BYU Law Review

Volume 1988 | Issue 1 Article 9

3-1-1988

# The Federal Prisoner Collateral Attack: Requiescat in Pace

Josephine R. Potuto

# The Federal Prisoner Collateral Attack: *Requiescat in Pace*

*Josephine R. Potuto**

## I. INTRODUCTION

A motion to attack a prison sentence made under section 2255[1] is a federal prisoner's substitute for a petition for a writ of habeas corpus.[2] A predominant use of the motion (however inapt the motion to attack sentence sounds) is as a collateral attack on a criminal conviction. At one time such a collateral attack provided not only a fairly expansive review of trial questions already litigated and decided, but also a broad consideration of questions that could and should have been decided[3] during the original criminal proceedings.[4]

Today, however, the relative availability of collateral attacks of convictions generally depends on whether the collaterally raised claim raised actually was litigated (in other words, raised and appealed) in the original criminal trial proceedings.[5] Because of procedural obstacles and a restricted scope of review, it

---

* Professor of Law, University of Nebraska College of Law.

1. 28 U.S.C. § 2255 (1982). Although a federal prisoner has available the same challenges to his conviction as does a state prisoner, he makes these challenges by a section 2255 motion to attack sentence rather than by a petition for a writ of habeas corpus. The section 2255 motion practice is employed to challenge the underlying *conviction* and not merely the sentence (although it also functions as a mechanism to reduce a sentence). United States v. Hayman, 342 U.S. 205, 222 (1952). Additional provisions generally applicable to the section 2255 motion practice are the Rules Governing Section 2255 Proceedings for the United State District Courts, 28 U.S.C. app. § 2255 R. 1-12 (1982); 28 U.S.C. §§ 2241-2253; and FED. R. APP. P. 22, 23.

2. 28 U.S.C. § 2254 (1982). At common law there were several types of writs of habeas corpus. *See* L. YACKLE, POSTCONVICTION REMEDIES (1981). What commonly is meant today by the writ of habeas corpus is that of habeas corpus ad subjiciendum, the Great Writ. *See Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). The common law scope of this writ was limited to an examination of the jurisdiction of the sentencing court. *See* 9 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 108-25 (3d ed. 1944); Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 263 (1965).

3. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963); Brown v. Allen, 344 U.S. 443 (1953). *See generally* L. YACKLE, *supra* note 2.

4. *See, e.g.*, Kaufman v. United States, 394 U.S. 217 (1969).

5. *See, e.g.*, Engle v. Isaac, 456 U.S. 107 (1982).

is only in an atypical case that a prisoner may be heard on collateral attack in the face of a procedural default (a claim either not raised or not appealed) during the original criminal proceedings.

Consequently, however counterintuitive it seems, it typically is easier for a state prisoner to reraise a claim actually litigated than to obtain collateral review of a claim either not litigated or not appealed.[6] By contrast, a federal prisoner virtually has no opportunity for collateral review if his claim was actually litigated. Thus, for the federal prisoner the area of procedural default is the only game in town—even though in most circumstances the only game in town is no game at all.

How and why a typical prisoner in federal custody finds himself in such a sorry position regarding the possibility of a successful collateral attack is the focus of this article. This article concludes as follows: (1) a federal prisoner's inability to succeed on an actually litigated claim is compelled by the nature of a legal system with appellate review; and (2) if treatment of procedural defaults is too harsh, for federal prisoners it is the law of direct review, not collateral attack, that should be changed.

## II. Actually Litigated Claims

Consider first what happens on collateral attack of an actually litigated claim. The opportunity to mount a successful collateral challenge after resolution of such a claim is markedly different for state as compared to federal prisoners.

A state prisoner is entitled to an exercise of independent judgment by a habeas court on the correctness of a conclusion of law rendered during an actually litigated state proceeding.[7] For a fact question actually litigated, a state prisoner must rebut a statutory presumption that the state findings of fact are correct.[8] This presumption attaches to explicit and implicit factfindings,[9] whether made by a trial judge or an appellate court,[10] and controls disposition of a prisoner's claim unless he can show (or, in a

---

6. *Compare* Vasquez v. Hillery, 474 U.S. 254 (1986) *and* Rose v. Mitchell, 443 U.S. 545 (1979) *with* Murray v. Carrier, 477 U.S. 478 (1986) *and* Wainwright v. Sykes, 433 U.S. 72 (1977).

7. *See, e.g.*, Miller v. Fenton, 474 U.S. 104 (1985); Cuyler v. Sullivan, 446 U.S. 335 (1980).

8. 28 U.S.C. § 2254(d) (1982).

9. LaVallee v. Delle Rose, 410 U.S. 690 (1973).

10. Cabana v. Bullock, 474 U.S. 376 (1986).

very unusual case, it is clear from the record or the State admits)[11] that somehow the factfinding was defective.

No equivalent statutory language prescribes for federal prisoners the standard of review to be employed on a section 2255 motion by the court examining either a conclusion of law or a finding of fact arising out of an actually litigated case. Nor has the United States Supreme Court directly addressed this question. In *United States v. Frady*,[12] however, the Court *did* address the standard of review on a section 2255 motion in the context of a procedural default in the original criminal proceedings. Frady had been convicted of first degree murder at a trial in which the jury was instructed that it could presume malice if the defendant offered no explanation for the use of a weapon to kill. Frady's procedural default was his failure to challenge the constitutionality of that instruction. The *Frady* Court concluded that collateral review of claims involving procedural defaults by federal prisoners requires both: (1) a more stringent standard of review than that which is employed on direct appeal of a conviction; and (2) a review standard at least as burdensome as that applicable to state prisoners petitioning for a writ of habeas corpus.[13]

### A. *Applicability of* Frady

For cases involving procedural defaults, *Frady* dictates two consequences: 1) no better treatment on collateral attack for federal as compared to state prisoners; and 2) treatment for both federal and state prisoners that is more harsh than that which would have been available on direct appeal. These *Frady* restrictions could easily also apply to actually litigated federal prisoner claims.[14]

To begin with, actually litigated claims are those that a federal prisoner has not merely had the opportunity to litigate and appeal, (as in the *Frady* procedural default situation) but those

---

11. 28 U.S.C. § 2254(d)(8) (1982).

12. 456 U.S. 152 (1982).

13. *Id.* at 162-69. The Court recognized that for federal prisoners, on a section 2255 review, a standard of review broader than that afforded on direct appeal would not offend comity concerns implicated by federalism. *Id.* at 166. The Court nonetheless found that the much stronger policy interest—finality of judgments—weighed in favor of the *Frady* test. *Id.*

14. Indeed, the Court's language is more general than the procedural default context out of which *Frady* arises: "On balance, we see no basis for affording federal prisoners a preferred status when they seek postconviction relief." *Id.* at 166.

that he actually litigated. Compared to the *Frady* litigant whose claim was neither heard nor reviewed by an appellate court, a federal prisoner on an actually litigated claim at least has had an adjudication on the merits at a hearing in which he was afforded both due process and protection of his sixth amendment right to a fair trial.

In addition, the Supreme Court of the United States consistently has described the opportunity to be heard on a section 2255 motion as being no broader than that available to a state prisoner petitioning for a writ of habeas corpus.[15] Where, as here, a federal prisoner has had a federal factfinder on his litigated claim while his state counterpart has not, divergence from this consistent pattern of section 2255 treatment is unlikely.

Moreover, no matter what the argument for divergent treatment, there is presently no evidence to suggest that the Court is inclined to read section 2255 more expansively than similar—or even dissimilar—language is read under statutes dealing with a petition for a writ of habeas corpus by state prisoners. If any-

---

15. *See Frady*, 456 U.S. at 152; Stone v. Powell, 428 U.S. 465, 481 n.16 (1976).

One reason for equivalence in restrictive interpretation (despite different statutory language) lies in the history of section 2255. Its adoption was prompted by a congressional desire to foster administrative convenience by equalizing federal district courts' workloads. United States v. Hayman, 342 U.S. 205 (1952). A petition for a writ of habeas corpus, because filed in the district court where the prison (custodian) is located, put an undue burden on those federal judges whose districts contained a prison. Under section 2255 that burden is shared equally by all federal district judges. *Id.* at 217 n.25 (statement of Chief Justice Stone). To answer challenges that a section 2255 motion procedure was an unconstitutional suspension of the writ of habeas corpus (*see* U.S. CONST. art. 1, § 9, cl.2.), the Court construed motion practice to permit any challenge that otherwise could be raised by a federal prisoner on a petition for a writ of habeas corpus. *Hayman*, 342 U.S. at 217 n.25.

A requirement that section 2255 motion practice may be no narrower than habeas practice need not mean that it also should be no broader. Such an approach is a reasonable statutory interpretation, however, as there is no indication that Congress intended section 2255 to expand federal prisoner collateral challenge opportunities. In any event, the appropriate measure for federal prisoners is a comparison between federal prisoner habeas and section 2255 availability, not state prisoner habeas and section 2255. Even under *Hayman* a federal prisoner may be afforded less collateral attack opportunity on section 2255 than a state prisoner on habeas *so long as* there is equivalence between section 2255 and federal prisoner habeas. In other words, there is nothing in *Hayman* foreclosing different treatment on collateral attack of federal and state prisoners. Nonetheless, since federal prisoner habeas now is a thing of the past, the Court likely will continue to compare state prisoner habeas with section 2255.

