

PREVIEW OF FIRST THREE PAGES  
OF CHAPTER ELEVEN

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SECOND OR SUCCESSIVE PETITIONS  
AND MOTIONS [11.00.0]:

- A. GENERAL PRINCIPLES [11.10.0]: Second and successive petitions and motions filed after April 26, 1996, are governed by AEDPA and subject to the restrictions set forth in 28 U.S.C. § 2244(b) (state prisoners) and § 2255, ¶ 8 (federal prisoners). Pre-AEDPA abuse of the writ principles, however, have not become irrelevant. To the contrary, these principles remain valid as a means of interpreting the phrase “second and successive” which, although used in AEDPA, is not defined. See, *infra*, Determining Whether The Petition Is Second Or Successive, page 683. And some circuits continue to apply abuse of the writ principles in certain circumstances where the prisoner’s initial federal habeas petition was filed before AEDPA’s enactment. See, *infra*, Retroactivity, Successive Petition Filed Post-AEDPA, Substantively, page 658.
1. Pre-AEDPA: Abuse Of The Writ [11.11.0]: Under the abuse of the writ doctrine that applied before AEDPA was enacted, a petitioner seeking to file a second or successive petition raising a claim not included in an initial petition was required to show cause for failing to raise it and prejudice therefrom. *McCleskey v. Zant*, 499 U.S. 467, 486, 493 (1991). If the petitioner failed to show cause and prejudice, the failure could nonetheless be excused if the petitioner could show that a failure to entertain the claim would result in a fundamental miscarriage of justice, which occurred only in those extraordinary instances when a constitutional violation probably caused the conviction of one innocent of the crime. *Id.* at 494-95. Although the Supreme Court never “attempted to establish conclusively the contours of the standard,” *Amadeo v. Zant*, 486 U.S. 214, 221 (1988), certain general guidelines emerged from the Court's decisions.

Cause. A petitioner was first required to show “cause” for his failure to raise the legal claim in an earlier petition. Habeas petitioners could not choose to withhold claims for disposition in later proceedings, and even negligence in discovering a claim would not excuse a delay. A petitioner was required to show that his efforts to raise the claim at earlier stages were “impeded” by “some objective factor external to the defense,” for example, where “the factual or legal basis for a claim was not reasonably available to counsel” during earlier proceedings. *McCleskey*, 499 U.S. at 493-94. The objective standard was not concerned with what a particular attorney or *pro se* petitioner actually knew, but whether the claim was reasonably available upon diligent inquiry. *Id.* at 494.

Prejudice. If a petitioner succeeded in showing cause for failure to raise the new legal claim, he was then required to demonstrate “actual prejudice” resulting from the errors of which he complained. *McCleskey*, 499 U.S. at 494. In the context of jury instructions later determined to be unconstitutional, the Supreme Court explained that under the prejudice inquiry, the question was not whether the instruction was undesirable, erroneous, or even universally condemned. Rather, the question was whether the ailing instruction by itself so infected the entire trial that the resulting conviction violated due process. *United States v. Frady*, 456 U.S. 152, 168 (1982). This in itself was not a bright-line rule, and the Court noted in *Frady* that the definition of prejudice in every other context remained an “open question.” *Id.* Again, however, general guidelines developed.

Generally, the petitioner “must shoulder the burden of showing, not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions.” *Frady*, 456 U.S. at 170. In other words, it is not enough to assert that an error “might have changed the outcome of the trial.” *Strickler v. Greene*, 527 U.S. 263, 289 (1999). Instead, a petitioner must convince a court that “there is a reasonable probability” that the result of the trial would have been different.” *Id.* at 289-91. This

“reasonable probability” standard does not require that a petitioner demonstrate he “would more likely than not have received a different verdict” without the claimed error. *Id.* at 289. Instead, the question is whether, considering the error, “he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.” *Id.* at 290.

2. AEDPA: Generally [11.12.0]: The AEDPA changed both procedural and substantive aspects of federal habeas law with respect to second and successive petitions and motions.

On a procedural level, a prisoner seeking to file a second or successive application for habeas relief must now apply directly to the court of appeals, which applies the proper AEDPA substantive standard and then grants or denies the prisoner permission to proceed in the district court. See, *infra*, Procedural Issues, page 709.

Substantively, any claim that has already been adjudicated in a previous § 2254 petition (or § 2255 motion) must be dismissed. See, *infra*, Same Claim Petitions, page 669. Any claim that has *not* already been adjudicated must be dismissed unless it relies on either a new and retroactive rule of constitutional law or new facts showing a high probability of actual innocence. See, *infra*, New Claim Petitions, page 672.

State Prisoners. The governing rule for filing a “second or successive” petition by state prisoners is set forth in 28 U.S.C. § 2244:

- (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
- (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--