04-1475-cr

To Be Argued By:
WILLIAM J. NARDINI

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1475-cr

JEFFREY P. BOUYEA
Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA
Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

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BRIEF AND APPENDIX FOR THE UNITED STATES OF AMERICA

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STATEMENT OF JURISDICTION

The district court (Alfred V. Covello, J.) had subject matter jurisdiction under 18 U.S.C. § 3231 and 28 U.S.C. § 2255. The district court's ruling, denying the petitioner's motion for relief under § 2255, was entered on May 12, 2003. A-15. The petitioner timely sought and obtained an extension of time to file a notice of appeal. A-15, A-69. On August 18, 2003, the district court issued a certificate of appealability pursuant to 28 U.S.C. § 2253(c)(1)(B). A71. On February 17, 2004, defense counsel moved for an extension of time to file a notice of appeal, based on lack of notice that the certificate had been granted, and for permission to proceed in forma pauperis. A-73. On March 10, 2004, the district court granted this motion. A-15, A-76. On that same date, the district court clerk docketed the petitioner's notice of appeal. A-15. This notice of appeal is therefore timely pursuant to Fed. R. App. P. 4(a). This Court has appellate jurisdiction pursuant to 28 U.S.C. §§ 1291 and 2253.

STATEMENT OF ISSUE PRESENTED FOR REVIEW

Did the district court err in holding that trial counsel was not constitutionally ineffective for failing to object to the court's jury instruction that the reasonable-doubt standard is "designed to protect the innocent and not the guilty," when the case law of this Court at the time of trial provided that such an instruction was not erroneous; when this Court held only one month after trial that such an instruction, though inadvisable, was not error, "plain or otherwise"; and when only several months later did this Court hold for the first time that it was indeed error to give such an instruction.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 04-1427-cr

JEFFREY P. BOUYEA,

Petitioner-Appellant,

-vs-

UNITED STATES OF AMERICA,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

In November 1996, a federal jury convicted the petitioner, Jeffrey Bouyea, of two counts of bank and wire fraud, and acquitted him of a third fraud count. Counsel failed to challenge at trial or on appeal a portion of the court's jury instructions regarding reasonable doubt and the presumption of innocence, that "those rules of law are

designed to protect the innocent and not the guilty." Joint Appendix ("A") A-52. One month after trial, in *United States v. Ciak*, 102 F.3d 38 (2d Cir. 1996), facing an unpreserved objection to a virtually word-for-word identical instruction, this Court held that the language, though inadvisable, presented "no error, plain or otherwise." Four months later, this time facing a properly preserved objection, this Court changed course and held that the language was reversible error. *United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997). In collateral proceedings under 28 U.S.C. § 2255, the district court (Covello, J.) held that petitioner's trial counsel was not constitutionally ineffective for failing to foresee *Doyle* and therefore to preserve and pursue an objection to these jury instructions.

On appeal, the petitioner argues that the district court erred because in November 1996, counsel's failure to anticipate *Doyle* and to object to this jury instruction fell outside the range of professionally acceptable conduct. The petitioner argues that counsel should have foreseen this development in the law based on (1) statements in prior decisions of this Court and other courts criticizing the cited language, (2) decisions from other jurisdictions holding the cited language to be error, and (3) decisions of this and other courts indicating a willingness to reverse other sorts of erroneous reasonable-doubt instructions.

This claim is meritless. As of November 1996, this Court had twice *upheld* the challenged instruction, despite its criticisms and despite a recognition that other courts disagreed with this conclusion. Accordingly, reasonable counsel cannot have been expected to foresee that future

objections would be successful. Any doubt regarding the state of the law in late 1996 is put to rest by this Court's decision in *Ciak*, which reviewed precisely the same case law that would have been available to defense counsel and nevertheless found an identical instruction not to be error at all. Moreover, because a claim of ineffective assistance must require an equal or greater showing of error than a claim of plain error on direct appeal, this Court's holding in *Ciak* that the disputed charge was not "plain error" definitively forecloses any argument that it constituted "clear or obvious error" of which counsel should have been aware at the time. Viewed without the distorting effect of hindsight, counsel's actions did not fall outside the wide range of objectively reasonable conduct provided by a constitutionally adequate lawyer. For this reason, the decision of the district court should be affirmed.

Statement of the Case

On February 22, 1996, a federal grand jury returned a three-count indictment charging the petitioner, Jeffrey P. Bouyea, with bank fraud in violation of 18 U.S.C. § 1344 (counts one and three) and wire fraud in violation of 18 U.S.C. § 1344 (count two).

On November 7, 1996, after a five-day trial before United States District Judge Alfred V. Covello, a jury convicted the petitioner on counts two and three, and acquitted him on count one. A-8.

On February 12, 1997, the district court sentenced the petitioner to 30 months of imprisonment, five years of supervised release, and restitution of $450,000. A-10.

On January 27, 1998, on direct appeal, this Court affirmed the judgment of the district court by unpublished summary order. Government Appendix ("GA") 12-14. On August 10, 1998, after an untimely petition for rehearing by the petitioner, this Court withdrew its summary order and substituted a published opinion, explaining in more detail its affirmance. GA15-18; *United States v. Bouyea*, 152 F.3d 192 (2d Cir. 1998) (per curiam).

The defendant filed another *pro se* petition for rehearing, raising the present ineffective-assistance claim, which was denied by this Court on January 11, 1999. GA 19-20 (denying petition "without prejudice to such a claim being raised in a petition for habeas corpus pursuant to 28 U.S.C. § 2255"). On October 4, 1999, the Supreme Court denied the petitioner's petition for writ of certiorari. A-24.

On October 3, 2000, while on supervised release, the petitioner submitted to the district court a *pro se* motion to vacate, set aside, or correct his sentence. A-16-23. After satisfying filing requirements, including the filing of a financial affidavit, the district court docketed the pleading as of October 4, 2000. A-12.

