

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1189
Summary Calendar

OWEN JAMES YARBOROUGH

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(CA4 91 544)

(July 22, 1993)

Before GARWOOD, JONES and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner-appellant Owen James Yarborough (Yarborough) appeals the dismissal of his third federal habeas petition challenging his Texas conviction for murder. The district court dismissed the petition for abuse of the writ. 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

In 1981, Yarborough was convicted of murder in Texas state court. He is currently serving a life sentence in the custody of the Texas Department of Criminal Justice (TDCJ) for this offense.

Yarborough filed four applications for state writs of habeas corpus challenging his conviction. The Court of Criminal Appeals denied them on June 13, 1984, October 29, 1986, September 14, 1988, and November 1, 1989, respectively.

Yarborough filed his first federal habeas petition in 1986, under 28 U.S.C. § 2254, raising three grounds for relief: (1) there was a conspiracy to convict him; (2) the state's main witness perjured himself; and (3) the state knew of the conspiracy and failed to act upon that knowledge. This petition was dismissed without prejudice for failure to exhaust state remedies.

Yarborough filed his second federal habeas petition in 1987, raising the same three grounds of relief as his first federal petition. After considering the merits of Yarborough's claims, this petition was denied as without merit.¹

On August 1, 1991, Yarborough filed the instant federal habeas petition, his third. His original petition in this matter raised the same three grounds of relief raised in his two prior federal petitions and alleged that he was denied effective assistance of counsel, that the state withheld exculpatory evidence showing that its principal witness had been arrested and charged in connection

¹ Although Yarborough's second habeas petition is not part of the record in this appeal, the record shows that the same three issues were raised and rejected on the merits, and Yarborough has not challenged this finding.

with the same murder, and that he was not properly charged or indicted.

On September 5, 1991, the state moved to dismiss the petition under 28 U.S.C. § 2254's Rule 9(b), pleading abuse of the writ; at the same time it filed its answer. Yarborough, in a pleading filed September 16, 1991, entitled "Petitioner's Response As To Why His Petition Should Not Be Barred Under Rule 9," responded to the motion to dismiss by arguing the merits and by stating that his lack of counsel was one reason the new allegations were not raised in previous petitions.

The matter was referred to a magistrate judge who on December 4, 1991, recommended dismissal for abuse of the writ because Yarborough failed to establish a legitimate cause for his successive filings and for his failure to include his new claims in prior petitions.

Yarborough on December 26, 1991, filed written objections to this recommendation, arguing the merits of his claim, and a motion for leave to amend his complaint by adding new challenges to the validity of his conviction.

The district court did not grant Yarborough leave to amend his complaint, but on February 5, 1992, adopted the magistrate judge's recommendation and dismissed Yarborough's petition for abuse of the writ. Yarborough filed a timely notice of appeal and the district court issued a certificate of probable cause.

Discussion

Before addressing whether Yarborough abused the writ, we must digress. Yarborough contends that he received insufficient notice

from the court that it was considering dismissing his petition for abuse of the writ and that his claim should be reinstated so that he can have the opportunity to respond to the state's motion to dismiss. "Abuse of the writ may be raised by the state or the district court sua sponte." *Johnson v. McCotter*, 803 F.2d 830, 832 (5th Cir. 1986). In either case, the district court must give the petitioner at least ten days' notice that the court is considering dismissing the claim for abuse of the writ, that the petition will be automatically dismissed if the petitioner fails to respond, and that the response should present facts explaining why the writ has not been abused. *Id.* Violations of this rule require reversal of the dismissal under Rule 9, unless the error was harmless. *Id.* The filing of a response to the state's Rule 9 Motion to Dismiss makes the lack of court-given notice a harmless error because it accomplishes the goal intended by the notice rule so that the petitioner be given the opportunity to respond. *Matthews v. Butler*, 833 F.2d 1165, 1171 & n.8 (5th Cir. 1987) (notice designed to give petitioner opportunity to respond).

Here, Yarborough did not receive notice from the court, either through service of a Rule 9(b) form or other means, that the claims raised in his original petition were being reviewed under Rule 9(b). However, Yarborough filed a response to the state's Rule 9 motion. Moreover, Yarborough was given additional notice and the additional chance to respond by the magistrate judge whose report recommended dismissal under Rule 9(b). Yarborough responded to this recommendation by timely filing objections, though his objections did not address the issue of 9(b) dismissal. The

district court's failure to give Yarborough ten days' notice before dismissing his original habeas petition under Rule 9(b) constituted harmless error.

