

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1543
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FERMAN WAYNE WRIGHT,

Defendant-Appellant.

- - - - -
Appeal from the United States District Court
for the Northern District of Texas
USDC No. CA3-91-1433-R
- - - - -

March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

Rule 9(b) of the Rules Governing § 2255 Proceedings provides in part that "a second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits." Wright concedes that the claims he now raises were previously presented and rejected. When a defendant fails to allege new or different grounds for relief in a subsequent motion, this Court may review the merits of the successive claim "if the failure to hear them would result in a miscarriage of justice." Sawyer v.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Whitley, ___ U.S. ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992)(interpreting Rule 9(b) under § 2254). Wright's contentions were reviewed by both the district court and this Court on direct appeal. Failure to review his contentions again would not result in a miscarriage of justice.

In his appellate brief,** Wright argues that his procedural due process rights were violated when he was not given a separate evidentiary hearing on the issue of enhancement. A claim raised for the first time in a subsequent § 2255 motion must be dismissed for an abuse of the writ unless the petitioner demonstrates "cause" for not raising the issue in the previous petition and "prejudice" if the court fails to consider the new point. Rule 9(b); See Woods v. Whitley, 933 F.2d 321, 323 (5th Cir. 1991)(interpreting Rule 9(b) under § 2254). As the magistrate judge noted, Wright can demonstrate neither "cause" nor "prejudice," therefore, his latest argument is equally unavailing. The district court's dismissal of Wright's motion is AFFIRMED.

** Whether Wright raised this argument in the district court cannot be ascertained because Wright's third § 2255 motion is not in the record. The magistrate judge did not specifically address this argument in his report. R. 2, 315-16.