No. 97-9217

In the Supreme Court of the United States

OCTOBER TERM, 1998

MANUEL D. PEGUERO, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether a court may grant collateral relief under 28 U.S.C. 2255 on the ground that the sentencing court failed to advise the defendant of his right to appeal, as required by Rule 32 of the Federal Rules of Criminal Procedure, where the defendant knew that he had the right to appeal and elected not to appeal.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Rule involved ... 2
Statement ... 2
Summary of argument ... 7
Argument:
Because petitioner knew that he had the right to appeal, the district court's failure to advise him of that right provides no basis for collateral relief ... 10
A. The district court's failure to advise petitioner of his right to appeal did not result in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure ... 11
B. A rule of per se collateral review is inconsistent with sound principles of collateral review ... 17
C. *Rodriquez* v. *United States* does not dispense with a showing of prejudice ... 24
Conclusion ... 26

TABLE OF AUTHORITIES

Cases:

Abney v. *United States*, 431 U.S. 651 (1977) ... 19
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) ... 16
Biro v. *United States*, 24 F.3d 1140 (9th Cir.
Castellanos v. *United States*, 26 F.3d 717 (7th Cir. 1994) ... 21
Davis v. *United States*, 417 U.S. 333 (1974) ... 7, 13
Everard v. *United States*, 102 F.3d 763 (6th Cir. 1996), cert. denied, 519 U.S. 1139 (1997) ... 23

Cases—Continued: Page

Farries v. *United States*, 439 F.2d 781 (3d Cir. 1971) 24
Harvey v. *United States*, 850 F.2d 388 (8th Cir. 1988) 19, 20
Hill v. *United States*, 368 U.S. 424 (1962) 7, 10, 12, 13, 14, 17, 24
Hoskins v. *United States*, 462 F.2d 271 (3d Cir. 1972) 23, 24
Jones v. *Barnes*, 463 U.S. 745 (1983) 19
McCarthy v. *United States*, 394 U.S. 459 (1969) 16
McCumber v. *United States*, 30 F.3d 78 (8th Cir. 1994) 6
Reed v. *Farley*, 512 U.S. 339 (1994) 10, 21
Reid v. *United States*, 69 F.3d 688 (2d Cir. 1995) 14
Rodriquez v. *United States*, 395 U.S. 327 (1969) 9, 24, 25
Thompson v. *United States*, 111 F.3d 109 (11th Cir. 1997) 14, 21
Tress v. *United States*, 87 F.3d 188 (7th Cir. 1996) 14
United States v. *Addonizio*, 442 U.S. 178 (1979) 10, 15
United States v. *Benthien*, 434 F.2d 1031 (1st Cir. 1970) 14
United States v. *Bygrave*, 97 F.2d 708 (2d Cir. 1996) 23
United States v. *Chang*, 142 F.3d 1251 (11th Cir. 1998) 23
United States v. *DeFusco*, 949 F.2d 114 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992) 16
United States v. *DeSantiago-Martinez*, 38 F.3d 394 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995) 23
United States v. *Drummond*, 903 F.2d 1171 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991) 14, 16
United States v. *Frady*, 456 U.S. 152 (1982) 8, 16

Cases—Continued: Page

United States v. *Garcia-Flores*, 906 F.2d 147 (5th Cir. 1990) 14
United States v. *Hasting*, 461 U.S. 499 (1983) 20
United States v. *Henry*, 893 F.2d 46 (3d Cir. 1990) 15
United States v. *Lyons*, 53 F.3d 1321 (D.C. Cir. 1995) 15
United States v. *Mosley*, 967 F.2d 242 (7th Cir. 1992) 12
United States v. *Parra-Ibanez*, 936 F.2d 588 (1st Cir. 1991) 16
United States v. *Peden*, 872 F.2d 1303 (7th Cir. 1989) 16
United States v. *Pollard*, 959 F.2d 1011 (D.C. Cir.), cert. denied, 506 U.S. 915 (1992) 19
United States v. *Sanchez*, 88 F.3d 1243 (D.C. Cir. 1996) 14
United States v. *Timmreck*, 441 U.S. 780 (1979) .... *passim*
Valente v. *United States*, 111 F.3d 290 (2d Cir. 1997) 23

Statutues and rules:

Controlled Substances Act, 21 U.S.C. 801 *et seq.*:
21 U.S.C. 841(a) 3
21 U.S.C. 841(a)(1) 3
21 U.S.C. 845a (1988) 3
21 U.S.C. 845b (1988) 3
21 U.S.C. 846 .... 2, 3
28 U.S.C. 2111 .... 8, 15, 20
28 U.S.C. 2253(c)(2) (Supp. II 1996) 6
28 U.S.C. 2255 (Supp. II 1996) 2, 4, 6, 7, 10, 11, 19
Fed. R. Crim. P.:
Rule 11 .... 8, 12, 16, 18, 19, 20
Rule 11 (1966) 18
Rule 11(h) (1983) 16

Rules —Continued: Page

Rule 32 (1989) 2, 6, 7, 8, 9, 10, 17, 19, 21, 22, 23
Rule 32(a) (1989) 12
Rule 32(a)(2) (1989) 2, 4, 5, 6, 22
Rule 32(c)(5) 2
Rule 52(a) 8, 15, 20
United States Sentencing Guidelines Manual § 5G1.3 (1992) 4

Miscellaneous:

R. Traynor, *The Riddle of Harmless Error* (1970) 20

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OPINIONS BELOW

The opinion of the court of appeals (J.A. 192-195) is unpublished, but the decision is noted at 142 F.3d 430 (Table). The opinion and order of the district court denying petitioner's motion under 28 U.S.C. 2255 (Supp. II 1996) (J.A. 168-187) is unreported.

