

The Plain Error of Cause and Prejudice

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*When parties fail to raise claims at the proper time, courts often subject those claims to heightened standards that impose additional hurdles to relief. One of the most common is “plain error,” which only permits correcting an error that is obvious, that affects substantial rights, and that seriously affects the fairness, integrity, or public reputation of judicial proceedings. In the 1982 decisions of *United States v. Frady* and *Engle v. Isaac*, however, the Supreme Court rejected plain error’s applicability to procedural default in federal habeas corpus proceedings—i.e., to claims that should have been, but were not, timely presented at a pre-federal habeas stage. Instead, it applied the rule of “cause and prejudice,” which allows review only if a petitioner has a valid reason for a default and can show actual prejudice as a result of the alleged violation of federal law.*

*Recent scholarship has largely ignored *Frady* and *Engle*’s rejection of plain error. But that rejection warrants academic scrutiny—especially as we mark the fortieth anniversary of these decisions this year—and this Article presents the argument that it must now be rethought. *Frady* and *Engle* were premised on the idea that plain error was less stringent than cause and prejudice, but subsequent doctrinal developments have rendered that premise false. And beyond that, the present-day manifestation of plain error much more effectively serves the core purposes of habeas and procedural default. Given that, the choice of cause and prejudice over plain error is now itself plainly erroneous.*

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I. INTRODUCTION

An all-too-common feature of litigation is that not every claim is raised when it should be. And when an argument comes too late, courts—for a host of reasons—are disinclined to accept that argument and will generally subject it to heightened scrutiny.¹

Although there are a range of standards governing the treatment of contentions not raised at the proper time,² one of the most common is “plain error” review. That standard often applies to arguments raised for the first time on appeal in criminal matters,³ but it is commonly invoked in a wide range of contexts.⁴ Plain error allows a court to accept an untimely argument only where it reflects (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings.⁵

Despite plain error’s fairly widespread and open-ended applicability, there is one important context in which it does not apply: where claims in federal habeas corpus proceedings should have been, but were not, timely presented at a pre-federal habeas stage.⁶ For such “procedurally defaulted” claims, instead of plain error, the “cause and prejudice” standard rules supreme.⁷ That standard, as its name suggests, permits a federal habeas court to consider a defaulted claim only if the petitioner “can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.”⁸

¹ See, e.g., *Puckett v. United States*, 556 U.S. 129, 134 (2009); *United States v. Hodge*, 902 F.3d 420, 429 (4th Cir. 2018).

² See, e.g., *United States v. Olano*, 507 U.S. 725, 731–32 (1993) (plain error); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (cause and prejudice); *United States v. Fattah*, 858 F.3d 801, 807 (3d Cir. 2017) (exceptional circumstances and good cause); *Bailey v. United Airlines*, 279 F.3d 194, 203–04 (3d Cir. 2002) (extraordinary circumstances).

³ See, e.g., *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) (per curiam).

⁴ See, e.g., *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010); *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1424 (5th Cir. 1996) (en banc); *United States v. Simmons*, Nos. 08-CR-1280 (VEC), 16-CV-2055 (VEC), 2020 WL 6381805, at * 4 (S.D.N.Y. Oct. 29, 2020); *United States v. Rakow*, No. CR 04-01563 MMM, 2007 WL 9751572, at *7 (C.D. Cal. Jan. 12, 2007).

⁵ See *Jones v. United States*, 527 U.S. 373, 389 (1999).

⁶ See *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982); *United States v. Frady*, 456 U.S. 152, 166–67 (1982).

⁷ See, e.g., *Massaro v. United States*, 538 U.S. 500, 504 (2003); *Coleman*, 501 U.S. at 750.

⁸ *Coleman*, 501 U.S. at 750.

The choice of cause and prejudice over plain error for procedural default in habeas proceedings stems from two 1982 Supreme Court decisions, *United States v. Frady* and *Engle v. Isaac*. There, the Court reasoned that plain error was inappropriate for procedural default because it was meant to apply on direct review, and a more stringent requirement was necessary to justify reaching untimely claims on collateral review.⁹ That more stringent requirement, the Court concluded, was cause and prejudice.¹⁰

Although these decisions have just turned forty years old this year, this Article argues that it is time to reconsider them, for two reasons. First, since *Frady* and *Engle*, the plain error and cause and prejudice standards have developed in such a way that cause and prejudice cannot be said to be more stringent than plain error. And second, the modern version of plain error is a more appropriate choice for procedural default, in light of the core purposes of habeas and default doctrine.¹¹

This Article's analysis proceeds as follows. Part II introduces and contextualizes the plain error and cause and prejudice standards, as well as the Supreme Court's decisions in *Frady* and *Engle*. Part III presents the argument as to why plain error is now more appropriate than cause and prejudice for procedural default. Part IV addresses and rejects several counterarguments. Part V concludes.¹²

⁹ See *Engle*, 456 U.S. at 134–35; *Frady*, 456 U.S. at 164.

¹⁰ See *Engle*, 456 U.S. at 134–35; *Frady*, 456 U.S. at 166–67.

¹¹ Although the Court's decision to adopt cause and prejudice instead of plain error has been criticized before, see, e.g., Jack A. Guttenberg, *Federal Habeas Corpus, Constitutional Rights, and Procedural Forfeitures: The Delicate Balance*, 12 HOFSTRA L. REV. 617, 665–75 (1984), the issue has received surprisingly little academic attention, especially after the first few years following *Frady* and *Engle*. This Article therefore breaks new ground in questioning these decisions on the basis of more recent developments.

¹² As a point of clarification, my argument is not that plain error is the *ideal* or *best* standard for procedural default. If, for instance, we were designing habeas doctrine from scratch, it is certainly possible that a better standard could be developed. The goal of this Article is simply to show that the decision to select cause and prejudice over plain error no longer holds and should be rethought. It is not meant to suggest that we should avoid consideration of other alternatives to improve the habeas system, which is in many ways unfair. See, e.g., Radley Balko, Opinion, *It's Time to Repeal the Worst Criminal Justice Law of the Past 30 Years*, WASH. POST (Mar. 3, 2021), <https://www.washingtonpost.com/opinions/2021/03/03/its-time-repeal-worst-criminal-justice-law-past-30-years>.

II. BACKGROUND

The law demands timeliness in litigants. It has long been said that “the law should administer its benefits to those who are vigilant in exercising their rights, and not to those who sleep over them.”¹³ And courts often express that enforcing procedural regularity is necessary for numerous reasons, including: to guard against sandbagging, or strategically holding an argument in reserve in case of an unfavorable decision;¹⁴ to facilitate the elimination of errors;¹⁵ to prevent unfair surprise and the underdevelopment of issues;¹⁶ to promote finality;¹⁷ to respect the institutional roles of different tribunals;¹⁸ and to ensure that the trial serves as the primary forum for resolving disputes.¹⁹ Accordingly, courts are generally disposed to grant relief only based on claims, objections, or arguments that have been made at the appropriate time—often the earliest feasible point—and to each court in the litigation process.²⁰

¹³ Ricard v. Williams, 20 U.S. (7 Wheat.) 59, 116 (1822); *see also In re Efron*, 746 F.3d 30, 32 (1st Cir. 2014) (“For over four centuries, persons learned in the law have known that, when litigation is in prospect, vigilance is good and somnolence is bad. . . . The lesson to be derived is that ‘[t]he law ministers to the vigilant not to those who sleep upon perceptible rights.’” (alteration in original) (citation omitted)).

¹⁴ *See, e.g., Stern v. Marshall*, 564 U.S. 462, 481–82 (2011); *Puckett v. United States*, 556 U.S. 129, 134 (2009); *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977); *Joseph Forrester Trucking v. Dir., Off. of Workers’ Comp. Programs*, 987 F.3d 581, 592 (6th Cir. 2021); *United States v. Hodge*, 902 F.3d 420, 429 (4th Cir. 2018); *Muiruri v. Lynch*, 803 F.3d 984, 987 (8th Cir. 2015); *United States v. Pielago*, 135 F.3d 703, 709 (11th Cir. 1998); *United States v. Taylor*, 54 F.3d 967, 972 (1st Cir. 1995).

¹⁵ *See, e.g., Henderson v. United States*, 568 U.S. 266, 286 (2013) (Scalia, J., dissenting); *Hodge*, 902 F.3d at 429; *HTC Corp. v. ICom GmbH & Co.*, 667 F.3d 1270, 1282 (Fed. Cir. 2012); *Pielago*, 135 F.3d at 709; *United States v. Roberts*, 119 F.3d 1006, 1013 (1st Cir. 1997); *Taylor*, 54 F.3d at 972; *cf. Sykes*, 433 U.S. at 90.

¹⁶ *See, e.g., Hodge*, 902 F.3d at 429; *In re Lett*, 632 F.3d 1216, 1226–27 (11th Cir. 2011); *Prime Time Int’l Co. v. Vilsak*, 599 F.3d 678, 686 (D.C. Cir. 2010); *Pielago*, 135 F.3d at 709; *Hicks v. Gates Rubber Co.*, 928 F.2d 966, 970–71 (10th Cir. 1991).

¹⁷ *See, e.g., United States v. Vonn*, 535 U.S. 55, 73 (2002); *Coleman v. Thompson*, 501 U.S. 722, 750 (1991); *HTC Corp.*, 667 F.3d at 1281–82; *In re Lett*, 632 F.3d at 1226–27; *Hicks*, 928 F.2d at 970–71.

¹⁸ *See, e.g., Puckett*, 556 U.S. at 134; *Coleman*, 501 U.S. at 750; *In re Lett*, 632 F.3d at 1226–27; *Miller v. Nationwide Life Ins. Co.*, 391 F.3d 698, 701 (5th Cir. 2004); *Roberts*, 119 F.3d at 1013; *United States v. Griffin*, 818 F.2d 97, 100 (1st Cir. 1987).

¹⁹ *See, e.g., Sykes*, 433 U.S. at 90; *Prime Time Int’l Co.*, 599 F.3d at 686; *Pielago*, 135 F.3d at 709.

²⁰ *See, e.g., Joseph Forrester Trucking v. Dir., Off. of Workers’ Comp. Programs*, 987 F.3d 581, 592 (6th Cir. 2021); *United States v. Joiner*, 988 F.3d 993, 996 (7th Cir. 2021); *Federated Mut. Ins. Co. v. Coyle Mech. Supply Inc.*, 983 F.3d 307, 315 (7th Cir.

Of course, assertions are still not always raised at the right time, and at least when that happens unintentionally, the procedural misstep is not unforgiveable.²¹ But, for all the reasons mentioned above, courts subject untimely contentions to demanding and unfavorable standards, which—although the details and formulations vary—usually require some type of special circumstances. For example, courts have required that there be “extraordinary” or “exceptional” circumstances;²² that the issue raised amount to “plain error”;²³ that a party have “good cause” for failing to present an issue earlier;²⁴ or that a party be able to show “cause and prejudice.”²⁵

The two standards most relevant here are the “plain error” and “cause and prejudice” standards. The first, plain error, is rooted in Federal Rule of Criminal Procedure 52(b),²⁶ which states: “A plain error that affects substantial rights may be considered even though it was not brought to the court’s attention.”²⁷ As presently interpreted, that provision bestows discretion upon courts to correct an error, but only if several conditions are met.²⁸ As the Supreme Court has explained the plain error doctrine:

[T]here must be (1) “error,” (2) that is “plain,” and (3) that “affect[s] 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 affect[s]

2020); *United States v. Evans*, 908 F.3d 346, 352 (8th Cir. 2018); *United States v. McKinley*, 227 F.3d 716, 719 (6th Cir. 2000); *United States v. Becker*, 36 F.3d 708, 709 (7th Cir. 1994); *Williams v. Bishop Coal Co.*, 981 F.2d 1253, 1992 WL 371951, at *2 (4th Cir. 1992) (per curiam) (unpublished table decision).

²¹ See, e.g., *United States v. Olano*, 507 U.S. 725, 733–34 (1993). An intentional decision not to pursue an issue generally precludes further consideration of that issue altogether. See, e.g., *id.*; *United States v. Young*, 908 F.3d 241, 246 (7th Cir. 2018); cf. *Wood v. Milyard*, 566 U.S. 463, 472–73 (2012).

²² See, e.g., *T-Mobile Ne. LLC v. Town of Barnstable*, 969 F.3d 33, 40 n.2 (1st Cir. 2020); *Brown v. Philip Morris Inc.*, 250 F.3d 789, 799 (3d Cir. 2001).

²³ See, e.g., *Olano*, 507 U.S. at 732–35; *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010).

²⁴ See, e.g., *United States v. Vance*, 893 F.3d 763, 769–70 (10th Cir. 2018); *United States v. Fattah*, 858 F.3d 801, 807 (3d Cir. 2017).

²⁵ See, e.g., *Walker v. Martin*, 562 U.S. 307, 315–16 (2011).

²⁶ The concept of plain error predates Rule 52(b), however. See *United States v. Frady*, 456 U.S. 152, 163 n.13 (1982).

²⁷ FED. R. CRIM. P. 52(b).

