No. 14-1337

In the Supreme Court of the United States

JESUS MANUEL DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether, under *Stone* v. *Powell*, 428 U.S. 465 (1976), a prisoner may challenge his federal conviction in post-conviction proceedings under 28 U.S.C. 2255 on the ground that evidence obtained in violation of the Fourth Amendment was introduced against him at trial.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule:

In the Supreme Court of the United States

No. 14-1337

JESUS MANUEL DIAZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals denying a certificate of appealability (Pet. App. 1a-5a) is not published in the Federal Reporter but is reprinted at 598 Fed. Appx. 591. The order of the district court (Pet. App. 6-23) is unreported. A prior opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted at 356 Fed. Appx. 117.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2015. The petition for a writ of certiorari was filed on May 5, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was

convicted of possession with intent to distribute over 1000 kilograms of marijuana, in violation of 21 U.S.C. 841(b)(1)(A). He was sentenced to 121 months of imprisonment, to be followed by five years of supervised release. Judgment 1-3. The court of appeals affirmed. 356 Fed. Appx. 117.

Petitioner filed a motion to vacate, set aside, or correct his sentence under 28 U.S.C. 2255. The district court denied relief and declined to issue a certificate of appealability (COA). Pet. App. 6a-25a. The court of appeals denied petitioner's application for a COA and dismissed his appeal. *Id.* at 1-5.

1. Petitioner was the owner-operator of a trucking company. 356 Fed. Appx. at 119. He drove his tractor-trailer into New Mexico and stopped at a port of entry operated by the New Mexico Department of Public Safety to obtain the required trucking permits. Petitioner's bill of lading and weight scale ticket piqued the attention of Officer James Smid. *Ibid.* The gross weight of petitioner's tractor-trailer was 56,760 pounds, which was approximately 14,000 pounds heavier than it should have been based on the weight of the tractor-trailer and the cargo that petitioner was reportedly hauling. *Id.* at 119-120. Officer Smid decided to conduct a "Level Two Regulatory Inspection." *Id.* at 120. New Mexico law authorizes officers to undertake that type of inspection, which includes an in-depth review of the driver's paperwork and a physical inspection of the vehicle, to ensure that a tractor-trailer complies with all state laws and regulations. *Ibid.* (citing N.M. Stat. Ann. § 65-5-1 (2011)).

Officer Smid examined petitioner's logbook, which showed that petitioner had been in California for two months—an unusually long stretch of down time for a

commercial trucker. 356 Fed. Appx. at 120. Petitioner told Officer Smid that he had been sick with the flu. *Ibid.* When Officer Smid inquired about the weight discrepancies, petitioner stated that the shipper might have placed additional merchandise into his trailer without listing it on the bill of lading. *Ibid.* Officer Smid found both explanations odd. *Ibid.* He also noted a change in petitioner's demeanor; petitioner began "lowering his head, rubbing his lips with his hand, and scratching his neck." *Ibid.*

During the physical inspection of the tractor-trailer, Officer Smid observed a lock and seal on the trailer doors, which, in his experience, was peculiar given the type of cargo (dollar-store merchandise) purportedly being transported. 356 Fed. Appx. at 120. Inside the cab, Officer Smid saw four cell phones but no CB radio, a common tool for most commercial truckers. *Ibid.* In Officer Smid's experience, individuals transporting contraband often use multiple cell phones. See *ibid.* When Officer Smid then inspected the cargo, he detected the strong smell of air freshener, which is often used by drug traffickers to conceal contraband. *Id.* at 121. Officer Smid also noticed clear differences in the pallets of boxes lining the trailer. *Ibid.* Large amounts of dust had collected on the boxes near the front, but the boxes at the rear were clean. *Ibid.* In Officer Smid's experience, this variation was consistent with the use of a "cover load"—a group of boxes that remain in the trailer to give the cargo the appearance of legitimacy. *Ibid.*