JURISDICTION

The judgment of the court of appeals (J.A. 196-197) was entered on February 27, 1998. The petition for a writ of certiorari was filed on May 26, 1998, and was granted on September 29, 1998. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

RULE INVOLVED

At the time of petitioner's sentencing, Rule 32(a)(2) of the Federal Rules of Criminal Procedure provided:

> *Notification of Appeal.*—After imposing sentence in a case which has gone to trial on a plea of not guilty, the court shall advise the defendant of the defendant's right to appeal, including any right to appeal the sentence, and of the right of a person who is unable to pay the cost of an appeal to apply for leave to appeal in forma pauperis. There shall be no duty to advise the defendant of any right to appeal after sentence is imposed following a plea of guilty or nolo contendere, except that the court shall advise the defendant of any right to appeal the sentence. If the defendant so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant.[1]

STATEMENT

Following a plea of guilty, petitioner was convicted of conspiracy to distribute cocaine, in violation of 21 U.S.C. 846. In April 1992, he was sentenced to 274 months' imprisonment, to be followed by five years of supervised release. J.A. 35-36, 56. Petitioner took no direct appeal. J.A. 193. In December 1996, petitioner filed a motion under 28 U.S.C. 2255 (Supp. II 1996) challenging his conviction and sentence. J.A. 9, 58-67.

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[1] This version of Rule 32(a)(2) was in effect from 1989 to 1994. See 490 U.S. 1135, 1140 (1989); 511 U.S. 1175, 1184-1185 (1994). The current version of that provision appears at Rule 32(c)(5) of the Federal Rules of Criminal Procedure, and is reprinted at pp. 3-4 of petitioner's brief. Unless otherwise noted, references in this brief to Rule 32 are to the version of Rule 32(a)(2) in effect at the time of petitioner's sentencing.

The district court denied the motion. J.A. 168-187. After the district court granted a certificate of appealability, J.A. 188-191, the court of appeals affirmed. J.A. 192-195.

1. On April 3, 1990, a grand jury in the Middle District of Pennsylvania indicted petitioner on charges of conspiracy to distribute cocaine and to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846; possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1); possession, within 1,000 feet of a school, of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a) and 845a (1988); and conspiracy with a minor to distribute cocaine, in violation of 21 U.S.C. 845b (1988). J.A. 16-21. In a written plea agreement, petitioner agreed to plead guilty to the drug conspiracy charged in the indictment, and the government agreed to dismiss the remaining charges and to move for a sentencing departure if petitioner provided substantial assistance to law enforcement. J.A. 80-91. In the plea agreement, petitioner acknowledged that he had personally participated in activities of the conspiracy involving from 15 to 50 kilograms of cocaine. J.A. 81.

At the change-of-plea hearing, the government proffered that petitioner and others moved to York, Pennsylvania, in the spring of 1989, for the purpose of selling cocaine. The government further proffered that the group subsequently obtained from 15 to 50 kilograms of cocaine in the New York City area, transported it to York, and distributed it. J.A. 31-32. The district court accepted petitioner's plea of guilty to drug conspiracy. J.A. 33-34.

After his guilty plea, petitioner was interviewed by government investigators. During that interview, however, petitioner falsely denied that he knew one of the

other participants in the conspiracy. J.A. 41-43, 53-54. The government did not file a motion for a downward departure on petitioner's behalf.

On April 22, 1992, the court held a sentencing hearing. Although the Sentencing Guidelines provided for a sentencing range of from 292 to 365 months of imprisonment, the district court imposed a sentence of 274 months.[2] J.A. 56. After imposing sentence, the district court failed to notify petitioner of his right to appeal his sentence. J.A. 35-57. Petitioner did not take a direct appeal. J.A. 193.

2. On December 10, 1996, petitioner filed a pro se motion under 28 U.S.C. 2255 (Supp. II 1996) to set aside his conviction and sentence. J.A. 9, 58-67. In that motion, petitioner alleged that his counsel had been ineffective in numerous respects. In particular, petitioner alleged that his counsel had failed to file a notice of appeal even though petitioner had asked that one be filed. J.A. 63, 65. The district court appointed new counsel to represent petitioner, and new counsel filed an amended motion adding the claim that the district court had violated Rule 32(a)(2) of the Federal Rules of Criminal Procedure by failing to inform petitioner of his

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[2] In sentencing petitioner below the Guidelines range, the district court relied on Guidelines § 5G1.3 (1992), which applies to defendants who are subject to an undischarged term of imprisonment for a different offense. Petitioner committed the present offense while on bail pending resolution of New Jersey state narcotics charges. Before he was sentenced in the present case, petitioner received a ten-year sentence for the New Jersey offenses. Although the district court could have made some or all of petitioner's federal sentence concurrent with his state sentence under Section 5G1.3, the court instead imposed a consecutive sentence and then departed below the minimum sentence specified by the Guidelines. J.A. 173-174.

right to appeal his sentence.[3] J.A. 92-93. Petitioner did not allege, however, that he had been unaware of his right to appeal, or that the district court's omission prejudiced him in any way. *Ibid.*

At an evidentiary hearing on the motion, both petitioner and his former counsel, Rex Bickley, testified about the circumstances surrounding petitioner's failure to take a direct appeal. Bickley testified that, on the day of the sentencing hearing, he informed petitioner of his right to appeal, offered to represent petitioner, and explained that the court would appoint him for that purpose. J.A. 104, 123. Bickley further testified that petitioner declined to take an appeal, however, preferring instead to cooperate with the government in an attempt to reduce his sentence. J.A. 104-105, 123-124. Bickley concurred in that decision, viewing as minimal the likelihood that petitioner would prevail if an appeal were taken. J.A. 76-77. In the year after petitioner's sentencing, petitioner wrote Bickley five or six letters indicating that petitioner wanted to provide information to the government. In none of those letters did petitioner express any desire to take an appeal. J.A. 125-126.