²⁸ See, e.g., *Greer v. United States*, 141 S. Ct. 2090, 2096–97 (2021); *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904–05 (2018).

the fairness, integrity, or public reputation of judicial proceedings.”²⁹

Meeting these requirements, as the Court has made clear, “is difficult,” and the burden of demonstrating that they have been satisfied falls squarely on the party invoking plain error review.³⁰

Plain error archetypally applies to matters in criminal cases that should have been presented to the district court but are instead raised for the first time on direct appeal.³¹ The standard, however, is far from limited to that context. Rather, it has often been applied to civil cases,³² as well as to non-appellate proceedings.³³ Thus, plain error is an expansive doctrine that is widely applicable to a host of settings.

But it does not apply everywhere, and that leads us to the second of the relevant standards. When someone convicted of a crime seeks

²⁹ *Johnson v. United States*, 520 U.S. 461, 466–67 (1997) (second and third alterations in original) (citations omitted); *accord, e.g., Greer*, 141 S. Ct. at 2096–97; *Rosales-Mireles*, 138 S. Ct. at 1904–05; *Puckett v. United States*, 556 U.S. 129, 135 (2009).

³⁰ *Greer*, 141 S. Ct. at 2097 (quoting *Puckett*, 556 U.S. at 135).

³¹ *Cf. Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) (per curiam) (“When a criminal defendant fails to raise an argument in the district court, an appellate court ordinarily may review the issue only for plain error.”); *Greer*, 141 S. Ct. at 2096 (“Under Rule 51(b) of the Federal Rules of Criminal Procedure, a defendant can preserve a claim of error ‘by informing the court’ of the claimed error when the relevant ‘court ruling or order is made or sought.’ If the defendant has ‘an opportunity to object’ and fails to do so, he forfeits the claim of error. If the defendant later raises the forfeited claim on appeal, Rule 52(b)’s plain-error standard applies.” (citation omitted)).

³² *See, e.g., Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1127–28 (10th Cir. 2011) (Gorsuch, J.); *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010); *Tilmon v. Prator*, 368 F.3d 521, 524 (5th Cir. 2004) (per curiam); *Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacion*, 345 F.3d 15, 22–23 (1st Cir. 2003); *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1424 (5th Cir. 1996) (en banc); *see also* ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2472 (3d ed. 2021) (“[A]lthough the Civil Rules, unlike the Criminal Rules, do not contain a formal provision allowing the appellate courts to notice plain error, that principle nonetheless appears well established.”); *cf. FED. R. CIV. P.* 51(d)(2) & advisory committee’s note to 2003 amendment (recognizing courts’ authority to review unpreserved objections to civil jury instructions “in exceptional circumstances,” borrowing the plain error standard “from Criminal Rule 52”).

³³ *See, e.g., United States v. Simmons*, Nos. 08-CR-1280 (VEC), 16-CV-2055 (VEC), 2020 WL 6381805, at *4 (S.D.N.Y. Oct. 29, 2020); *United States v. Montgomery*, 442 F. Supp. 3d 875, 884 (W.D. Pa. 2020); *United States v. Pomales-Arzuaga*, 319 F. Supp. 3d 578, 582–83 (D.P.R. 2018); *Hill v. Quigley*, 336 F. Supp. 3d 283, 288–89 (S.D.N.Y. 2018); *Barthelus v. G4S Gov’t Sols., Inc.*, 141 F. Supp. 3d 1309, 1314 (S.D. Fla. 2015); *United States v. Rakow*, No. CR 04-01563 MMM, 2007 WL 9751572, at *7 (C.D. Cal. Jan. 12, 2007); *United States v. Brandao*, 448 F. Supp. 2d 311, 317–18 (D. Mass. 2006); *United States v. Birkett*, 419 F. Supp. 2d 536, 539 (S.D.N.Y. 2006).

federal habeas relief under 28 U.S.C. § 2255 (governing review of federal convictions)³⁴ or 28 U.S.C. § 2254 (governing review of state convictions), they may raise new claims that were never presented before, such as on direct review or state post-conviction review. Such claims—among others, such as those that were rejected by the state courts on procedural grounds³⁵—are deemed “procedurally defaulted,” and absent an excuse for the default, federal habeas courts will not hear them.³⁶ In that context, the courts have concluded that plain error is an inappropriate standard for excusing default and have imposed the so-called cause and prejudice standard instead.³⁷ That standard, unsurprisingly, demands that habeas petitioners³⁸ show two things: “cause for the default and actual prejudice as a result of the alleged violation of federal law.”³⁹

Cause and prejudice won out over plain error in the procedural default context as a result of two Supreme Court decisions, both issued

³⁴ Of course, 2255 is formally a habeas substitute, not “true” habeas corpus. *See Boumediene v. Bush*, 553 U.S. 723, 774–75 (2008). I use “habeas” somewhat colloquially, as nothing in this Article turns on employing more precise terminology.

³⁵ *See, e.g., Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (“[A] federal court may not review federal claims that were procedurally defaulted in state court—that is, claims that the state court denied based on an adequate and independent state procedural rule.”).

³⁶ *See, e.g., Martinez v. Ryan*, 566 U.S. 1, 7, 9–10 (2012); *Massaro v. United States*, 538 U.S. 500, 504 (2003). Under 2254, a claim that has never been raised before will only be defaulted if the petitioner is unable to seek relief in the state courts due to a state procedural rule. *See Coleman v. Thompson*, 501 U.S. 722, 731–32 (1991). Otherwise, the claim is simply “unexhausted.” *See id.*

³⁷ *See Engle v. Isaac*, 456 U.S. 107, 134–35 (1982); *United States v. Frady*, 456 U.S. 152, 166–67 (1982); *see also Walker v. United States*, 810 F.3d 568, 573 (8th Cir. 2016). Default can also be excused upon a showing of a “miscarriage of justice,” meaning “actual innocence.” *McQuiggin v. Perkins*, 569 U.S. 383, 392–93 (2013).

³⁸ Convicted individuals seeking relief under 2254 are generally called “petitioners,” whereas claimants under 2255 are termed “movants.” *Cf., e.g., Brown v. United States*, 583 F. Supp. 2d 1330, 1344 n.7 (S.D. Ga. 2008) (“Current counsel, perhaps used to litigating 28 U.S.C. § 2254 petitions, seem to have forgotten that before the Court is a 28 U.S.C. § 2255 motion—hence, a *motion* in a criminal case (albeit packing a parallel civil file for docketing-statistic purposes)—which makes Brown a defendant or movant, not a ‘petitioner.’”); *Vega v. United States*, 269 F. Supp. 2d 528, 528 n.1 (D.N.J. 2003) (“A party seeking relief under 28 U.S.C. § 2255 is technically a movant rather than a petitioner for a writ of habeas corpus.”). As courts sometimes do, however, I use “petitioners” to refer to both types of claimants for convenience. *See Vega*, 269 F. Supp. 2d at 528 n.1 (“We will refer to the movant as petitioner, for ease of reference.”).

³⁹ *Coleman*, 501 U.S. at 750.

on April 5, 1982: *United States v. Frady* and *Engle v. Isaac*.⁴⁰ These decisions are crucial to this Article's analysis, and I describe each in turn.

In *Frady*, a federal prisoner sought relief under 2255, and the D.C. Circuit overturned his conviction after concluding that his jury instructions had been plainly erroneous.⁴¹ The Supreme Court reversed, however, primarily on the ground that a more stringent standard than plain error was necessary in the procedural default context. It concluded that plain error was designed for direct review, and on collateral review, "a prisoner must clear a significantly higher hurdle than would exist on direct appeal."⁴² More specifically, it said:

Because it was intended for use on direct appeal . . . the "plain error" standard is out of place when a prisoner launches a collateral attack against a criminal conviction after 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. . . .

By adopting the same standard of review for § 2255 motions as would be applied on direct appeal, the Court of Appeals accorded no significance whatever to the existence of a final judgment perfected by appeal. Once the defendant's chance to appeal has been waived or exhausted, however, we are entitled to presume he stands fairly and finally convicted, especially when, as here, he already has had a fair opportunity to present his federal claims to a federal forum. Our trial and appellate procedures are not so unreliable that we may not afford their completed operation any binding effect beyond the next in a series of endless postconviction collateral attacks. To the contrary, a final judgment commands respect.⁴³

The *Frady* Court then went on to determine what the appropriate "higher hurdle" standard for procedural default in 2255 proceedings should be, settling (with little analysis) on cause and prejudice.⁴⁴

As just noted, the Supreme Court decided *Engle v. Isaac* on the same day as *Frady*. There, several 2254 petitioners argued that the Court "should replace or supplement the cause-and-prejudice

⁴⁰ See *Engle*, 456 U.S. at 134–35; *Frady*, 456 U.S. at 166–67.

⁴¹ *Frady*, 456 U.S. at 157–59.

⁴² *Id.* at 164–66.

⁴³ *Id.* at 164–65.

⁴⁴ *Id.* at 166–67.

standard”—which was at that time broadly, but not universally, applicable in the 2254 context⁴⁵—“with a plain-error inquiry.”⁴⁶ The Court, however, rejected that argument, finding it “no more compelling” than in *Fradley*.⁴⁷ It primarily reasoned as follows:

The federal courts apply a plain-error rule for direct review of federal convictions. Federal habeas challenges to state convictions, however, entail greater finality problems and special comity concerns. We remain convinced that the burden of justifying federal habeas relief for state prisoners is “greater than the showing required to establish plain error on direct appeal.”⁴⁸

Thus, the Court again chose cause and prejudice over plain error in the procedural default context because it determined that a standard

⁴⁵ In the 1963 decision of *Fay v. Noia*, the Supreme Court endorsed a lenient procedural default standard, concluding that “a procedural default in state court does not bar federal habeas review unless the petitioner has *deliberately bypassed* state procedures by intentionally forgoing an opportunity for state review.” *Coleman v. Thompson*, 501 U.S. 722, 744–45 (1991) (emphasis added). Then, in *Wainwright v. Sykes*, the Court “limited *Fay* to its facts”—situations “where a petitioner has surrendered entirely his right to appeal his state conviction”—and applied the cause and prejudice framework to failures to comply with a contemporaneous objection rule in state court. *Id.* at 746–47. In doing so, the Court drew upon earlier cases that had adopted the cause and prejudice requirement in the context of failures to raise grand jury objections before trial, and it employed expansive language and reasoning that suggested a broadly applicable rule. *See Wainwright v. Sykes*, 433 U.S. 72, 84–91 (1977); *see also Crick v. Smith*, 650 F.2d 860, 867 (6th Cir. 1981) (“While *Wainwright* attacked the overly broad language of *Fay*, its own language also speaks broadly concerning the underlying values of the two rules. Indeed, Justice Rehnquist’s rationale for application of the ‘cause’ and ‘prejudice’ rule appears to apply as well to failures to appeal altogether as to other types of defaults.” (citation omitted)). But it formally treated the ruling as a narrow one that did not set an across-the-board standard. *See Sykes*, 433 U.S. at 88 n.12 (“The Court in *Fay* stated its knowing-and-deliberate-waiver rule in language which applied not only to the waiver of the right to appeal, but to failures to raise individual substantive objections in the state trial. Then, with a single sentence in a footnote, the Court swept aside all decisions of this Court ‘to the extent that (they) may be read to suggest a standard of discretion in federal habeas corpus proceedings different from what we lay down today’ We do not choose to paint with a similarly broad brush here.” (citation omitted)); *see also White v. Sowers*, 644 F.2d 1177, 1182 (6th Cir. 1980) (“Justice Rehnquist, speaking for the majority, appeared equally intent on crafting a relatively narrow rule.”). Cause and prejudice did not become the universal rule until the 1991 decision of *Coleman v. Thompson*. *See Coleman*, 501 U.S. at 750.

⁴⁶ *Engle v. Isaac*, 456 U.S. 107, 134 (1982).

⁴⁷ *Id.*

⁴⁸ *Id.* at 134–35 (citations omitted).

more stringent than that on direct review (of federal convictions) was necessary.⁴⁹

So to summarize, the failure to raise arguments at the right time can be forgiven, and often the standard applicable to inappropriately timed assertions is plain error. But the Supreme Court has held that for procedurally defaulted claims on federal habeas review, a stricter standard than that used on direct review is required and, accordingly, that cause and prejudice should set the rule rather than plain error. That holding remains in force today.

III. WHY PLAIN ERROR IS MORE APPROPRIATE THAN CAUSE AND PREJUDICE FOR PROCEDURAL DEFAULT

Although cause and prejudice has remained ascendant over plain error in the procedural default context for forty years, there is a serious problem with that ascendancy: the very basis for it no longer holds today. And what's more, as the doctrine currently stands, plain error is a much more appropriate standard for procedural default than cause and prejudice. Accordingly, *Frady* and *Engle* must be reconsidered.