On August 15, 2001, the district court issued an order to show cause, directing the Government to file a response. A-12. On November 6, 2001, the Government filed a timely response brief. A-13. On March 12, 2002, present counsel was appointed to represent the petitioner. A-14. On September 4, 2002, petitioner's counsel filed a timely reply brief. A-14. On November 7, 2002, the Government filed a timely sur-reply brief. A-14.

On May 12, 2003, the district court denied the petition in a written ruling. A-15; A-61-68; *Bouyea v. United States*, 263 F. Supp.2d 403 (D. Conn. 2003).

On July 9, 2003, petitioner moved for a certificate of appealability, which was granted on August 18, 2003. A-71.

On February 17, 2004, the petitioner moved for an extension of time within which to file a notice of appeal, which was granted on March 10, 2004. The notice of appeal was entered on that same date.[1]

STATEMENT OF FACTS

A. Trial Proceedings

In a five-day trial beginning on October 29, 1996, the Government introduced evidence on three counts of bank and wire fraud against the petitioner, Jeffrey P. Bouyea,

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[1] On September 9, 2004, during the pendency of this appeal, the petitioner completed his five-year term of supervised release. His appeal is not rendered moot, however, because he was serving his term of supervised release and was therefore "in custody" for purposes of 28 U.S.C. § 2255 at the time he filed the present petition challenging his conviction. *See Carafas v. LaVallee*, 391 U.S. 234, 237-38 (1968) (holding that state prisoner's motion to vacate conviction under 28 U.S.C. § 2254 was not rendered moot upon expiration of sentence, where petition was filed in federal court before such expiry); *United States v. Brown*, 117 F.3d 471, 475 (11th Cir. 1997) (same, in § 2255 proceedings).

based on false statements he made in connection with certain bank loans.

At the outset of trial, the district court instructed the jury at length on the presumption of innocence, which did not include any of the language that the petitioner now claims to be objectionable:

> Now, a defendant in a criminal matter is presumed innocent unless or until proven guilty. This presumption of innocence alone is sufficient to acquit a defendant if the government has failed to prove the charge beyond a reasonable doubt. The indictment here is an accusation and only that. It's not proof of anything at all, nor is it evidence. A defendant is presumed innocent unless or until you the jury decide unanimously that the government has proven the defendant's guilt beyond a reasonable doubt.
>
> This raises the question, then, of just what is proof beyond a reasonable doubt. Some of you have possibly served as jurors in civil cases where you were told that it's only necessary to prove that a fact is more likely true than not true. In criminal cases the government's proof must be more powerful than that.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. Reasonable doubt is doubt based

> upon reason and common sense, the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that a reasonable person would not hesitate to rely and act upon it in the most important of his or her affairs.
>
> Unless the government proves beyond a reasonable doubt that a defendant has committed each and every element of the offense charged in the indictment, you must find the defendant not guilty of the offense. If the jury views the evidence of the case as reasonably permitting either of two conclusions, one of innocence, the other of guilt, you must, of course, adopt the conclusion of innocence.

GA 2-3.

On November 7, 1996, at the conclusion of evidence, the district court gave the following instruction regarding reasonable doubt and the presumption of innocence:

> A defendant is presumed innocent unless and until proven guilty. This presumption of innocence alone is sufficient to acquit a defendant if the government has failed to prove the charge beyond a reasonable doubt. As I previously instructed you, the indictment is an accusation, and only that. It is not proof of anything at all nor is it evidence. A defendant is presumed innocent unless or until you, the jury, decides, unanimously, that the government

> has proven the defendant's guilt beyond a reasonable doubt.
>
> This presumption was with the defendant when the trial began. It remains with him now as I speak to you, and it will continue with the defendant into your deliberations unless and until you are convinced that the government has proven the defendant's guilt "beyond a reasonable doubt."

A-32. The Court immediately followed with a definition of proof beyond a reasonable doubt:

> This then raises the question of just what is proof "beyond a reasonable doubt." Some of you may have served as jurors in civil cases, where you were told that it is only necessary to prove that a fact is more likely true than not true. In criminal cases, the government's proof must be more powerful than that.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every possible doubt. If, based upon your consideration of the evidence, you are firmly convinced that a defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think that there is a real possibility that he is not guilty, you must give that defendant the benefit of the doubt and find him not guilty.

A-33 (citation omitted). Throughout its instructions on the substantive elements of the various offenses, the court repeatedly emphasized the Government's burden of proving the defendant's guilt as to each element beyond a reasonable doubt. *See, e.g.,* A-38, 40, 41, 42, 43, 44, 46, 47, 48, 49. In its closing remarks to the jury, the court gave the following instruction, which gives rise to the petitioner's present claim of error:

> I will remind you again that it is the sworn duty of the courts and jurors to safeguard the rights of persons charged with crime by respecting the presumption of innocence which the law imputes to every person so charged and by making the government meet its burden of proving guilt beyond a reasonable doubt. *But you must keep in mind that those rules of law are designed to protect the innocent and not the guilty.* If and when the presumption of innocence has been overcome by evidence proving beyond a reasonable doubt that the accused is guilty of the crime charged, then it is your sworn duty to enforce the law and render a verdict of guilty.

A-52. Defense counsel did not object to any of these portions of the charge, including the italicized language which forms the basis of this appeal.

On that same date, the jury returned its verdict. The jury acquitted the petitioner of count one, and convicted him of counts two and three. A-8.

Trial counsel continued to represent the petitioner on direct appeal. In his merits brief, counsel argued (1) that the evidence supporting count two was legally insufficient, and (2) that his conviction on count three should be vacated because of retroactive misjoinder or prejudicial spillover. In addition, in a supplemental brief, counsel argued (3) that there was insufficient evidence that the wire fraud scheme alleged in count two "affected a financial institution" within the meaning of 18 U.S.C. § 3293(2).