Petitioner testified at the hearing that he informed Bickley at the moment of sentencing that he wanted to appeal. J.A. 139, 153. Petitioner also testified that, shortly after sentencing, a fellow prisoner wrote a letter to Bickley reiterating petitioner's request that a timely appeal be taken. J.A. 138-139, 156-160. Petitioner produced what he claimed was a copy of the letter and testified that his fellow prisoner's wife had sent the original letter to Bickley. J.A. 157-158, 166-

[3] The text of Rule 32(a)(2), as it existed at the time of petitioner's sentencing, is reprinted *supra*, p. x.

167. Bickley testified that he never received such a letter. J.A. 163-164.

3. The district court denied petitioner's Section 2255 motion. J.A. 168-187. It held that the failure to advise petitioner of his right to appeal, as required by Rule 32(a)(2), provided no basis for collateral relief. J.A. 184. Because petitioner knew about his right to appeal, the court explained, the court's failure to advise him of that right did not "result[] in a complete miscarriage of justice or in a proceeding inconsistent with the rudimentary demands of fair procedure." *Ibid.* (quoting *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (internal quotation marks omitted)). The district court also rejected petitioner's other claims for relief.[4] J.A. 179-186. Petitioner sought a certificate of appealability, limited to the Rule 32 issue, and the district court granted the certificate. J.A. 188-191.[5]

4. The court of appeals affirmed. J.A. 192-195. Citing *McCumber* v. *United States*, 30 F.3d 78, 79 (8th Cir. 1994), it held that the failure to inform a defendant

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[4] In rejecting petitioner's other claims for relief, the district court credited petitioner's counsel rather than petitioner on a number of points on which their testimony differed. For example, the district court found that petitioner had intentionally forgone an appeal in the hope of obtaining a sentencing reduction by providing substantial assistance. J.A. 180-181. The court also discredited petitioner's claims that counsel had never explained the plea agreement to petitioner and had promised that petitioner would receive only a ten-year sentence. J.A. 182-183.

[5] The government acquiesced in the granting of a certificate of appealability. J.A. 189. In fact, however, the district court erred in issuing a certificate. A certificate of appealability may be issued "only if the applicant has made a substantial showing of the denial of a constitutional right," 28 U.S.C. 2253(c)(2) (Supp. II 1996), and the Rule 32 error on which petitioner sought the certificate is not of constitutional dimension.

of his appellate rights is "harmless error" if the government can show by clear and convincing evidence that the defendant knew of his right to appeal. J.A. 194-195. In the present case, the court held, "it is clear that [petitioner] knew of his right to appeal," "[w]ithout even crediting [his] former counsel's testimony." J.A. 195. The court therefore concluded that the sentencing court's failure to advise petitioner of that right was "harmless and thus does not justify collateral attack by [petitioner]." *Ibid.*

SUMMARY OF ARGUMENT

Petitioner seeks collateral relief pursuant to 28 U.S.C. 2255 (Supp. II 1996), on the ground that the district court that sentenced him failed to advise him of his right to appeal, as required by Rule 32 of the Federal Rules of Criminal Procedure. This Court has held, however, that "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Davis* v. *United States*, 417 U.S. 333, 346 (1974) (quoting *Hill* v. *United States*, 368 U.S. 424, 429 (1962)). Rather, a defendant can obtain collateral relief based on such an error only if he can show that the error "resulted in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (quoting *Hill*, 368 U.S. at 428). Petitioner cannot make such a showing.

A. It is undisputed that petitioner knew that he had the right to appeal. Thus, petitioner's claim is that the district court failed to advise him of something that he independently knew. This Court's decision in *Tim-*

mreck establishes that such a claim provides no basis for collateral relief. In *Timmreck*, the district court failed to advise the defendant that he would have to serve a special parole term of at least three years if he pleaded guilty. Although that omission was inconsistent with the requirements of Rule 11 of the Federal Rules of Criminal Procedure, the Court held that the defendant was not entitled to collateral relief, because he did "not argue that he was actually unaware of the special parole term." 441 U.S. at 784. Collateral relief is similarly unavailable in the present case, because petitioner has never even claimed that he was actually unaware of his right to appeal, and the evidence establishes that he was aware of that right.

Even on direct appeal, procedural errors that do not result in prejudice normally provide no basis for reversal of a criminal conviction. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a). It necessarily follows that such errors cannot justify overturning final convictions on collateral review. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

B. Petitioner's arguments in support of a rule of per se collateral relief are without merit. Although Rule 32 is intended to protect defendants' right to appeal, this Court held in *Timmreck* that the violation of a procedural rule intended to protect important rights does not justify collateral relief in the absence of prejudice.

Nor is there merit to petitioner's claim (Br. 20, 22) that a rule of per se collateral relief is justified because any inquiry into prejudice will "risk[] unreliable results" and cause "excessive litigation." Those concerns do not apply where, as in the present case, it is undis-

puted that the defendant knew of his right to appeal. In such cases there is no risk of an inaccurate determination of prejudice, and no need for any, much less "excessive," litigation of the issue. Rather, the district court can and should simply dismiss such claims without a hearing.

More generally, a proper balance of interests requires an analysis of prejudice before a court may overturn a final judgment on collateral review. Courts are capable of making accurate determinations of prejudice, and routinely do so before granting collateral relief.