Upon completing his inspection, Officer Smid asked petitioner whether the trailer contained any cocaine, heroin, or methamphetamine. 356 Fed. Appx. at 121. Petitioner answered "no." *Ibid.* Officer Smid also

asked whether the trailer contained any marijuana. *Ibid.* Petitioner hesitated, turned away, laughed nervously, and answered "no." *Ibid.* Officer Smid then asked petitioner if he would consent to a search of the tractor-trailer. *Ibid.* Petitioner gave verbal assent and signed a Spanish-language consent form. *Ibid.*

During the course of the search, a drug-detection canine walked around the trailer and alerted to the front-left corner. 356 Fed. Appx. at 122. Officer Smid and another officer then discovered a large plywood tunnel built into the trailer. *Ibid.* Officer Smid crawled inside the tunnel and located a large plastic bag containing over 3300 pounds of marijuana. *Ibid.*

2. Petitioner was indicted in the United States District Court for the District of New Mexico on one count of possession with intent to distribute over 1000 kilograms of marijuana, in violation of 21 U.S.C. 841(b)(1)(A).

Before trial, petitioner moved to suppress the physical evidence seized during the search as the fruits of a search that violated the Fourth Amendment. After conducting an evidentiary hearing and reviewing testimony from Officer Smid, the district court denied petitioner's motion. The court first concluded that Officer Smid's safety inspection of the tractor-trailer was a regulatory search and thus that the search complied with the Fourth Amendment. 356 Fed. Appx. at 122; see *United States* v. *Gwathney*, 465 F.3d 1133, 1138-1139 (10th Cir. 2006), cert. denied, 550 U.S. 927 (2007) ("[A] warrantless search of a commercial truck satisfies the Fourth Amendment where: (1) there is a substantial government interest underlying a regulatory scheme authorizing the search,

(2) the warrantless search is necessary to further the regulatory scheme, and (3) the inspection program provides a constitutionally adequate substitute for a warrant."). The court further held that the subsequent search of the tractor-trailer was constitutional because, during the safety inspection, Officer Smid had developed probable cause and reasonable suspicion to believe that the tractor-trailer contained contraband. 356 Fed. Appx. at 122-123. In the alternative, the district court found that petitioner had voluntarily consented to that search. *Id.* at 123.

Petitioner was convicted after a jury trial and sentenced to 121 months of imprisonment, to be followed by five years of supervised release. 356 Fed. Appx. at 122; Judgment 1-3.

3. The court of appeals affirmed on direct appeal. 356 Fed. Appx. at 119-128. The court noted that petitioner did "not challenge the district court's conclusion regarding the constitutionality of Officer Smid's Level Two Inspection," but rather challenged only "the subsequent search of the cab and trailer." *Id.* at 123. As to that search, the court of appeals held that Officer Smid's observations during the Level Two inspection supplied probable cause to believe that the tractor-trailer contained contraband. *Id.* at 123-124. The court accordingly affirmed petitioner's conviction. *Id.* at 124. The court did not address the district court's findings that reasonable suspicion and consent served as alternative grounds for upholding the search. *Ibid.*

4. Petitioner filed a motion under 28 U.S.C. 2255 to vacate his sentence. As relevant here, petitioner argued that Officer Smid's Level Two inspection of the tractor-trailer was a pretext for a criminal investiga-

tion and, therefore, was unconstitutional under the Fourth Amendment, tainting the subsequent search that uncovered the marijuana. Pet. App. 9a-10a, 38a-40a. Petitioner argued that his trial counsel was constitutionally ineffective for failing to seek suppression on that basis. *Id.* at 10a-11a, 35a-38a.

A magistrate judge recommended that the district court dismiss the motion. Pet. App. 26a-40a. The magistrate judge concluded that petitioner's Fourth Amendment claim was not cognizable in proceedings under 28 U.S.C. 2255 because petitioner "had a full and fair opportunity to litigate the Fourth Amendment claim at trial and present issues on direct appeal." *Id.* at 38a. The magistrate judge also recommended that the district court deny petitioner's claim of ineffective assistance of counsel because, even if the initial Level Two inspection was an unconstitutional search, the evidence of petitioner's drug trafficking was admissible in light of the district court's alternative ruling that petitioner had knowingly and voluntarily consented to the search of the tractor-trailer. *Id.* at 35a-38a. "Because discovery of the marijuana arose from a valid consensual search," the magistrate judge explained, "there is no reasonable probability that the evidence would have been suppressed had counsel argued that raising the level of the required safety inspection was a pretext." *Id.* at 37a.