This Court rejected these claims by summary order dated January 27, 1998, and later by superseding published opinion dated August 10, 1998. GA 12-14, 15-18; *United States v. Bouyea*, 152 F.3d 192 (2d Cir. 1998) (per curiam).

B. § 2255 Proceedings

On October 4, 2000, the petitioner filed a *pro se* motion to set aside his conviction pursuant to 28 U.S.C. § 2255. In that motion, he raised several challenges to his jury instructions. A-18-19. Subsequently, appointed counsel filed a reply brief which discussed only the claim that trial counsel was ineffective for failing to object to the reasonable-doubt instruction, and to raise the issue on direct appeal.

On May 12, 2003, the district court denied the petitioner's motion, holding that the defendant had procedurally forfeited his claims regarding the jury instructions by failing to raise them at trial or on direct appeal. A-65. The court also held that the petitioner's

claims with respect to the substantive jury instructions were substantively meritless. A-66.

The court also held that counsel had not been constitutionally ineffective for failing to object to the reasonable-doubt instructions, because at the time of trial, the precedents of this Court had "upheld jury instructions substantially similar to those at issue here." A-67. In this regard, the court pointed to this Court's decisions in *United States v. Bifield*, 702 F.2d 342 (2d Cir. 1983), and *United States v. Farina*, 184 F.2d 18, 21 (2d Cir. 1950). Accordingly, the court found that "given the state of the law as it existed at the time of the jury charge, counsel's failure to object to the charge did not fall below an objective standard of reasonableness under prevailing professional norms." A-67.

Finally, the court held that counsel was not constitutionally ineffective for failing to raise the issue on appeal, because the petitioner could not prove prejudice arising from the alleged error. Upon review of the charge as a whole, the court was "not persuaded that under plain error review, there is a reasonable probability that the court of appeals would have determined that the charge seriously affected the fairness, integrity, or public reputation of the judicial proceedings." A-68.

SUMMARY OF ARGUMENT

The district court correctly concluded that trial counsel's failure to object to the jury instruction did not amount to ineffective assistance of counsel. The defendant cannot establish, as required by the first prong of *Strickland v. Washington*, 466 U.S. 668 (1984), that his trial counsel's performance was outside the wide range of professionally competent assistance for failing to foresee this Court's later decision in *United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997). At the time of trial in November 1996, this Court had twice upheld similar jury charges against claims of error, despite the Court's acknowledgment that other courts disagreed with its holding and its recognition that perhaps the challenged instructions might be deemed "unwise." Reasonably competent counsel cannot have been expected to anticipate that this Court would abandon its prior holdings in the future based on this Court's expressed concerns about the instructions, where the Court had nevertheless found them not to be erroneous. And because this Court has held that reasonably competent counsel is not charged with monitoring the law in other jurisdictions, trial counsel likewise cannot be faulted for failing to object in order to attempt to persuade this Court to abandon its earlier precedents, or to focus on the extraordinarily slim chance of obtaining Supreme Court review.

Moreover, the state of the law in late 1996 was crystallized in this Court's own decision in *United States v. Ciak*, 102 F.3d 38 (2d Cir. 1996), issued less than one month after the jury instructions were given in the present case, which held that the exact same instructions were not

error, "plain or otherwise." Even if *Ciak* is viewed as only holding that the instructions were not "plain error," such a conclusion still forecloses any argument that then-existing precedent demonstrated a "clear and previously identified error[]" in the instructions that any reasonably competent counsel would have been charged with recognizing.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY HELD THAT TRIAL COUNSEL WAS NOT INEFFECTIVE FOR FAILING TO OBJECT TO THE REASONABLE-DOUBT INSTRUCTION

A. Relevant Facts

The relevant facts are set forth above in the Statement of Facts.

B. Governing Law and Standard of Review

To obtain collateral relief under 28 U.S.C. § 2255, the petitioner must show that his "sentence was imposed in violation of the Constitution or laws of the United States." 28 U.S.C. § 2255. Habeas corpus relief is an extraordinary remedy and should only be granted where it is necessary to redress errors which, were they left intact, would "inherently result in a complete miscarriage of justice." *Hill v. United States*, 368 U.S. 424, 428 (1962). The strictness of this standard embodies the recognition that collateral attack upon criminal convictions is "in tension with society's strong interest in [their] finality." *Ciak v.*

United States, 59 F.3d 296, 301 (2d Cir. 1995). *See also Strickland v. Washington*, 466 U.S. 668, 693-94 (1983) (recognizing the "profound importance of finality in criminal proceedings.").

A person challenging his conviction on the basis of ineffective assistance of counsel bears a heavy burden. "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689. The ultimate goal of the inquiry is not to second-guess decisions made by defense counsel; it is to ensure that the judicial proceeding is still worthy of confidence despite any potential imperfections, as "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *Roe v. Flores-Ortega*, 528 U.S. 470, 482 (2000) (quoting *United States v. Cronic*, 466 U.S. 648, 658 (1984)).

In *Strickland*, the Supreme Court held that a defendant must establish (1) that his counsel's performance "fell below an objective standard of reasonableness" and (2) that counsel's unprofessional errors actually prejudiced the defense. *Id.* at 688.

> To satisfy the first, or "performance," prong, the defendant must show that counsel's performance was "outside the wide range of professionally competent assistance," [*Strickland*, 466 U.S.] at 690, and to satisfy the second, or "prejudice," prong, the defendant must show that "there is a reasonable probability that, but for counsel's

> unprofessional errors, the result of the proceeding would have been different," *id.* at 694.

Brown v. Artuz, 124 F.3d 73, 79-80 (2d Cir. 1997). A defendant must meet both requirements of the *Strickland* test to demonstrate ineffective assistance of counsel. If the defendant fails to satisfy one prong, the Court need not consider the other. *Strickland*, 466 U.S. at 697. "The *Strickland* standard is rigorous, and the great majority of habeas petitions that allege constitutionally ineffective counsel founder on that standard." *Linstadt v. Keane*, 239 F.3d 191, 199 (2d Cir. 2001).