⁴⁹ In *Frady*, the Court also concluded that it had *already* determined “that the plain-error standard is inappropriate for the review of a state prisoner’s collateral attack” in the 1977 case of *Henderson v. Kibbe*. *Frady*, 456 U.S. at 165–66. And given that foundation, it supported its decision by comparing the federal conviction context to the state conviction context and explaining why its reasoning as to the latter should hold for the former. *See id.* at 166 (“Of course, unlike in the case before us, in *Kibbe* the final judgment of a state, not a federal, court was under attack, so considerations of comity were at issue that do not constrain us here. But the Federal Government, no less than the States, has an interest in the finality of its criminal judgments. In addition, a federal prisoner like *Frady*, unlike his state counterparts, has already had an opportunity to present his federal claims in federal trial and appellate forums. On balance, we see no basis for affording federal prisoners a preferred status when they seek postconviction relief.”). The assertion that the Court had previously decided the plain error question in the state court context is questionable, *see* Guttenberg, *supra* note 11, at 672–73 (“The Court’s reliance on *Kibbe*, however, was inappropriate because that case involved the proper standard for determining when erroneous jury instructions violate fourteenth amendment due process. In fact, *Kibbe* merely stated the unnoteworthy conclusion that the proof needed to establish a constitutional violation is greater than that needed to excuse a procedural forfeiture. The Court in *Kibbe* was not commenting on the use of plain error in a collateral proceeding, since this issue was not under consideration.”), but it rendered *Engle* essentially a foregone conclusion. And indeed, *Engle* likewise invoked *Kibbe* in rejecting the petitioners’ argument for plain error. *See Engle*, 456 U.S. at 134–35 (“We remain convinced that the burden of justifying federal habeas relief for state prisoners is ‘greater than the showing required to establish plain error on direct appeal.’” (quoting *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977))).

A. *Cause and Prejudice Is No Longer More Demanding than Plain Error*

As discussed in detail above, the primary reason for the Supreme Court's selection of cause and prejudice over plain error for procedural default is that a more demanding standard is necessary in that context. Therefore, if cause and prejudice is *not* more demanding than plain error, then the Court's choice is without foundation. And due to the evolution of plain error and cause and prejudice over time, that is precisely the case today.

At the time of *Frady* and *Engle*, plain error was an ill-defined concept. Instead of the clear, four-prong test described above, the doctrine reflected a vague judicial authority to correct serious errors, and courts applied it inconsistently.⁵⁰ Indeed, as *Federal Practice and Procedure* describes it, around that time:

[L]ower courts endeavored to put a gloss on the rule by defining the kind of error for which they can reverse under Rule 52(b). Thus it was said that "plain error" means "error both obvious and substantial," or "serious and manifest errors," or "seriously prejudicial error," or "grave errors which seriously affect substantial rights of the accused." Perhaps these attempts to define "plain error" did no appreciable harm, but it was doubtful whether they were of much help. A sounder perception was that whether an appellate court should take notice of an error not raised below must be made on the facts of the particular case, and there were no "hard and fast classifications in either the application of the principle or the use of a descriptive title." *Indeed the cases have given the distinct impression that "plain error" is a concept appellate courts have found impossible to define, save that they know it when they see it.*⁵¹

⁵⁰ See Guttenberg, *supra* note 11, at 674 ("Although the lower courts have not been consistent in their interpretation or application of the plain error rule, there is substantial agreement that the rule is to be applied cautiously and, at a minimum, to correct errors which would cause a miscarriage of justice if left unattended.").

⁵¹ 3B PETER J. HENNING, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 856 (4th ed. 2021) (emphasis added); *accord, e.g.*, United States v. De Rosa, 548 F.2d 464, 472 n.12 (3d Cir. 1977) ("While plain error is a concept 'appellate courts find impossible to define save that they know it when they see it,' it has been equated by this Court to error giving rise to a 'manifest miscarriage of justice,' or error of a constitutional dimension." (citations omitted)); Daniel J. Meltzer, *State Court Forfeitures of Federal Rights*, 99 HARV. L. REV. 1128, 1213 (1986) ("Plain error, a doctrine of excuse found in the federal courts and most states, is 'a concept appellate courts find impossible to define, save that they know it when they see it.' Application of such a doctrine tends to be extremely fact specific, perhaps bordering upon the ad hoc." (citation omitted)).

Furthermore, *Frady* itself depicted plain error simply as a power of correction “to be used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.”⁵² And in the year following that decision, the D.C. Circuit—the court reversed in *Frady*—approvingly quoted the italicized language from *Federal Practice and Procedure* above indicating that courts only know plain error “when they see it” (which also had been present in the contemporary edition of the treatise).⁵³

Cause and prejudice, although somewhat more concrete,⁵⁴ was likewise fairly nebulous when *Frady* and *Engle* were decided. Just a few years before, in invoking cause and prejudice to refuse to excuse a default, the Court in *Wainwright v. Sykes* explained:

The “cause”-and-“prejudice” exception . . . will afford an adequate guarantee, we think, that the rule will not prevent a federal habeas court from adjudicating for the first time the federal constitutional claim of a defendant who in the absence of such an adjudication will be the victim of a miscarriage of justice. *Whatever precise content may be given those terms by later cases, we feel confident in holding without further elaboration that they do not exist here.*⁵⁵

And that ambiguity was affirmatively acknowledged in *Frady*.⁵⁶

Because of the then-existing uncertainty about the meaning of plain error and cause and prejudice, it is entirely understandable that the Court concluded the latter standard was more demanding than the

⁵² *Frady*, 456 U.S. at 163 n.14.

⁵³ *United States v. Blackwell*, 694 F.2d 1325, 1341 n.23 (D.C. Cir. 1982) (citation omitted).

⁵⁴ *See Frady*, 456 U.S. at 167–68 (“Under this standard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) ‘cause’ excusing his . . . procedural default, and (2) ‘actual prejudice’ resulting from the errors of which he complains.”).

⁵⁵ *Wainwright v. Sykes*, 433 U.S. 72, 90–91 (1977) (emphasis added).

⁵⁶ *See Frady*, 456 U.S. at 168 (“In considering the prejudice, if any, occasioned by the erroneous jury instructions used at *Frady*’s trial, we note that in *Wainwright v. Sykes* we refrained from giving ‘precise content’ to the term ‘prejudice,’ expressly leaving to future cases further elaboration of the significance of that term.”). The *Frady* Court did, however, provide clarity as to the meaning of prejudice in the specific context at issue in the case, i.e., for “a defendant who has failed to object to jury instructions at trial.” *Id.* at 168–69 (explaining that the standard of prejudice in that context 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”) (citation omitted)).

former. But as the Court later gave substance and meaning to those standards, it (seemingly inadvertently) undermined that balance.

First and foremost, the modern plain error standard encompasses a substantially narrower subset of errors than cause and prejudice does. About a decade after *Frady* and *Engle*, the Supreme Court decided *United States v. Olano*, which formally established the modern four-part framework for plain error review.⁵⁷ That framework, in turn, has led to several distinct elements that go far beyond what the cause and prejudice standard requires. For instance, the plain error rule demands that the error to be corrected must be “plain,” which has been interpreted to mean that the error “must be clear or obvious, rather than subject to reasonable dispute.”⁵⁸ And likewise, courts are only supposed to exercise their discretion to correct an error if it “seriously affects the fairness, integrity or public reputation of judicial proceedings,” which is “‘a case-specific and fact-intensive’ inquiry”⁵⁹ that can undermine a finding of plain error even if the other requirements are met.⁶⁰ Cause and prejudice, in contrast, permits review of *any* error, whether or not that error is debatable and whether or not it impacted the fairness, integrity, or public reputation of

⁵⁷ See *United States v. Olano*, 507 U.S. 725, 731–37 (1993); accord HENNING, *supra* note 51, § 856; see also *United States v. Olano*, 62 F.3d 1180, 1187–88 (9th Cir. 1995) (showing that *Olano* clarified plain error and established the modern test); *United States v. Merlos*, 8 F.3d 48, 50 (D.C. Cir. 1993) (same). Recall that plain error requires: (1) an error; (2) that is plain; (3) that affects substantial rights; and (4) that seriously affects the fairness, integrity, or public reputation of judicial proceedings. See *supra* note 29 and accompanying text.

⁵⁸ *Puckett v. United States*, 556 U.S. 129, 135 (2009).

⁵⁹ *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906, 1909 (2018) (citations omitted).

⁶⁰ See, e.g., *United States v. Cotton*, 535 U.S. 625, 632–33 (2002) (concluding that an error “did not seriously affect the fairness, integrity, or public reputation of judicial proceedings” because the evidence “was ‘overwhelming’ and ‘essentially uncontroverted,’” even if the error were structural and therefore might not require a showing of prejudice to satisfy the “substantial rights” prong of plain error); *Johnson v. United States*, 520 U.S. 461, 468–70 (1997) (same); *United States v. Banks*, 29 F.4th 168, 179 (4th Cir. 2022) (same); see also *United States v. Williams*, 974 F.3d 320, 344 (3d Cir. 2020) (“Because ‘each case necessarily turns on its own facts,’ an appellate court’s exercise of discretion is properly based on its evaluation of which result would most ‘promote the ends of justice.’ In conducting this evaluation, the Court has frequently weighed the costs to the fairness, integrity, and public reputation of judicial proceedings that would result from allowing the error to stand with those that would alternatively result from providing a remedy.” (citation omitted)).

judicial proceedings, so long as there is cause for the failure to raise it at the appropriate time and prejudice as a result.⁶¹

Additionally, plain error and cause and prejudice seem to be subject to the same “prejudice” standard, or at least effectively the same standard.⁶² To meet the “affects substantial rights” prong of plain error review, the Supreme Court has said that a petitioner generally needs to demonstrate that the error prejudiced them in some way.⁶³ And in the 2004 decision of *United States v. Dominguez Benitez*, the Court concluded that the appropriate standard for that showing is the standard of prejudice for ineffective assistance of counsel claims and of “materiality” for *Brady* claims: “a reasonable probability that, but for [the issue complained of], the result of the proceeding would have been different.”⁶⁴ Likewise, in the 1999 decision of *Strickler v. Greene*, the Supreme Court equated the *Brady* materiality standard to the prejudice standard for cause and prejudice.⁶⁵ In line with that authority, moreover, numerous federal appellate decisions have reasoned that the prejudice prong of cause and prejudice is equivalent

⁶¹ *Cf.* *House v. Bell*, 547 U.S. 518, 536 (2006) (“As a general rule, claims forfeited under state law may support federal habeas relief only if the prisoner demonstrates cause for the default and prejudice from the asserted error.”).

⁶² *See, e.g.*, Justin Murray, *Policing Procedural Error in the Lower Criminal Courts*, 89 *FORDHAM L. REV.* 1411, 1467–68 (2021).

⁶³ *United States v. Olano*, 507 U.S. 725, 734 (1993) (“[I]n most cases [the ‘affects substantial rights’ language] means that the error must have been prejudicial: It must have affected the outcome of the district court proceedings.”).

⁶⁴ *United States v. Dominguez Benitez*, 542 U.S. 74, 81–83 (2004). The ineffective assistance prejudice standard and the *Brady* materiality standard are viewed as essentially the same, *see, e.g.*, *Walters v. Lee*, 857 F.3d 466, 487 n.3 (2d Cir. 2017) (Jacobs, J., dissenting) (collecting cases from every other circuit stating that the standards for *Brady* materiality and prejudice for ineffective assistance claims are the same or equivalent), and they share the same roots, *see, e.g.*, *Strickler v. Greene*, 527 U.S. 263, 299 (1999) (Souter, J., concurring in part and dissenting in part) (“[I]n *United States v. Bagley*, we embraced ‘reasonable probability’ as the appropriate standard to judge the materiality of information withheld by the prosecution whether or not the defense had asked first. *Bagley* took that phrase from *Strickland v. Washington*, where it had been used for the level of prejudice needed to make out a claim of constitutionally ineffective assistance of counsel.” (citation omitted)); *Strickland v. Washington*, 466 U.S. 668, 694 (1984) (“[T]he appropriate test for prejudice [in the ineffective assistance context] finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution.”).