The only likely difference in the treatment of habeas corpus opportunities for state prisoners and section 2255 would be where the section 2255 motion language *specifically and explicitly* gave a federal prisoner more opportunity for review. The present section 2255 language does not.

thing, given its disaffection with the writ's availability as a collateral attack on a conviction,[16] the Court is more likely to continue to limit both writ and motion availability.

Thus the absence of explicit statutory mandate requiring a section 2255 court to presume as correct factfindings made during federal criminal proceedings does not mean that on a section 2255 motion there is no equivalent presumption of correctness. It merely means that for federal prisoners the presumption of correctness does not arise by statute. Instead, the *Frady* rationale likely supplies the presumption.[17] Even without *Frady*, routine operation of principles of comity and precedent require at least as much and in most instances more.

### *B. Standard of Review Under Section 2255 of Actually Litigated Claims*

To evaluate the problem faced by a federal prisoner challenging on a section 2255 motion the resolution of an actually litigated claim, consider a concrete example. Assume that a robbery of a federal bank is witnessed by three tellers and a customer at the bank. All four witnesses describe the robber as a short, bearded, black man. The police arrest John Smith, a short, bearded black man, and require him to participate in a lineup.[18] He is identified by the witnesses and is indicted and tried for the crime.

Prior to his trial, Smith moves to suppress the out-of-court identifications on the ground that the composition of the lineup was unduly suggestive.[19] At a pretrial hearing he testifies that all other participants in the lineup were tall, white, and clean-shaven. The prosecution witnesses testify similarly. The judge nonetheless permits introduction at trial of the identification evidence. His reason: No undue suggestibility resulting from the

---

16. There is also similar disaffection among at least some segments of both the voting public and its elected officials.

17. This is true unless the federal appellate standard for review of trial level factfinding provides even a more limited review than does the presumption of correctness. If the federal appellate standard (clearly erroneous) is narrower, then the *Frady* rationale would have that standard apply.

18. The lineup is preindictment so Smith has no lawyer present to represent him. *See* Kirby v. Illinois, 406 U.S. 682 (1972); United States v. Wade, 388 U.S. 218 (1967).

19. This would violate his due process right to a fair trial. Manson v. Brathwaite, 432 U.S. 98 (1977); Stovall v. Denno, 388 U.S. 293 (1967).

conduct and composition of the lineup. The judge's decision is one of law, not fact[20] (and unquestionably wrong at that).

Smith is convicted, appeals, and his conviction is affirmed on appeal.[21] The affirmance results either because the reviewing circuit panel concludes that the district judge was correct in finding the identifications admissible or because the circuit panel concludes that admission into evidence of the identifications, although error, was harmless beyond a reasonable doubt.[22] In either case, the circuit panel decision obviously is a decision of law concerning the merits of Smith's case.

Smith now moves under section 2255 to challenge his conviction on the basis that the out-of-court identifications improperly were admitted at his trial. Because federal habeas corpus and section 2255 motion practice operate in a world removed from strict application of general estoppel law,[23] Smith may obtain review even though he litigated and failed to prevail on this claim[24] at a hearing in which he was afforded due process. But the fact that Smith technically may try again assuredly does not predict his success: for him to prevail he now must persuade a section 2255 court to disregard a conclusion of law already rendered on his claim.

If *Frady* were all that operated on a federal prisoner's ability to be heard on an actually litigated claim, then Smith might expect to be treated on collateral attack in the same manner

---

20. Suggestibility in identification procedures is a question of law; witness credibility is one of fact. Sumner v. Mata, 455 U.S. 591 (1982).

21. I will discuss later what happens if he either does not raise this claim on appeal or does not appeal at all. *See infra* text accompanying notes 66-98.

22. *See* Jackson v. Virginia, 443 U.S. 307 (1979); Chapman v. California, 386 U.S. 18 (1967); Lacy v. Gardino, 791 F.2d 980 (1st Cir.), *cert. denied*, 107 S. Ct. 284 (1986). To date the burden is on the government to show that the error was harmless beyond a reasonable doubt. *Chapman*, 386 U.S. at 18. The Court recently considered a case in which it was asked to clarify whether the burden remains on the government by the time of collateral attack of the conviction. Greer v. Miller, 107 S. Ct. 3102 (1987).

23. Fay v. Noia, 372 U.S. 391 (1963); Bator, *Finality in Criminal Law and Federal Habeas Corpus For State Prisoners*, 76 HARV. L. REV. 441, 473 & n.75 (1963). This dramatic opportunity for collateral attack generally is unavailable to other litigants even when a claim is grounded in a federal constitutional right and even when the claim was litigated in state rather than federal court. *See* Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985); Kremer v. Chemical Constr. Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980).

24. While I am discussing here the section 2255 movant who litigated and appealed his claim, the section 2255 litigant who did not litigate his claim (failing through procedural default) is also outside the normal operation of estoppel principles. By definition the claimant never properly raised his claim in a forum and at a time when he could and should have raised it.

that a state prisoner is treated.[25] Since a state prisoner is entitled to an independent judgment on collateral attack regarding a conclusion of law reached during his original trial and appeal, Smith, as a federal prisoner, might expect a similar exercise of independent judgment regarding his claim. However, such a result for a federal prisoner would be nothing short of extraordinary.

In exercising independent judgment to find the lineup suggestive and the introduction of the identifications at trial not harmless error, a section 2255 district judge would have to disregard a conclusion of law of the court of appeals for the circuit in which he sits. Whether on section 2255[26] motion or otherwise, no authority exists to permit a trial judge to disregard a decision rendered by an appellate court whose decisions have binding precedential effect on him.[27] This law is incontrovertibly clear even without the additional fillip that on section 2255 review the circuit court decision to be ignored was reached in the very case and on the very facts and claim before the district judge on section 2255 motion.

Thus on section 2255 review of the pretrial decision to admit the identifications, a decision affirmed on direct appeal, a section 2255 district judge is obliged to follow the original judgment.[28] Smith's obvious next step is to appeal the section 2255 district judge's decision.

Smith's section 2255 appeal will be heard by a circuit panel comprised of judges coordinate with, not inferior to, the circuit

---

25. Remember, however, that *Frady* simply dictates that federal prisoners not be given a preferred position on collateral attack. *See supra* text accompanying note 15. That need not mean that federal prisoners may not be treated worse. *See supra* note 15.

26. *See, e.g.*, United States v. Rowan, 663 F.2d 1034 (11th Cir. 1981); Ordonez v. United States, 588 F.2d 448 (5th Cir.), *cert. denied*, 441 U.S. 963 (1979); United States v. Natell, 553 F.2d 5 (2d Cir.), *cert. denied*, 434 U.S. 819 (1977); Egger v. United States, 509 F.2d 745 (9th Cir.), *cert. denied*, 423 U.S. 842 (1975); Jackson v. United States, 495 F.2d 349 (8th Cir. 1974).

27. *E.g.*, United States v. Burke, 781 F.2d 1234, 1239 n.2 (7th Cir. 1985) (district court to follow law of circuit even if district court believes law "profoundly wrong"); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 867 (3d Cir. 1984) (district court must follow majority decision of circuit panel, not dissent); Hasbrouck v. Texaco, Inc., 663 F.2d 930, 933 (9th Cir. 1981), *cert. denied*, 459 U.S. 828 (1982) (district court to follow law of circuit no matter how "egregiously in error" it perceives the law and despite split in circuits on issue).

28. I assume here, of course, the typical situation in which neither new evidence or new law intervene nor is raised a claim of ineffective assistance of counsel, any of which would move the case to the area of procedural default. *See infra* text accompanying notes 45-65.

panel that heard his direct appeal. This section 2255 panel may decide Smith's case free from any constraint derived from an inferior position in the appellate hierarchy. Yet the section 2255 panel also will follow the decision reached and affirmed during the original criminal proceedings.[29]

Since estoppel principles do not operate, after *Frady* the best explanation as to why the section 2255 panel will affirm is the obligation of a court to follow precedent set down by a coordinate.[30] The tradition surrounding the obligation to follow coordinate court precedent is that, although not bound in a formal sense,[31] a court nonetheless treats such authority as controlling unless intervening decisions from a higher court[32] or markedly different circumstances cast serious doubt on the continuing efficacy of the earlier coordinate court decision.[33] The routine and

---

29. *But see* Davis v. United States, 417 U.S. 333 (1974). In *Davis*, a prisoner whose claim was rejected on direct appeal was permitted to reraise it on collateral attack in a situation where an intervening decision of another panel in the same circuit had accepted the same claim made on appeal of a conviction in a different case. The circumstance of two panels in a circuit disagreeing as to a matter of law no longer should occur. *See infra* note 35. In any event, it is questionable whether the *Davis* rule survives today. *See* Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986).

30. Principles governing law of the case also may provide guidance. *See* Lacy v. Gardino, 791 F.2d 980, 985 (1st Cir.), *cert. denied*, 107 S. Ct. 284 (1986) (discussing whether doctrine of law of case or deference to coordinate court precedent should apply on habeas). Precedent governs the applicability of an earlier decision to a new case involving a new fact situation; law of the case governs the applicability of an earlier ruling in a case to later stages of the same case. As with the tradition governing the effect of coordinate court precedent on a reviewing court, law of the case doctrine also is technically discretionary but generally binding in operation. Law of the case doctrine, however, does permit exception to its binding application where an earlier holding is clearly erroneous or manifestly unjust. *Lacy*, 791 F.2d at 985; Arizona v. California, 460 U.S. 605 (1983); Loumar v. Smith, 698 F.2d 759 (5th Cir. 1983).