The district court adopted the magistrate judge's recommendation and dismissed the motion. Pet. App. 6a-22a. In denying petitioner's claim of ineffective assistance of counsel, the district court pointed to its alternative holding in the trial-stage proceedings that "the validity of the search was premised on [petitioner's] knowing and voluntary consent." *Id.* at 12a.

Because "any irregularities in the [initial] inspection * * * were of no consequence to * * * whether the search uncovering the marijuana was supported by valid consent," the district court held, "[petitioner] could not establish actual prejudice for trial counsel's failure to bring those arguments." *Ibid.*

5. The court of appeals denied petitioner's request for a COA and dismissed his appeal. Pet. App. 1a-5a. The court held that petitioner's Fourth Amendment claim was not cognizable in post-conviction proceedings under 28 U.S.C. 2255. Pet. App. 5a (citing *Stone* v. *Powell*, 428 U.S. 465, 494-495 (1976); and *United States* v. *Lee Vang Lor*, 706 F.3d 1252, 1257 (10th Cir.), cert. denied, 134 S. Ct. 679 (2013)). The court also held that the district court's rejection of petitioner's ineffective-assistance-of-counsel claim was "not reasonably debatable" because, regardless of counsel's efforts to pursue the argument that the Level Two inspection was unconstitutional, Officer Smid obtained petitioner's "knowing and voluntary consent to the [subsequent] search which uncovered the marijuana." *Id.* at 4a.

ARGUMENT

Petitioner argues that this Court should grant certiorari to resolve (i) whether *Stone* v. *Powell*, 428 U.S. 465 (1976), restricts the ability of federal prisoners to raise Fourth Amendment claims in proceedings under 28 U.S.C. 2255 (Pet. 12-18); and (ii) if so, whether petitioner can circumvent the *Stone* bar on the ground that he lacked a full and fair opportunity to litigate his Fourth Amendment claim at his federal trial (Pet. 18-24). Petitioner's arguments lack merit. As this Court has explained, the *Stone* bar applies with full force in Section 2255 proceedings, see *United States* v. *John-*

son, 457 U.S. 537, 562 n.20 (1982), and petitioner has identified no legal support for his view that he was denied a full and fair opportunity to litigate a suppression motion in his trial in federal court. Although an Eighth Circuit panel held in 2008 that *Stone* does not apply in Section 2255 proceedings, see *Baranski* v. *United States*, 515 F.3d 857, 859-860, cert. denied, 555 U.S. 1011 (2008), that holding was clearly incorrect. Because the prisoner lost on the merits in *Baranski*, that case did not present a suitable occasion for en banc rehearing. And in any event, the decision below, in rejecting petitioner's ineffective-assistance-of-counsel claim, establishes that petitioner could not prevail on his Fourth Amendment claim even if it were cognizable on collateral review. Further review is therefore unwarranted.

1. The court of appeals correctly held that petitioner's Fourth Amendment claim is not cognizable in a collateral-review proceeding under Section 2255. See Pet. App. 5a.

a. In a series of decisions in the mid-Twentieth Century, this Court recognized that state prisoners could seek federal habeas relief under 28 U.S.C. 2254 for violations of federal constitutional rights in their trials. See, *e.g.*, *Fay* v. *Noia*, 372 U.S. 391 (1963); *Brown* v. *Allen*, 344 U.S. 443 (1953); cf. *Waley* v. *Johnson*, 316 U.S. 101 (1942) (per curiam). In 1961, this Court held in *Mapp* v. *Ohio*, 367 U.S. 643, that the exclusionary rule must be applied by state courts in trials and on direct appeal to exclude the admission of evidence obtained in violation of the Fourth Amendment (as incorporated against the States by the Fourteenth Amendment). See *id.* at 655, 657. In the following years, this Court entertained habeas petitions

challenging state-court convictions on the ground that evidence obtained in violation of the Fourth Amendment was introduced against the prisoner, without expressly analyzing whether such challenges differed from other constitutional challenges for the purpose of collateral review. See *Stone*, 428 U.S. at 479-481.