"Generally, this Court has concluded that counsel's failure to object to a jury instruction (or to request an additional instruction) constitutes unreasonably deficient performance only when the trial court's instruction contained 'clear and previously identified errors.'" *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001) (quoting *Bloomer v. United States*, 162 F.3d 187, 193 (2d Cir.1998)).

"A court of appeals reviews a district court's denial of a 28 U.S.C. § 2255 petition *de novo*." *Fountain v. United States*, 357 F.3d 250, 254 (2d Cir.), *pet'n for cert. filed*, No. 04-294 (Aug. 25, 2004); *Coleman v. United States*, 329 F.3d 77, 81 (2d Cir.), *cert. denied*, 124 S. Ct. 840 (2003). "[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact." *Strickland*, 466 U.S. at 698; *see also United States v. Monzon*, 359 F.3d 110, 119 (2d Cir. 2004); *United States v. Schwarz*, 283 F.3d 76, 90-91 (2d Cir. 2002). Findings of historical fact are upheld

unless clearly erroneous, while conclusions of law are reviewed *de novo*. *See Monzon*, 359 F.3d at 119; *United States v. Gordon*, 156 F.3d 376, 379 (2d Cir.1998) (per curiam). A district court's denial of a hearing on a habeas petition is reviewed for abuse of discretion. *See Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003); *Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001).

C. Discussion

1. Trial Counsel's Failure To Object to the Reasonable-Doubt Instruction Was Not Unreasonable, in Light of This Court's Prior Holdings That Such Instructions Were Not Error.

The principal question in this appeal is whether trial counsel's performance was objectively unreasonable under the first prong of *Strickland*. In undertaking this portion of the *Strickland* analysis, a reviewing court should "not view the challenged conduct through the 'distorting' lens of hindsight but 'from counsel's perspective at the time.'" *United States v. Gaskin*, 364 F.3d 438, 469 (2d Cir. 2004) (quoting *Strickland*, 466 U.S. at 689); *see also Lockhart v. Fretwell*, 506 U.S. 364, 371-72 (1993).[2]

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[2] The Government concedes, with the benefit of hindsight, that in light of *United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997), the petitioner would be able to satisfy the second prong of *Strickland* -- namely, that if counsel had preserved an objection to the challenged instruction and advanced it on appeal, there was a "reasonable probability" that

(continued...)

At the time of the petitioner's trial, jury instructions nearly identical to those at issue here had been upheld on two occasions by this Court. In *United States v. Bifield*, 702 F.2d 342 (2d Cir. 1983), the Court considered an instruction very similar to the one given at the petitioner's trial. The Court upheld the instruction, finding that "the instructions given by the court, when read in their entirety, were sufficiently clear so as not to dilute the presumption of innocence to which appellant is entitled." *Id.* at 351. The Court's ruling in *Bifield* rested on longstanding precedent established in *United States v. Farina*, 184 F.2d 18 (2d Cir. 1950), which involved a similar instruction. There, the Court had found that other elements of the reasonable doubt instruction were

> so clear and explicit, that any generalization indulged in by the judge to the effect that the presumption was not intended as a bulwark behind which the guilty might hide could not, in our opinion, mislead the jury regarding the duty of the Government to go forward with convincing proof before a verdict of guilty could be properly rendered.

Id. at 21.

In the present appeal, the petitioner faults trial counsel for failing to foresee that this Court would revisit *Bifield*

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[2] (...continued)
the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694 (holding that hindsight is appropriately employed when evaluating "prejudice" prong).

and *Farina* in *United States v. Doyle*, 130 F.3d 523 (2d Cir. 1997), which held that this reasonable-doubt instruction constituted reversible error, when the objection was properly preserved. In making this argument, the petitioner relies on certain statements in *Bifield* and *Farina* suggesting the inadvisability (though not the illegality) of the challenged reasonable-doubt instructions. The petitioner then meticulously reconstructs cases regarding challenges to *other* aspects of reasonable-doubt instructions, as well as cases involving prosecutorial misconduct, from this and other courts. As discussed below, none of these cases demonstrate that any reasonably competent trial counsel in 1996 would have objected to the instructions at issue.

First, as petitioner correctly acknowledges, the Court's later decision in *Doyle* cannot be factored into an evaluation of trial counsel's performance. An attorney's conduct must be evaluated solely in light of the judicial precedent that existed at the time, because "[a]n attorney is not required to 'forecast changes or advances in the law.'" *Sellan v. Kuhlman*, 261 F.3d 303, 315 (2d Cir. 2001) (quoting *Jameson v. Coughlin*, 22 F.3d 427, 429 (2d Cir.1994)). "Clairvoyance is not a required attribute of effective representation." *United States v. Gonzalez-Lerma*, 71 F.3d 1537, 1541-42 (10th Cir.1995) (holding that trial counsel was not ineffective for failing to request continuance of sentence until pending legislation, which might have reduced defendant's sentence, was passed); *see also Smith v. Singletary,* 170 F.3d 1051, 1054 (11th Cir.1999) ("[A]s an acknowledgment that law is no exact science, the rule that an attorney is not liable for an error of judgment on an unsettled proposition of law is

universally recognized . . . .") (internal quotation marks and citation omitted). The central question is whether, based on the then-existing precedent of this Court, a reasonably competent lawyer in late 1996 would have known that the now-challenged instructions contained "'clear and previously identified errors.'" *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001) (quoting *Bloomer v. United States*, 162 F.3d 187, 193 (2d Cir.1998)).