Although a rule of per se collateral relief would obviate the need for an inquiry into prejudice, it would come only at the cost of requiring courts, even where the lack of prejudice was clear, to vacate final judgments, resentence defendants, and reinstate their appeals. Moreover, even the courts that purport to adhere to a rule of per se collateral relief have carved out exceptions where they view it as sufficiently clear that the violation of Rule 32 was not prejudicial. Continued litigation over the proper scope of those exceptions would erode much of the claimed efficiency of petitioner's approach.

C. This Court's decision in *Rodriquez* v. *United States*, 395 U.S. 327 (1969), does not support a rule of per se collateral relief. The Court in *Rodriquez* held that, on the particular record before it, the district court's failure to advise the defendant of his right to appeal "effectively deprived [him] of his right to appeal." *Id.* at 332. That case-specific holding that prejudice was shown provides no support for petitioner's claim that the failure to advise a defendant of the right to appeal justifies collateral relief without a showing of

prejudice. This Court's subsequent decision in *Timmreck* forecloses the latter claim.

ARGUMENT

BECAUSE PETITIONER KNEW THAT HE HAD THE RIGHT TO APPEAL, THE DISTRICT COURT'S FAILURE TO ADVISE HIM OF THAT RIGHT PROVIDES NO BASIS FOR COLLATERAL RELIEF

Petitioner seeks collateral relief pursuant to 28 U.S.C. 2255 (Supp. II 1996), on the ground that the district court that sentenced him in 1992 failed to advise him of his right to appeal, as required by Rule 32 of the Federal Rules of Criminal Procedure. It is well settled, however, that Section 2255 does "not encompass all claimed errors in conviction and sentencing." *United States* v. *Addonizio*, 442 U.S. 178, 185 (1979). Rather, "unless the claim alleges a lack of jurisdiction or constitutional error, the scope of collateral attack has remained far more limited. * * * [A]n error of law does not provide a basis for collateral attack unless the claimed error constituted 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *Ibid.* (quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). See also *Reed* v. *Farley*, 512 U.S. 339, 348 (1994) (opinion of Ginsburg, J.); *United States* v. *Timmreck*, 441 U.S. 780, 784 (1979) (denying relief under Section 2255 because claimed error did not "result[] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure'") (quoting *Hill*, 368 U.S. at 428). Petitioner's claim for collateral relief rests solely on a violation of a rule of procedure, and petitioner therefore rightly concedes (Br. 14) that he could obtain relief only if he could meet the "demanding legal standard" im-

posed by *Timmreck* and *Hill*. Petitioner cannot meet that standard.[6]

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[6] The courts of appeals have divided over the question whether a failure to advise a defendant of the right to appeal justifies collateral relief without any inquiry into whether the absence of advice was prejudicial. Several circuits have held that collateral relief may not be granted in the absence of prejudice. See *Tress* v. *United States*, 87 F.3d 188, 189-190 (7th Cir. 1996); *United States* v. *Garcia-Flores*, 906 F.2d 147, 148-149 (5th Cir. 1990); *United States* v. *Drummond*, 903 F.2d 1171, 1173-1175 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). Several others, without discussing this Court's decisions in *Timmreck* and *Hill*, have held that collateral relief must be granted without regard to prejudice. See *Thompson* v. *United States*, 111 F.3d 109, 110-111 (11th Cir. 1997); *United States* v. *Sanchez*, 88 F.3d 1243, 1246-1247 (D.C. Cir. 1996); *Reid* v. *United States*, 69 F.3d 688, 689-690 (2d Cir. 1995); *United States* v. *Benthien*, 434 F.2d 1031, 1032-1033 (1st Cir. 1970). Cf. *Biro* v. *United States*, 24 F.3d 1140, 1141-1142 (9th Cir. 1994) (collateral relief need not be granted if advice about right to appeal was unnecessary, *e.g.*, where defendant entered into plea agreement validly waiving right to appeal); *United States* v. *Butler*, 938 F.2d 702, 703-704 (6th Cir. 1991) (vacating defendant's conviction and remanding for resentencing where defendant noted untimely appeal; no discussion of whether relief would have been proper if defendant had actual knowledge of right to appeal); *Paige* v. *United States*, 443 F.2d 781, 782-783 (4th Cir. 1971) (granting collateral relief where there was factual dispute as to whether defendant had been prejudiced by lack of advice of right to appeal); *United States* v. *Deans*, 436 F.2d 596, 599-600 (3d Cir.) (assuming jurisdiction over untimely appeal because defendant was not advised of right to appeal; declining to rely on trial counsel's affidavit, which indicated that counsel had advised defendant of his right to appeal), cert. denied, 403 U.S. 911 (1971).

A. The District Court's Failure To Advise Petitioner Of His Right To Appeal Did Not Result In A Complete Miscarriage Of Justice Or In A Proceeding Inconsistent With The Rudimentary Demands Of Fair Procedure

1. Petitioner has never contended that he was unaware of his right to appeal at the time of his sentencing. To the contrary, his Section 2255 motion, and his testimony at the hearing on that motion, make clear that he was aware of that right. See, *e.g.*, J.A. 63, 65, 138-139. Petitioner's trial counsel also testified that he informed petitioner of the right to appeal. J.A. 104-105. Given the lack of any factual dispute on the point, the district court and the court of appeals appropriately decided the case on the premise that petitioner knew that he had the right to appeal.[7] J.A. 184, 195.