Then, in *Kaufman* v. *United States*, 394 U.S. 217 (1969), the Court held that a federal prisoner could seek collateral relief under 28 U.S.C. 2255, the federal analogue to habeas corpus, on the ground that "he was convicted on evidence obtained in an unconstitutional search and seizure." 394 U.S. at 218, 231. The Court explained that the enactment of Section 2255 in 1948 "revised the procedure by which federal prisoners are to seek [collateral] relief but did not in any respect cut back the scope of the writ." *Id.* at 221. The Court understood its prior decisions to "leave no doubt that the federal habeas remedy extends to state prisoners alleging that unconstitutionally obtained evidence was admitted against them at trial." *Id.* at 225. And the Court saw no basis "to restrict * * * access by federal prisoners with illegal search-and-seizure claims to federal collateral remedies, while placing no similar restriction on access by state prisoners." *Id.* at 226. In the course of its analysis, the Court rejected the government's contention that Fourth Amendment claims should not be cognizable on collateral review because "Fourth Amendment protection against unreasonable searches and seizures * * * is of a different nature from denials of other constitutional rights" in that "the exclusion of illegally seized evidence is simply a prophylactic device intended generally to deter Fourth Amendment violations." *Id.* at 224.

The Court reversed course in *Stone* in reviewing cases arising from state prisoners' federal habeas corpus petitions under 28 U.S.C. 2254. See 428 U.S. at 468-469, 494-495. The Court began by noting that its holding in *Kaufman* rested on the unexamined premise that state prisoners could challenge their convictions on federal habeas review on the ground that evidence obtained in violation of the Fourth Amendment had been introduced against them. See *id.* at 479-481. The Court, after observing that it had not yet "had occasion fully to consider the validity of this view," went on to "conclude, in light of the nature and purpose of the Fourth Amendment exclusionary rule, that this view is unjustified." *Id.* at 481. After an extensive examination of the origin, deterrent value, and practical consequences of the exclusionary rule, the Court held that in the context of collateral review, "the contribution of the exclusionary rule, if any, to the effectuation of the Fourth Amendment is minimal and the substantial societal costs of application of the rule persist with special force." *Id.* at 494-495; see *id.* at 482-494. Accordingly, the Court held that "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Id.* at 494. In a footnote, the Court added that "[t]o the extent the application of the exclusionary rule in *Kaufman* did not rely upon the supervisory role of this Court over the lower federal courts, cf. *Elkins* v. *United States*, 364 U. S. 206 (1960), * * * the rationale for its application in that context is also rejected." *Id.* at 481 n.16 (internal cross-reference omitted).

Thus, as nearly every court of appeals to address the question has held (see p. 13, *infra*), "the underlying premise of *Kaufman* was overruled by *Stone*." *United States* v. *Cook*, 997 F.2d 1312, 1317 (10th Cir. 1993). *Kaufman*'s holding rested expressly and exclusively on the view that state prisoners could invoke the exclusionary rule to challenge their convictions in federal habeas proceedings (and that no sound basis existed to deny federal prisoners the same opportunity). See *Kaufman*, 394 U.S. at 221-227. Once the Court's premise about the availability of habeas relief for state prisoners was overruled in *Stone*, the *Kaufman* rule was invalidated as well. That is why *Stone* expressly noted that the stated rationale of *Kaufman* was "rejected." 428 U.S. at 481 n.16.