31. To be binding in a formal sense the precedent must come from a court in the same system that is appellate to the one considering the precedent.

32. For a federal district court decision, this obviously would be a panel decision of the court of appeals of the circuit in which the district court sits. For a panel decision, this first would be the circuit court sitting *en banc* and secondly would be the Supreme Court of the United States. The rule requiring panels to follow coordinate panel precedent is clear and binding in every circuit. The only way around it is for the coordinate panel to cheat and thus find a way to distinguish the case. But since on section 2255 the facts and law are precisely the same, it is virtually inconceivable that a panel would find a way to distinguish.

33. *E.g.*, Rabidue v. Osceola Ref. Co., 805 F.2d 611 (6th Cir. 1986), *cert denied*, 107 S. Ct. 1983 (1987); Ketchum v. Gulf Oil Corp., 798 F.2d 159, 162 (5th Cir. 1986); Lacy v. Gardino, 791 F.2d 980 (1st Cir.), *cert. denied*, 107 S. Ct. 28 (1986); Poulis v. State Farm Fire & Casualty Co., 747 F.2d 863, 867 (3d Cir. 1984); LeVick v. Skaggs Cos., 701 F.2d 777 (9th Cir. 1983); *see* Farley v. Farley, 481 F.2d 1009, 1012 (3d Cir. 1973); *cf.* Feller v. Brock, 802 F.2d 722 (4th Cir. 1986); Treadaway v. Academy of Motion Picture Arts & Sciences, 783 F.2d 1418 (9th Cir. 1986).

preferred solution governing how to handle such precedent, therefore, is for court A to follow the precedential lead of its coordinate, court B, and leave to a higher court the option of overruling.[34]

If the standard of review on section 2255 collateral attack is equivalent to that of the law governing treatment of coordinate court precedent, then a section 2255 circuit panel reviewing a litigated and appealed claim will follow the original trial decision as affirmed unless it clearly is no longer good law. The operative rule in every circuit governing section 2255 panel review of a coordinate panel is just that: the decision on direct appeal of the conviction always is followed unless intervening circumstances or law make the decision questionable.[35] Therefore, to obtain review of an alleged erroneous actually litigated decision,[36] *en banc* circuit review is the only available mechanism.[37]

At the level of *en banc* review, Smith finally has brought his claim to a court bound neither by appellate hierarchy nor comity to follow the circuit panel decision rendered on direct appeal of his conviction.[38] Yet even here he has two and perhaps three problems not faced by his state prisoner counterpart.

First, his failure to seek *en banc* review after circuit panel affirmance of his conviction by itself may be sufficient to pre-

---

34. Assuming the losing litigant appeals, an appellate court will have the opportunity to make this decision because a court sitting on appeal of the court A decision necessarily must review the court B precedent that dictated the result. If warranted, the appellate court will overrule the court B precedent and reverse the court A decision.

35. *E.g.*, Tracey v. United States, 739 F.2d 679 (1st Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); Furman v. United States, 720 F.2d 263, 266 (2d Cir. 1983) (even a summary affirmance with no written opinion binds circuit panel on section 2255 appeal); United States v. Rowan, 663 F.2d 1034 (11th Cir. 1981); United States v. Shabazz, 657 F.2d 189 (8th Cir. 1981); United States v. Palumbo, 608 F.2d 529 (3d Cir. 1979), *cert. denied*, 446 U.S. 922 (1980); United States v. Nolan, 571 F.2d 528 (10th Cir. 1978); *see* Kramer v. United States. 788 F.2d 1229 (7th Cir. 1986). The only hint of a possibility of review is a Fifth Circuit holding that says a section 2255 reviewing panel "need not" rather than "cannot" review a conviction appealed from the criminal trial. United States v. Burroughs, 650 F.2d 595, 598 (5th Cir. Unit B July), *cert. denied*, 454 U.S. 1037 (1981). This is a weak reed to grasp: in *Burroughs* the section 2255 panel used that language in declining to review.

36. If the case falls within an exception such as new law then the case becomes one of procedural default and is governed by that law. *See infra* text accompanying notes 45-65.

37. As to whether the Supreme Court might review if the circuit court *en banc* either affirmed or refused to consider the claim, see *infra* text accompanying notes 109-10.

38. If he did seek review of his motion and was denied, or worse, the *en banc* circuit agreed with the panel decision, then comity concerns again intervene to impede his ability to achieve *en banc* review on section 2255.

clude *en banc* review on section 2255.[39] Second, a direct appeal to the section 2255 panel was his as of right while *en banc* review both is discretionary with the circuit court and infrequently granted. Third, he already has some votes against him on his *en banc* appeal as the judges who on direct appeal affirmed his conviction also are members of the *en banc* court.[40]

By contrast to a state prisoner, then, Smith stands much less chance of having his claim heard and consequently much less chance of success on the merits. At a minimum it will take him much more time even to reach a court that may grant him substantive review.

Now consider what happens to Smith on collateral attack if the original pretrial decision that is affirmed on appeal was one of fact, not law. In the earlier example both Smith and the prosecution witnesses agreed that Smith was the only black man who appeared in the lineup. There thus was no factual dispute as to the composition of the lineup and no resolution of a conflict through a factfinding by the judge.

Assume now that, although Smith testifies as he did the first time, the prosecution witnesses do not. According to them, all the participants in the lineup were short, bearded, black men. Once again the judge permits the introduction at trial of the out-of-court identifications. His reason this time is based on comparative witness credibility: the judge believes the prosecution witnesses were truthful in their description of the lineup and that Smith was not. Once again Smith is convicted and once again his conviction is affirmed on appeal.

Were he a state prisoner, Smith could succeed on collateral attack if he could rebut a presumption of correctness running to the litigated findings of fact. If, therefore, the *Frady* rationale were all that mattered, then Smith might expect treatment equivalent to that afforded state prisoners.[41] Despite *Frady*, however, a federal prisoner such as Smith is in no better and once again probably is in far worse shape.

In affirming Smith's conviction on direct appeal, the circuit panel does not exercise independent judgment to conclude as a

---

39. As to the strategy involved in waiting until section 2255 to seek *en banc* review, see *infra* text accompanying notes 99-109.

40. The problem that some of the judges reviewing *en banc* have already considered the claim and resolved it against him is the same problem that Smith would face were the *en banc* review to occur after direct appeal of the conviction.

41. *See supra* note 15.

factual matter that the police and eyewitnesses were credible and Smith was not. Instead, it concludes as a matter of law either that the trial judge was not clearly wrong in reaching his factual conclusion or that any error was harmless. Thus, although in this second Smith example the trial level finding was one of fact, the circuit court decision to affirm was not. That being true, a section 2255 district judge who disagrees with a coordinate judge's factfinding on credibility in a litigated and appealed case necessarily also must disagree with a conclusion of law reached by a court whose decisions he is bound to follow.[42] Similarly true, a section 2255 circuit panel again will be reviewing a coordinate panel conclusion of law.

It follows, therefore, that any claim originally litigated and appealed by a federal prisoner, whether involving a question of law *or* fact, logically must result in a district judge denial of a section 2255 motion.[43] Otherwise a person convicted in a federal trial whose conviction was affirmed may begin again at a federal district level in the circuit of trial and reraise his claim before a court inferior to, and in the same jurisdiction as, the court that heard and rejected his claim on direct appeal. It also follows that the district judge's denial will be affirmed on section 2255 appeal and, absent extraordinary circumstances, a request for hearing *en banc* will be refused. Thus for federal prisoners, section 2255 review typically is available only for claims never litigated or litigated but not appealed. This is the area of procedural default.[44]

---

42. Assume, however, that even after direct appeal the conclusion as to comparative witness credibility remains a factfinding task on a section 2255 challenge. Smith still is in no better shape on collateral attack.

The circuit court on appeal could have affirmed Smith's conviction only by concluding either that the factfinding was not clearly wrong or that in any case the error was harmless beyond a reasonable doubt. To grant Smith's motion the district judge once again would have to disagree with its circuit court. The district court's opportunity to disagree might be even more restricted because, if *Frady* controls, then the standard of review on collateral attack must be more stringent than on direct appeal of a conviction. In that case the district court would have to disagree with its circuit court despite application of a review standard more stringent than that applied by the circuit court on direct appeal.

43. *See* Miller v. Fenton, 474 U.S. 104, 112-13 (1985); Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).

