failing to raise all important issues at the first sentencing opportunity is a waste and is judicially inefficient).

170. *See supra* Section III.A.

171. *See supra* note 27.

172. *See* Ajan v. United States, 731 F.3d 629, 631–32 (6th Cir. 2013) (noting the court is issuing a new sentence); United States v. Hadden, 475 F.3d 652, 664 (4th Cir. 2007) ("[T]he end result of the resentencing or correction of the prisoner's sentence [under § 2255] is an entirely new sentence . . . . To hold otherwise would prevent the defendant from ever obtaining direct appellate review of his new sentence."); United States v. Campbell, 168 F.3d 263, 265–67 (6th Cir. 1999) (reasoning that a court should start fresh because of the competing elements of the sentencing calculus).

173. *See supra* Section II.B.

174. *See supra* Section IV.B.

issue and ensure a fair and effective sentencing system, every circuit across the United States should apply the same resentencing scope. Congress stepped in to take action against sentencing disparities in the 1980s and could do so again now, but the reality of our political climate does not necessarily facilitate fast action. To remedy this issue, courts will have to take it upon themselves to re-evaluate their resentencing approach and make the change if necessary.

This Note proposes an analytical framework that illustrates the de novo approach is the proper interpretation of the resentencing scope of 28 U.S.C. § 2255. First, this proposed framework will go through the analytical steps that point to de novo resentencing. It analyzes the statutory language of 28 U.S.C. § 2255 and other sentencing statutes and precedent, related doctrines, public policies, fairness considerations, and judicial efficiency concerns. Second, this Note will compare the result against the policy initiatives of the Sentencing Reform Act to ensure that the de novo approach is consistent with congressional intent. Lastly, this Note will apply the facts of Cody's story, which were told above, to see how his situation would have turned out if the district court used de novo resentencing, illustrating why the de novo approach is the superior resentencing scope approach.

A. A Proposed Framework That Courts Should Use When Determining the Proper Scope of 28 U.S.C. § 2255 Resentencing: De Novo Resentencing

To begin the statutory analysis of 28 U.S.C. § 2255, it is appropriate to use traditional tools of statutory interpretation to determine Congress's intent.[175] First, looking at the plain language of 28 U.S.C. § 2255, the statute does not expressly provide what the proper scope of resentencing should be, but it does give the sentencing court great deference and options when it comes to providing an appropriate remedy after granting a prisoner's motion.[176] These available re-

175. Federal courts are only empowered to provide writs of habeas corpus when Congress has authorized the action by statute. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75, 93 (1807); *supra* Part II.A. Thus, tools of statutory construction are of particular relevance in analyzing this post-collateral relief option.

176. *See* 28 U.S.C. § 2255(b) (2012) (stating in part "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").

medial options are not expressly or implicitly limited by the text of the statute; conversely, the statute suggests that the sentencing court should choose an option "as may appear appropriate."[177]

In addition to 28 U.S.C. § 2255's silence as to the appropriate scope of resentencing, no other federal statute specifically directs the sentencing court to resentence in a particular way.[178] Thus, it can be inferred that Congress intended sentencing courts to apply the general sentencing rules and procedures when courts choose to resentence an individual after a successful 28 U.S.C. § 2255 motion. These rules and procedures require the sentencing court to consider a plethora of information to ensure the court has a holistic picture of the defendant and that the court crafts an appropriate sentence.[179] In other words, the rules direct the sentencing court to sentence de novo. The broad discretion given to sentencing courts in 28 U.S.C. § 2255 is congruent to the broad discretion a sentencing court has at the original sentencing, thus, suggesting that courts are encouraged to resentence de novo.

In further support of de novo resentencing, courts should take into account United States Supreme Court decisions. In *Pepper v. United States*, the Court held "when a defendant's sentence has been set aside on appeal, a district court at resentencing may consider evidence of the defendant's postsentencing rehabilitation."[180] This holding supports the principle that sentencing courts have broad discretion to apply the de novo approach and must consider a vast array of information to ensure just sentencing.[181] If a defendant's 28 U.S.C. § 2255 motion is successful, their sentence is set aside.[182] Accordingly, the *Pepper* rule and the principles accompanying it apply to § 2255 resentencing. This lends further support that § 2255 resentencing should be de novo.

Next, courts should find that the law-of-the-case doctrine and the mandate rule are not applicable to § 2255 resentencing, and the sentencing package doctrine invites de novo resentencing. Although

177. *See id.*

178. *See supra* note 113 and accompanying text.

179. *See supra* note 114 and accompanying text.

180. Pepper v. United States, 562 U.S. 476, 481 (2011).

181. *See supra* notes 110, 112 and accompanying text.