It is true that the same footnote in *Stone* left open the possibility that *Kaufman*'s outcome could be separately supported by the federal courts' supervisory role over federal courts, citing a pre-*Mapp* decision invoking the Court's supervisory authority as a basis for applying the exclusionary rule on direct appeal in a federal prosecution where evidence had been obtained by state officers in violation of the Fourth Amendment. See 428 U.S. at 481 n.16; see also *Elkins*, 364 U.S. at 216; but cf. *Mapp*, 367 U.S. at 649 ("There are in the cases of this Court some passing references to the [*Weeks* v. *United States*, 232 U.S. 383 (1914)] rule as being one of evidence. But the plain and unequivocal language of *Weeks* * * * to the effect that the *Weeks* rule is of constitutional origin[] remains entirely undisturbed."). But *Kaufman* did not even discuss this Court's supervisory power over federal courts, let alone hold that the supervisory power justifies applying the exclusionary rule in Section 2255 proceedings.

The footnote in *Stone* merely declined to decide whether the supervisory power could supply a new basis to adopt *Kaufman*'s holding, in a case where that question was not presented. *Stone* unequivocally and expressly overruled the actual basis for *Kaufman*, and no decision of this Court since *Stone* has revived *Kaufman*'s holding on supervisory-power grounds.

To the contrary, since *Stone*, this Court has resolved any potential doubt about whether Fourth Amendment claims are cognizable under Section 2255. In *United States* v. *Johnson*, *supra*, the Court explained that "[a]fter *Stone* * * * the *only* cases raising Fourth Amendment challenges on collateral attack are those federal habeas corpus cases in which the State has failed to provide a state prisoner with an opportunity for full and fair litigation of his claim, *analogous federal cases under 28 U.S.C. § 2255*, and collateral challenges by state prisoners to their state convictions under postconviction relief statutes that continue to recognize Fourth Amendment claims." 457 U.S. at 562 n.20 (emphases added). And more broadly, this Court has repeatedly confirmed that the grounds for relief under Sections 2254 and 2255 are generally equivalent (as the Court did in *Kaufman* itself, see 394 U.S. at 221-222). See *Davis* v. *United States*, 417 U.S. 333, 343 (1974) ("[Section] 2255 was intended to afford federal prisoners a remedy identical in scope to federal habeas corpus."); *Danforth* v. *Minnesota*, 552 U.S. 264, 281 n.16 (2008) ("[Section] 2255 was enacted as a functional equivalent for habeas corpus.").

Accordingly, the court of appeals correctly held that petitioner's Fourth Amendment challenge was subject to the *Stone* bar—that is, that it could be

raised only if petitioner was denied a full and fair opportunity to raise his challenge in his original trial and on direct appeal.

b. Petitioner contends (Pet. 12-18) that review is warranted to resolve a conflict over whether *Stone* applies in Section 2255 proceedings. Almost every court of appeals to consider the question over the nearly forty years since *Stone* has held that the *Stone* bar applies to federal prisoners challenging their convictions under Section 2255. See *Ray* v. *United States*, 721 F.3d 758, 761-762 (6th Cir. 2013); *Brock* v. *United States*, 573 F.3d 497, 500 (7th Cir.), cert. denied, 558 U.S. 1058 (2009); *United States* v. *Ishmael*, 343 F.3d 741, 742-743 (5th Cir. 2003), cert. denied, 540 U.S. 1204 (2004); *Cook*, 997 F.2d at 1317 (10th Cir.); *United States* v. *Hearst*, 638 F.2d 1190, 1196 (9th Cir. 1980), cert. denied, 451 U.S. 938 (1981); see also *United States* v. *Byers*, 740 F.2d 1104, 1137 n.90 (D.C. Cir. 1984) (Robinson, J., concurring).

Alone among courts of appeals, the Eighth Circuit, in its 2008 decision in *Baranski*, *supra*, held that *Stone* does not apply in Section 2255 proceedings. *Id.* at 859-860.[*] The Eighth Circuit's short discussion relied on the view that *Stone* "did not overrule *Kaufman*" and that "the supervisory power of federal appellate courts over district courts is broader than its authority to review state court decisions under § 2254." *Id.* at 859-860. For the reasons discussed

---

[*] Petitioner incorrectly states (Pet. 12) that earlier decisions of the First and Second Circuits recognized a "split" of authority. The cited decisions merely declined to decide the question of *Stone*'s applicability to Section 2255 proceedings because it was unnecessary to the disposition of the cases. They did not identify any conflict of authority.

above, that analysis does not have support in this Court's decisions, and the Eighth Circuit appeared to have overlooked this Court's recognition in *Johnson* that the *Stone* bar applies in Section 2255 proceedings.