44. With procedural default read to cover newly discovered evidence, intervening changes in the law, and ineffective assistance of counsel as well as cases in which the claim could have been litigated and appealed. *See* Davis v. United States, 417 U.S. 333 (1974); Kramer v. United States. 788 F.2d 1229 (7th Cir. 1986); Tracey v. United States, 739 F.2d 679 (1st Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); United States v. Walsh, 733 F.2d 31 (6th Cir. 1984); Furman v. United States, 720 F.2d 263 (2d Cir. 1983); United States v. Rowan, 663 F.2d 1034 (11th Cir. 1981); United States v. Donn, 661 F.2d

## III. Law of Procedural Default

A procedural default may occur at pretrial, trial, or on appeal. The law for pretrial and trial defaults is and has been clear for quite some time. The law for appellate defaults, while clearer today than in the recent past, still leaves at least one question unresolved.[45]

### *A. Trial and Pretrial Defaults*

To obtain review of a federal constitutional claim not raised or not raised properly at trial or pretrial a prisoner must show, by a standard of review more stringent than plain error, *both* cause *and* prejudice for the default.[46]

Prejudice does not mean that a procedural default occurred, that there was legal cause for the default, and that, because of it, a potential claim was never heard. Prejudice requires a showing that actual litigation of the question likely would have resulted in a different result at trial or on appeal.[47] In most instances, then, a showing of prejudice requires a showing that, had the claim been made in a timely manner, the prisoner would have been acquitted.[48]

Showing cause for a default is no easier than showing resultant prejudice. The Supreme Court so far has recognized only two claims for cause sufficient to permit collateral review despite a default: (1) ineffective assistance of counsel, and (2) an objective factor "external to the defense" that produced the default.

---

820 (9th Cir. 1981); United States v. Shabazz, 657 F.2d 189 (8th Cir. 1981); United States v. Burroughs, 650 F.2d 595 (5th Cir. 1981), *cert. denied*, 454 U.S. 1037 (1981); United States v. Palumbo, 608 F.2d 529 (3d Cir. 1979), *cert. denied*, 446 U.S. 922 (1980); United States v. Nolan, 571 F.2d 528 (10th Cir. 1978).

45. See *infra* text accompanying notes 66-98 for a discussion of the treatment of appellate procedural defaults.

46. Engle v. Isaac, 456 U.S. 107, 134-35 (1982); United States v. Frady, 456 U.S. 152 (1982). Plain error is the standard of review on direct appeal for any error not raised by the defendant on appeal. Fed. R. Crim. P. 52(b).

47. *Engle*, 456 U.S. at 107.

48. For procedural defaults leading to the introduction of suppressible evidence, the showing would be that, absent the default, the evidence would have been suppressed. Kimmelman v. Morrison, 477 U.S. 365 (1986). In most of these cases, suppression of the evidence will lead to an acquittal at trial, a dismissal of the prosecution, or a plea to a lesser offense than the one originally charged.

### 1. *Ineffective assistance*

The clearest claim for cause sufficient on collateral attack to excuse a procedural default in the original criminal proceedings is ineffective assistance of counsel. The sixth amendment guarantees the right to counsel to defendants formally charged with a crime.[49] Because that right means nothing if provision of incompetent counsel satisfies it, a procedural default is properly chargeable to a defendant only if he was provided competent counsel.[50]

A prisoner claiming ineffective assistance of counsel must rebut a strong presumption that his lawyer performed adequately by showing that: (1) his lawyer fell below the range of competence demanded of lawyers in criminal cases; and (2) there is a reasonable probability that, *but for* this deficient lawyer performance, the defendant would have been found not guilty.[51]

### 2. *Factor external to defense*

The second category for cause is some objective factor "external to the defense" that impeded a lawyer's ability to raise a claim in a timely manner.[52] This category excludes virtually all challenges except those based on new evidence or on novelty of the constitutional claim not raised sooner.

A new evidence claim,[53] such as bribery of a juror or a recanting complaining witness, requires a showing that the evidence was not discoverable earlier through due diligence and probably[54] would lead to acquittal if introduced on retrial.[55] A

---

49. Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963). The sixth amendment right to assistance necessarily encompasses the right to effective assistance. Strickland v. Washington, 466 U.S. 668 (1984). The right to effective assistance attaches at the first formal adversary proceeding against a defendant. *E.g.*, Maine v. Moulton, 474 U.S. 159 (1985); Brewer v. Williams, 430 U.S. 387 (1977). It continues through the first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985).

50. *Strickland*, 466 U.S. at 668.

51. *Id.* For a fourth amendment claim the showing would be that the evidence would have been suppressed. *Kimmelman*, 477 U.S. at 365. Since a showing of a different trial result is precisely the showing necessary to show cause for a procedural default, it follows that whenever ineffective assistance of counsel constitutes cause, prejudice is automatically shown.

52. Murray v. Carrier, 477 U.S. 478 (1986).

53. For a federal prisoner, the appropriate vehicle to raise a new evidence claim is a section 2255 motion *unless* the claim is made within two years of final judgment. In that case, he should move for a new trial. FED. R. CRIM. P. 33.

54. Where the new evidence claim is one of witness perjury, the test is that a retrial

typical prisoner rarely has a tenable new evidence claim, and his success rate on such a claim is just as rare.[56]

With an argument based on newness of intervening constitutional law as cause for default, a prisoner's chance to succeed is even worse.[57] As a general rule, lawyers are expected to raise not only the law as it is, but also the law as it can reasonably be anticipated.[58] A prisoner may succeed in claiming an unanticipated change in law as cause, therefore, only by showing that the law was so abrupt a change and so different from precedent as properly to be characterized as new. In the unlikely event he succeeds the prisoner still must explain why the new rule retroactively should be applied to him.

The law now is quite clear[59] that a new constitutional rule applies retroactively to all non-final judgments.[60] The question on collateral attack is in what circumstances it will apply retroactively to judgments that were final at the time the new rule was announced.[61]

---

possibly (rather than probably) would lead to an acquittal. *E.g.*, United States v. Wright, 625 F.2d 1017 (1st Cir. 1980).

55. *See, e.g.*, United States v. Kelly, 790 F.2d 130 (D.C. Cir. 1986); United States v. Adams, 759 F.2d 1099 (3d Cir.), *cert. denied*, 474 U.S. 971 (1985); United States v. Offutt, 736 F.2d 1199 (8th Cir. 1984); United States v. Oliver, 683 F.2d 224 (7th Cir. 1982). *See generally* Berry v. State, 10 Ga. 511 (1851) (original articulation of new evidence test). The fact that a prisoner must show a likelihood of acquittal on retrial is not an additional problem on section 2255 since, as discussed *supra* text accompanying notes 47-48, this in any case is the showing necessary to demonstrate prejudice resulting from a procedural default.

56. As an illustration of the difficulty, consider the much-publicized case of Gary Dotson. Dotson had been convicted of rape primarily on the basis of testimony by the victim and complaining witness, Cathleen Webb. Several years later Webb recanted. Shipp, *Debate Surrounds Rape Decision*, N.Y. Times, Apr. 13, 1985, at 1, col. 1. Despite her recantation, Dotson was denied a retrial. N.Y. Times, Aug. 20, 1985, at A19, col. 1. The Governor of Illinois refused to pardon Dotson but did commute his sentence to time served. Shipp, *Sentence Commuted in Illinois Rape Case*, N.Y. Times, May 13, 1985, at A1, col. 2.

57. Nor will the incidence of tenable claims be any more frequent than that of new evidence claims.

58. *E.g.*, Herndon v. Georgia, 295 U.S. 441 (1935). Showing novelty of a claim as cause for not raising it thus requires showing something more than merely the fact that controlling precedent came subsequent to procedural default. Murray v. Carrier, 477 U.S. 478 (1986); Smith v. Murray, 477 U.S. 527 (1986).

59. For a long time the Court distinguished, even for non-final judgments, between constitutional rules that went to the accuracy and integrity of the trial factfinding and those that did not. *See* Linkletter v. Walker, 381 U.S. 618 (1965). It also distinguished between rules representing "clear breaks" with the past and those that did not. Griffith v. Kentucky, 107 S. Ct. 708 (1987); United States v. Johnson, 457 U.S. 537 (1982).

60. *Griffith*, 107 S. Ct. at 708; Shea v. Louisiana, 470 U.S. 51 (1985).

61. A final judgment is one where all appeals have been taken and the merits de-

At best, given the cause and prejudice test, a prisoner who asserts novelty as cause will achieve retroactive application only if he can show that the new constitutional rule, if applied to his case, would likely require acquittal. However, it is more probable that a simple showing[62] of a likelihood of acquittal would not be sufficient. Instead, he probably must show that because the new rule was not applied at his original trial there is real doubt as to whether he in fact committed the crime (in other words, he must show that he might be innocent).[63] Not only can very few defendants make a tenable claim of innocence, but it is difficult to

---

cided (or the time to appeal has passed) and either a writ of certiorari has been denied by the United States Supreme Court or the time to petition for the writ has passed. *Johnson*, 457 U.S. at 542 n.8. By the time of collateral attack, a judgment must be final or collateral attack is the wrong procedural mechanism for bringing the claim. *See* United States v. Dukes, 727 F.2d 34 (2d Cir. 1984).

62. The reason for doubt as to the level of showing is that so far the Court has failed to discuss the relationship between retroactivity of new constitutional rules and novelty as cause for first claiming the protection of a new rule on collateral attack. *See* Allen v. Hardy, 478 U.S. 255 (1986); Solem v. Stumes, 465 U.S. 638 (1984). The closest the Court has come is in Reed v. Ross, 468 U.S. 1, 20 (1984) (Powell, J., concurring). Defendant Ross was tried and convicted of first-degree murder. His defense was self defense. He had the burden at trial of showing lack of malice in the killing. Such an allocation was held unconstitutional several years after Ross's conviction was final. Ross's claim, first raised on collateral attack, was the unconstitutionality of allocating that burden to him, not factual innocence. His excuse for his default was the novelty of the constitutional rule requiring burden allocation to the State. A five-person majority of the Court granted Ross a new trial even though he could not show factual innocence.