Second, reasonable trial counsel in 1996 would have focused on the holdings of *Bifield* and *Farina* -- that the challenged instructions were not error -- rather than the *dicta* in those cases suggesting that the instructions were problematic. Instructive in this regard is this Court's recent decision in *Larrea v. Bennett*, 368 F.3d 179, 183 (2d Cir. 2004). In *Larrea*, the Court held *inter alia* that state trial counsel was not constitutionally ineffective for failing to object to an *Allen* charge which the New York Court of Appeals later found unconstitutional in *People v. Antommarchi*, 80 N.Y.2d 247, 590 N.Y.S.2d 33, 604 N.E.2d 95 (1992). In support of his contention that competent trial counsel should have predicted the future holding in *Antommarchi* and therefore preserved an objection to the instruction, the petitioner relied primarily on two cases from this Court (including *Farina*) which had criticized the instruction at issue, but had not found it erroneous.

This Court found the petitioner's reliance on *Farina* unwarranted, since the opinion in that case had merely described the instruction as "'[p]erhaps . . . unwise,'" without reaching the question of whether reversal might be warranted. *Larrea*, 368 F.3d at 184 (quoting *Farina*, 184

F.2d at 21). The Court likewise found that the second cited decision, *United States v. Klock*, 210 F.2d 217 (2d Cir. 1954), had not put counsel on notice that he had to preserve this claim, since the Court had only "'disapproved'" of a similar charge while specifically stating it did "'not hold that the charge amounted to error.'" *Larrea*, 368 F.3d at 184 (quoting *Klock*, 210 F.2d at 224). After reviewing another state-court decision, this Court summarized its holding:

> At best, the cases suggest that some day the Court of Appeals or the First Department might find that such a charge, even in isolation, is error. A skilled attorney might have found these cases and crafted an argument based on them, but trial counsel's failure to do so was not outside the wide range of reasonably competent assistance, especially considering that the issue arose without warning in the heat of a trial.

Larrea, 368 F.3d at 184 (footnote omitted).

As in *Larrea*, petitioner can point only to prior cases that did not find the challenged instruction to be erroneous, but only inadvisable. In light of the *Larrea* Court's specific holding that *Farina*'s criticism of the instructions at issue did not require counsel in future cases to lodge objections, the petitioner's reliance on *Farina* is untenable. The same logic applies to *Bifield*, because it simply reiterated the holding of *Farina* -- finding no "reversible error" in the challenged instruction despite the acknowledgment that it was a "close question" and that "it is better practice to avoid using language to the effect that

the law is made to protect the innocent and not the guilty." 702 F.2d at 351. Indeed, as this Court noted in *Doyle*, 130 F.3d at 534, there is no indication in *Bifield* that counsel had failed to preserve an objection to the instructions, and the *Bifield* Court nowhere suggested that its holding was dependent on any deferential standard of review. Reasonably competent counsel in 1996 therefore would have read *Bifield* as solidifying, rather than undercutting, the Court's earlier holding in *Farina*.

Of course, the best evidence of how reasonable people would have assessed the state of this Circuit's law in late 1996 is this Court's near-contemporaneous decision in *United States v. Ciak*, 102 F.3d 38 (2d Cir. 1996), issued on December 4, 1996. The unanimous opinion of three members of this Court in *Ciak* permits this Court to avoid the "distorting" effect of "hindsight," *Strickland*, 466 U.S. at 689, and to evaluate this issue as reasonable trial counsel would have -- namely, without the benefit of knowing that the Court would later decide in *Doyle* that the district court's reasonable-doubt instructions constituted reversible error.

At issue in *Ciak* were virtually identical jury instructions given by the same district judge who presided over the present case.[3] Trial counsel had failed to object,

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[3] The instructions at issue in *Ciak* were as follows:

> I want to remind you again that it's the sworn duty of the courts and jurors to safeguard the rights of persons charged with crimes by respecting the presumption of innocence which the law imputes to every person so

(continued...)

and so the Court reviewed for plain error. The Court reviewed its decisions in *Bifield* and *Farina*, and noted that the challenged language "matches almost verbatim" the language "upheld" in *Bifield*. 102 F.3d at 45. It summarized *Bifield* as concluding that "the reference to burden-of-proof standards as a means of protecting the innocent, not the guilty, did not 'dilute the presumption of innocence to which the appellant is entitled' and, accordingly, did not constitute error." *Id.* The Court explained that the same two factors that rendered the jury instructions correct as a whole in *Bifield* also defeated Ciak's claim of error:

> (1) "[t]he court instructed the jury specifically and repeatedly that [the defendant] was innocent when presented for trial and continued to be innocent until such time, if ever, as the government proved his guilt beyond a reasonable doubt," and (2) "[t]he court stressed that Bifield did not have to prove his innocence, but rather that the government had to prove his guilt." [*Bifield*, 702 F.2d at 351.] Judge

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[3] (...continued)
charged and by making the government meet its burden of proving guilt beyond a reasonable doubt. *You must keep in mind that those rules of law are designed to protect the innocent and not the guilty.* If and when the presumption of innocence has been overcome by evidence proving beyond a reasonable doubt that the accused is guilty of the crime charged, then it's your sworn duty to enforce the law and render a verdict of guilty.

102 F.3d at 45 (emphasis added in *Ciak*).

> Covello included similar warnings in both his preliminary and his final instructions to the jury in this case. He noted in his final instructions, for example, that the presumption of innocence "was with the defendant when the trial began . . . . [and] [i]t remains with him now as I speak to you and will continue with the defendant into your deliberations unless and until you are convinced that the Government has proven the defendant's guilt beyond a reasonable doubt."

Ciak, 102 F.3d at 45. In sum, the Court found "*no error, much less plain error*, in the district court's use of the language at issue in its jury charge." *Id.* at 46 (emphasis added); *see also id.* ("The district court committed *no error -- plain or otherwise* -- in instructing the jury that the reasonable doubt standard is 'designed to protect the innocent and not the guilty.'") (emphasis added).

