

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-2267
Summary Calendar

CARL WILLIAM JOHNSON,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(CA-H-89-2386)

(January 26, 1993)

Before GARWOOD, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant Carl William Johnson (Johnson) appeals the district court's dismissal under Rule 9(b) of the Rules Governing § 2254 Cases of his *pro se* petition for habeas relief under 28 U.S.C. § 2254. Finding no error, we affirm.

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Factual and Procedural Background

In 1982, Johnson was convicted by a jury of aggravated rape in state district court in Harris County, Texas. The court sentenced him to sixty years' imprisonment. On November 18, 1982, the Houston court of appeals affirmed his conviction in an unpublished opinion. The Texas Court of Criminal Appeals denied Johnson's petition for discretionary review on February 23, 1983.

Between 1983 and 1986, Johnson proceeded to file four unsuccessful applications for a state writ of habeas corpus. The first was denied without written order on the findings of the trial court without a hearing on January 4, 1984, by the Texas Court of Criminal Appeals. The second was denied without written order on September 26, 1984, by the Court of Criminal Appeals. His third and fourth applications were denied by the Court of Criminal Appeals without written order on the findings of the trial court without a hearing on January 30, 1985, and October 1, 1986, respectively.

Johnson thereafter proceeded to file a federal habeas corpus petition under 28 U.S.C. § 2254. Johnson sought relief on three grounds: 1) that he was denied due process because the trial court failed to instruct the jury on the definition of a deadly weapon; (2) that he was denied due process because the trial court encroached on the jury's province by making a finding that a deadly weapon was used in the commission of the offense; and (3) that the judgment was void because the jury charge allowed conviction on a non-unanimous verdict. On December 9, 1987, the district court denied Johnson relief. Johnson did not appeal.

On July 18, 1989, Johnson filed the instant petition for federal habeas relief. In this second federal habeas petition, Johnson asserted five grounds of relief: (1) he was denied due process because the indictment was fundamentally defective; (2) he was denied due process because the court's charge allowed the jury to convict for an offense not alleged in the indictment; (3) he was denied due process because the trial court failed to instruct the jury on the definition of a deadly weapon; (4) he was denied due process because the verdict was premised on a non-unanimous verdict; (5) he was denied effective assistance of counsel. The district court granted him leave to proceed *in forma pauperis*. The State of Texas filed a motion to dismiss the petition under Rule 9(b) of the Rules Governing Habeas Corpus Cases under § 2254. The State contended that Johnson's fourth allegation should be dismissed as successive because it was raised in his prior federal habeas petition. The State also argued that Johnson's remaining four allegations should be dismissed as an abuse of the writ because he did not present them in his first federal habeas petition. On November 6, 1990, the district court ordered Johnson to respond to the state's motion to dismiss and establish that he had not abused the writ. In the order, the district court noted that it appeared that Johnson's first federal habeas petition included three repeated claims, instead of only one as the State had alleged.

After receiving an extension of time, Johnson responded to the State's motion to dismiss on December 31, 1990. Johnson commenced his Response by waiving his fourth ground of relief that the

verdict was premised on a non-unanimous verdict. Johnson also argued that even though his third ground that the trial court denied him due process by failing to instruct the jury on the definition of a deadly weapon had been previously raised in his first federal habeas, he should be allowed to relitigate it because the district court in his first federal petition erred in disposing of the claim. Johnson contended that his remaining three grounds of relief should not be dismissed even though he did not raise them in his first federal petition because he was functionally illiterate, had been representing himself *pro se*, and did not realize that he was waiving the claims.

On March 4, 1991, the district court granted the state's Rule 9(b) motion and entered final judgment against Johnson. Johnson timely filed a notice of appeal.

Discussion

The district court dismissed all of Johnson's claims under Rule 9(b) as either successive or an abuse of the writ. The decision to dismiss a habeas petition under Rule 9(b) lies within the sound discretion of the district court and will be reversed only for an abuse of discretion. *Daniels v. Blackburn*, 763 F.2d 705, 707-08 (5th Cir. 1985).

I. Successive Claims

In his first federal habeas petition, Johnson raised two of the constitutional claims he presses here: (1) that he was denied due process because the verdict was premised on a non-unanimous verdict and (2) that he was denied due process because the trial court failed to instruct the jury on the definition of a deadly

weapon. In his Response to the state's motion to dismiss, Johnson stated that he was waiving his ground that he was denied due process because the verdict was premised on a non-unanimous verdict. Thus, Johnson only presents one claim that he has raised in an earlier federal habeas petition, namely, that the trial court violated his due process rights by failing to instruct the jury on the definition of a deadly weapon.