*Ross* is not dispositive of what a prisoner must show when raising new law as cause, because neither prejudice nor retroactivity were at issue in *Ross*; the State both conceded prejudice and failed to argue retroactivity.

There is very good reason to believe that had these issues been argued, Ross's conviction would have been affirmed. Justice Powell, who made the fifth vote in the *Ross* majority, concurred specially to note that, although he believed retroactive application was inappropriate, he joined the majority because retroactivity was not argued. *Id.*; *see* Greer v. Miller, 107 S. Ct. 3102, 3110-11 (1987) (Stevens, J., concurring). Unless Justices Scalia or Kennedy are more likely to permit retroactivity than Justice Powell was, were the same facts in *Ross* to arise in a case today, and the retroactivity issue argued, the holding in *Ross* which found cause and prejudice on a showing of the likelihood of acquittal, would not command five votes on the present Court. The Court would likely require that factual innocence be shown.

63. In the context of discussions of retroactivity to final judgments, the Court has found retroactivity appropriate only if application of the new constitutional rule has a "fundamental impact on the integrity of factfinding," Allen v. Hardy, 106 S. Ct. 2878, 2881 (1986), and the prime purpose of the new rule "goes to the heart of the truthfinding function." Solem v. Stumes, 465 U.S. 638, 645 (1984). Other considerations are the extent of reliance by law enforcement and the impact of retroactive effect on the administration of justice. *Id.* at 645-46, 650. The law enforcement reliance interest may no longer be a factor. *See* Griffith v. Kentucky, 107 S. Ct. 708 (1987); Shea v. Louisiana, 470 U.S. 51 (1985). Impact on the administration of justice surely continues to be a factor.

believe that there are many constitutional rules yet to be discovered by the Court that so fundamentally can affect a factfinding.

### 3. *Neither cause nor prejudice*

A prisoner who cannot show *both* cause *and* prejudice for his procedural default almost certainly will not be heard on collateral attack. As with claims of intervening new law, it is likely that his showing must be that there is a reasonable probability of innocence.[64] A showing that he would have been acquitted is not enough.[65]

## *B. Procedural default on appeal*

A prisoner faced with a procedural default that occurred during his original criminal proceedings at trial or pretrial thus must show, by more than plain error, legally cognizable cause for his default and either a real likelihood of a not guilty verdict on retrial, or worse,[66] a real likelihood of factual innocence. Consider now what happens on collateral attack to a prisoner who litigated his claim at trial or pretrial but failed to appeal, or appealed but failed to raise or properly preserve the claim he seeks collaterally to have reviewed.

To make sense out of the current treatment of appellate defaults it is necessary to return to the law of appellate default immediately antecedent to the announcement of the cause and prejudice test. In *Fay v. Noia*,[67] a case involving an outright failure to appeal a conviction, the Court developed the deliberate bypass test for evaluating whether a default barred collateral review. This test, applicable equally to pretrial, trial, and appellate defaults, barred collateral review only if a prisoner knew of and cooperated in a tactical decision to default.[68]

---

64. Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986).

65. That being so, it is clear that there are *no* exceptions to the required showing of cause and prejudice, at least for fourth amendment and *Miranda* claims. *See* Miranda v. Arizona, 384 U.S. 436 (1966). With both these claims the evidence challenged as illegally obtained is highly probative of guilt. A prisoner who cannot show cause (legally cognizable excuse) for failing to move to suppress, cannot, in the face of the challenged evidence, show factual innocence.

66. From the prisoner's point of view, of course.

67. 372 U.S. 391 (1963).

68. The test was stated:

> If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts . . . then it is open to the federal court on

The deliberate bypass test soon fell by the wayside, at least where trial and pretrial defaults were concerned. But since the cases describing the test of cause and prejudice all were cases involving trial defaults,[69] a definitional fog rolled in regarding the operative test for appellate procedural defaults.

The obvious question, and one whose answer provoked a division of opinion among the circuits, was whether deliberate bypass remained the operative test for appellate defaults or whether even for these the cause and prejudice test governed. Within this question lurked a second: whether the test to be applied depended on the type of appellate default.

For failures to appeal, the precise situation in *Noia*, almost all of the circuits continued to apply the deliberate bypass test both to habeas petitions[70] and section 2255 motions.[71] On the other hand, these courts almost uniformly applied a cause and prejudice test to cases in which a defendant appealed but failed to raise on appeal the particular issue raised on collateral attack.[72]

---

> habeas to deny him all relief. . . . At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner.

*Id.* at 439.

69. *E.g.*, Engle v. Isaac, 456 U.S. 107 (1982); Wainwright v. Sykes, 433 U.S. 72 (1977); Francis v. Henderson, 425 U.S. 536 (1976); Davis v. United States, 411 U.S. 233 (1973). *Sykes* was the first full articulation of what the cause and prejudice test means.

70. *E.g.*, Holcomb v. Murphy, 701 F.2d 1307 (10th Cir.), *cert. denied*, 463 U.S. 1211 (1983); Crick v. Smith, 650 F.2d 860 (6th Cir. 1981), *cert. denied*, 455 U.S. 922 (1982); Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977); Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977). *But cf.* United States *ex rel.* Caruso v. Zelinsky, 689 F.2d 435 (3d Cir. 1982); Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982).

71. Widgery v. United States, 796 F.2d 223, 224-25 (8th Cir. 1986); Bumgarner v. United States, 758 F.2d 1292 (8th Cir. 1985); Diggs v. United States, 740 F.2d 239, 243-45 (3d Cir. 1984); United States v. McDonald, 611 F.2d 1291 (9th Cir. 1980). *But see* Rizzo v. United States, 821 F.2d 1271 (7th Cir. 1987); Norris v. United States, 687 F.2d 899, 904 (7th Cir. 1982) (opinion described failure to appeal while facts involved failure to raise claim on appeal).

For nonconstitutional claims, on the other hand, failure to appeal always bars collateral attack unless the trial result amounts to a "complete miscarriage of justice." United States v. Timmreck, 441 U.S. 780, 783-84 (1979); *accord* United States v. Addonizio, 442 U.S. 178 (1979); Hodges v. United States, 368 U.S. 139 (1961); Sunal v. Large, 332 U.S. 174 (1947); Johnson v. United States, 805 F.2d 1284 (7th Cir. 1986); Kramer v. United States, 788 F.2d 1229 (7th Cir. 1986) (claim heard even though nonconstitutional); United States v. Manko, 772 F.2d 481 (8th Cir. 1985); United States v. Hanyard, 762 F.2d 1226 (5th Cir. 1985); *see* Tracey v. United States, 739 F.2d 679, 682 (1st Cir. 1984), *cert. denied*, 469 U.S. 1109 (1985); United States v. Walsh, 733 F.2d 31 (6th Cir. 1984).

72. *Compare* Leroy v. Marshall, 757 F.2d 94 (6th Cir.), *cert. denied*, 474 U.S. 831 (1985); Huffman v. Wainwright, 651 F.2d 347 (5th Cir. Unit B July 1981); Forman v. Smith, 633 F.2d 634 (2d Cir. 1980), *cert. denied*, 450 U.S. 1001 (1981) *with* Holcomb v.

Recently the fog at least partially has been lifted by the Supreme Court.[73] The Court now clearly has held that a failure properly to preserve a claim on appeal is a procedural default subject to the cause and prejudice test if treated as a default by the jurisdiction in which the trial was held.[74] Although the recent Court cases all deal with prisoners in state custody, under the *Frady* rationale (dictating no better treatment for federal as compared to state prisoners on collateral attack after procedural default) their application to federal prisoners seems clear.[75]

The Court therefore has answered one of the appellate default questions: it will hold a prisoner who failed to raise a litigated claim on direct appeal to as strict an application of the cause and prejudice test as it holds a prisoner whose default occurred at trial or pretrial.[76] The cause and prejudice test thus

---

Murphy 701 F.2d 1307 (10th Cir.), *cert. denied*, 463 U.S. 1211 (1983). *See* Rinehart v. Brewer, 561 F.2d 126 (8th Cir. 1977).

Some circuit courts declined to resolve the question. *See* Ford v. Strickland, 696 F.2d 804 (11th Cir.), *cert. denied*, 469 U.S. 865 (1983) (both tests).

73. Murray v. Carrier, 106 S. Ct. 2639 (1986); Smith v. Murray, 106 S. Ct. 2661 (1986); Reed v. Ross, 468 U.S. 1 (1984). In *Ross*, the first time Ross raised his claim was on collateral attack. He did not raise it at pretrial, trial, or on appeal. *Ross*, 468 U.S. at 7. *Ross* nonetheless is still an instance of appellate procedural default because in North Carolina it is not necessary at trial to object to jury instructions in order to preserve review on appeal. *Id.* at 7 n.4.

74. *Carrier*, 106 S. Ct. at 2639 (1986). If, despite a failure to raise a claim properly on appeal of a conviction, an appellate court actually considers the claim, then there is no procedural default for purposes of a collateral attack in federal court. *Cf.* Boykin v. Alabama, 395 U.S. 238, 241-42 (1969). Procedural defaults refer only to those matters that actually were not considered, not to those matters that an appellate court was free not to consider but nonetheless did. Similarly, there is no procedural default if a claim properly was raised by a defendant but not discussed or considered explicitly by the appellate court. Procedural defaults refer only to those matters that not only were not considered but that need not have been considered because they were raised improperly. The appellate procedural default problem, then, arises exclusively with regard to claims improperly appealed, or not appealed at all, that are not reviewed by an appellate court.