Both of the redeeming characteristics of the instructions in *Ciak* were also present in the case at bar. As in *Ciak*, the district court specifically instructed the jury in both its preliminary and final instructions that the defendant was presumed innocent until proven guilty by the government beyond a reasonable doubt. *See* GA 2-3, A-32. Likewise, the court stressed that the government bore the burden of proving guilt, and that the defendant did not have to prove his innocence. *See, e.g.,* GA 2-3, A-32-33. The district court included almost verbatim the same language quoted with approval by the *Ciak* court: "This presumption was with the defendant when the trial began. It remains with him now as I speak to you, and it will continue with the defendant into your deliberations

unless and until you are convinced that the government has proven the defendant's guilt 'beyond a reasonable doubt.'" A-32. In short, a reasonable lawyer's assessment of then-existing precedent cannot be deemed objectively unreasonable -- and hence constitutionally deficient -- when it corresponds perfectly with this Court's contemporaneous assessment of the same jury charge in light of the same law.

Third, in light of *Ciak*, it is unavailing for the petitioner to rely on other decisions of this Court regarding flaws in different reasonable-doubt instructions; decisions of Connecticut state courts questioning (but not invalidating) these same instructions; and decisions of other circuits finding similar instructions to be error. *See* Def. Br. at 16-24, 26-30. Regardless of what was happening in other jurisdictions or with respect to other legal questions, *Bifield* and *Farina* appeared to constitute settled circuit law that the jury instruction *in this case,* and *in this Circuit*, was not error. It is true that the petitioner's appellate brief offers an admirably comprehensive survey of the law, which carefully and thoughtfully stitches together a number of disparate jurisprudential strands from different courts, to support the argument that *Bifield* and *Farina* were ripe for re-thinking. But as the Court noted in *Larrea*, the fact that "[a] skilled attorney might have found these cases and crafted an argument based on them" does not mean that "trial counsel's failure to do so was . . . outside the wide range of reasonably competent assistance" guaranteed by the Sixth Amendment. *Larrea*, 368 F.3d at 184; *see also United States v. DiTomasso*, 817 F.2d 201, 216 (2d Cir. 1987) (although "[t]o put it charitably," trial counsel's performance did not "furnish[]

a full model for aspiring advocates," it was not constitutionally deficient).

There are additional reasons why the petitioner's reliance on decisions outside this Circuit have no bearing on the "performance" prong of *Strickland*. As this Court noted in *Ciak*, the *Bifield* panel had acknowledged that its holding diverged from that of other courts, but nevertheless found the challenged instructions not be error. *See Ciak*, 102 F.3d at 45 (citing *Bifield*, 702 F.2d at 351)). Thus, reasonable counsel would have had no reason to believe that such a divergence of opinion among *other* courts would prompt *this* Court to reconsider *Bifield*. Moreover, this Court has squarely rejected the proposition that, for purposes of evaluating an ineffective-assistance claim, "a reasonable attorney must be familiar with authority from jurisdictions other than her own." *Larrea*, 368 F.3d at 184 n.4.

Furthermore, contrary to petitioner's claim, reasonable counsel are not generally required to preserve claims for review by the U.S. Supreme Court solely by virtue of a split of authority among the circuits, where the law in the circuit where the case is pending is squarely against the petitioner. First, because *Larrea* held that reasonable counsel is not required to be familiar with authority from other jurisdictions, counsel is not required to track the emergence of circuit splits that *might* induce the Supreme Court to grant review. Second, on a more practical note, reasonable counsel would be aware that the likelihood of obtaining Supreme Court review is exceedingly small. For example, in its October Term 1999, the Supreme Court received 8,437 petitions for writ of certiorari, and it

granted only 92. Of these, only a portion were criminal cases. *See* Lee Epstein, *The Supreme Court Compendium: Data, Decisions, and Developments* 71 (3d ed. 2003). Reasonable counsel would understand that, in general, his efforts would be more fruitfully applied to pursuing claims with some chance of success in the district court or court of appeals, rather than preserving arguments that seemed likely to fail in those courts but might succeed on the remote chance the Supreme Court might grant certiorari.

Petitioner erroneously relies on *Mayo v. Henderson*, 13 F.3d 528 (2d Cir. 1994), for the proposition that the split in the circuits on the validity of the instruction might have invited Supreme Court review and that counsel's decision not to object was therefore unreasonable. The facts of *Mayo* differ more than incidentally from the instant case. In *Mayo*, defendant's appellate counsel was found to have acted unreasonably for not raising the issue of the prosecution's failure to hand over *Rosario* material. The State argued that counsel had not acted unreasonably because New York's intermediate court, the Appellate Division, had not conclusively determined whether or not *Rosario* error was subject to harmless-error analysis. *Mayo*, 13 F.3d at 535. This Court, however, found that New York's highest court, the Court of Appeals, had clearly ruled that *Rosario* error was *per se* error for purposes of direct review. *Id.* The Court ruled that "an intermediate court's equivocation [was not] a basis for omitting an argument that had already been expressly suggested by the state's highest court." *Id.* at 536. It is thus only in that context -- where a particular area of law had been settled by the highest court but not yet applied by an intermediate court -- that *Mayo* has any force. The

situation here is quite different. At the time of trial, this Court's view was apparently clear -- the instruction did not constitute error -- and the Supreme Court has never spoken on the matter. Petitioner's counsel, therefore, did not act unreasonably in relying on Second Circuit precedent and for failing to foresee the later decision in *Doyle*.