⁶⁵ *See Strickler*, 527 U.S. at 280, 282, 289, 296; *accord Banks v. Dretke*, 540 U.S. 668, 691 (2004) (“[C]oincident with the third *Brady* component (prejudice), prejudice within the compass of the ‘cause and prejudice’ requirement exists when the suppressed evidence is ‘material’ for *Brady* purposes.” (citing *Strickler*, 527 U.S. at 282)).

to ineffective assistance prejudice or *Brady* materiality.⁶⁶ Thus, the modern iteration of the prejudice component of cause and prejudice does not meaningfully differentiate that standard from the modern iteration of plain error.⁶⁷

Now, to be sure, cause and prejudice remains more demanding than plain error insofar as it compels a showing of “cause.” That requirement is not easy to meet: it requires “something *external* to the petitioner,” such as a valid claim of ineffective assistance of counsel, attorney abandonment, the previous unavailability of “the factual or

⁶⁶ For the equivalency between the prejudice inquiries for ineffective assistance and cause and prejudice, see, for example, *Chase v. MaCauley*, 971 F.3d 582, 595–96 (6th Cir. 2020); *Thomas v. Payne*, 960 F.3d 465, 477 (8th Cir. 2020); *Harris v. Comm’r, Ala. Dep’t of Corr.*, 874 F.3d 682, 688 (11th Cir. 2017); *Grueninger v. Dir., Va. Dep’t of Corr.*, 813 F.3d 517, 532 & n.13 (4th Cir. 2016); *Ambrose v. Booker*, 801 F.3d 567, 578, 584 (6th Cir. 2015); *Mincey v. Head*, 206 F.3d 1106, 1147 n.86 (11th Cir. 2000); *Lynch v. Ficco*, 438 F.3d 35, 49–50 (1st Cir. 2006); *Ellis v. United States*, 313 F.3d 636, 649 & n.6 (1st Cir. 2002). And for the equivalency between *Brady* materiality and the prejudice prong of cause and prejudice, see, for example, *Simpson v. Carpenter*, 912 F.3d 542, 571 (10th Cir. 2018); *Juniper v. Zook*, 876 F.3d 551, 564 n.6 (4th Cir. 2017); *Canales v. Stephens*, 765 F.3d 551, 574–75 (5th Cir. 2014); *Jones v. Bagley*, 696 F.3d 475, 486–87 (6th Cir. 2012); *Bell v. Bell*, 512 F.3d 223, 231 n.3 (6th Cir. 2008) (en banc); *Albrecht v. Horn*, 485 F.3d 103, 132 (3d Cir. 2007).

The contours of prejudice for cause and prejudice are not perfectly settled. For instance, the Sixth Circuit has said both that prejudice for cause and prejudice is more stringent than for ineffective assistance claims and that the two standards are equivalent. Compare *Jones v. Bell*, 801 F.3d 556, 563–64 (6th Cir. 2015), with *Ambrose*, 801 F.3d at 578, 584. But the foregoing analysis makes clear that the standards discussed above broadly mirror each other, even if there are courts or decisions that suggest some ambiguity or possibility of difference.

⁶⁷ That is important, at least in part, because *Frady* (unlike *Engle*) addressed only prejudice (and not cause), and so differentiated cause and prejudice and plain error based on a perceived distinction in these standards’ prejudice requirements. See *United States v. Frady*, 456 U.S. 152, 167–68 (1982); cf. James S. Liebman & Randy Hertz, Brecht v. Abrahamson: *Harmful Error in Habeas Corpus Law*, 84 J. CRIM. L. & CRIMINOLOGY 1109, 1136 n.117 (1994) (“[T]he Court has carefully noted that the appellant’s burden of showing ‘plain error’ under Rule 52(b) is a lesser burden than is the burden borne by a prisoner attempting to show ‘cause and prejudice’ under *Wainwright v. Sykes*, and a fortiori, than the burden borne by a defendant attempting to establish the ‘materiality’ element of a ‘suppression of evidence’ violation under *Bagley*, or the ‘prejudice’ element of an ‘ineffective assistance’ violation under *Strickland*.” (citations omitted)). And in fact, in light of *Frady* and its progeny (and notwithstanding the evolution of the plain error and cause and prejudice standards described above), some decisions have expressed the view that the prejudice required for cause and prejudice is greater than that required for plain error. See, e.g., *United States v. Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003).

legal basis for a claim,” or “interference by officials.”⁶⁸ And it is not satisfied, for instance, by mere attorney neglect, a claim of constitutionally ineffective assistance that itself is unexhausted or defaulted, the novelty of a claim that was not *entirely* unavailable beforehand, or the futility of raising a particular argument (that Supreme Court precedent has not foreclosed).⁶⁹ Furthermore, because the reason for failing to raise an issue is analytically distinct from the merits of that issue, the cause requirement can eliminate claims regardless of their strength.⁷⁰ Plain error has no such cause requirement, and its elements are all primarily focused on the seriousness of the error at issue.⁷¹

Nevertheless, plain error can still be considered more stringent with respect to cause, at least in a sense. If a habeas petitioner is able to show cause for defaulting a prejudicial issue, their claim is generally

⁶⁸ *Maples v. Thomas*, 565 U.S. 266, 280–81 (2012) (citation omitted); *Strickler*, 527 U.S. at 283 n.24 (citation omitted); *Coleman v. Thompson*, 501 U.S. 722, 753–54 (1991) (citations omitted); *Murray v. Carrier*, 477 U.S. 478, 488 (1986) (citation omitted); see *Davila v. Davis*, 137 S. Ct. 2058, 2065 (2017); *Edwards v. Carpenter*, 529 U.S. 446, 451–52 (2000).

⁶⁹ See *Davila*, 137 S. Ct. at 2065; *Maples*, 565 U.S. at 280–81; *Edwards*, 529 U.S. at 452–53; *Bousley v. United States*, 523 U.S. 614, 623 (1998); *Coleman*, 501 U.S. at 753; *Carrier*, 477 U.S. at 488; *Smith v. Murray*, 477 U.S. 527, 536–37 (1986); *Gatewood v. United States*, 979 F.3d 391, 396 (6th Cir. 2020); *Lassend v. United States*, 898 F.3d 115, 122–23 (1st Cir. 2018).

⁷⁰ See, e.g., Donald E. Wilkes, Jr., *The Great Writ Hit: The Curtailment of Habeas Corpus in Georgia Since 1967*, 7 J. MARSHALL L.J. 415, 460–61 (2014); John C. Jeffries, Jr. & William J. Stuntz, *Ineffective Assistance and Procedural Default in Federal Habeas Corpus*, 57 U. CHI. L. REV. 679, 690 (1990).

⁷¹ *Cf.*, e.g., Guttenberg, *supra* note 11, at 674; Meltzer, *supra* note 51, at 1207. The “fairness, integrity, or public reputation” element is flexible and *can* extend beyond the substance of a case in some circumstances—such as by considering the likelihood of strategic behavior in failing to timely raise a claim. See *infra* Part IV.C. But the inquiry is overwhelmingly focused on merits-related issues—generally evaluating factors like “the error’s effect on the values or interests protected by the violated right,” prejudice, and “the relative ease of correcting the error”—which makes sense, given that this element, at bottom, simply asks whether correcting an error would “promote the ends of justice.” *United States v. Williams*, 974 F.3d 320, 344–45 (3d Cir. 2020) (citations omitted). In line with that, moreover, even when a non-merits point is considered, it only operates as a “thumb-on-the-scale” consideration within a broadly holistic analysis, meaning that any merits-related points are still highly relevant. See, e.g., *United States v. Shwayder*, 312 F.3d 1109, 1122 (9th Cir. 2002); *United States v. Bayless*, 201 F.3d 116, 128 (2d Cir. 2000); *cf.* *Puckett v. United States*, 556 U.S. 129, 142 (2009) (“The fourth prong is meant to be applied on a case-specific and fact-intensive basis. We have emphasized that a ‘*per se*’ approach to plain-error review is flawed.” (citation omitted)).

reviewed de novo.⁷² Under plain error, in contrast, even if the complainant has a good reason for failing to preserve an error that prejudiced them, there is no exception to the doctrine's additional requirements: that the error be beyond reasonable dispute and seriously affect the fairness, integrity, or public reputation of judicial proceedings.⁷³ In short, cause and prejudice permits full review of any

⁷² See, e.g., *Johnson v. Williams*, 568 U.S. 289, 301–02 (2013); *Atwood v. Ryan*, 870 F.3d 1033, 1060 n.22 (9th Cir. 2017); *Bey v. Superintendent Greene SCI*, 856 F.3d 230, 236 (3d Cir. 2017). Courts rarely discuss the standard of review in 2255 cases (i.e., the standard a district court in a 2255 proceeding applies to the trial/sentencing proceedings), but the general standard is de novo, see, e.g., *Valentine v. United States*, 488 F.3d 325, 343–44, 343 n.4 (6th Cir. 2007) (Martin, J., concurring in part and dissenting in part); *United States v. Williams*, No. 1:15-cr-119, 2019 WL 2610688, at *6 (S.D. Ohio June 26, 2016); *Barnes v. Hammer*, No. 12–2745 (PAM/SER), 2013 WL 5488531, at *16 (D. Minn. Oct. 1, 2013), and that carries through to defaulted claims where cause and prejudice is shown, see, e.g., *United States v. LaPrade*, 673 F. App'x 198, 205 (3d Cir. 2016); *United States v. De la Fuente*, 8 F.3d 1333, 1337–41 (9th Cir. 1993); *Serrano v. United States*, No. 3:19-cv-00719, 2020 WL 5653478, at *10, 15–16 (M.D. Tenn. Sept. 23, 2020); *Moore v. United States*, Nos. 20-cv-476-bbc, 07-cr-137-bbc, 2020 WL 4785432, at *5 (W.D. Wis. Aug. 18, 2020); *United States v. Chea*, Nos. 98-cr-20005-1 CW, 98-cr-40003-2 CW, 2019 WL 5061085, at *6–13 (N.D. Cal. Oct. 2, 2019); *United States v. Smith*, No. 3:08CR283, 2019 WL 4675369, at *2–3, 5–7 (E.D. Va. Sept. 25, 2019); *Camacho v. United States*, Nos. 17 Civ. 5199 (AKH), 13 Cr. 58 (AKH), 2019 WL 3838395, at *2–3 (S.D.N.Y. Aug. 15, 2019); *Lilley v. United States*, No. C16-0410JLR, 2016 WL 6997037, at *4–5 (W.D. Wash. Nov. 30, 2016); *United States v. Martinez*, No. 10–cr–00214–CMA, 2016 WL 6997266, at *6 (D. Colo. Nov. 30, 2016); *United States v. Hernandez*, 450 F. Supp. 2d 950, 965–66 (N.D. Iowa 2006).

There are exceptions. For instance, if there are factual findings relevant to a defaulted but excused claim, these will be reviewed for clear error in 2254 proceedings, see, e.g., *Ambrose v. Booker*, 684 F.3d 638, 645 (6th Cir. 2012), and some decisions have suggested that a similar standard applies in 2255 proceedings as well, see, e.g., *Story v. United States*, No. 2:17-CV-00144-JRG-CRW, 2020 WL 6141047, at *11 (E.D. Tenn. Oct. 19, 2020); *United States v. Clark*, No. 2:14-cr-20199, 2018 WL 3207975, at *1 (E.D. Mich. June 29, 2018). But such exceptions do not impact the discussion here. In the main, the merits of defaulted but excused claims are reviewed de novo.

⁷³ Cf. e.g., *Greer v. United States*, 141 S. Ct. 2090, 2099 (2021) (explaining that the futility of raising an argument does not change whether plain error applies); *United States v. Marshall*, 754 F. App'x 157, 160 (4th Cir. 2018) (“[T]he reasons for the failure to object do not alter the [plain error] standard of review.”); *United States v. McIvery*, 806 F.3d 645, 651 (1st Cir. 2015) (“Even when the law changes between the time of a lower court ruling and the time a subsequent appeal is heard, objections not interposed before the lower court are deemed forfeited and are reviewed for plain error.”); *Swanson v. United States*, 692 F.3d 708, 717 (7th Cir. 2012) (suggesting that plain error review would apply even if counsel had been ineffective in failing to raise an issue).

Of course, a party can argue that an issue was not forfeited (to avoid plain error review), and the reason for the failure to raise it earlier can be relevant in that context. Cf., e.g., *United States v. Rodriguez*, 919 F.3d 629, 635 (1st Cir. 2019) (explaining that

prejudicial error so long as the complainant had a good reason for failing to raise it, but plain error does not.

In sum, although the Supreme Court chose cause and prejudice over plain error because the Court perceived it to be the more stringent standard, that perception is no longer accurate. Rather, plain error now contains rigorous elements that cause and prejudice does not; the two doctrines impose essentially the same standard of prejudice; and even as to the only distinct component of cause and prejudice—the cause requirement—plain error can be viewed as more onerous. Thus, the core logic of *Frady* and *Engle* no longer holds.

B. *Plain Error Better Vindicates the Principles of Habeas and Procedural Default than Cause and Prejudice*

That is not the only reason why we should rethink *Frady* and *Engle*, however. In addition, plain error’s present-day formulation is simply a much better option for procedural default than cause and prejudice, in light of the key principles applicable to habeas and default doctrine.

First, and most importantly, even though plain error is in many ways more demanding than cause and prejudice, it aligns much better with habeas’s core purpose of serving as “a bulwark against convictions that violate fundamental fairness” and “a guard against extreme malfunctions in . . . criminal justice systems.”⁷⁴ Because the cause requirement focuses only on why a claim was not raised earlier—rather than on the severity of the asserted error—and narrowly defines sufficient “cause,” it can easily bar relief or prevent review on the merits for even strong claims involving significant constitutional violations.⁷⁵

plain error does not apply where a defendant “had no realistic opportunity to object before the entry of judgment”); *United States v. Young*, 585 F.3d 199, 202 n.11 (5th Cir. 2009) (per curiam) (“[E]ither Young did object to the report; or he did not object but the Magistrate Judge did not warn him of the consequences. Each possibility allows Young to avoid plain error review.”). But habeas petitioners can make similar arguments (to avoid cause and prejudice), likewise pointing to why they are raising their claim for the first time on habeas review. *Cf., e.g., Bousley*, 523 U.S. at 621–22 (acknowledging a narrow “exception to the procedural default rule for claims that could not be presented without further factual development”); *Massaro v. United States*, 538 U.S. 500, 504 (2003) (similar); *United States v. Braswell*, 501 F.3d 1147, 1149 n.1 (9th Cir. 2007) (making a similar point and connecting the reasoning of *Bousley* and *Massaro*). The point here is that plain error permits no cause-based exception for claims that *are forfeited*.