75. Under *Frady* the holdings seem clearly applicable to section 2255 federal prisoners because state and federal prisoners are to be treated similarly in their opportunity to obtain collateral relief in the face of a procedural default. The only possible question regarding applicability arises because *Frady* involved a trial procedural default.

76. In *Carrier*, 106 S. Ct. at 2639 (1986), defendant Carrier was convicted in a Virginia court of rape and abduction. Trial counsel in timely fashion twice attempted and was refused pretrial discovery of statements made by the victim. In the notice of appeal after conviction he included as error the failure to provide pretrial discovery, but he did not assign this failure as error in his petition for appeal. Since in Virginia only errors so assigned are considered on appeal, *id.* at 2642-43, Carrier's conviction was affirmed without any consideration of possible error regarding pretrial discovery.

Carrier then filed a petition for habeas corpus in which he alleged a due process violation in the failure to provide discovery. The petition was dismissed because of his appellate procedural default.

bars review even though the claim not appealed was raised and fully litigated at trial.[77] This is the case even though: (1) there is a fully developed trial record for collateral review; (2) the appellate court may have had specific notice of the potential claim;[78] (3) the default occurs outside the presence and almost certainly without the knowledge of the prisoner;[79] (4) the claim is fully briefed and presented to the appellate court (although not by the prisoner);[80] and (5) the prisoner seeking collateral review sits under a death sentence allegedly the direct result of the trial error not appealed.[81]

Still unanswered by the Court[82] is what test to apply to appellate defaults involving no appeal.[83] Until the Court speaks,

---

*Smith*, 106 S. Ct. at 2661, was a Virginia capital murder case that resulted in a death sentence for Smith. A court-appointed psychiatrist had examined Smith during pretrial at defense request. At the sentencing phase of the bifurcated trial the psychiatrist testified over defense objection to information learned from Smith as to other deviant sexual behavior. (The deviant sexual behavior in the instant case was that the victim had been raped at knifepoint. *Id.* at 2663.) On appeal Smith's counsel did not assign as error the admission of the psychiatrist's testimony.

Later, Smith sought habeas review in the state court arguing that his fifth amendment privilege against self-incrimination was infringed by the admission of the psychiatric testimony. He was denied review because of failure to raise the claim on direct appeal.

He then petitioned for a writ of habeas corpus on the same ground in federal court. As cause for his default he argued that his fifth amendment claim became available to him only subsequent to his appeal through an unanticipated change in federal constitutional law. (Two intervening Supreme Court decisions found the fifth amendment privilege applicable to psychiatric examination. Ake v. Oklahoma, 470 U.S. 68 (1984); Estelle v. Smith, 451 U.S. 454 (1981).) The Supreme Court of the United States held that Smith showed no cause for his appellate default since he should have anticipated the change in law possibly favorable to him.

77. *Carrier*, 106 S. Ct. at 2639; *Smith*, 106 S. Ct. at 2661.

78. *See Carrier*, 106 S. Ct. at 2639 (claim raised in notice of appeal although not assigned as error in brief on appeal).

79. Carrier's lawyer did not consult with him about the decision not to raise the discovery claim on appeal. *Id.*

80. *Smith*, 106 S. Ct. at 2661, 2688. An *amicus* brief filed in Smith's appeal by the Post Conviction Assistance Project of the University of Virginia Law School raised and briefed the claim that Smith himself first raised on collateral attack.

81. *Smith*, 106 S. Ct. at 2661.

82. The Court twice has specifically reserved the question of the applicable test to apply to a failure to appeal. *See Carrier*, 106 S. Ct. at 2639, 2648; Wainwright v. Sykes, 433 U.S. 72, 88 n.12 (1977).

83. I assume here that the time to take an appeal long since has passed. This assumption is necessary because otherwise Smith would face an exhaustion requirement precluding his section 2255 motion. Exhaustion requires resort to procedures available at the time a section 2255 motion is made—not to procedural mechanisms once but no longer available. *See* Fay v. Noia, 372 U.S. 391 (1963). Unlike state prisoners, *see* 28 U.S.C. § 2254 (b), (c) (1982), there is no statutory exhaustion requirement governing

the circuit courts undoubtedly will continue as before. In all but one circuit[84] that means application of the deliberate bypass test.

Return once more to prisoner Smith and his challenge to the introduction at trial of the out-of-court identifications. Assume that Smith's section 2255 motion will be heard by the judge who presided at Smith's trial or by a coordinate judge on the district court for that district.[85] In both earlier examples Smith appealed his conviction and the question on collateral attack was the opportunity for review of an actually litigated claim. What now is posited is a situation in which he seeks section 2255 review when, although he raised and litigated his claim at pretrial, he never appealed his conviction.

Smith's first showing must be that his failure to appeal was not a deliberate bypass.[86] To do this, Smith almost certainly must persuade the section 2255 judge that he did not participate in the decision not to appeal.[87]

Assume that the section 2255 judge concludes that there was no deliberate bypass. So far Smith merely has succeeded in persuading the judge that it is permissible to take a look at the substantive claim. Smith's next task is to persuade the section 2255 district judge not to follow the original pretrial decision on the merits.

The section 2255 district judge now is faced not with an appealed decision of law that he must follow, but with a coordinate

---

federal prisoners on section 2255 motion. The courts have held, however, that absent extraordinary circumstances a section 2255 claim will not be heard until a federal prisoner has exhausted. *E.g.*, Womack v. United States, 395 F.2d 630 (D.C. Cir. 1968); *see* United States v. Taylor, 648 F.2d 565 (9th Cir.), *cert. denied*, 454 U.S. 866 (1981). The requirement is discretionary. United States v. Dukes, 727 F.2d 34 (2d Cir. 1984); Sosa v. United States, 550 F.2d 244, 246 n.1 (5th Cir. 1977).

84. Norris v. United States, 687 F.2d 899 (7th Cir. 1982); *see also* Widgery v. United States, 796 F.2d 223, 228 n.2 (8th Cir. 1986) (Heaney, J., dissenting).

85. *See* Rules Governing Section 2255 Proceedings for the United States District Courts, 28 U.S.C. app. § 2255 R.9 (1982). It also could be heard by the federal magistrate. *See id.*; United States v. Raddatz, 447 U.S. 667 (1980). This is the worst case possible for Smith since the magistrate obviously will be bound to follow rulings of the trial district judge, his superior in the appellate chain of command.

86. The burden as to the deliberate bypass showing seems to belong to the prisoner. *See, e.g.*, Nash v. United States, 342 F.2d 366 (5th Cir. 1965); cases cited *supra* note 84. *But see, e.g.*, Sawicki v. Johnson, 475 F.2d 183 (6th Cir. 1973).

87. In the event he fails with this showing, he still might have a chance to succeed if he can persuade the judge that under *Noia* his knowledge and acquiescence should not be treated as a tactical decision to bypass. *Noia* lends some credence to this argument. *See* Fay v. Noia, 372 U.S. 391, 439-40 (1963).

judge's decision to admit the identifications. Absent any gloss peculiar to section 2255,[88] the district judge is subject to the same comity restraints discussed above regarding a section 2255 panel's review of a coordinate panel's decision. Thus, one would expect that mandatory comity similarly would apply[89] and Smith's motion routinely would be denied.

A canvass of what section 2255 district judges actually do on collateral attack of a litigated but unappealed claim[90] certainly supports this conclusion. A section 2255 judge will decline to follow a conclusion of law only if intervening law compels a different result (and this returns a prisoner to the area of procedural default). He uniformly will follow any factfinding rendered after evidentiary hearing[91] and, except for claims involving the voluntary nature of a plea, the judge also uniformly will follow a coordinate judge's decision rendered without a hearing.[92]

Even among plea cases, moreover, in some courts there is no possibility of review,[93] while among others at least a presumption of correctness runs to the original decision.[94] Of those courts that do look, only two plea cases were found where a district judge on section 2255 actually refused to follow the original decision (as contrasted with stating a theoretical opportunity to re-

---

88. The section 2255 district judge opinions generally do not describe the reviewing obligation as one of mandatory comity. In one sense mandatory comity is antithetical to the availability of section 2255 collateral attack (although it easily might be argued that substantive review will come from the section 2255 circuit panel). Regardless what a section 2255 judge describes as his reviewing opportunity, the fact is that he almost uniformly follows the decision rendered at trial or pretrial in the original criminal proceedings.

89. Treadaway v. Academy of Motion Picture Arts & Sciences, 783 F.2d 1418 (9th Cir. 1986); Farley v. Farley, 481 F.2d 1009 (3d Cir. 1973); County of Oakland v. City of Detroit, 610 F. Supp. 364, 367 (E.D. Mich. 1984), *appeal docketed*, 762 F.2d 1010 (6th Cir. 1985); Fricker v. Town of Foster, 596 F. Supp. 1353 (D.R.I. 1984); United States v. Anaya, 509 F. Supp. 289, 293 (S.D. Fla. 1980) (*en banc*), *aff'd sub nom.*, United States v. Zayas-Morales, 685 F.2d 1272 (11th Cir. 1982); Buna v. Pacific Far East Line, Inc., 441 F. Supp. 1360, 1365 (N.D. Cal. 1977).