In *Baranski*, however, the government ultimately prevailed on the merits of the federal prisoner's Fourth Amendment challenge. See 515 F.3d at 861. Although that circumstance would not have precluded the government from seeking en banc review, it did make the case a less suitable vehicle for the Eighth Circuit to convene en banc in order to bring its precedent in line with the decisions of every other circuit to consider the question. Given that the *Baranski* panel appears to be the only court of appeals to have concluded that Fourth Amendment claims are cognizable under Section 2255, the Eighth Circuit should have the opportunity to review that holding en banc in an appropriate case where the cognizability question is outcome-determinative. If the Eighth Circuit were to reach the same conclusion as every other court of appeals to address the issue, that would render this Court's review unnecessary. And deferring resolution of the issue is sensible because, as in *Baranski* itself, it is doubtful that federal defendants would often prevail on collateral review of Fourth Amendment suppression claims where they would not otherwise prevail on an ineffective-assistance-of-counsel theory, see *Kimmelman* v. *Morrison*, 477 U.S. 365 (1986), given doctrines such as law of the case, procedural default, and harmless error.

2. a. Petitioner also seeks review (Pet. 18-24, 27-28) to clarify the standard for ascertaining whether a prisoner did not receive "an opportunity for full and

fair litigation of a Fourth Amendment claim," in which case *Stone* permits a Fourth Amendment challenge to be brought on collateral review. Petitioner did not, however, argue in the lower courts that he did not receive a full and fair opportunity to raise his Fourth Amendment challenge, and the court of appeals did not pass on any such contention other than noting that petitioner had "not shown he lacked a full and fair opportunity to litigate his claims." Pet. App. 5a. Petitioner urged the court of appeals only to reconsider its precedent applying *Stone* to Section 2255 proceedings; he did not attempt to distinguish *Stone* on the ground that he was denied a full and fair opportunity to litigate his Fourth Amendment claim at his trial or on direct appeal. This Court ordinarily does not consider issues that were not pressed or passed on below. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Accordingly, in light of petitioner's forfeiture, that issue does not warrant further review.

b. In any event, petitioner received a full and fair opportunity to litigate his Fourth Amendment claim. Although petitioner contends (Pet. 18-23) that circuits have disagreed about what constitutes a full and fair opportunity, he has not identified a single decision that would support his contention that he was denied an adequate opportunity to present his suppression argument in his federal trial.

When conducting the full-and-fair-opportunity inquiry, the courts of appeals generally focus on whether the prisoner was afforded a procedure for presenting his Fourth Amendment claim. See, *e.g.*, *Good* v. *Berghuis*, 729 F.3d 636, 639 (6th Cir. 2013), cert. denied, 135 S. Ct. 1174 (2015); *Capellan* v. *Riley*, 975 F.2d 67, 71 (2d Cir. 1992). Petitioner was afforded

such process in the federal district court where he was tried. Like any federal defendant, he had the right to file a pretrial motion seeking the suppression of evidence due to a Fourth Amendment violation. See Fed. R. Crim. P. 12(b)(3)(C).