⁷⁴ *Coleman*, 501 U.S. at 747 (citation omitted); *Woods v. Donald*, 575 U.S. 312, 316 (2015) (citation omitted).

⁷⁵ *Cf., e.g., Ledford v. Warden, Ga. Diagnostic Prison*, 975 F.3d 1145, 1163 (11th Cir. 2020) (“[B]ecause Ledford cannot establish cause or prejudice to excuse the

The likelihood of that result is amplified, moreover, by the fact that litigating procedural default can be quite challenging for federal habeas petitioners. The doctrine can be complex and unintuitive,⁷⁶

default of his ineffective-assistance-of-appellate-counsel claim, that claim cannot serve as cause to excuse the default of his juror-misconduct claim.”); *Dickerson v. Warden*, 750 F. App’x 458, 461–62 (6th Cir. 2018) (rejecting an argument that “state court delay in sending [the petitioner] its decision” was cause); *Jeter v. Sec’y, Fla. Dep’t of Corr.*, 479 F. App’x 286, 288 (11th Cir. 2012) (per curiam) (“Jeter alleges that he retained counsel to file a Rule 3.850 motion, but the attorney did not file the motion before the deadline, maybe because the attorney had died. . . . We cannot say that two affidavits from Jeter’s family members and Jeter’s own assertions provide clear and convincing evidence that the Florida court’s finding [that he had not retained counsel] was incorrect.”); *Bonilla v. Hurley*, 370 F.3d 494, 498 (6th Cir. 2004) (per curiam) (concluding that the petitioner’s asserted “pro se status,” “ignorance of the law and procedural requirements for filing a timely notice of appeal,” “mistaken belief that he required a complete copy of his trial transcripts prior to filing a notice of appeal,” restricted “time in the prison law library,” and “unfamiliarity with the English language” did not show cause); *Clemons v. McAdory*, 58 F. App’x 657, 661 (7th Cir. 2003) (“Clemons asserts that he did not exhaust his gang testimony/tattoo display claim because he is not smart enough to comply with court rules on his own, and he believed that his lawyer was preparing all the necessary paperwork for his appeal. These reasons are clearly insufficient.”); *Wood v. Hall*, 130 F.3d 373, 378–79 (9th Cir. 1997) (rejecting an argument that the petitioner “has shown cause for his procedural default because he left Oregon [without permission] to seek medical treatment for a life-threatening heart condition that could not be treated in Oregon” because it “boils down to an assertion that it was unfair”—but not unconstitutional—“for the state to apply its fugitive disentitlement doctrine to him”); *Fairfax v. Scott*, 39 F.3d 319, 1994 WL 612311, at *2–3 (5th Cir. 1994) (per curiam) (unpublished table decision) (“Fairfax counters that cause exists because he did not receive notification that his conviction and sentence were affirmed within the period allotted for filing a [petition for discretionary review] or an extension of time to file same. . . . By his own admission, Fairfax did not file for an extension of time in the Texas Court of Criminal Appeal. He has not shown cause, only negligence on his own part.”); *Steele v. Young*, 11 F.3d 1518, 1522 (10th Cir. 1993) (“Steele’s status as a pro se petitioner and his deficiencies in reading and writing skills are not external factors that prevented Steele or his counsel from raising the double jeopardy issue on direct appeal.”); *Fletcher v. McCormick*, 951 F.2d 359, 1991 WL 279107, at *2 (9th Cir. 1991) (unpublished table decision) (“Although Fletcher provides detailed allegations of beatings during his imprisonment, he makes only cursory allegations that guards interfered with his ability to file pleadings.”); see also Joseph L. Hoffmann & William J. Stuntz, *Habeas After the Revolution*, 1993 SUP. CT. REV. 65, 113 (“Almost all procedural defaults are the result of defense attorney mistakes. The narrow definition of ‘cause,’ however, means that most such mistakes will not excuse the default; anything short of truly awful attorney behavior will not suffice. Thus, defendants are routinely penalized for their lawyers’ errors.”); Wilkes, *supra* note 70, at 461 (similar).

⁷⁶ See, e.g., Shelly Richter, *Racing Against the Clock: Why California Should Reform Its Timeliness Framework for Habeas Corpus Petitions*, 54 U.C. DAVIS L. REV. 2633, 2672 (2021); Hoffmann & Stuntz, *supra* note 75, at 112–13; M. Shanara Gilbert, *Racism and*

most (non-capital) petitioners are pro se, and they commonly face circumstances that render litigating pro se difficult, such as restricted freedoms and resources, illiteracy, learning disabilities, and mental illness.⁷⁷ And what's more, when the cause requirement eliminates a claim on a non-merits basis, it may well be extinguishing that claim's *only* opportunity for merits review, since a default, by its nature, means that the claim was never before raised or had been previously rejected on procedural grounds.⁷⁸ Thus, to put it in the words of Justice Brennan, "the only thing clear about the Court's 'cause'-and-'prejudice' standard is that it exhibits the notable tendency of keeping prisoners in jail without addressing their constitutional complaints."⁷⁹

That remains true even in circumstances where the merits are potentially relevant to the cause inquiry, such as when a petitioner asserts that he could not have previously raised a *Brady* claim because the prosecution withheld the *Brady* evidence at issue,⁸⁰ or when

Retrenchment in Capital Sentencing: Judicial and Congressional Haste Toward the Ultimate Injustice, 18 N.Y.U. REV. L. & SOC. CHANGE 51, 74 n.122 (1991).

⁷⁷ See, e.g., *Halbert v. Michigan*, 545 U.S. 605, 621 (2005); David M. Shapiro & Charles Hogle, *The Horror Chamber: Unqualified Impunity in Prison*, 93 NOTRE DAME L. REV. 2021, 2052–53 (2018); Emily Garcia Uhrig, *The Sacrifice of Unarmed Prisoners to Gladiators: The Post-AEDPA Access-to-Courts Demand for a Constitutional Right to Counsel in Federal Habeas Corpus*, 14 U. PA. J. CONST. L. 1219, 1223, 1252–54 (2012); Margaret Smilowitz, Comment, *What Happens After the Right to Counsel Ends? Using Technology to Assist Petitioners in State Post-Conviction Petitions and Federal Habeas Review*, 107 J. CRIM. L. & CRIMINOLOGY 493, 498–99 (2017); cf. *Buckley v. Lockhart*, 892 F.2d 715, 724 (8th Cir. 1989) (Heaney, J., dissenting) ("This case exemplifies the labyrinth that prisoners must negotiate when state courts do not address their petitions on their merits and bar certain claims because of procedural default. Few prisoners are equipped to navigate this procedural maze. Although current law forces us to recognize procedural default, it also causes us to deny relief to petitioners who may deserve it.").

⁷⁸ Cf., e.g., *Johnson v. Williams*, 568 U.S. 289, 301–02 (2013) (explaining that there is a presumption that federal claims in state court were "adjudicated on the merits" but that it can be rebutted, inter alia, "for the purpose of showing that the federal claim should be regarded as procedurally defaulted"); *Fay v. Noia*, 372 U.S. 391, 433 (1963) (indicating that a procedural default in state court would likely result in a habeas petitioner "forfeit[ing] his state remedies, appellate and collateral, as well as direct review thereof in [the Supreme] Court"). To be sure, this is not *always* the case. It could be, for example, that a claim was raised in the trial court and defaulted through the failure to press that claim on appeal. But the cause requirement at least often eliminates all merits review of a claim.

⁷⁹ *Wainwright v. Sykes*, 433 U.S. 72, 116 (1977) (Brennan, J., dissenting); accord, e.g., Wilkes, *supra* note 70, at 460–61; Henry B. Robertson, *The Needle in the Haystack: Towards a New State Postconviction Remedy*, 41 DEPAUL L. REV. 333, 344–45 (1992).

⁸⁰ See, e.g., *Banks v. Dretke*, 540 U.S. 668, 691 (2004); *Hughbanks v. Hudson*, 2 F.4th 527, 535–36 (6th Cir. 2021).

ineffective assistance of counsel is offered as the reason for having failed to assert some underlying claim.⁸¹ With respect to the former example, courts will find a *Brady* claim defaulted notwithstanding the suppression of *Brady* evidence if the suppression was not “the reason” for the default, for instance if the petitioner had sufficient information to pursue the claim at an earlier point.⁸² And as to the latter example—where ineffective assistance is employed to try to excuse a default—there are a host of non-merits barriers to a finding of cause. For instance, a court might conclude that regardless of whether a constitutional violation occurred—even one amounting to plain error—it was not objectively unreasonable for counsel to fail to raise it (e.g., because there was a strategic reason for not objecting, other attorneys might have done the same, or the error was not obvious at the time counsel should have raised the issue).⁸³ Or, a court could decide that a claim of ineffective assistance is not cause because that claim was *itself* defaulted.⁸⁴ And if the ineffectiveness of state postconviction counsel is offered as cause, a court might find that the case does not fit into the exceedingly narrow set of circumstances where that cause is sufficient: where (1) the defaulted claim is ineffective assistance of *trial* counsel; (2) state law actually or effectively prohibits bringing such claims on direct review; and (3) the default

⁸¹ See, e.g., *Atwood v. Ryan*, 870 F.3d 1033, 1059–60 (9th Cir. 2017); *Moore v. Mitchell*, 708 F.3d 760, 778 (6th Cir. 2013); *Hoffner v. Bradshaw*, 622 F.3d 487, 504 (6th Cir. 2010); cf. Amy Knight Burns, Note, *Insurmountable Obstacles: Structural Errors, Procedural Default, and Ineffective Assistance*, 64 STAN. L. REV. 727, 730 (2012) (“[T]he most common ‘cause’ accepted in [procedural default] cases is a claim of ineffective assistance of counsel—where the claim was not raised below because the petitioner’s lawyer unreasonably failed to raise it.”).

⁸² *Henry v. Ryan*, 720 F.3d 1073, 1082–83 (9th Cir. 2013); accord, e.g., *Snow v. Baker*, 820 F. App’x 541, 542 (9th Cir. 2020); *Sullivan v. United States*, 587 F. App’x 935, 943–44 (6th Cir. 2014); *Fisher v. Rozum*, 441 F. App’x 115, 118 (3d Cir. 2011); *Hutchison v. Bell*, 303 F.3d 720, 741–43 (6th Cir. 2002); *Cannon v. Gibson*, 259 F.3d 1253, 1269 (10th Cir. 2001).

⁸³ See, e.g., *Knowles v. Mirzayance*, 556 U.S. 111, 126–27 (2009); *Yarborough v. Gentry*, 540 U.S. 1, 8–11 (2003) (per curiam); *Moody v. United States*, 958 F.3d 485, 492 (6th Cir. 2020); *Mejia v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018); *Scott v. United States*, 890 F.3d 1239, 1258–59 (11th Cir. 2018); *United States v. Carthorne*, 878 F.3d 458, 466 (4th Cir. 2017); *Bucci v. United States*, 662 F.3d 18, 31–32 (1st Cir. 2011); *Cvijetinovic v. Eberlin*, 617 F.3d 833, 838–39, 838 n.6 (6th Cir. 2010); *Gordon v. United States*, 518 F.3d 1291, 1300 (11th Cir. 2008); see also *Strickland v. Washington*, 466 U.S. 668, 687–91 (1984).

⁸⁴ See, e.g., *Edwards v. Carpenter*, 529 U.S. 446, 453 (2000); *Ledford v. Warden, Ga. Diagnostic Prison*, 975 F.3d 1145, 1163 (11th Cir. 2020); *Richardson v. Lemke*, 745 F.3d 258, 272 (7th Cir. 2014).

was caused by postconviction counsel failing to raise the claim *at the first opportunity* (rather than, say, by their failure to pursue it on appeal of a postconviction proceeding).⁸⁵ Finally, as the foregoing perhaps suggests, “cause” issues involving ineffective assistance of counsel pose some of the greatest complexities and litigation challenges within the procedural default space, especially for pro se petitioners.⁸⁶

Plain error is much fairer and less problematic. In contrast to cause and prejudice, plain error focuses directly on the strength of the petitioner’s claim, meaning that the merits of every defaulted issue would receive at least some level of scrutiny and consideration.⁸⁷ Furthermore, while plain error is not an easy standard to meet, it should be *relatively* easy to navigate and argue, even for pro se petitioners. That is because all petitioners are already necessarily arguing the merits of their claims, typically including some form of

⁸⁵ See, e.g., *Davila v. Davis*, 137 S. Ct. 2058, 2065–66 (2017); *Hartman v. Payne*, 8 F.4th 733, 736–37 (8th Cir. 2021); *Crutchfield v. Dennison*, 910 F.3d 968, 976–78 (7th Cir. 2018); *Lee v. Corsini*, 777 F.3d 46, 61 (1st Cir. 2015); *Fairchild v. Trammell*, 784 F.3d 702, 723 (10th Cir. 2015); *West v. Carpenter*, 790 F.3d 693, 698 (6th Cir. 2015).