90. I do not claim to have canvassed the world of cases involving such section 2255 collateral attacks, but I have made some effort.

91. Excluded are those cases in which a factfinding was not followed due to intervening new law or new evidence claims or related claims unavailable for consideration at the original hearing.

92. I reach this conclusion because I found neither case nor language suggesting the inclination to review.

93. *E.g.*, Rogers v. Maggio, 714 F.2d 35, 38 n.5 (5th Cir. 1983).

94. *See* Key v. United States, 806 F.2d 133, 136 (7th Cir. 1986) (presumption of "verity"); Smith v. United States, 339 F.2d 519, 526 (8th Cir. 1964) (presumption of "regularity"); *cf.* Blackledge v. Allison, 431 U.S. 63 (1977) (habeas).

fuse to follow). Each of these cases involved a clear indication of severe judicial overreaching.[95]

Since John Smith had a pretrial hearing on his claim, it is safe to assume that his section 2255 motion will be denied by the district judge. Examine next what happens on his section 2255 appeal. This time, of course, there is no circuit panel decision demanding comity because Smith did not appeal his conviction. The circuit panel on section 2255 thus is free to review the district judge's pretrial denial of Smith's claim on the merits[96] as well as the section 2255 judge's finding of deliberate bypass.

In reviewing the conclusion that there was no bypass the section 2255 panel clearly will operate as it would in appellate review of any trial court decision whether on section 2255 or otherwise. In other words, the panel will exercise independent judgment regarding conclusions of law and reverse a factfinding only if clearly erroneous.[97]

With regard to the substantive merits of Smith's claim as decided by the district judge in the original criminal proceedings, it is less clear what the standard of review will be. The *Frady* Court held that, for procedural defaults, review on collateral attack must be more restricted than review on direct appeal. This means that in default cases the applicable standard is cause and prejudice rather than plain error. For actually litigated claims, *Frady's* applicability regarding restrictive review is uncertain: neither the Supreme Court nor the circuit courts have considered the question.

Although the circuit courts are silent as to the *Frady* implications for appellate review on section 2255 of actually litigated claims, at least one circuit court may have applied a more stringent standard of review.[98] Without explicitly describing what it was doing, this court seems to have adhered to a clearly errone-

---

95. *E.g.*, United States v. Tateo, 377 U.S. 463 (1964) (plea); Smith v. United States, 223 F.2d 750 (5th Cir. 1955) (plea).

96. With regard to the substantive claim, the focus has to be back on the original trial decision because the section 2255 district judge decided simply to follow that decision without reconsidering the merits on section 2255.

97. *See generally* Stern, *Review of Findings of Administrators, Judges and Juries: A Comparative Analysis*, 58 HARV. L. REV. 70 (1944).

98. *See* United States v. Dukes, 727 F.2d 34, 41 (2d Cir. 1984) (trial court legal conclusion that counsel performed competently under the sixth amendment reversed only if "clearly erroneous"). The problem in reading the opinion, however, is that it is not clear whether the section 2255 court understood it was reviewing a legal conclusion and not a finding of fact.

ous standard even for a conclusion of law. Until the uncertainty is resolved, the most that can be said regarding the standard of review applied on section 2255 appeal is that: (1) the standard obviously is no less restrictive than direct review, (2) under *Frady* perhaps should be more restrictive, and (3) some courts might require a clearly erroneous standard for reversal of a conclusion of law as well as of a finding of fact.

## IV. Federal Prisoner Strategy

Whether convicted in federal or state court, a defendant with any tenable claim of reversible error likely will, and certainly should, appeal his conviction regardless of the effect of a direct appeal on any later collateral challenge he may bring. Only a badly advised or very foolish federal defendant[99] would choose not to appeal in order to avoid creating an actually litigated claim that would foreclose any possibility of successful collateral attack.

Without doubt a federal prisoner's chance to succeed always is better on direct appeal. On collateral attack, not only does a potentially more stringent standard of review decrease his likelihood of success, but a prisoner encounters more difficulty in making his claim because he loses the right to the assistance of counsel[100] to which he is entitled on direct appeal.[101] A federal prisoner, moreover, does not even achieve the benefit of a different pool of judges available to review his claim since he faces review by judges on the same circuit court that would have heard his direct appeal.

All this aside, by waiting for collateral attack he inevitably suffers more time served on his sentence. Had he appealed from his conviction he may not have been serving his sentence during the appeal. He surely will be serving the sentence at the time he moves for section 2255 review, he likely will be serving the sentence pending resolution by the district judge,[102] and, even if he

---

99. *See* United States v. Renfrew, 679 F.2d 730 (8th Cir. 1982) (dismissal of direct appeal against advice of attorney).

100. A petition for a writ of habeas corpus—or its section 2255 equivalent for federal prisoners—is a civil proceeding. *Ex parte* Tom Tong, 108 U.S. 556, 559 (1883); *Ex parte* Bollman, 8 U.S. (4 Cranch) 75 (1807). *But see* United States v. Frady, 456 U.S. 152, 178-87 (1982) (Brennan, J., dissenting). Thus, the sixth amendment right to counsel does not attach.

101. Such entitlement is for the first appeal as of right. Evitts v. Lucey, 469 U.S. 387 (1985). An appeal to the circuit court of appeals is an appeal of right.

102. Because on collateral challenge his conviction is a final judgment. His chance of

succeeds on the merits of his challenge at the district level, he also may be serving the sentence pending appeal.[103]

Yet, assuming that a federal prisoner's collateral attack would offer more hope to prevail than would a direct appeal, he still should make the direct appeal. Once he chooses not to appeal in order to preserve the possibility of successful collateral attack, by definition he loses all possibility of success: this tactical choice almost certainly will constitute a deliberate bypass and clearly is not cause for the cause and prejudice test.

A well-counseled federal prisoner, therefore, may be expected to appeal his conviction even though, if affirmed on appeal, a subsequent section 2255 motion[104] automatically will be denied.[105] Short of a continuing belief in miracles[106]—and a lot of free time[107]—there seems to be no good reason for a federal prisoner to proceed to bring a section 2255 challenge of his actually litigated claim.[108] The only marginally sensible argument for section 2255 challenge is where a prisoner is prepared to suffer the section 2255 district judge denial and panel affirmance because he seeks ultimately to reach the Supreme Court or possibly the circuit *en banc* on review of the decision reached on collateral attack. Even here it seems that a better approach is to proceed from direct appeal of the conviction to a request for *en*

---

release on bail or its equivalent pending resolution of his collateral challenge is small. *See, e.g.*, Aronson v. May, 85 S. Ct. 3, 4 (1964); Layne v. Gunter, 559 F.2d 850, 851 n.2 (1st Cir. 1977), *cert. denied*, 434 U.S. 1038 (1978); Calley v. Callaway, 496 F.2d 701, 702 (5th Cir. 1974).

103. Hilton v. Braunskill, 107 S. Ct. 2113, 2120 (1987).

104. Referring to the actually litigated claim reraised on federal habeas, not a claim of new law or new evidence or other claims unavailable at the time of the original trial and appeal.

105. If not dismissed outright.

106. *See* Larsen, *A Prisoner Looks At Writ-Writing*, 56 CALIF. L. REV. 343 (1968); Zeigler & Hermann, *The Invisible Litigant: An Inside View of Pro Se Actions in the Federal Courts*, 47 N.Y.U. L. REV. 157 (1972).

107. *See generally*, Potuto, *The Right of Prisoner Access: Does* Bounds *Have Bounds?*, 53 IND. L.J. 207 (1978); Potuto, *An Operational Plan for Realistic Prison Employment*, 1980 WIS. L. REV. 291.

108. Why, then, would a prisoner nonetheless bring a section 2255 motion on an actually litigated claim? A prisoner proceeding pro se may not know that he stands no chance on the section 2255 petition and, in any event, has a lot of time on his hands and probably nothing but time to lose. In addition, the federal prisoner may be hoping not that the federal court on habeas will grant his petition but that after an affirmance by the circuit of the district's court dismissal he can obtain review by the Supreme Court of the United States (or *en banc* circuit court review).

*banc* review[109] and/or then to petition the United States Supreme Court for a writ of certiorari.

### *A.* En Banc *Review*

There is only one conceivable argument for believing that *en banc* review of an actually litigated claim is more likely on a section 2255 motion than it would have been on direct appeal. It assumes that judges pay closer attention to claims they review as members of an appellate panel charged directly with a mandatory obligation to review than they do to requests for *en banc* review made to them as simply three members of an entire court. A section 2255 challenge possibly will involve different circuit judges on section 2255 appeal than were on the panel hearing the direct appeal. Assuming that different judges sit, there is a chance that as members of a section 2255 appellate panel they might look at the claim appealed more closely than they would have looked at a request for *en banc* review after direct appeal. If they do look more closely *and* they disagree with the first panel decision, they still would have to follow it. But then they should be receptive to *en banc* review on section 2255 when they might not have been to a similar request after direct appeal of the conviction.

### *B. Supreme Court Review*

A prisoner also may think he has a better chance to get to the United States Supreme Court on collateral attack than on direct appeal from his conviction. For a prisoner in state custody this might be a reasonable belief since a petition for a writ of habeas corpus not only provides a federal forum and consequent protection from possible state court bias, but it also functions to aid Supreme Court docket management.

