

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-1714  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BENJAMIN ALEXANDER POTTS,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. CA3-92-0829 (CR3-87-113-D)  
- - - - -  
(December 14, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:\*

Under Rule 9(b) of the Rules Governing § 2255 Proceedings, a motion arising under 28 U.S.C. § 2255 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, or, if new and different grounds are alleged, the judge finds that the failure of the movant to assert those grounds in a prior motion constituted an abuse of the procedure. A district court's decision to dismiss a motion under Rule 9(b) is reviewed under

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the abuse-of-discretion standard. United States v. Flores, 981 F.2d 231, 234 (5th Cir. 1993).

In his third § 2255 motion, Benjamin Alexander Potts asserts for the first time that the prosecutor and judge committed misconduct and that the presentence report contains incorrect information. Potts also asserts new allegations to support claims he has raised before: involuntariness of his plea and ineffective assistance of counsel.

A court may not consider the merits of a new claim or a repetitive claim unless the petitioner shows "cause" and "prejudice." Sawyer v. Whitley, \_\_\_ U.S. \_\_\_, 112 S. Ct. 2514, 2518, 120 L. Ed. 2d 269 (1992). To establish "cause," a movant must show that some external impediment prevented him from raising the claims in an earlier petition. McCleskey v. Zant, 499 U.S. 467, \_\_\_, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991). Factors constituting "cause" include "interference by government officials, as well as the reasonable unavailability of the factual or legal basis for a claim." Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992). If the movant has not established cause, the court need not consider prejudice. Id. at 118.

Potts's alleged "stress" and the fact that his third motion is more "elaborated" do not constitute external forces amounting to cause for his failure to raise these claims and allegations earlier. See McCleskey, 111 S. Ct. at 1470. Nor does Potts's pro se status amount to cause. See Saahir, 956 F.2d at 118. Potts's allegations that he was subjected to "correctional staff retaliation" and that the sentencing judge had "serious

animosity" towards him do not explain how he was prevented from raising these specific claims earlier or from reasonably knowing about the pertinent facts and legal theories.

A review of the record reveals no "objective external factor" that prevented Potts from raising these claims and allegations earlier. Because Potts has failed to satisfy the cause standard, this Court need not consider prejudice. See Saahir, 956 F.2d at 118.

Although Potts has not shown cause, this Court may nevertheless review the merits of his claims if he makes a colorable showing that a constitutional violation probably caused the conviction of an innocent person. See Sawyer v. Whitley, 112 S. Ct. at 2518-19; Flores, 981 F.2d at 236. Although Potts asserts his innocence, he makes no "colorable" showing of factual innocence. The record, moreover, provides proof of his guilt: on April 6, 1987, a savings-and-loan association was robbed of \$4,670.20 by a lone, white male with a thin build, approximately six-feet tall, wearing a light tan jacket, a straw cowboy-type hat, a fake moustache and sideburns, and blue jeans. The robber was seen leaving the savings-and-loan association in a tan-and-brown pickup truck. Police officers subsequently stopped a tan-and-brown pickup truck with Potts, a white male approximately six-feet tall with a thin build, riding as a passenger. Police officers recovered from the truck \$4,600 in American currency that included "bait money" prerecorded by the savings-and-loan association, a tan cowboy-type hat, a fake moustache, and fake sideburns.

Potts has failed to show cause or make a colorable showing that a constitutional violation probably caused the conviction of an innocent person. The district court, therefore, did not abuse its discretion in dismissing the claims under Rule 9(b).

Potts has also filed a motion to proceed in forma pauperis on appeal. That motion is DENIED as moot because the district court has already granted such a request. See FED. R. APP. P. 24(a).

The judgment of the district court is AFFIRMED.