UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8803

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JUAN GOVEA,

Defendant-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(DR-93-CV-30 (DR-92-CR-2-1))

(February 17, 1995)

Before DAVIS, JONES, and EMILIO M. GARZA, Circuit Judges.

EDITH H. JONES, Circuit Judge:[*]

Juan Govea was convicted by a jury for violating two federal firearm statutes, and failed to file an appeal. Nonetheless, he appeared pro se in district court filing a § 2255 motion alleging that he could not have violated the statute prohibiting possession of a firearm by a convicted felon because he had his civil rights restored in Texas, and that his prosecution was unconstitutionally vindictive. The district court denied

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[*] Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

relief by rejecting the merits of his claims. We affirm the judgment of the district court on the grounds that Govea's assertions were procedurally barred.

"[A] collateral challenge may not do service for an appeal." United States v. Frady, 456 U.S. 152, 165 (1982). A defendant who intends to raise an issue for the first time on appeal thus must show "both `cause' for his procedural default, and 'actual prejudice' resulting from the error." United States v. Shaid, 937 F.2d 228, 231-32 (5th Cir. 1991) (en banc), cert. denied, 112 S.Ct 978 (1992). Of course, the government must invoke the procedural bar in the district court. United States v. Drobny, 955 F.2d 990, 994-95 (5th Cir. 1992).

The government did respond to Govea's § 2255 motion by noting that both of these issues could have been raised on direct appeal and were not. Although Mr. Govea asserts that he has shown both cause and prejudice, he failed to state a "cause" for not filing a direct appeal and has not argued that he could not have raised the issues on direct appeal. As for "actual prejudice," he assumed that "[a]fter a thorough reading of the habeas petition . . . the `actual prejudice' suffered by [me] will become apparently clear."

For some reason the district court overlooked the obvious defect despite this court's warning that failure to terminate a habeas proceeding on procedural bar constitutes an abuse of discretion. Foret v. Whitley, 965 F.2d 18, 20 (5th Cir. 1992). Since the cause and prejudice requirement is the same in § 2254 and

§ 2255 cases, Shaid, 937 F.2d at 234 n.10, the motion should have been denied on this procedural ground.

Although the government has not argued the procedural bar to this court, we can disagree with the reasoning of the district court but affirm its judgment on any alternative ground. Bickford v. International Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. 1981).

Accordingly, we AFFIRM the denial of relief because of Govea's failure to present cause for and prejudice from not raising these complaints in a direct appeal.