The consequence to a state prisoner of a Supreme Court denial of a writ of *certiorari* on direct appeal, after all, is that a federal district judge will take a look at the claim on habeas. If rejected by that judge and on appeal, the Supreme Court might feel quite secure that there was no tenable claim to be made. If, on the other hand, the habeas petition is granted, again that decision may obviate any felt need by the Supreme Court to review

---

109. Although unlikely, such an *en banc* request after direct appeal of the conviction may be necessary to avoid a procedural default. If that is the case, then a federal prisoner is back to an appellate default problem.

the claim. Habeas review thus assures federal court involvement while permitting the Supreme Court to avoid hearing cases it otherwise might feel compelled to consider.

This docket-saving maneuver does not work nearly as well with a prisoner convicted in federal court. Even if the prisoner has a clear claim for relief,[110] neither a district judge on a section 2255 motion nor the circuit panel on appeal will respond; it also is unlikely that the circuit court *en banc* will handle the problem. By contrast to a state prisoner, if a federal prisoner's claim is to be reviewed, sooner or later the Supreme Court will have to do it.

I have not qualified the relative likelihood of Supreme Court review of an actually litigated claim on collateral challenge as opposed to direct appeal. However, if the Supreme Court today is more likely to review a federal prisoner's actually litigated claim on a section 2255 motion than on direct appeal, the reason is that the Court looks more closely at a claim when a prisoner never again will have a chance to raise it. If so, then bringing a section 2255 motion on an actually litigated claim will and should continue. If the Court is not more likely to hear a collateral challenge, but that is merely a perception unfounded in today's practice, then the motions will continue unabated until the perception changes.

## V. Harsh Treatment or Responsible Result?

If a procedural default occurs at trial or pretrial, a federal prisoner, like his state counterpart, must meet a cause and prejudice test that bars review in any but a very atypical case. Similarly, an appellate default involving failure to raise a particular claim means that a prisoner can succeed only in the unlikely event that he can show cause and prejudice. Finally, even with a failure to appeal outright, where a prisoner in most circuits still faces the easier test of deliberate bypass, some major caveats attach.

To begin with, there will be few cases in which there is an outright failure to appeal.[111] Thus, although a more relaxed

---

110. As an example of a compelling claim, consider John Smith and his challenge to the trial court's conclusion that there was no due process violation in a lineup composed of all white men except Smith, a black man.

111. *See, e.g.*, Widgery v. United States, 796 F.2d 223 (8th Cir. 1986) (failure to appeal second and third motions for new trial).

standard presently applies in these cases, that will matter to very few prisoners. Moreover, even among these few cases, a federal prisoner almost always will be on section 2255 appeal before he will have his substantive claim addressed. On this section 2255 appeal he then faces at least a clearly erroneous standard of review regarding factfindings and perhaps the same standard regarding conclusions of law. And for even that much opportunity to be available a federal prisoner is banking on the Supreme Court either continuing silent or ultimately speaking to uphold deliberate bypass as the test for defaults involving a failure to appeal. Should the Court eliminate the deliberate bypass test a prisoner who failed to appeal because he counted on satisfying this test on section 2255 may end up facing the cause and prejudice test, a test that in these circumstances he clearly cannot satisfy. The intervening change in the applicable test is unlikely to constitute novelty of a new constitutional rule that would excuse a failure to anticipate the change (in other words, that would excuse a failure to have appealed and thus prevented retroactive application of the cause and prejudice test).

By contrast to his negligible opportunity for success on section 2255 when faced with a procedural default, a federal prisoner is in even worse shape on collateral challenge if he litigated and appealed his claim during the original criminal trial proceedings. By losing during the original criminal proceedings he already has lost his only real hope of success on his claim. Collateral attack will not change a thing.

Thus for the typical federal prisoner seeking collaterally to challenge his conviction, his opportunity for successful collateral attack appears to be the prototypical impossible dream. Has the law of federal prisoner collateral attack finally arrived at (or, more accurately, returned to) the right result; or is the federal prisoner today subject to an unreasoning and unreasonable policy of harshness?

The federal prisoner collateral attack law is exactly as it should be. The law of federal habeas corpus, and by extension that of section 2255 motions, began as simply a mechanism to challenge the jurisdiction of the court ordering detention and as nothing more.[112] Its expansion to collateral attacks on the merits

---

112. *See, e.g.*, Stone v. Powell, 428 U.S. 465, 474-75 (1976); 9 W. HOLDSWORTH, A HISTORY OF THE ENGLISH LAW 108-25 (1972); Collings, *Habeas Corpus for Convicts—Constitutional Right or Legislative Grace?*, 40 CALIF. L. REV. 335, 337-38 (1952); Oaks, *Habeas Corpus in the States—1776-1865*, 32 U. CHI. L. REV. 243, 262 (1965).

provided an opportunity for federal courts to assure that state courts acted fairly in their treatment of federal rights.[113] Federal prisoner collateral attacks were carried along not through any similar distrust of federal court receptivity to constitutional criminal law principles, but essentially as a backward nod to comity interests. What better response to allegations of federal court intervention in, and second guessing of, state judicial action than a requirement of comparable second guessing of federal judicial action?

Certainly it is virtually impossible to argue that a federal prisoner on an actually litigated claim should be entitled to relitigate that claim in the same district and circuit of trial. Holding that prisoner to one go-round through the federal courts is entirely appropriate. The only remaining question is whether the cause and prejudice test is the appropriate test for deciding when a claim may be heard in the face of a procedural default—particularly when the default occurred on appeal.

The present state of procedural default law dramatically decreases the likelihood of retrial and emphasizes system regularity and efficiency. There is a great deal to be said for this result.

Finality of judgments, after all, is a legitimate concern in the operation of the legal system. Where federal court time and effort is employed considering arguments and claims that should have been made at the original criminal trial and appeal, that time and effort is deflected from consideration of claims brought by other litigants seeking their first day in court. Cause and prejudice law applied to trial defaults and to failure to raise a particular claim on appeal (and for that matter, failure to appeal at all if that is what the law ultimately requires) simply brings prisoner collateral attacks in line with the law everywhere outside criminal trials. Arguably there is no reason to provide that a defendant in a criminal case, particularly when tried in a federal court, should get two bites at the apple when other litigants raising federal constitutional claims do not.

There is no question that the cause and prejudice test, resting, as it does, on an assumption that lawyers act competently, heavily burdens the competently but poorly represented defendant by causing him to suffer the omissions and bad tactical choices of counsel. Yet here again this assumption is one routinely applied to all other litigants in all other cases.

---

113. And where necessary, to provide a federal factfinder when they were not.

When the procedural default rule is extended to appellate defaults, it is much more troubling. Not only is it rare for a jurisdiction to have a developed appellate bar, but good trial lawyers do not necessarily make good appellate lawyers. The possibility therefore exists for recurring situations of appellate defaults of a claim fully litigated at trial with a fully developed record. Claims involving appellate procedural defaults, because they permit review and correction on collateral attack without the burdensome necessity for retrial or rehearing, create nowhere near the systemic burden of trial and pretrial defaults. The consequent balancing thus easily might have reached a result restricting the cause and prejudice test to these latter defaults.

Where federal prisoners are concerned, the Court is right to require a cause and prejudice showing before substantive review on collateral attack of a particular claim not appealed[114] (with the caveat that a genuine question as to guilt always should be sufficient to meet the test).[115] The Court would also be right to extend the rule to outright failures to appeal. For federal prisoners, it makes little sense to describe and adhere to one view of appellate default on direct appeal simply to permit back-door review of such a foreclosed claim through a section 2255 motion.

If broader discretion to hear claims involving appellate defaults of federal prisoners is wanted, then it can be achieved simply by expanding the operative rule for when direct review may be obtained. If this is done, then a claim neither argued nor considered on direct appeal may be entertained on section 2255 without regard to cause and prejudice because it will be a claim

---

114. Cases involving prisoners in state custody provide a different problem, the answer to which is troublesome. So long as claims involving appellate defaults are refused review by a state appellate court, whether on direct appeal or on postconviction application for relief, then either a federal court on habeas reviews these claims or it restricts itself to what may be a harsh state appellate default rule. (Supreme Court jurisdiction on direct review clearly bars consideration of claims involving procedural defaults. *See* Fay v. Noia, 372 U.S. 391 (1963).) Because it is the State that undertakes a criminal prosecution and because of the nature and severity of the punishment, both direct and collateral, upon conviction, it would be preferable for less harsh treatment of appellate defaults in criminal cases by the jurisdiction handling the original trial and appeal. Less harsh treatment of defaults is not an approach mandated by the Constitution of the United States.

115. As described *supra* at text accompanying notes 49-51, when the problem is incompetence of counsel, the possibility of a not guilty verdict is an insufficient showing. The prisoner also must show that his lawyer's representation fell below a standard of reasonableness. Otherwise, the prisoner had competent, although poor, representation and cannot show cause for the default even though he can show resultant prejudice.

that the direct appeal rules would not bar for failure to bring sooner. Whatever the operative approach regarding consideration of appellate defaults by federal prisoners, it should be consistent with the rule regarding availability of direct review. It is absurd within the federal system to reopen—on no additional showing—the same gates on collateral attack that were closed to a federal prisoner on direct review.