We find that the district court did not abuse its discretion in dismissing this claim as successive. Rule 9(b) of the Rules Governing § 2254 Cases similarly permits judges to refuse to consider successive claims "if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." If the petitioner does raise a claim that a federal court has already considered in a previous habeas corpus petition, "we may review the merits of the successive claim only when `the prisoner supplements his constitutional claim with a colorable showing of factual innocence.'" *Sawyer v. Whitley*, 945 F.2d 812, 815 (5th Cir. 1991) (quoting *Kuhlmann v. Wilson*, 106 S.Ct. 2616, 2627 (1986) (plurality opinion)), *aff'd*, 112 S.Ct. 2514 (1992).

In the instant case, Johnson's only argument against dismissing this claim is that the ends of justice would be better served by allowing this claim to go forward because the district court reached the wrong disposition in his first federal habeas case. *See Sanders v. United States*, 83 S.Ct. 1068 (1963). The ends of justice can provide grounds for relitigating a habeas claim if the petitioner makes a colorable showing of factual innocence as

required by *Kuhlmann*. See *Kuhlmann v. Wilson*, 106 S.Ct. 2616, 2627 (1986) (plurality opinion). Johnson, however, does not raise any question as to his guilt or innocence, but simply attacks the sufficiency of the jury charge. We also note that there are no new factual or legal grounds urged beyond those already addressed by the district court in Johnson's first habeas petition. If Johnson felt that the district court handling his first federal habeas petition erred, his remedy was to appeal, which he failed to do. He did not have the option of waiting and presenting the same claims to a different federal district judge. We find no error in the district court's dismissal of this claim under Rule 9(b).

II. Abuse of the Writ

Johnson's remaining three claims¹ were not raised in his first federal habeas petition, and so Johnson is subject to the abuse of the writ doctrine. Rule 9(b) clarifies that if new and different grounds are alleged in a second or successive petition, the judge may dismiss the petition if he "finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." In *McCleskey v. Zant*, the Supreme Court confirmed "that a petitioner can abuse the writ by raising a claim in a subsequent petition that he could have raised in his first, regardless of whether the failure to raise it earlier stemmed from a deliberate choice." 111 S.Ct. 1454, 1468 (1991). However, the

¹ These claims are that he was denied due process because the indictment was fundamentally defective, that he was denied due process because the charge allowed the jury to convict on an offense not alleged in the indictment, and that he was denied effective assistance of counsel.

Supreme Court also held in *McCleskey* that it will excuse an abuse of the writ and consider a new claim if the petitioner can show "cause" and "actual prejudice" for not raising the claim in the first petition. *Id.* at 1470.

In order to demonstrate cause, the petitioner must show that the failure to raise the claim in his first petition was due to "'some objective external impediment preventing counsel from constructing or raising a claim.'" *McCleskey*, 111 S.Ct. at 1472 (quoting *Murray v. Carrier*, 106 S.Ct. 2639, 2648 (1986)). Sufficient external impediments include interference by government officials and the reasonable unavailability of the factual basis for the claim. *Id.* The relevant inquiry is "whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process." *McCleskey*, 111 S.Ct. at 1472. We note that the three new grounds that Johnson presents in his second federal habeas petition were all raised in at least one of his four state habeas petitions. All of Johnson's state habeas petitions were filed before his first federal habeas petition. Because these claims had all been raised in state court before the time that Johnson filed his first federal habeas petition, he clearly had a sufficient basis to allege these claims in the first federal petition and pursue the matter through the federal habeas process. As Johnson lacks cause for failing to raise these three claims in his first federal habeas petition, we need not consider whether he has suffered actual prejudice.

However, even if a petitioner cannot show cause, the failure

to raise the claim may nonetheless be excused if he can show that "a fundamental miscarriage of justice would result from a failure to entertain the claim." *McCleskey*, 111 S.Ct. at 1470. A fundamental miscarriage of justice implies that the "constitutional violation has probably resulted in the conviction of one who is actually innocent," see *Murray v. Carrier*, 106 S.Ct. 2639, 2649 (1986), and has been harmonized with the *Kuhlmann* 'colorable showing of factual innocence' requirement. See *Sawyer*, 945 F.2d at 816. Johnson does not argue that he is actually innocent, but instead raises only legal errors. Moreover, nothing in the state or federal record suggests that the claimed errors resulted in the conviction of an innocent person. Accordingly, the actual innocence exception does not apply, and because Johnson has not demonstrated cause and prejudice, the district court properly dismissed these three claims under Rule 9(b) as an abuse of the writ.

Conclusion

Finding that the district court properly dismissed Johnson's habeas petition under Rule 9(b), we affirm.²

AFFIRMED

² On January 30, 1992, Johnson filed with this Court a "Motion to abate to exhaust state court remedies," requesting that this Court abate the appeal for ninety days because he had discovered some new claims that had not been exhausted in state court. There is little, if anything, to recommend such a procedure. Johnson has not given any indication as to what these claims are. He apparently requests abatement of this appeal in order to protect these claims from being subject to dismissal in the future as an abuse of the writ. We note that even if we abated this appeal, these claims would still be subject to the abuse of the writ doctrine if he raised them in a third federal habeas petition because Johnson has already filed one federal habeas petition. We deny Johnson's motion.