Some courts of appeals have focused additionally on the adequacy of the procedures used in the particular case to resolve the prisoner's Fourth Amendment claim. See, *e.g.*, *Willett* v. *Lockhart*, 37 F.3d 1265, 1273 (8th Cir. 1994) (en banc) (asking whether "the prisoner was foreclosed from using th[e] procedure because of an unconscionable breakdown in the system"), cert. denied, 514 U.S. 1052 (1995); *Gamble* v. *Oklahoma*, 583 F.2d 1161, 1165 (10th Cir. 1978) (holding that review is available "where the state court wilfully refuses to apply the correct and controlling constitutional standards"); but see *Good*, 729 F.3d at 639 (rejecting that approach). No dispute exists on the adequacy of the procedures employed by the district court here. Petitioner filed a pretrial motion to suppress raising other claims, the district court entertained each claim in his motion, and the court convened an evidentiary hearing to take evidence related to those claims. Petitioner has identified no colorable basis in his certiorari petition to conclude that he was denied a full and fair opportunity to litigate his Fourth Amendment claim, just like any defendant in federal court. Indeed, as petitioner acknowledges (Pet. 29), he did not even attempt to raise at trial or on direct appeal the pretextual-search Fourth Amendment claim that he now presses.

Accordingly, even if petitioner had not forfeited his new argument that he was denied a full and fair opportunity to litigate his Fourth Amendment claim,

review would not be warranted because his claim clearly lacks merit and is not supported by the decision of any court of appeals.

3. This case is not a suitable vehicle for addressing whether and when Fourth Amendment claims are cognizable in Section 2255 proceedings.

Even if the Court answered petitioner's first question in his favor, it is clear from the court of appeals' disposition of other aspects of petitioner's appeal that other procedural hurdles would preclude review of his Fourth Amendment claim. As petitioner acknowledges (Pet. 4, 29), at trial and on direct appeal, petitioner did not contest the district court's ruling that Officer Smid's safety inspection qualified as a valid regulatory search under the Fourth Amendment. 356 Fed. Appx. at 123. As petitioner explains, his "pretextual administrative search claim was not raised by trial counsel—and was in fact conceded in pre-trial pleadings." Pet. 29. He raised the claim for the first time in his Section 2255 motion.

When a prisoner fails to raise a claim at trial or on direct appeal, the claim is procedurally defaulted. A court generally may not consider a defaulted claim on collateral review unless the prisoner establishes both "cause" for the default and "prejudice" from the asserted error. *United States* v. *Frady*, 456 U.S. 152, 167-168 (1982). Petitioner cannot meet that burden (and he does not contend otherwise in his petition). In particular, petitioner cannot establish that ineffective assistance of counsel was cause for his default, see *Murray* v. *Carrier*, 477 U.S. 478, 488 (1986), because the district court and the court of appeals have already rejected his standalone ineffective-assistance

claim (see pp. 6-7, *supra*), and he has not sought certiorari on that issue.

Nor can petitioner invoke the "actual innocence" alternative to the cause-and-prejudice requirement. See *Dretke* v. *Haley*, 541 U.S. 386, 388 (2004). The court of appeals (on direct appeal) and the magistrate judge (on post-conviction review) cataloged the extensive trial evidence showing that petitioner knowingly transported the marijuana found inside his tractor-trailer. 356 Fed. Appx. at 124-125; Pet. App. 34a-35a.

More broadly, even if petitioner could obtain review of his claim that Officer Smid's Level Two inspection of his tractor-trailer violated the Fourth Amendment, it would have no effect on the outcome of this case. Officer Smid's subsequent search of the tractor-trailer—which led to discovery of the marijuana—was independently justified on a separate ground. After Officer Smid concluded the initial inspection, he asked petitioner for consent to perform a more thorough search. Petitioner verbally agreed to the request and signed a consent form. 356 Fed. Appx. at 121. Following an evidentiary hearing, the district court "expressly found that [petitioner's] consent was knowingly and voluntarily given." Pet. App. 13a. And the decision below affirmed that finding in the course of rejecting petitioner's ineffective-assistance claim. See *id.* at 4a ("[Petitioner's] claims—which essentially contend that counsel failed to adequately argue that the officers' administrative safety inspection was a mere pretext for a criminal investigation—do not account for [petitioner's] knowing and voluntary consent to the search which uncovered the marijuana."). As a result, petitioner's consent provides an independent legal basis for upholding the constitutionality

of the subsequent search and therefore his conviction. Petitioner thus could not obtain relief even if his Fourth Amendment claim were cognizable on collateral review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

SEPTEMBER 2015