⁸⁶ Cf., e.g., *Trevino v. Thaler*, 569 U.S. 413, 432–33 (2013) (Roberts, C.J., dissenting) (expressing concern that the Supreme Court’s decision to allow ineffective assistance of postconviction counsel to serve as cause “whenever the ‘state procedural framework, by reason of its design and operation, makes it highly unlikely in a typical case that a defendant will have a meaningful opportunity’ to raise his claim on direct appeal” would lead to “endless” questions and “state-by-state litigation . . . to work them out” (citation omitted)); *Martinez v. Ryan*, 566 U.S. 1, 11–12 (2012) (“Without the help of an adequate attorney, a prisoner will have similar difficulties vindicating a substantial ineffective-assistance-of-trial-counsel claim. Claims of ineffective assistance at trial often require investigative work and an understanding of trial strategy. When the issue cannot be raised on direct review, moreover, a prisoner asserting an ineffective-assistance-of-trial-counsel claim in an initial-review collateral proceeding cannot rely on a court opinion or the prior work of an attorney addressing that claim. . . . While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.”); *Edwards*, 529 U.S. at 454–58 (Breyer, J., concurring) (lamenting the extraordinary complexity—for “lawyers, let alone unrepresented state prisoners”—generated by the rule that ineffective assistance can only serve as cause if the ineffective assistance claim itself is not defaulted); *Richardson v. Superintendent Coal Twp. SCI*, 905 F.3d 750, 760 (3d Cir. 2018) (describing the layers of procedural default inquiries in the ineffective assistance context as a “labyrinth”).

⁸⁷ As noted above, the “fairness, integrity, or public reputation” element can at times implicate non-merits considerations. See *supra* note 71; see also *infra* Part IV.C. But again, the element’s primary focus is on the merits—and the merits would still be considered—given that the inquiry is holistic and the core question is whether allowing an error to stand would be fair or just. See *supra* note 71.

prejudice,⁸⁸ and the types of errors plain error encompasses are those that petitioners should be most equipped to uncover and challenge: ones “so ‘plain’ the trial judge and prosecutor were derelict in countenancing [them], even absent the defendant’s timely assistance in detecting [them].”⁸⁹ In other words, petitioners would have few labyrinths to explore or extraneous issues to investigate and litigate; they would just have to show how their conviction was infected by serious, obvious, and unfair errors. Finally, and perhaps most critically, adopting plain error as the standard for procedural default would ensure that federal courts are empowered and encouraged to correct plain and significant constitutional violations that undermine the fairness, integrity, or public reputation of judicial proceedings—*precisely* what habeas corpus is supposed to address.⁹⁰

Second, adopting plain error for procedural default would better respect the principles of federalism and of honoring the finality of criminal judgments that are central to habeas doctrine—and that often counsel against granting habeas relief.⁹¹ Those principles drove the *Frady* and *Engle* decisions and their expressed goal of imposing a more demanding standard on collateral review than on direct review.⁹² Yet as we have already seen, cause and prejudice cannot be said to be more stringent than plain error—the standard on direct review—and is in many ways *less* stringent. Thus, cause and prejudice serves the principles of federalism and finality quite poorly, and plain error would do so better simply by virtue of requiring more than the existing rule.

Additionally, there is no reason why the plain error doctrine would have to be as “forgiving” on habeas as on direct review. As

⁸⁸ See *Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (“Habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in ‘actual prejudice.’”); *Daniels v. United States*, 939 F.3d 898, 903 n.3 (7th Cir. 2019) (noting that several circuits have applied *Brecht* to 2255 cases); see also *supra* notes 62–67 and accompanying text.

⁸⁹ *United States v. Frady*, 456 U.S. 152, 163 (1982); accord, e.g., *United States v. Chaparro*, 956 F.3d 462, 484 (7th Cir. 2020). In line with that, petitioners should be relatively prepared to argue why granting relief would promote fairness and justice, even if some of that inquiry permits consideration of non-merits issues on occasion. See *supra* notes 71, 87.

⁹⁰ See *supra* note 74 and accompanying text.

⁹¹ See, e.g., *Ryan v. Gonzales*, 568 U.S. 57, 76 (2013); *Martinez*, 566 U.S. at 9; *Johnson v. United States*, 544 U.S. 295, 309 (2005); *McCleskey v. Zant*, 499 U.S. 467, 490–91 (1991); *Frady*, 456 U.S. at 166.

⁹² See *Engle v. Isaac*, 456 U.S. 107, 134–35 (1982); *Frady*, 456 U.S. at 164–66, 175.

discussed above, courts have applied plain error to a range of contexts outside of direct appeal in criminal litigation. And when they do that, they regularly make clear that the plain error test is not rigid, but rather can and must be contoured to the circumstances at hand. For example, courts routinely emphasize that plain error review in civil proceedings is more exacting than in criminal ones.⁹³ A similar approach could certainly be taken in habeas proceedings to ensure that plain error in the procedural default context would fully align with *Frady* and *Engle*'s federalism and finality-grounded conclusion that "to obtain collateral relief a prisoner must clear a significantly higher hurdle than would exist on direct appeal."⁹⁴

Third, replacing cause and prejudice with plain error would serve the interests of efficiency and judicial economy, which are likewise key to the procedural default doctrine as well as habeas more generally.⁹⁵

⁹³ See, e.g., *Trs. of Electricians' Salary Deferral Plan v. Wright*, 688 F.3d 922, 926 (8th Cir. 2012); *Henry v. Hulett*, 969 F.3d 769, 786 (7th Cir. 2020); *C.B. v. City of Sonora*, 769 F.3d 1005, 1016–18 (9th Cir. 2014) (en banc); *United States v. Sum of \$185,336.07 U.S. Currency*, 731 F.3d 189, 195 (2d Cir. 2013); *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) (Gorsuch, J.); *Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011); *Salazar ex rel. Salazar v. District of Columbia*, 602 F.3d 431, 437 (D.C. Cir. 2010); *Gaydar v. Sociedad Instituto Gineco-Quirurgico y Planificacion*, 345 F.3d 15, 23 (1st Cir. 2003); cf. FED. R. CIV. P. 51 advisory committee's note to 2003 amendment ("Although the language [of plain error used in Rule 51] is the same [as in criminal cases], the context of civil litigation often differs from the context of criminal prosecution; actual application of the plain-error standard takes account of the differences.").

⁹⁴ *Frady*, 456 U.S. at 166; see also *Engle*, 456 U.S. at 134–35. The Supreme Court presumably could have reached a similar conclusion in *Frady* and *Engle* based on prevailing case law at the time. Cf., e.g., *Brenner v. World Boxing Council*, 675 F.2d 445, 456 (2d Cir. 1982) ("We have recognized that the plain error doctrine, especially in civil cases, should be applied only where the 'error (is) so serious and flagrant that it goes to the very integrity of the trial.'" (citation omitted)); *Gay v. P. K. Lindsay Co.*, 666 F.2d 710, 712 n.1 (1st Cir. 1981) ("Plain error . . . is a rare species in civil litigation; it will be found only 'to prevent a clear miscarriage of justice.'" (citations omitted)); *Wright v. Farmers Co-Op of Ark. & Okla.*, 620 F.2d 694, 699 (8th Cir. 1980) ("[I]n this circuit, the plain error exception to compliance with Rule 51 is narrow and 'confined to the exceptional case where the error has seriously affected the fairness, integrity, or public reputation of judicial proceedings.'" (citations omitted)); *Liner v. J. B. Talley & Co.*, 618 F.2d 327, 329–30 (5th Cir. 1980) (per curiam) (similar). Why it did not do so and instead reasoned as if the only possible manifestation of plain error was the one that applied on direct review of criminal cases is puzzling. See *Engle*, 456 U.S. at 134–35; *Frady*, 456 U.S. at 164–66. But that puzzle need not be solved here, since it is clear from the foregoing discussion that plain error *could* be adopted without running afoul of the Court's concerns.

⁹⁵ See, e.g., *United States v. Castro*, 30 F.4th 240, 245 (5th Cir. 2021); see also *Day v. McDonough*, 547 U.S. 198, 205–06 (2006).

As indicated above, cause and prejudice can frequently raise a host of challenging non-merits questions. For example, it can require courts to resolve issues such as whether a particular jurisdiction's procedures offer a meaningful opportunity to raise ineffective assistance of trial counsel claims on direct review, what precise behavior constitutes "interference" with a petitioner's ability to raise a claim, whether the basis for a petitioner's challenge was sufficiently available at the time of a default, how to approach multi-layered procedural default inquiries, and whether a petitioner's lawyer—at various stages of litigation—provided deficient performance.⁹⁶ Such questions, moreover, often prove more difficult and time-consuming to resolve than the merits themselves, as jurists and commentators regularly emphasize.⁹⁷ Furthermore, courts are encouraged to resolve default

⁹⁶ See, e.g., *Brown v. Brown*, 847 F.3d 502, 509–10 (7th Cir. 2017); *Johnson v. Foster*, 786 F.3d 501, 506–07 (7th Cir. 2015); *Ambrose v. Booker*, 684 F.3d 638, 645–49 (6th Cir. 2012); *Henderson v. Campbell*, 353 F.3d 880, 895–98 (11th Cir. 2003); see also *supra* note 86 and accompanying text.

⁹⁷ See, e.g., *Yick Man Mui v. United States*, 614 F.3d 50, 56–57 (2d Cir. 2010) (“Deciding whether a[n] [ineffective assistance] claim could have been raised and decided on the record on direct appeal injects another issue to be litigated. Resolving that issue may be difficult and may result in great delays caused by appeals and remands. . . . Simply reaching the merits of such a claim rather than first considering the failure to raise it on direct appeal is likely to further both efficiency and finality and avoid miscarriages of justice.”); *Carpenter v. Edwards*, 113 F. App'x 672, 679–80 (6th Cir. 2004) (Merritt, J., concurring) (“As Justices Breyer and Stevens observed, the forfeiture rules are no longer ‘comprehensible’ but rather have become ‘difficult puzzles’ that foreclose a rational and efficient procedure for deciding habeas cases. Time-wise and justice-wise, we would be much better off if we could just get to the merits, as in the days of *Fay v. Noia*.” (citations omitted)); *United States v. Galloway*, 56 F.3d 1239, 1242 (10th Cir. 1995) (en banc) (“[I]f procedural bar is raised as a defense, it embroils us in nonmerits issues which are as time consuming as if we went straight to the merits, and infinitely less productive. Applying, as we must, the cause and prejudice standard for avoiding the procedural default, we must first examine all the reasons advanced as cause, and write on the subtext after revisiting everything that happened on direct appeal, and then some.”); *Hardiman v. Reynolds*, 971 F.2d 500, 503 n.5 (10th Cir. 1992) (“[W]here the existence of the default or its justification under *Coleman*'s cause and prejudice test is not clear from the record, it may be an inefficient use of resources to engage in a sua sponte search for a state procedural default. See *Batchelor v. Cupp*, 693 F.2d 859, 864 (9th Cir. 1982) (“These questions, when raised in the district court, are almost always more complicated and time consuming than are the merits of the petitioner's federal claim.”) (citation omitted)); *McKinnon v. Lockhart*, 921 F.2d 830, 833 n. 7 (8th Cir. 1990) (per curiam) (“In cases such as this, it might well be easier and more efficient to reach the merits than to go through the studied process required by the procedural default doctrine. Recent commentary points up the problems with the cause and prejudice standard: ‘[T]he decision tree for habeas review of defaulted claims is intricate and costly. . . . In

questions before reaching the merits,⁹⁸ and although courts are permitted to go directly to the merits where they clearly provide an easier ground for denying relief,⁹⁹ the merits are generally subject to de novo review when cause and prejudice are assumed so as to bypass the default analysis.¹⁰⁰ In other words, under cause and prejudice, courts may well be stuck conducting a complex procedural default analysis that is ultimately more difficult than the merits questions, and even if they can bypass the default issues, they must then approach the merits under a standard of review that does little to streamline their analysis. Finally, in cases where relief is warranted despite a default, courts will have to address both the potentially complex default issues and the merits under a searching standard of review, and because the cause element is analytically distinct from the merits, many of the default issues will provide limited insights into how the merits should be resolved.