Thus, petitioner's claim is that the district court committed error by failing to tell him something that he independently knew. There is no basis for concluding that such an error "result[s] in a 'complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" *Timmreck*, 441 U.S. at 784 (quoting *Hill*, 368 U.S. at 428). As the Seventh Circuit has explained, "[a] district court's

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[7] There was a factual dispute between petitioner and his former counsel about whether petitioner sought to exercise his right to appeal or instead chose to forgo an appeal. Compare, *e.g.*, J.A. 104-105 with, *e.g.*, J.A. 138-139. The district court credited counsel's testimony that petitioner decided to forgo any appeal, and therefore rejected petitioner's claim that his counsel was ineffective for failing to file a notice of appeal. J.A. 180-186. The factual dispute about whether petitioner wanted to exercise his right of appeal, however, is not at issue here; and, indeed, the premise of the claim that petitioner's counsel thwarted petitioner's desire to appeal is that petitioner knew that he had such a right.

failure to tell the defendant about his right to appeal does not authorize relief of any kind if the defendant knew he could appeal. * * * Not being told in court what your lawyer told you beforehand, or what you knew already, is no constitutional injury." *United States* v. *Mosley*, 967 F.2d 242, 244 (1992).

This Court's cases establish that, in the absence of prejudice, a "failure to comply with the formal requirements of" a rule of procedure provides no basis for collateral relief. *Hill*, 368 U.S. at 429. In *Hill*, the defendant sought collateral relief on the ground that the sentencing judge had violated Rule 32(a) of the Federal Rules of Criminal Procedure, by failing expressly to afford the defendant an opportunity to make a statement before the court imposed sentence. 368 U.S. at 425. The Court held that "the failure to follow the formal requirements of Rule 32(a) is not of itself an error that can be raised by collateral attack." *Id.* at 426. The Court noted that the defendant had not been affirmatively denied the right to speak and did not claim any prejudice from the violation. *Id.* at 429. In fact, there was "no claim that the defendant would have had anything at all to say if he had been formally invited to speak." *Ibid.* Under the circumstances, the Court held, collateral relief was unavailable. *Ibid.*

Similarly, the defendant in *Timmreck* sought collateral relief on the ground that the district court had violated Rule 11 of the Federal Rules of Criminal Procedure, by not informing him at the time of his guilty plea that the offense to which he was pleading guilty required imposition of a special parole term of at least three years.[8] 441 U.S. at 781-782. The defendant

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[8] Rule 11 establishes procedures governing the entry of guilty pleas. It requires that, before accepting a guilty plea, the district

in *Timmreck*, however, did "not argue that he was actually unaware of the special parole term or that, if he had been properly advised by the trial judge, he would not have pleaded guilty. His only claim is of a technical violation of the Rule." *Id.* at 784. Because there had been no "showing of special prejudice to the defendant," this Court held that the defendant was not entitled to collateral relief. *Id.* at 783.

Timmreck and *Hill* foreclose petitioner's claim. Like the defendants in those cases, petitioner seeks collateral relief based solely upon a procedural error. Yet, like those defendants, petitioner can show no prejudice from the error.[9] A procedural error that caused no harm provides no ground upon which to overturn a final conviction. See *Davis* v. *United States*, 417 U.S. 333, 346 (1974) ("'[C]ollateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error.") (quoting *Hill*, 368 U.S. at 429).

Timmreck is particularly relevant. The error in *Timmreck* is of the same character as the error in the present case: the district court failed to provide a defendant with required information relevant to the

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court address the defendant in open court, advise the defendant of his rights and of the consequences of pleading guilty, and ensure that the plea is voluntary. Fed. R. Crim. P. 11.

[9] In this case, the court of appeals suggested that the government bore the burden of establishing the absence of prejudice by clear and convincing evidence. J.A. 194-195. To the contrary, the burden of alleging and establishing prejudice is properly placed upon the defendant seeking collateral relief on the ground of a violation of a rule of procedure. See *Timmreck*, 441 U.S. at 783-785; *Hill*, 368 U.S. at 429.

defendant's exercise of his rights. And collateral relief was denied in *Timmreck* for the same reason that it should be denied here: neither defendant alleged that he was unaware of the information that the district court omitted to provide. See *Timmreck*, 441 U.S. at 784.

Petitioner (Br. 19-20) and his *amicus* (National Association of Criminal Defense Lawyers (NACDL) Br. 25) attempt to distinguish *Timmreck* on the ground that the defendant in *Timmreck* could have raised his claim on direct appeal but failed to do so, whereas defendants who are not advised of their right to appeal, and who are not otherwise aware of that right, "cannot be expected to file appeals." Pet. Br. 19. T he proposed distinction is unavailing. Although the more demanding standard applicable on collateral review rests in part on the notion that defendants should generally raise their claims on direct appeal, see, *e.g.*, *Timmreck*, 441 U.S. at 784, the heightened collateral-review standard reflects other important finality concerns as well. See *ibid.* This Court has therefore applied that standard to a claim that could not have been raised on direct appeal. See *Addonizio*, 442 U.S. at 184-190 (applying "miscarriage of justice" standard to claim that post-sentencing change in parole policy unlawfully extended defendant's sentence beyond period intended by sentencing judge). In any event, petitioner knew of his right to appeal, and his failure to appeal can therefore not be excused on the ground of ignorance.

2. Even on direct appeal, a procedural error that does not result in prejudice to the defendant normally provides no basis for reversal of a criminal conviction. See 28 U.S.C. 2111 ("On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard

to errors or defects which do not affect the substantial rights of the parties."); Fed. R. Crim. P. 52(a) ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.").