Yarborough had no right to Form 9 notice before dismissal of the claims raised in the motion to amend his complaint. The court implicitly denied the motion to amend the complaint meaning that the claims were not before the court and that the court did not rule on or dismiss those claims. FED. RULE CIV. P. 15(a) (leave of court required to file amendments after responsive pleading filed); *Daly v. Sprague*, 742 F.2d 896, 899-900 (5th Cir. 1984) (granting defendant's motion for summary judgment was implicit denial of plaintiff's motion to amend his complaint). We observe that the district court did not abuse its discretion in denying Yarborough leave to amend his petition since his motion to amend was filed after the magistrate judge had issued his recommendation. Moreover, the claims sought to be raised in the request for amendment facially appear to lack merit as they relate only to details of state practice not cognizable under section 2254; and, there was no reason why the claims so sought to be raised by an amended petition could not have been raised in Yarborough's original petition (and in his 1987 federal habeas petition). This result obtains even though pro se habeas pleadings are treated liberally. *Davis v. United States*, 961 F.2d 53, 57 (5th Cir. 1991) (undue delay, bad faith, undue prejudice, and futility all grounds to deny leave to amend); *Avatar Exploration, Inc. v. Chevron, U.S.A., Inc.*, 933 F.2d 314, 320 (5th Cir. 1991) (denial of leave to amend where motion untimely and futile); *Hernandez v. Garrison*, 916

F.2d 291, 293 (5th Cir. 1990) (not abuse of discretion to deny leave to amend after magistrate judge's report filed where motion did not state what amended complaint would be); *Daly*, 742 F.2d at 900 (abuse of discretion standard).

We turn now to whether Yarborough abused the writ by raising claims that were ruled on in his prior habeas petitions and by raising new claims that could have been raised in his prior petitions. The same general test applies to claims that were raised and rejected on the merits in prior petitions and new claims that could have been but were not raised in prior petitions. If the petitioner raises a claim that a federal court has already considered or a claim that could have been raised in a prior petition, the merits of the claim will only be addressed if the petitioner can show cause and prejudice. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518 (1992). If the petitioner cannot show cause, a new or successive claim will still be considered if it is supplemented with a colorable showing that a fundamental miscarriage of justice would result from the failure to consider the claim. *Sawyer*, 112 S.Ct. at 2518-2519. In habeas cases, the phrase "fundamental miscarriage of justice" has been construed to mean "'a colorable claim of factual innocence.'" *Sawyer*, 112 S.Ct. at 2519.

To establish a legitimate cause, a petitioner must "show that at the time he filed his previous habeas petitions, some factor external to his defense prevented him from discovering the claims he now raises or from uncovering them through reasonable investigation." *Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir.

1992); *McQueen v. Whitley*, 989 F.2d 184, 185 (5th Cir. 1993). Legitimate causes include government interference and the reasonable unavailability of the actual or legal basis of the claim. *Saahir*, 956 F.2d at 118. The petitioner's pro se status or lack of counsel at previous habeas proceedings do not qualify as legitimate causes because these conditions are external to his defense.² *Id.* (petitioner's inadequate legal research not legitimate cause). Similarly, "the mere fact that counsel [at trial] failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause." *Murray v. Carrier*, 106 S.Ct. 2639, 2644 (1986) (rule for "cause and prejudice test" applied to determine whether court will grant habeas review to matters not objected to at trial); *Coleman v. Thompson*, 111 S.Ct. 2546, 2566 (1991) (counsel failure not legitimate cause where matter not raised in prior state habeas proceedings).

Yarborough offered no reasons why his successive claims should be reconsidered. Concerning the claims raised for the first time in this petition, Yarborough argues that he did not have prior knowledge of his ineffective assistance of counsel claim and that he did not obtain information concerning the deal the prosecution made with its principal witness (the state dropped charges against Yarborough's co-conspirator in return for testimony at trial).

² There is no constitutional right to counsel in federal habeas matters and there can be no claim of ineffective assistance of counsel where counsel does participate in habeas proceedings. See generally *Coleman v. Thompson*, 111 S.Ct. 2546, 2556-66 (1991).

Below, but not on appeal, Yarborough contended that his lack of intelligence and reliance on appointed counsel caused him to fail to raise these claims previously.

Yarborough alleged no facts showing that he did not learn that his trial counsel was ineffective or of the deal with the state's principal witness prior to his filing the second federal habeas petition.³ Moreover, reliance on counsel is not a legitimate cause for raising a new claim. See *Murray*, 106 S.Ct. at 2639. Yarborough has not established a legitimate cause for failing to assert his new claims in his prior habeas petition.

Since Yarborough has not offered a legitimate cause for failing to assert his new claims in prior petitions or for bringing his old claims in this petition, it is unnecessary to consider whether he will be prejudiced by the failure of the court to consider his claims on the merits. *McCleskey v. Zant*, 111 S.Ct. 1454, 1474 (1991).

Finally, Yarborough has failed to allege a colorable claim of factual innocence. Since Yarborough has failed to offer a legitimate reason for bringing his new and successive claims and has not alleged anything which would establish that the matters complained of resulted in the conviction of one who is factually innocent, the district court acted properly in dismissing his petition for abuse of the writ.

³ On appeal, Yarborough argued that newly discovered information about a confidential informant showed cause; however, neither Yarborough's habeas petition nor his motion to amend alleged a claim involving a confidential informant.

Conclusion

Yarborough has failed to show that he has not abused the writ. Accordingly, the district court's dismissal of his third federal habeas petition is

AFFIRMED.⁴

⁴ Under the circumstances, there is no need to appoint counsel to help Yarborough pursue his barred claims. *See generally Lamb v. Estelle*, 667 F.2d 492, 297 (5th Cir. 1979); *Saahir*, 956 F.2d at 118.