Under the plain error standard, however, things would be much more straightforward. Instead of presenting courts with tough questions that often need to be resolved before the merits issues, and

essence, *Sykes* and *Strickland* require habeas lawyers and federal judges and magistrates to work through the equivalent of a law school exam every time a defendant tries to escape procedural default.’ . . . In *Johnson v. Dugger*, it took forty pages and eighty footnotes, nearly all spent on procedural default issues, for the majority to decide that a remand is necessary to develop more facts concerning issues raised by the procedural default doctrine. Likewise, in the case before us, delay occurred when the district court remanded the case to the magistrate to make findings and recommendations on whether McKinnon had demonstrated cause for his default. With all due respect for the *Sykes* standard and the policies it is designed to serve, the magistrate and this court could likely have disposed of the merits of McKinnon’s claims with little effort.” (alteration in original) (citations omitted)); *Buckley v. Lockhart*, 892 F.2d 715, 725 (8th Cir. 1989) (Heaney, J., dissenting) (“The courts and the petitioners all would benefit if state courts would reach the merits of these claims. Much time could have been saved had this case been disposed of on the merits at an earlier stage.”); *Wilkes*, *supra* note 70, at 461 (“[H]abeas procedural default rules frequently result ‘in unnecessarily time-consuming and complex review of purely procedural issues’ when ‘[i]t would often be far quicker and far fairer . . . simply to decide the constitutional issues being presented.’” (second alteration in original) (citation omitted)).

⁹⁸ See, e.g., *Lambrix v. Singletary*, 520 U.S. 518, 524–25 (1997); *Lynch v. Ficco*, 438 F.3d 35, 46 n.10 (1st Cir. 2006).

⁹⁹ See, e.g., *Lambrix*, 520 U.S. at 524–25; *Woods v. Lamas*, 631 F. App’x 96, 99 n.4 (3d Cir. 2015); *Jewett v. Brady*, 634 F.3d 67, 77 (1st Cir. 2011); *Dodge v. Robinson*, 625 F.3d 1014, 1017 n.1 (8th Cir. 2010); *Mahdi v. Bagley*, 522 F.3d 631, 635 (6th Cir. 2008).

¹⁰⁰ See, e.g., *Allen v. Benedetti*, 629 F. App’x 814, 815 (9th Cir. 2015); *Westberg v. Palmer*, 489 F. App’x 883, 887–88 (6th Cir. 2012); *Hayes v. Blades*, No. 1:11-cv-00502-EJL, 2015 WL 3514385, at *18 (D. Idaho June 4, 2015); *supra* note 72 and accompanying text.

which may be both more challenging than and unrelated to those issues, plain error would lead courts to address the merits immediately. Furthermore, instead of requiring courts to evaluate the merits (when they do so) effectively *de novo*, plain error would amplify the review standard and thereby simplify the merits analysis. Indeed, because plain error requires errors to be “plain,” the merits issues would almost always be fairly easy to decide—since novel, complex, or intricate questions would generally fail to meet that requirement.¹⁰¹ In addition, plain error would simplify the analysis regardless of whether relief is warranted; the stringent requirements of plain error would frequently provide straightforward bases for denying relief, but it also should often be fairly apparent when errors are severe and obvious enough to meet those requirements.¹⁰² Thus, a plain error standard for procedural default would do much to optimize efficiency and judicial economy.¹⁰³

¹⁰¹ See, e.g., *United States v. Aguilar*, 668 F. App’x 625, 626 (5th Cir. 2016) (*per curiam*) (observing that an error is not plain where “the questions and relevant analytical framework are both complex and unanswered”); *United States v. Narez-Garcia*, 819 F.3d 146, 151–52 (5th Cir. 2016) (“An error is not plain under current law ‘if a defendant’s theory requires the extension of precedent.’” (citation omitted)); *United States v. Aslan*, 644 F.3d 526, 547 (7th Cir. 2011) (“With the law unsettled, the error cannot be plain.”); *United States v. Hurt*, 527 F.3d 1347, 1356 (D.C. Cir. 2008) (“Neither the Supreme Court nor this court has spoken to the issue . . . so Hurt cannot prevail.”).

¹⁰² Cf. *United States v. Frady*, 456 U.S. 152, 163 (1982) (“Rule 52(b) was intended to afford a means for the prompt redress of miscarriages of justice. By its terms, recourse may be had to the Rule only on appeal from a trial infected with error so ‘plain’ the trial judge and prosecutor were derelict in countenancing it, even absent the defendant’s timely assistance in detecting it.”).

¹⁰³ Of course, there are some cases where an analysis of cause and prejudice could easily resolve a case. However, where the prejudice requirement supplies an easy ground for decision, so too would plain error, given that it likewise demands a showing of prejudice. Similarly, where “cause” supplies the straightforward ground, most of the time plain error would offer simple grounds as well, just different ones (e.g., the plainness requirement). Finally, to the extent cause would provide an easy ground for denying relief but plain error would not, it would seem that: (1) plain error would nevertheless simplify the process of *granting* relief, see *supra* note 102 and accompanying text; and (2) denying relief would raise serious fairness concerns, which should ultimately trump efficiency concerns, see *supra* notes 74–90 and accompanying text; cf. *Wainwright v. Sykes*, 433 U.S. 72, 115–16 (1977) (Brennan, J., dissenting) (“Ultimately, all of these limitations on the finality of criminal convictions emerge from the tension between justice and efficiency in a judicial system that hopes to remain true to its principles and ideals. Reasonable people may disagree on how best to resolve these tensions. But the solution that today’s decision risks embracing seems to me the most unfair of all: the denial of any judicial consideration of the constitutional claims of a criminal defendant because of errors made by his attorney

Finally, plain error would do more than cause and prejudice to deter strategic behavior such as “sandbagging,” to encourage problems to be brought to the court’s attention early on, and to ensure that the trial is the “‘main event,’ . . . rather than a ‘tryout on the road’ for what will later be the determinative federal habeas hearing.”¹⁰⁴ Concerns over such issues animate the cause and prejudice standard.¹⁰⁵ But that standard only imperfectly addresses those concerns.¹⁰⁶

That is primarily because of the standard of review applicable to defaulted claims and how it relates to the standard for many non-defaulted claims. As noted above, if a petitioner can satisfy cause and prejudice for a defaulted claim, that claim is generally subject to plenary review by a habeas court. In stark contrast, claims that were previously adjudicated on the merits—and hence not defaulted—face serious limits on review. With respect to 2254 claims, they are subject to the extremely deferential standard of 28 U.S.C. § 2254(d), which prohibits federal habeas relief unless the state court’s resolution of the claim:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.¹⁰⁷

And in 2255 proceedings, previously adjudicated claims cannot be reviewed at all except for in narrow circumstances, such as (at a

which lie outside the power of the habeas petitioner to prevent or deter and for which, under no view of morality or ethics, can he be held responsible.”).

¹⁰⁴ *Sykes*, 433 U.S. at 89–90.

¹⁰⁵ See, e.g., *McClesky v. Zant*, 499 U.S. 467, 491–93 (1991); *Fradley*, 456 U.S. at 165–66; *Sykes*, 433 U.S. at 89–90; Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. REV. 1319, 1329–31 (2020); Sean L. Dalton, *Carved in Sand: Actual Innocence in United States v. Maybeck*, 73 N.C. L. REV. 2388, 2406 n.146 (1995).

¹⁰⁶ This discussion assumes—for sake of arguing in line with the principles currently influencing habeas doctrine—that such concerns are valid. That is, however, a questionable assumption. See, e.g., *Sykes*, 433 U.S. at 103 & n.5 (Brennan, J., dissenting); Lee Kovarsky, *Death Ineligibility and Habeas Corpus*, 95 CORNELL L. REV. 329, 357 n.193 (2010); Gavin R. Tisdale, Note, *A New Look at Constitutional Errors in Criminal Trials*, 48 CONN. L. REV. 1665, 1687 (2016).

¹⁰⁷ 28 U.S.C. § 2254(d); cf. *Johnson v. Williams*, 568 U.S. 289, 301–02 (2013) (indicating that claims that are not subject to this standard will be procedurally defaulted).

minimum) “an intervening change of controlling law,” “new evidence,” or “a clear error or . . . manifest injustice.”¹⁰⁸

All of that, in turn, could create incentives for petitioners to, in various ways, avoid presenting claims on direct review. For example, a petitioner who believes that a federal habeas court might be more open to granting relief than other courts could prefer to seek de novo review—by defaulting a claim and arguing cause and prejudice—rather than presenting their claim earlier and facing 2254(d) or 2255’s limitations on relitigation.¹⁰⁹ Or relatedly, a habeas petitioner might simply feel less pressure to uncover every possible claim while direct review or state habeas proceedings are ongoing and instead feel encouraged to scour the record after the fact for claims that could potentially surmount the cause and prejudice hurdle.

Adopting plain error for procedural default would substantially reduce any incentive not to present claims during pre-federal habeas proceedings. As explained above, unlike cause and prejudice, plain

¹⁰⁸ United States v. Becker, 502 F.3d 122, 127 (2d Cir. 2007); *see, e.g.*, Davis v. United States, 417 U.S. 333, 342 (1974); Stoufflet v. United States, 757 F.3d 1236, 1238–43 (11th Cir. 2014); White v. United States, 371 F.3d 900, 902 (7th Cir. 2004). That rule may even apply to ineffective assistance of counsel claims—which can be raised for the first time in a 2255 proceeding without facing a procedural default barrier, *see* Massaro v. United States, 538 U.S. 500, 503–04 (2003)—where the *basis for the ineffectiveness claim* has already been resolved, *see* Yick Man Mui v. United States, 614 F.3d 50, 57 (2d Cir. 2010) (“[S]trategies, actions, or inactions of counsel that gave rise to an ineffective assistance claim adjudicated on the merits on direct appeal may not be the basis for another ineffective assistance claim in a Section 2255 proceeding.”).

¹⁰⁹ This is substantially more likely in the 2254 context, given that the “earlier courts” in that context are ones of an entirely different system; many state court judges are elected and hence “may have difficulty resisting popular pressures not experienced by federal judges,” Stone v. Powell, 428 U.S. 465, 525 (1976) (Brennan, J., dissenting); *see also* Norman L. Greene, *Reflections on the Appointment and Election of State Court Judges: A Response to Adumbrations on Judicial Campaign Speech and a Model for a Response to Similar Advocacy Articles*, 43 IDAHO L. REV. 601, 621–22 (2007); and 2255 motions are usually adjudicated by the original district judge, *see* RULES GOVERNING SECTION 2255 PROCEEDINGS FOR THE UNITED STATES DISTRICT COURTS R. 4(a) [hereinafter “2255 R.”]. But a 2255 petitioner might still want to hold an argument in reserve rather than put all their eggs in the direct review basket. For instance, they could believe there is a chance of a new district judge in a 2255 proceeding, *see* 2255 R. 4(a) (“If the appropriate judge is not available, the clerk must forward the motion to a judge under the court’s assignment procedure.”), or a new appellate panel, *see Appellate Courts and Cases – Journalist’s Guide*, USCOURTS.GOV, <https://www.uscourts.gov/statistics-reports/appellate-courts-and-cases-journalists-guide> (last visited Oct. 29, 2022) (“Appeals normally are decided by *randomly assigned* three-judge panels.” (emphasis added)), and they could therefore wish to retain arguments for 2255 review in case a new constellation of judges happens to be more amenable to granting relief.

error raises the standard of review for defaulted, prejudicial claims regardless of the reason for the default. And the standard plain error imposes is comparable to the standards currently applicable to previously adjudicated claims. Specifically, it is similar to 2254(d) in that both are difficult to meet and require errors beyond the possibility of reasonable disagreement.¹¹⁰ It is also directly analogous to the clear error/manifest injustice exception to the 2255 relitigation bar.¹¹¹ Thus, the standard of review would be similar on habeas for both defaulted and non-defaulted claims, and there would be much less reason for a petitioner not to raise all their claims prior to habeas review.

In sum, not only is plain error more appropriate than cause and prejudice for procedural default based on the fundamental rationale the Supreme Court employed to adopt the latter over the former, but also plain error better aligns with the core principles the Court has designated as central to habeas and procedural default. Thus, it is time for *Frady* and *Engle* to be reconsidered and for plain error to replace cause and prejudice.¹¹²

¹¹⁰ Compare *Puckett v. United States*, 556 U.S. 129, 135 (2009) (explaining that for an error to be “plain,” “the legal error must be clear or obvious, rather than subject to reasonable dispute,” as well as that “[m]eeting all [the requirements of plain error] is difficult, ‘as it should be’” (citation omitted)), with *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011) (“If [2254(d)] is difficult to meet, that is because it was meant to be. . . . As a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.”).

¹¹¹ See *Dupree v. Warden*, 715 F.3d 1295, 1301 (11th Cir. 2013) (explaining that “manifest injustice” and “plain error” are equivalent and more stringent than “clear error”); *United States v. Clayton*, 210 F.3d 841, 843 (8th Cir. 2000) (“Because Clayton raises this argument for the first time on appeal, we review it for plain error only. We will not reverse on this basis absent a clear error resulting in manifest injustice.” (citations omitted)); *Morales-Fernandez v. INS*, 418 F.3d 1116, 1120 (10th Cir. 2005) (“Both the [Supreme] Court and this circuit have frequently described the . . . plain error standard as shorthand for or synonymous with an ‘interests of justice,’ ‘miscarriage of justice,’ or ‘manifest injustice’ exception to a litigant’s failure to object in the trial court.”); *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1425 (5th Cir. 1996) (en banc) (“[M]ost cases, pre- and post-*Olano*, in our circuit and others, use the term ‘manifest injustice’ to describe the result of a plain error. And, other cases seem to have equated plain error with manifest injustice.”).