A failure to provide information to a defendant who already has that information from another source is a typical example of harmless error. Thus, a defendant who has pleaded guilty may not obtain reversal of his conviction on direct appeal on the ground that the district court failed to conduct part of the colloquy required by Rule 11, when the record indicates that the defendant was aware of the omitted information. See, *e.g.*, *United States* v. *Lyons*, 53 F.3d 1321, 1322-1323 (D.C. Cir. 1995) (failure to advise defendant of potential fine at time of guilty plea was harmless, because defendant was advised of potential fine at arraignment and in pre-sentence report); *United States* v. *Henry*, 893 F.2d 46, 48 (3d Cir. 1990) (failure to advise defendant of minimum term of supervised release was harmless, because plea agreement, which defendant signed and acknowledged he understood, informed defendant of minimum term); *United States* v. *Peden*, 872 F.2d 1303, 1307 (7th Cir. 1989) ("a district court's failure to comply with Rule 11(c)(1) is harmless error where the record establishes that the defendant nevertheless understood the charges against him and their direct consequences").[10]

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[10] In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Court exercised its supervisory authority to require reversal in any case in which the district court accepted a plea of guilty without fully adhering to the requirements of Rule 11. The specific holding of *McCarthy* was overturned by the 1983 addition of Rule 11(h), which provides that "[a]ny variance from the procedures required by this rule which does not affect substantial rights shall be disregarded." See, *e.g.*, *United States* v. *DeFusco*, 949 F.2d 114, 117 (4th Cir. 1991), cert. denied, 503 U.S. 997 (1992); *United States*

Those cases make clear that, in the absence of prejudice, the failure to give defendants required advice does not justify overturning convictions on direct appeal. It necessarily follows that, in the absence of prejudice, such a failure cannot justify overturning final convictions on collateral review. See *United States* v. *Frady*, 456 U.S. 152, 166 (1982) ("We reaffirm the well-settled principle that to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal.").

B. A Rule Of Per Se Collateral Relief Is Inconsistent With Sound Principles of Collateral Review

Petitioner contends that a district court's failure to advise a defendant of the right to appeal is "an omission inconsistent with the rudimentary demands of fair procedure." Br. 14 (quoting *Hill*, 368 U.S. at 428). Such a failure, petitioner further contends, "justifies post-conviction relief as a matter of law," even if the failure was not prejudicial in any way. Br. 24. Petitioner's contention is unsound.

1. Petitioner notes (Br. 17-18) that Rule 32, which originally required only that unrepresented defendants be advised by the court of their right to appeal, was

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v. *Parra-Ibanez*, 936 F.2d 588, 598 n.24 (1st Cir. 1991); *United States* v. *Drummond*, 903 F.2d 1171, 1173 & n.5 (8th Cir. 1990), cert. denied, 498 U.S. 1049 (1991). In addition, this Court's subsequent cases have repudiated the general approach reflected in *McCarthy*. See, *e.g.*, *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254-255 (1988) ("[A] federal court may not invoke supervisory power to circumvent the harmless-error inquiry prescribed by Federal Rule of Criminal Procedure 52(a). * * * Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions.").

amended in 1966 to require that represented defendants as well be advised of their right to appeal. Petitioner further notes (Br. 17-19) that the 1966 amendment necessarily reflects the conclusion that defense attorneys do not always adequately advise defendants of their appellate rights, and that those rights should therefore be further protected by requiring that the court advise defendants of them. Because the right to appeal is fundamental, petitioner concludes (Br. 18), "the rule which protects that [right] is fundamental, and should be treated as a rudimentary demand of fair procedure." Petitioner's conclusion does not follow from his premises.

The question in this case is not whether it is sound policy to require that the court advise defendants of their right to appeal; Rule 32 requires such advice, and a district court's failure to comply with that Rule amounts to error. Rather, the question is whether such an error justifies collateral relief when the purpose of the Rule is met, because the defendant did know of his right to appeal. This Court's decision in *Timmreck* establishes that collateral relief is unavailable in such circumstances.

In *Timmreck*, the district court failed to advise the defendant that pleading guilty would subject him to a mandatory special parole term of three years. 441 U.S. at 781-782. This Court implicitly assumed that the district court's omission was a violation of Rule 11, which at the time of the defendant's guilty plea required that the district court "address the defendant personally" to determine that a guilty plea was "made voluntarily with understanding of * * * the consequences of the plea." *Id.* at 781 n.1 (quoting Fed. R. Crim. P. 11 (1966)). Rule 11 was clearly intended to protect the important constitutional rights that a

defendant waives by entering a guilty plea, including the rights to be tried by a jury, to confront one's accusers, and to assert the privilege against compelled self-incrimination. See, *e.g.*, *Boykin* v. *Alabama*, 395 U.S. 238, 242-243 (1969). Rule 11 also necessarily reflects the conclusion that defendants are not always be adequately advised of those rights by their attorneys, and that those rights should therefore be further protected by requiring the court to advise defendants of them. Nevertheless, the Court held in *Timmreck* that collateral relief was not justified, because there was no suggestion that the failure to comply with the procedural requirements of Rule 11 was prejudicial to the defendant.

Timmreck establishes that the violation of a procedural rule intended to protect important constitutional rights does not justify collateral relief in the absence of prejudice.[11] It follows *a fortiori* that, in the absence of prejudice, collateral relief is not justified by a violation of a procedural rule intended to protect the right to appeal, which is not of constitutional dimension. See *Jones* v. *Barnes*, 463 U.S. 745, 751 (1983); *Abney* v. *United States*, 431 U.S. 651, 656 (1977).