This conclusion is reinforced by this Court's ruling in *DelValle v. Armstrong*, 306 F.3d 1197 (2d Cir. 2002). In that case, the Court upheld DelValle's Connecticut state conviction in § 2254 proceedings, despite the fact that the trial court had instructed the jury that reasonable doubt is a "rule of law . . . made to protect the innocent and not the guilty." *Id.* at 1199. The Court held that it had to evaluate the challenged instruction "in the context of the overall charge," *id.* at 1201 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)), and that viewed in context, the instruction was not "so erroneous as to deprive appellant of his constitutional rights to due process and to a fair jury trial," *id.* Because the trial court had

> repeatedly emphasized throughout its jury instructions that appellant was entitled to a presumption of innocence and that the state bore the burden of proving each element of the crime beyond a reasonable doubt, . . . a single instruction taken in isolation that at worst suggests a lessening of that burden does not constitute grounds for habeas relief.

Id. at 1201.

Although *DelValle* arose from a state prisoner's § 2254 proceedings, rather than a federal prisoner's § 2255 proceedings, and is not directly controlling, it nevertheless provides a strong analogy to the present case. As this Court acknowledged in *DelValle*, the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-1323, 110 Stat. 1214 ("AEDPA"), required it to assess the state prisoner's claim deferentially and solely in light of Supreme Court precedent, and thus not in light of *Doyle*. But *DelValle* is relevant for precisely that reason -- because the Court evaluated the challenged jury instructions much as reasonable counsel in 1996 would have -- that is, in light of general Supreme Court precedent and without the benefit of *Doyle*. Specifically, the *DelValle* Court evaluated the claimed instructional error according to the standard set forth in *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977):

> The burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal. The question in such a collateral proceeding is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," not merely whether "the instruction is undesirable, erroneous, or even 'universally condemned.'"

Id. at 154 (quoting *Cupp v. Naughten*, 414 U.S. 141, 146-47 (1973)) (footnote omitted).

This is precisely the same elevated standard that the Supreme Court extended to federal prisoners in § 2255 proceedings in *United States v. Frady*, 456 U.S. 152, 166 (1982). *DelValle* demonstrates that absent *Doyle*, a reasonable court (namely, the Connecticut Supreme Court), and hence a reasonable lawyer, could have interpreted Supreme Court precedent as late as 2002 as providing that the challenged jury instructions were not erroneous when viewed in context and hence did not violate the Due Process Clause. As in *DelValle*, the challenged instruction in the present case was an isolated statement surrounded by repeated confirmations that the burden of proof was upon the Government to prove the defendant's guilt beyond a reasonable doubt.

Finally, the fact that a different trial lawyer in *Doyle* preserved and appealed the same issue demonstrates only that the argument was available to petitioner at the time of his trial, not that counsel's failure to do so was professionally unreasonable. Every legal argument must be raised for the first time. The fact that Mr. Doyle was fortunate enough to have the first[4] counsel in this Circuit who preserved such an objection at trial and pursued it on appeal does not render incompetent all previous counsel to have appeared before this same district judge, or before other judges in the District of Connecticut, who had traditionally employed the same standard reasonable-doubt instruction.

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[4] Or possibly the second, if counsel in *Bifield* preserved the objection which was ultimately rejected on appeal.

2. Trial Counsel's Failure To Object Cannot Be Constitutionally Ineffective Because This Court Has Already Held That the Challenged Instructions Were Not Plain Error

It is true that *Doyle* later distinguished *Ciak* as a plain-error case, 130 F.3d at 534 -- even though *Ciak* itself had ruled that the challenged instruction was not error at all, "plain or otherwise," 102 F.3d at 46. But even if one were to view *Ciak* as holding only that this jury instruction was not "plain error," such a limited holding would still preclude the petitioner's claim of ineffective assistance of counsel, because "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal." *United States v. Frady*, 456 U.S. 152, 166 (1982). As the Supreme Court explained in *Frady*, the standards that apply on direct appeals are "out of place when a prisoner launches a collateral attack against a criminal conviction after a society's legitimate interest in the finality of the judgment has been perfected by the expiration of the time allowed for direct review or by the affirmance of the conviction on appeal." 456 U.S. at 164. With respect to claimed errors in jury instructions, "*[t]he burden of demonstrating that an erroneous instruction was so prejudicial that it will support a collateral attack on the constitutional validity of a state court's judgment is even greater than the showing required to establish plain error on direct appeal*." *Id.* at 166 (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977)) (emphasis added in *Frady*). This same heightened standard applies to federal prisoners in § 2255 proceedings. *Id.* Accordingly, a showing of

ineffective assistance must be *at least* as difficult for a petitioner to make as a showing of plain error.

At a minimum, *Ciak* stands for the proposition that any error in these reasonable-doubt instructions was not "plain error" in late 1996. Rule 52(b) of the Federal Rules of Criminal Procedure provides that "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." The Supreme Court has held that "before an appellate court can correct an error not raised at trial, there must be (1) error, (2) that is plain, and (3) that affects substantial rights. If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *United States v. Cotton*, 535 U.S. 625, 631 (2002) (quotation marks, citations, and alterations omitted); *Johnson v. United States*, 520 U.S. 461, 469 (1997); *United States v. Olano*, 507 U.S. 725, 734-735 (1993).

"'[P]lain' is synonymous with 'clear' or, equivalently, 'obvious.'" *Id.* at 734. An error is generally not "plain" under Rule 52(b) unless there is binding precedent of this Court or the Supreme Court, except "in the rare case" where it is "so egregious and obvious as to make the trial judge and prosecutor derelict in permitting it, despite the defendant's failure to object." *United States v. Whab*, 355 F.3d 155, 158 (2d Cir.) (internal quotation marks and citations omitted), *cert. denied*, 124 S. Ct. 2055 (2004); *see also Frady*, 456 U.S. at 163. In such highly unusual circumstances, the Court may take notice of such an error despite the lack of binding precedent directly on point.