182. *See* 28 U.S.C. § 2255(b) (2012) ("[T]he court shall vacate and set the judgment aside. . . .").

resentencing after a 28 U.S.C. § 2255 motion may feel like a subsequent resentencing phase in the case, it should be treated the same as an initial sentencing hearing. Unlike a direct appeal where an appellate court remands the case, with instructions, to the district court for resentencing, a district court solely makes the determination that resentencing is the appropriate § 2255 remedy; accordingly, there is no mandate from a superior court that limits the resentencing scope.[183] Because there is not a mandate from a superior court that includes limiting instructions, the mandate rule is inapplicable, and a district court that is resentencing pursuant to 28 U.S.C. § 2255 does not have any limitations placed on its sentencing power and is able to resentence de novo. The law-of-the-case doctrine may appear in de novo resentencing as long as the sentencing court properly exercises its discretion.[184] While a sentencing court may find that an issue has already been decided and there is no need to raise the issue again at resentencing, this doctrine alone does not muster the support needed to justify the mass application of the limited resentencing approach throughout the United States. To say limited resentencing is needed because of the law-of-the-case doctrine is to say sentencing courts are unfit to exercise discretion. This idea is contrary to the *Sentencing Guidelines* and Supreme Court decisions that advocate for sentencing courts' broad discretion.[185] Conversely, the sentencing package doctrine proves that de novo resentencing is necessary to ensure the sentencing court considers all information holistically and to allow the sentencing court to craft the appropriate sentence.[186]

While there are arguments voicing public policy considerations against de novo resentencing, they are not applicable to § 2255 cases. Additionally, whereas policies such as finality, federalism, and respect for the justice system may plague habeas corpus statutes that

183. *Compare* United States v. Saikaly, 207 F.3d 363, 365–71 (6th Cir. 2000) (resentencing after a 28 U.S.C. § 2255 motion), *with* United States v. Guzman, 48 F. App'x 158, 159–63 (6th Cir. 2002) (resentencing after a remand from the Sixth Circuit).

184. *Cf.* United States v. West, 646 F.3d 745, 748–49 (10th Cir. 2011) (stating that the court "may (not must) expand the scope of resentencing absent an express limitation" but the court *must* "exercise discretion in determining the appropriate scope").

185. *See* United States v. Booker, 543 U.S. 220, 245–46 (2005).

186. *See* United States v. Campbell, 168 F.3d 263, 265–66 (6th Cir. 1999).

deal with state prisoners, those concerns are not necessarily present in 28 U.S.C. § 2255.[187] A motion to vacate, set aside, or correct the sentence deals only with federal prisoners and federal courts.

Courts considering fairness implications that may appear at resentencing will conclude that de novo resentencing is more just than the limited approach. De novo resentencing applies to both the prosecution and the defendant. Therefore, no one party can derive a benefit over the other when a motion is filed. Because the defendant starts with a clean slate at resentencing, it is completely possible for that defendant to receive a greater sentence than his initially imposed sentence. Courts have ruled that this does not violate double jeopardy concerns.[188] Some courts reject the de novo approach because they say it gives a defendant a "second bite of the apple."[189] If a defendant's 28 U.S.C. § 2255 motion is granted, the associated conviction is vacated because it violates the Constitution. These petitioners would not be receiving a so-called "second bite" because they never received a real and proper "first bite," as evidenced by the granting of their § 2255 motion.[190] Finally, the fact that de novo resentencing allows for new information to be considered means that a district court will have a more holistic picture and will be able to better craft an appropriate sentence that "will suit not merely the offense but the individual defendant."[191] The *Sentencing Guidelines*, U.S. Supreme Court decisions, and federal statutes all provide evidence that a sentencing judge should be able to consider all the information available to impose the most accurate and appropriate sentence.[192]

Finally, courts should take judicial efficiency into consideration. Circuits that follow the limited approach require parties to raise all issues at the first sentencing hearing, reasoning that raising all is-

187. *See supra* Section IV.B.

188. *See* United States v. Cochran, 883 F.2d 1012, 1017 (11th Cir. 1989) ("[A]ny expectation of finality in a sentence is wholly absent where, as here, the defendant requests that his prior sentences be nullified.").

189. United States v. Whren, 111 F.3d 956, 959 (D.C. Cir. 1997).

190. The need for a 28 U.S.C. § 2255 motion would be nonexistent if the sentencing court either made the correct determination during the first sentence or had the correct controlling precedent at that time, which in turn created the current need for the § 2255 motion.