2. Petitioner also contends (Br. 20, 22) that a rule of per se collateral relief is justified because any inquiry into prejudice will "risk[] unreliable results" and cause "excessive litigation." In this case, of course, it is

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[11] See, *e.g.*, *United States* v. *Pollard*, 959 F.2d 1011, 1020 (D.C. Cir.) (although district court violated Rule 11 by failing to inquire into whether guilty plea was voluntary, collateral relief under Section 2255 is not warranted, because defendant failed to establish prejudice), cert. denied, 506 U.S. 915 (1992); *Harvey* v. *United States*, 850 F.2d 388, 394-395 (8th Cir. 1988) (same where district court violated Rule 11 by failing to advise defendants of nature of charges against them).

undisputed that petitioner knew of his right to appeal. Cases such as this present no risk of an inaccurate determination of prejudice and do not require any, much less "excessive," litigation of the issue. Rather, the district court can and should simply dismiss such claims without a hearing.[12]

a. More generally, the risk of an inaccurate determination of prejudice is no greater here than in the many other settings in which courts inquire into prejudice. The well established principle that convictions should not be reversed in the absence of prejudice, whether on direct appeal or on collateral review, is premised on the view that court can reliably conduct that inquiry. See 28 U.S.C. 2111; Fed. R. Crim. P. 52(a); *Timmreck*, 441 U.S. at 783-784. As this Court has explained,

> [W]hen courts fashion rules whose violations mandate automatic reversals, they "retrea[t] from their responsibility, becoming instead impregnable citadels of technicality." * * * [I]t is the duty of a reviewing court * * * to ignore errors that are harmless * * *. The goal * * * is "to conserve judicial resources by enabling appellate courts to cleanse the judicial process of prejudicial error without becoming mired in harmless error."

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[12] In the present case, for example, the district court could properly have rejected petitioner's Rule 32 claim without a hearing, because it was undisputed in the pleadings that petitioner was aware of his right to appeal and therefore was not prejudiced by the district court's failure to advise him of that right. There was a need for a hearing, however, to resolve the factual dispute over the quite different question whether petitioner sought to exercise his right to appeal or instead decided not to appeal. See *supra*, pp. XX-XX.

United States v. *Hasting*, 461 U.S. 499, 509 (1983) (quoting R. Traynor, *The Riddle of Harmless Error* 14, 81 (1970)) (internal quotation marks omitted).

It is true, as petitioner notes (Br. 20, 21-22), that the question of prejudice in the present context will turn in some cases on an assessment of "the conflicting recollections of the defendant and the former attorney," and that the former attorney may have a motive to testify that he gave proper advice to his client. But that is true in other settings as well. For example, an assessment of the testimony of the defendant and his original counsel is often highly relevant when a defendant who pleaded guilty claims that he was prejudiced by a district court's failure to advise the defendant of his rights as required by Rule 11. See, *e.g.*, *Harvey*, 850 F.2d at 396-397 (rejecting defendants' claim that district court's failure to advise them of nature of charges was prejudicial, relying in part on counsels' testimony that they discussed charges with defendants). The same is true in cases in which a defendant alleges that counsel was ineffective for failing to file a notice of appeal. See, *e.g.*, *Castellanos* v. *United States*, 26 F.3d 717, 720 (7th Cir. 1994) (where defendant alleged that counsel was ineffective for failing to file notice of appeal, court remands case for factual determination as to whether defendant requested that appeal be taken). Thus, contrary to petitioner's suggestion, it is neither inappropriate nor infeasible for courts to inquire on collateral review into whether a district court's failure to advise a defendant of the right to appeal was prejudicial.

b. Petitioner's invocation of judicial efficiency fares no better. First, no decision of this Court supports the idea that federal courts may properly overturn final judgments on collateral review if they conclude that it

would be more convenient to do that than to conduct the inquiry, mandated by *Timmreck* and *Hill*, into whether the error at issue was prejudicial to the defendant. Second, even if sufficiently strong considerations of efficiency could justify the setting aside of final judgments on collateral review, petitioner has failed to make a case for that conclusion here.

There is no suggestion that district courts routinely overlook Rule 32's requirements. In the unusual case in which there is "[a]n unwitting judicial slip," *Reed*, 512 U.S. at 349 (opinion of Ginsburg, J.), a hearing will not be necessary to determine prejudice unless prejudice is alleged and factually disputed. Under a rule of per se collateral relief, in contrast, the district courts would be required to grant collateral relief in every case (subject to certain ill-defined exceptions, see *infra*, pp. XX-XX), by vacating defendants' convictions and reimposing sentence. See, *e.g.*, *Thompson* v. *United States*, 111 F.3d 109, 111 (11th Cir. 1997) (remedying violation of Rule 32 by vacating sentence and remanding for reimposition of sentence, so that defendant could then appeal). In addition, the courts of appeals would be required to consider and decide the merits of the claims that defendants raised in their ensuing appeals. Resolution of those appeals would entail a substantial expenditure of judicial resources.[13] That expenditure is

[13] That is true even where, as here, any reinstated appeal would be limited to sentencing issues. Rule 32 does not require that defendants who plead guilty be advised of the right to take a direct appeal challenging the validity of the adjudication of guilt. Rather, it requires only that defendants who plead guilty be advised of the right to appeal the *sentence*. Fed. R. Crim. P. 32(a)(2). Any remedy for a violation of that requirement should be tailored to the violation, and thus should be limited to reinstatement of an appeal

unjustified, moreover, where the defendant knew that he had the right to appeal and elected not to do so. Such a defendant should not be given the windfall of a second chance to appeal simply because the district court did not advise him of a right of which he was independently aware.