This plain-error standard bears striking resemblance to the rule that counsel will not generally be deemed deficient for failing to object to a jury instruction absent "'*clear* and *previously identified* errors.'" *Aparicio v. Artuz*, 269 F.3d 78, 99 (2d Cir. 2001); *Bloomer v. United States*, 162 F.3d 187, 193 (2d Cir.1998).[5]

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[5] The defendant correctly points out that in *Bloomer*, this Court stated that an attorney may be held responsible for failing to object to a jury instruction "when precedent supported a 'reasonable probability' that a higher court would rule in defendant's favor." 162 F.3d at 193. Although this statement appears in a discussion of the first, or "performance," prong of *Strickland*, the Government respectfully submits that this statement regarding the "reasonable probability" standard should properly be read as applying only to the question of prejudice. As Magistrate Judge Peck pointed out in the report and recommendation in *Larrea*, which was adopted by the district court, and ultimately affirmed by this Court, the phrase "reasonable probability" appears to have been borrowed from *Strickland*'s materiality test, "which states that 'a reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Larrea v. Bennett*, 2002 WL 1173564, at *25 & n.41 (S.D.N.Y. May 31, 1992), *adopted*, 2002 WL 1808211, at *3-*4 (S.D.N.Y. Aug. 6, 1992). Because "reasonable probability" "denotes a fairly low likelihood that an event will take place," engrafting such a requirement onto the performance prong would essentially "require counsel to raise all non-frivolous objections, absent strategic considerations," which in turn would "appear[] to violate *Strickland*'s admonition that '[j]udicial scrutiny of counsel's performance must be highly deferential.'" *Larrea*, 2002 WL 1173564 at *25 (quoting *Strickland*, 466 U.S. at 689).

(continued...)

The petitioner places great reliance on this Court's decision in *United States v. Birbal,* 62 F.3d 456 (2d Cir. 1995), which found other reasonable-doubt instructions to be erroneous, as well as a number of cases that followed in *Birbal*'s wake, including *Bloomer v. United States*, 162 F.3d 187 (2d Cir. 1998), and *McKee v. United States*, 167 F.3d 103 (2d Cir. 1999), which granted § 2255 relief based on counsel's failure to preserve the same error recognized in *Birbal*. What sets that line of cases apart from the present case is that in *Birbal*, this Court held that the errors in question were "plain" in light of a prior circuit decision (*United States v. Delibac*, 925 F.2d 610 (2d Cir. 1991)), and therefore subject to reversal under Fed. R. Crim. P. 52(b). This holding supported the Court's later conclusion

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[5] (...continued)

Consistent with the Government's reading, both of the cases cited by *Bloomer* for the "reasonable probability" test employed that standard only in connection with the prejudice component of the *Strickland* analysis; by contrast, those panels evaluated the performance prong of *Strickland* in more black-and-white terms of how obvious the claim was. *See Mayo v. Henderson*, 13 F.3d 528, 532 (2d Cir. 1994) ("[A] petitioner may establish constitutionally inadequate performance if he shows that counsel omitted significant *and obvious* issues while pursuing issues that were clearly and significantly weaker."); *id.* at 534; *Claudio v. Scully*, 982 F.2d 798, 805 (2d Cir. 1992) ("No reasonably competent attorney should have missed the Article 1, § 6 claim, even though the Appellate Division ultimately rejected it."). This Court's decisions since *Bloomer* have done likewise. *See Larrea*, 368 F.3d at 183; *McKee v. United States*, 167 F.3d 103, 106-08 (2d Cir. 1999); *Brown v. United States*, 167 F.3d 109, 109-11 (2d Cir. 1999); *Aparicio,* 269 F.3d at 99.

in *Bloomer* and *McKee* that lawyers who failed to object to the instructions at issue *after Delibac* had failed to recognize "obvious" errors and had therefore performed below objectively reasonable professional standards. In the present case, by contrast, *Ciak* established that the error at issue here was *not* plain as of 1996, and so it was not until *Doyle* itself was decided in 1997 that counsel in the Second Circuit were on notice that failure to challenge such reasonable-doubt instructions would be deemed constitutionally deficient.

In short, because *Ciak* establishes that the jury instruction at issue was not "plain error" in December 1996, *a fortiori* it could not have been "clear and previously identified error[]" for purposes of the performance prong of *Strickland*.

3. The District Court Did Not Abuse Its Discretion in Declining To Hold an Evidentiary Hearing

The district court did not abuse its discretion in declining to hold an evidentiary hearing before ruling on the petitioner's ineffective-assistance claim. *See Pham v. United States*, 317 F.3d 178, 182 (2d Cir. 2003); *Chang v. United States*, 250 F.3d 79, 82 (2d Cir. 2001). The Supreme Court has explained that courts must indulge a strong presumption that trial counsel's conduct was constitutionally adequate. Only if this Court were to reject the arguments set forth above, and conclude that the petitioner "appear[s] to have successfully established his ineffective assistance claim," would a hearing be called for. In those circumstances, a remand would be be

appropriate to allow "the attorney whose performance is challenged . . . an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs." *McKee*, 167 F.3d at 108 (internal quotation marks omitted).

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Dated: October 1, 2004

Respectfully submitted,

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CERTIFICATION PER FED. R. APP. P. 32(A)(7)(C)

This is to certify that the foregoing brief complies with the 14,000 word limitation requirement of Fed. R. App. P. 32(a)(7)(B), in that the brief is calculated by the word processing program to contain approximately 8,825 words, exclusive of the Table of Contents, Table of Authorities, Addendum of Statutes and Rules, and this Certification.

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ASSISTANT U.S. ATTORNEY

GOVERNMENT APPENDIX

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ADDENDUM
OF STATUTES AND RULES

28 U.S.C. § 2253

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) There shall be no right of appeal from a final order in a proceeding to test the validity of a warrant to remove to another district or place for commitment or trial a person charged with a criminal offense against the United States, or to test the validity of such person or detention pending removal proceedings.

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

28 U.S.C. § 2255

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

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there had been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of –

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

Fed. R. Crim. P. 52

Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.