191. Wasman v. United States, 468 U.S. 559, 563–64 (1984).

192. United States v. Jones, 114 F.3d 896, 897–98 (9th Cir. 1997).

sues at the original sentencing hearing allows both parties to gain early notice of the issues in the case and the original sentencing court can resolve issues while they are fresh in the mind—resulting in fewer issues on subsequent proceedings.[193] Circuits that follow the majority de novo approach argue that the limited approach will cause front-loading because movants will fear that the court will hold they have waived their opportunity to raise the issue at a later proceeding.[194] This front-loading will place an unnecessary burden on district courts and appellate courts. The limited approach's reasoning is the weaker reasoning because it unnecessarily invites an increased workload on the original sentencing judge. The number of initial sentences drastically outweigh the number of re-sentences that occur because of remand or collateral review.[195] Even though the limited approach applies exceptions to allow courts to hear a limited number of issues for the first time at a subsequent hearing,[196] these exceptions place the party being sentenced in great risk because if the court does not apply an exception, then the appellate court will likely give deference to and side with the sentencing court. On the other hand, de novo resentencing allows issues to be raised at all times. Although the judge can still exercise discretion whether to consider the issue, the judge has to provide a persuasive record of why they made that decision. Overall, judicial efficiency should not be given a significant amount of weight in the overall evaluation. Judicial efficiency's purpose is to preserve resources. Correct and accurate justice will always outweigh efficiency.

193. *See supra* note 138 and accompanying text.

194. *See* United States v. Jennings, 83 F.3d 145, 151–52 (6th Cir. 1996).

195. The United States Sentencing Commission reported that it received information on 66,873 federal criminal cases in which the individual offender was sentenced in fiscal year 2017 and that it "received documentation on 5,243 resentencings and other modifications of sentence" in 2017. U.S. SENTENCING COMM'N, OVERVIEW OF FEDERAL CRIMINAL CASES: FISCAL YEAR 2017, at 1, 12 (2018), https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2018/FY17_Overview_Federal_Criminal_Cases.pdf. Of the reported 5,243 reported resentencings or modifications of sentence, 21.4% occured through a post-conviction motion—such as a § 2255 motion—in a district court. *Id.* at 12.

196. *See supra* note 149 and accompanying text.

B. De Novo Resentencing Is Consistent with Congressional Sentencing Policies

The de novo resentencing approach is in line with the Sentencing Reform Act for a few reasons. First, because a court can consider a broader pool of information and evaluate the information's truthfulness, it is more likely that the sentencing court will be able to determine an appropriate sentence based on accurate information. This will increase the likelihood that the sentence received is proportionate to the offense committed. Second, because the court considered accurate information and crafted an appropriate sentence, the defendant will receive a sentence that is uniform with other similarly placed defendants around the country. Similarly placed defendants will not receive a differing sentence solely because a different circuit in the United States resentences them. This bolsters the fairness and equality of the sentencing system as a whole. Third, honesty improves and trust increases in the justice system as a whole when courts base sentencing on accurate information and impose a sentence that the defendant is supposed to receive.

C. De Novo Resentencing in Action: Proper Justice for Cody

The hypothetical posed at the beginning of this Note demonstrated the harsh injustice that the limited resentencing approach can cause. Cody was at the mercy of the sentencing court as it decided if his new issue was barred or not. In this case, the judge decided that he had waived his right to raise the issue because he did not object to the PSR at the original sentencing hearing. As this Note discussed in Section III.C.2.ii, the court could have exercised one of the exceptions to the rule, but the judge did not even consider that option. Cody could appeal that decision, but the appellate court would review that decision for abuse of discretion, and it is likely that an appellate court that follows the limited approach will rule that the district judge did not abuse his discretion. The limited approach denies the sentencing court the opportunity to consider all the information and get an accurate and holistic picture of the defendant. This is contrary to the goals of the Sentencing Reform Act.

If a jurisdiction following the de novo approach resentenced Cody, the sentencing court would be required to exercise its discre-

tion in allowing Cody to raise the new objection to the PSR or not. If the sentencing court decided that it would not consider the new information because it believed that Cody really did have a good reason to raise the objections at the original sentence, Cody could appeal to the appellate court and that court would review for abuse of discretion. Because this jurisdiction follows the de novo approach, there is a good chance that the court of appeals will remand the case back to the district court for resentencing because the district court did not sentence Cody based on accurate information. Most likely, the court would follow the lead of the *Saikaly* court and find that this is a new PSR, so it would have been impossible for Cody to object to this new PSR in the past because it did not exist at that time. If the court allowed Cody's objection and he convinced the sentencing court that the new information in the PSR was false, that new information would not be taken into account as the court crafted the new sentence, and Cody would receive a significantly lower sentence—a sentence that is in accordance with the goals of the Sentencing Reform Act. The de novo sentencing approach enables a sentencing court to ensure just results.

VI. CONCLUSION

Clarification of the proper resentencing scope—de novo resentencing—and procedures every circuit should follow to correctly apply a de novo resentencing scope will not only save courts the time and effort of determining the appropriate course of action, but it will also prevent sentencing based on false information. If courts in different circuits continue to apply different resentencing scopes to movants after successful 28 U.S.C. § 2255 motions, the justice system as a whole will be going against the ideals set forth in the Sentencing Reform Act. Because of the unique circumstances that are provided in a federal collateral review, courts are equipped to deal efficiently with new objections and information. After all, we are dealing with people's liberty.