In sum, the choice is between petitioner's rule, which (subject to certain exceptions, see *infra*, pp. XX-XX), treats violations of Rule 32 as invariably requiring vacation of final judgments, resentencing, and reinstatement of defendants' appeals, and our rule, which requires such relief only if prejudice is shown and requires a hearing to determine prejudice only if prejudice is disputed. Even if the choice between those rules could properly be made on the basis of considerations of judicial efficiency, petitioner cannot carry the burden of showing that his approach would better serve efficiency interests.

d. Petitioner's claim that a rule of per se collateral relief would conserve judicial resources is further undermined by his concession (Br. 11) that even those courts of appeals that purport to apply such a rule make exceptions where, in their view, the violation of Rule 32 was clearly not prejudicial. For example, they deny relief where the defendant takes a direct appeal notwithstanding the lack of advice, see, *e.g.*, *United States* v. *Chang*, 142 F.3d 1251, 1251-1252 (11th Cir. 1998); *United States* v. *Bygrave*, 97 F.3d 708, 709-710 (2d Cir. 1996); where the defendant validly waived his right to appeal in a plea agreement, see, *e.g.*, *Valente* v. *United States*, 111 F.3d 290, 292-293 (2d Cir. 1997); *Everard* v. *United States*, 102 F.3d 763, 765-766 (6th Cir. 1996),

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challenging the sentence. Sentencing appeals under the Guidelines, however, can be very resource-intensive.

cert. denied, 519 U.S. 1139 (1997); *United States* v. *DeSantiago-Martinez*, 38 F.3d 394, 395-396 (9th Cir. 1994), cert. denied, 513 U.S. 1128 (1995); and where the defendant was advised of his right to appeal on the record at a proceeding sufficiently close in time to sentencing, see, *e.g.*, *Hoskins* v. *United States*, 462 F.2d 271, 273-275 (3d Cir. 1972) (collateral relief denied, despite district court's failure to advise defendant of right to appeal at time of sentencing, because district court had advised defendant of right to appeal approximately seven weeks earlier, at close of trial).

If petitioner's submission were accepted, its apparent ease of application would likely dissolve in disputes over whether further exceptions should be recognized. Courts would likely have to decide whether collateral relief would be required, without regard to prejudice, if the district court failed to advise the defendant at the time of sentencing that he had a right to appeal, but (1) the defendant was advised on the record of his rights by his defense attorney, the prosecutor, or the courtroom clerk; (2) the defendant made statements on the record indicating his awareness of his right to appeal; or (3) the defendant was advised of his right to appeal on the record at some other proceeding removed in time from sentencing, compare, *e.g.*, *Hoskins*, 462 F.2d at 273-275 (denying collateral relief where defendant was advised of right to appeal at close of trial, seven weeks before sentencing), with, *e.g.*, *Farries* v. *United States*, 439 F.2d 781, 781-782 (3d Cir. 1971) (granting collateral relief where defendant was advised of right to appeal at first sentencing proceeding, which was three-and-a-half months before second sentencing proceeding).

It would hardly conserve judicial resources to adopt a rule that would require courts to struggle with such issues. In addition, it makes little sense to announce a

rule of per se collateral relief without regard to prejudice, but to carve out exceptions to that rule when the lack of prejudice is clear. Far more sensible is the approach dictated by *Timmreck*: a defendant seeking collateral relief on the basis of a violation of a procedural rule is not entitled to relief unless he can establish that the violation "resulted in 'a complete miscarriage of justice' or in a proceeding 'inconsistent with the rudimentary demands of fair procedure.'" 441 U.S. at 784 (quoting *Hill*, 368 U.S. at 428).

C. *Rodriquez* v. *United States* Does Not Dispense With A Showing Of Prejudice

Amicus NACDL cites this Court's decision in *Rodriquez* v. *United States*, 395 U.S. 327 (1969), as suggesting "a narrow scope for harmless error analysis." Br. 18. *Rodriquez*, however, does not support a rule of per se collateral relief. The question presented in *Rodriquez* was whether a defendant who was deprived of his right to appeal by his counsel's failure to file a timely notice of appeal was required to "show some likelihood of success on appeal" in order to obtain collateral relief. 395 U.S. at 330. The Court held that no such showing is required. *Ibid.*

The government also argued in *Rodriquez*, however, that the case should be remanded for further proceedings to determine the reason for counsel's failure to file a notice of appeal. 395 U.S. at 331. The Court concluded that no remand was required, noting that "[t]his issue was not present in this case when certiorari was granted and we do not think it is present now." *Ibid.* Observing that it "d[id] not see how further delay and further prolonged proceedings would serve the cause of justice," the Court concluded that it was "'just under the circumstances,' 28 U.S.C. § 2106, for [the Court] to

dispose of [Rodriquez's] arguments finally at this stage," because the record before the Court sufficed to establish that Rodriquez had been effectively denied his right to appeal. *Id.* at 331. Specifically, the Court pointed out that Rodriquez's counsel had indicated to the district court immediately after sentencing that Rodriquez wanted to proceed *in forma pauperis*, and "unless an appeal was contemplated, there would be no reason to make such a motion." *Id.* at 332. Because the same motion "should have put the trial judge on notice that [Rodriquez] would be unrepresented in the future," the Court held, the trial judge was obliged to advise Rodriquez of his right to appeal. *Id.* at 331-332 & n.3 (noting that rule then in effect required notice of appellate rights only if defendant was unrepresented). Under the circumstances, the Court concluded, the trial judge's failure to advise Rodriquez of his right to appeal "effectively deprived [Rodriquez] of his right to appeal." *Id.* at 332.

In *Rodriquez*, the Court rejected what it viewed as a belated and unnecessary request that the record be expanded, and held that the record before it adequately supported the conclusion that Rodriquez had been deprived of his right to appeal. That case-specific holding provides no support for the quite different claim here—*i.e.*, that the failure to advise a defendant of the right to appeal justifies collateral relief without need for any further inquiry into whether the failure was prejudicial. Indeed, the Court in *Rodriquez* concluded that no hearing was necessary precisely because it believed it apparent that the defendant in that case wanted to appeal and was effectively denied his right to appeal, because he was no longer represented by counsel and was not advised by the court of his appellate rights. *Rodriquez* is thus entirely consistent

with this Court's subsequent holding in *Timmreck* that a showing of prejudice is a requirement for collateral relief.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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