¹¹² At least until a better standard is devised. See *supra* note 12.

IV. COUNTERARGUMENTS

Although hopefully the foregoing discussion has convinced readers of the plainly erroneous nature of cause and prejudice, there certainly may be objections to my analysis. Accordingly, this Part addresses a series of potential counterarguments, including that adopting plain error for procedural default: (A) might be unfair in some cases; (B) would leave no distinction between defaulted and forfeited claims; (C) would create a procedural default standard similar to, but less demanding than, AEDPA deference; or (D) would generate confusion. None of these assertions, however, ultimately undermines this Article's position.

A. *Plain Error Would Be Unfair in Some Cases*

The first possible counterargument to rethinking *Frady* and *Engle's* choice of cause and prejudice over plain error is that applying plain error across the board could generate significant unfairness in certain cases. For instance, where new evidence has come to light, there very well might be cause for failing to raise a prejudicial issue and yet no error that was "plain." Thus, perhaps we should leave procedural default doctrine as is.

That counterargument is not without force, and too strict a procedural default rule could certainly be unfair. But as noted above, forfeiture doctrine—which is generally the trigger for plain error review—can take into account the reason for the failure to raise an argument.¹¹³ Indeed, courts regularly treat claims that could not have been raised at an earlier point as preserved.¹¹⁴ And a similar principle is applicable to procedural default.¹¹⁵ Accordingly, and given that

¹¹³ See *supra* note 73.

¹¹⁴ See, e.g., *United States v. Doby*, 928 F.3d 1199, 1203 (10th Cir. 2019); *United States v. Rivas-Estrada*, 906 F.3d 346, 348–49 (5th Cir. 2018); *United States v. Ramirez*, 714 F.3d 1134, 1137–38 (9th Cir. 2013); *United States v. Hunter*, 809 F.3d 677, 682 (D.C. Cir. 2016); *United States v. Jackson*, 658 F.3d 145, 153 (2d Cir. 2011); *United States v. Johnson*, 756 F.3d 1218, 1222 (10th Cir. 2014) (per curiam); *United States v. Battles*, 745 F.3d 436, 446–47 (10th Cir. 2014); see also FED. R. CRIM. P. 51(b) ("If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party.").

¹¹⁵ See *supra* note 73. *But cf.* *United States v. Chalan*, 438 F. App'x 710, 712 (10th Cir. 2011) ("Our circuit has not explicitly considered the interaction between *Murray* and *Bousley*. The former holds that a petitioner can show cause when the [sic] 'the factual . . . basis for a claim was not reasonably available' at the time of direct appeal. This statement suggests the cause and prejudice inquiry applies to such claims. But if the factual predicate for a claim is not available, it would appear to qualify under

procedural default is an equitable and discretionary doctrine,¹¹⁶ it could be formulated so as to treat claims that were *truly* unavailable at an earlier point as *non-defaulted* (or exempted from the standard default rule), even while broadly applying plain error *as an excuse to default*.

Of course, that approach would to some degree re-inject a “cause” element into procedural default, which, in turn, raises the question of whether it would simply return us to where we started, nullifying the above analysis.¹¹⁷

The answer, however, is no. To start, given procedural default’s flexibility, there is no reason why such a cause element could not be contoured narrowly—applicable to only a small set of cases—such that the reason for failing to raise a claim could only be invoked or considered in rare circumstances. Hence, a cause “exemption” would not swallow the generally applicable plain error rule or undermine its benefits. Rather, it would simply avoid unfairness in cases where applying plain error does not make sense.

Alternatively, even if plain error were effectively applied across the board, the doctrine could be adjusted so as to avoid much of the potential unfairness, again given the malleable nature of procedural default, as well as plain error itself.¹¹⁸ For example, although plain error typically applies to actions that were erroneous at the time they were taken, the Supreme Court has concluded that an error will be viewed as “plain” even if it did not become obvious until the time of appellate review.¹¹⁹ A similar rule could be adopted in the procedural default context. Courts could say, for instance, that a previously undiscoverable claim satisfies the “plainness” prong so long as it would have been plain error to deny the claim if it had been raised earlier.

In short, we should not avoid rethinking *Frady* and *Engle* based on the risk of unfairness in certain cases. There are several ways to

Bousley as a ‘claim[] that could not be presented without further factual development.’” (alteration in original) (citations omitted)).

¹¹⁶ See *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“The procedural-default rule is neither a statutory nor a constitutional requirement, but it is a doctrine adhered to by the courts to conserve judicial resources and to respect the law’s important interest in the finality of judgments.”); *Dretke v. Haley*, 541 U.S. 386, 392 (2004) (“The procedural default doctrine . . . ‘refers to a complex and evolving body of equitable principles informed and controlled by historical usage, statutory developments, and judicial decisions.’” (citation omitted)).

¹¹⁷ See *supra* Part III.

¹¹⁸ See *supra* notes 93–94 and accompanying text.

¹¹⁹ See *Henderson v. United States*, 568 U.S. 266, 271–79 (2013).

manage that possibility, and plain error is broadly a preferable rule to cause and prejudice.

B. *The Same Standard Would Apply to Defaulted and Forfeited Claims*

A second possible counterargument is that we should not replace cause and prejudice because then there would be no difference between the standards applied to procedurally defaulted claims and non-defaulted claims that are merely forfeited (i.e., non-defaulted claims that are raised for the first time in federal habeas proceedings on appeal).

This is a version of the argument advanced by the *Frady* Court that plain error was designed for direct review.¹²⁰ But as noted above, plain error need not be applied with the same level of stringency in every context.¹²¹ Consequently, plain error could certainly accommodate any perceived need to be more forgiving towards forfeited claims than defaulted ones.

Moreover, the plain error inquiry in the procedural default context would necessarily differ from the habeas appeal context. For the former, the analysis would focus on decisions made by courts during the pre-federal habeas proceedings; for the latter, it would focus on decisions made by the district court in resolving the habeas petition. While there might be some overlap, the inquiries would still be quite distinct and would largely examine different things. Accordingly, petitioners would still need to take care to raise arguments and objections before the district court, even if they could overcome a default.

C. *Plain Error Is Similar to, but Less Demanding than, AEDPA Deference*

A third objection, similar to the second, is that plain error would be less demanding than AEDPA deference. As noted above, under 28 U.S.C. § 2254(d)(1), habeas relief cannot be granted for claims previously decided on the merits in state court unless they run afoul of “clearly established Federal law, as determined by the Supreme Court

¹²⁰ Cf. *United States v. Frady*, 456 U.S. 152, 164, 166 n.15 (1982) (explaining that plain error should not be used for procedural default “[b]ecause it was intended for use on direct appeal,” but noting that “[w]e of course do not hold that the ‘plain error’ standard cannot be applied by a court of appeals on *direct* review of a district court’s conduct of the § 2255 hearing itself”).

¹²¹ See *supra* notes 93–94 and accompanying text.

of the United States.”¹²² Plain error, although likewise restricting relief only to patent defects,¹²³ does not require that an error be made obvious by rulings of the Supreme Court.¹²⁴ Thus, one might argue, under a plain error procedural default rule, a petitioner could be incentivized to default their claims and proceed under plain error rather than face AEDPA’s more demanding limitations. And since “cause” for a default is distinct from the merits and difficult to show, cause and prejudice would discourage such behavior.

This argument is a cogent one, but it is ultimately unpersuasive. First of all, as explained above, cause and prejudice is likely to encourage strategic behavior because it permits de novo review so long as there is good reason for failing to raise a prejudicial error.¹²⁵ Plain error, in contrast, always requires a heightened showing to obtain relief, meaning that the potential benefit of defaulting under that standard is much less. In essence, the only circumstance in which defaulting might be strategically beneficial under a plain error standard would be where an error is not plain under the decisions of the Supreme Court, but is under the decisions of some other court.

Furthermore, plain error directs courts to correct an error only if it seriously affects the fairness, integrity, or public reputation of judicial proceedings. That requirement provides courts with considerable decisional latitude,¹²⁶ and it would certainly permit them to consider the possibility of strategic or dilatory behavior in deciding how to resolve a claim. Indeed, as the Second Circuit has explained:

What must also be weighed in the equation, however, is whether the party seeking relief under the plain error rule may have originally made a strategic decision not to object to the conduct now challenged on appeal. Consideration of

¹²² 28 U.S.C. § 2254(d)(1).

¹²³ See *supra* note 110 and accompanying text.

¹²⁴ Compare *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013) (per curiam) (making clear that circuit precedent cannot render law “clearly established” for purposes of § 2254(d)(1)), with *Henderson*, 568 U.S. at 278 (demonstrating that an error can be plain based on appellate decisions, not just Supreme Court rulings), and *United States v. Mathis*, 554 F. App’x 856, 857 (11th Cir. 2014) (per curiam) (“[T]he law of this circuit [is] that . . . there can be no plain error where there is no precedent from the Supreme Court or *this Court* directly resolving’ the issue.” (alterations in original) (emphasis added) (citation omitted)).

¹²⁵ See *supra* note 109 and accompanying text.

¹²⁶ See, e.g., *United States v. Pérez-Rodríguez*, 13 F.4th 1, 30 (1st Cir. 2021) (“Our analysis under this final prong of plain error review is ‘flexible . . . and depends significantly on the nature of the error, its context, and the facts of the case.’” (citation omitted)); see also *supra* notes 59–60 and accompanying text.

this “strategy” factor is implicit in *Olano*’s fourth requirement—that the error seriously affect the fairness, integrity or public reputation of judicial proceedings. If a defendant makes a knowing choice to abstain from objecting to an alleged error, the probability that fairness would require correcting that error is, of course, significantly reduced.

. . . [T]he possibility of strategic behavior is important not only in cases where the particular decision not to object to an alleged error is itself manipulative; rather, it comes into play whenever recognition of the error by a higher court would encourage such actions by future litigants.¹²⁷

Moreover, the contours of procedural default are subject to significant judicial discretion, and plain error’s level of rigor can vary with the circumstances.¹²⁸ Thus, if deemed necessary, plain error could be applied in 2254 cases so as to align with AEDPA. In other words, in appropriate cases, the doctrine could perhaps be interpreted so as to require that an error be “plain” according to decisions of the Supreme Court.

In short, adopting plain error in the procedural default context would not encourage tactical behavior or delay, and in any event, plain error is capable of addressing any potential concerns regarding those issues.¹²⁹

D. *Replacing Cause and Prejudice Would Create Confusion*

The final counterargument is that replacing cause and prejudice with plain error would generate confusion, as the legal system adjusts to a new procedural default regime.

This objection is the weakest of the set. Again, cause and prejudice is a profoundly challenging and labyrinthine doctrine, and it is much more confusing to litigate and apply than plain error.¹³⁰ Furthermore, because plain error has broad applicability outside the

¹²⁷ *United States v. Bayless*, 201 F.3d 116, 128 (2d Cir. 2000); *accord* *United States v. Hill*, 31 F.4th 1076, 1084–85 (8th Cir. 2022); *United States v. Greenspan*, 923 F.3d 138, 157–58 (3d Cir. 2019); *United States v. Shwayder*, 312 F.3d 1109, 1122 (9th Cir. 2002); *United States v. Williams*, 64 F.3d 665, 1995 WL 478122, at *4 (7th Cir. 1995) (unpublished table decision).

¹²⁸ *See supra* notes 93–94 and accompanying text.

¹²⁹ A party that engages in strategic withholding of arguments also risks waiver, which can foreclose a finding of plain error. *See United States v. Olano*, 507 U.S. 725, 733–34 (1993).

¹³⁰ *See supra* notes 74–90, 95–103 and accompanying text.

default context—including in habeas proceedings¹³¹—litigants and the judiciary should already be comfortable with the rule and equipped to apply it. Therefore, it is actually retaining cause and prejudice that would generate the most confusion, and adopting plain error would serve as an improvement.

V. CONCLUSION

It is time to reconsider *Frady* and *Engle*. Although their decision to retain cause and prejudice over plain error for procedural default may have made sense forty years ago, subsequent legal developments have wholly undermined the basis for that choice. And plain error, in its modern form, is a substantially more appropriate standard for procedural default, vindicating much more effectively the principles undergirding habeas and default doctrine. In short, there is little reason to continue to abide by the choice made in those decisions,¹³² and it is time for cause and prejudice's dominance over procedural default to come to an end.

¹³¹ See, e.g., *United States v. Redd*, 562 F.3d 309, 313 (5th Cir. 2009).

¹³² Cf., e.g., *Jones v. Mississippi*, 141 S. Ct. 1307, 1336 (2021) (Sotomayor, J., dissenting) (“The traditional *stare decisis* factors include the quality of the precedent’s reasoning, its consistency with other decisions, legal and factual developments since the precedent was decided, and its workability.”).