IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3363
(Summary Calendar)

MELVIN CROCHET,

Petitioner-Appellant,

versus

BRUCE LYNN, Secretary,
Dept. of Corrections, and
RICHARD P. IEYOUB, Attorney
General, State of Louisiana

Respondents-Appellees.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA-91-4554-E)

(February 4, 1993)

Before KING, DAVIS and WIENER, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Melvin Crochet, a Louisiana prisoner,

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

appeals the dismissalSQon grounds of abuse of the writSQof his second federal petition for habeas corpus relief. Concluding that the district court committed no reversible error in dismissing Crochet's petition, we affirm.

I

FACTS AND PROCEEDINGS

Crochet was convicted in state court of aggravated rape, and was sentenced to 50 years' imprisonment. After exhausting state remedies, Crochet filed a petition for habeas corpus relief in the federal district court in 1984, contending that his sentence of 50 years was illegal. He argued that attempted aggravated rape was not truly a lesser included offense of aggravated rape, so that he should have been sentenced to no more than 20 years, the maximum penalty for the true lesser included offense of forcible rape. The district court denied relief on the merits, and Crochet appealed to this court. We affirmed the judgment of the district court, holding that Crochet's petition raised an issue of state law that did not present a federal question.

In his current petition, Crochet argues that his sentence was imposed without due process because the sentencing court was unaware that it had discretion to sentence him to a prison term of less than 50 years, citing Hicks v. Oklahoma, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980). This exact challenge to Crochet's sentence has not previously been presented to the Louisiana courts; however, in its answer the state failed to plead Crochet's failure to exhaust state remedies so the state is deemed

to have waived that defense. See McGee v. Estelle, 722 F.2d 1206, 1213-14 (5th Cir. 1984) (en banc).

The district court, noting that Crochet had filed a previous habeas petition which did not include this claim, served him with a Rule 9 form, requiring that he show why his petition should not be dismissed for abuse of the writ. Crochet responded that, at the time he filed his first federal petition, the Louisiana courts held that a person convicted of aggravated rape under La. Rev. Stat. 14:42, before it was amended to delete the mandatory death penalty, had to be sentenced to the maximum sentence allowed for a lesser included offense. He stated that the first indication he had that the sentencing judge had discretion to sentence him within the range of 0-50 years instead of to a mandatory 50 years' sentence was when he read our opinion on appeal of his first federal habeas petition. He also stated that he was not assisted by counsel when he filed his first petition, and that he was personally incapable of recognizing the legal theory that forms the basis of his current claim. He further claimed that the "paging" system of research at Angola hampered his ability to research his claim.

The district court found that Crochet's petition raised a new issue not presented in his first petition, but that he had not shown either that he had cause for failing to raise this issue before or that he would suffer prejudice if the court failed to review his newly asserted claim. Nevertheless, the court proceeded to consider the merits of his claim and found the new issue meritless. The court then denied his petition but granted a

certificate of probable cause, and Crochet timely appealed.

II

ANALYSIS

Crochet argues that his petition should not have been dismissed under Rule 9(b) because there had been no showing that his failure to raise this claim in his prior petition was intentional or negligent. As we have noted, he avers that, although he was aware of the facts underlying his claim, he was not represented by counsel when he filed the previous petition and that on his own he could not understand the legal significance of those facts. He also argues that prejudice is established by the fact that he would have received a lesser sentence had the sentencing court known that it had the discretion to impose a lesser sentence.

Districts courts may dismiss successive habeas petitions that assert new and different grounds if the failure of the petitioner to assert those grounds constitutes an abuse of the writ. Rule 9(b). A petitioner's successive habeas petition must be dismissed as an abuse of the writ unless the petitioner demonstrates both cause for not raising the issue in his prior federal habeas petition and prejudice that would result if the court should fail to consider the new issue. McCleskey v. Zant, ____ U.S. ____, 111 S.Ct. 1454, 1470-71, 113 L.Ed.2d 517 (1991); Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992).

The cause prong of the two-pronged "cause and prejudice" test requires the petitioner to show that some objective factor external to the defense impeded his efforts to raise the claim. Objective

factors that constitute cause include governmental interference or the reasonable unavailability of the factual or legal basis of the claim. McCleskey, 111 S.Ct. at 1470. "The requirement of cause in the abuse of the writ context is based on the principle that petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." Id. at 1472.

Crochet's excuses for not having raised the new issue in his prior petition do not establish cause. He admits that he was aware of the judge's comments at sentencing, but argues that he did not know their legal significance. The fact that he was not represented by counsel is not an excuse for his ignorance of the law. Saahir, 956 F.2d at 118. Crochet alleges that the method of legal research at Angola made research difficult, but that does not constitute an objective external factor preventing his raising the claim in his first habeas petition. The thoroughness of the pleadings he filed in his state proceedings and in his prior federal habeas proceeding show that his research capabilities were more than adequate. He may not have intentionally or negligently omitted the subject claim, but neither intentional nor negligent omission is an element essential to a holding of abuse of the writ. Crochet could have determined the appropriate legal theory if he had diligently researched his case before filing his first writ petition. See Saahir, 956 F.2d at 119. We agree with the district court's finding that Crochet has failed to meet the cause prong of the test.

The "cause and prejudice test" is a conjunctive one, i.e., the filer of a successive habeas petition must demonstrate both cause and prejudice. As Crochet has not established cause, he cannot prevail. Therefore, we need not consider the second, or prejudice, prong of the test.

Even though Crochet failed to show cause for not having raised this issue in his prior petition, the district court could still consider his petition to prevent a "fundamental miscarriage of justice." McCleskey, 111 S.Ct. at 1470-71. This alternative standard addresses the likelihood that a constitutional violation caused the conviction of an actually or factually innocent person. Saahir, 956 F.2d at 119.

Crochet does not allege that he is innocent of the crime. Neither does he argue that he is "innocent" of a sentence of 50 years, i.e., that but for the judge's misunderstanding, no reasonable judge would have sentenced him to 50 years. He argues only that the sentencing court did not consider the option of sentencing him to less than 50 years because the court believed that a 50-year sentence was mandatory. Thus his claim is related to the length of his prison sentence, not to his actual guilt or to the legality of being sentenced for his crime of conviction. In the context of sentencing, as distinguished from guilt or innocence of the crime, the Supreme Court has defined what is meant by "actual innocence" of the death penalty. But we find it difficult if not impossible to discern how this concept could apply in the context of a sentence for a term of years, particularly one that

falls within the statutory maximum period of incarceration. A petitioner claiming actual innocence of the death penalty must show that "but for constitutional error, no reasonable juror would find him eligible for the death penalty." Sawyer v. Whitley, ____ U.S. ____, 112 S.Ct. 2514, 2523, 120 L.Ed.2d 269 (1992). Crochet has not shown that failure of the sentencing court to consider this issue would result in a fundamental miscarriage of justice. Specifically, he has not demonstrated that if the sentencing court had been aware of its discretion to impose a sentence shorter than 50 years it would have done so. We conclude, therefore, that the U. S. District Court did not abuse its discretion in dismissing Crochet's petition for abuse of the writ.

Even though the district court could have based its dismissal on abuse of the writ alone, it chose to address the merits of Crochet's claim as well. When it did so, the court found that, according to Louisiana law, the sentencing judge was not vested with discretion to sentence Crochet to less than 50 years. Fifty years was the most severe penalty for the proper lesser included crime of attempted aggravated rape, and Louisiana law required sentencing at the maximum for one found guilty of a lesser included offense. This ruling is correct. The state court did not, as Crochet insists, have the discretion to sentence him within a range of 0 to 50 years; it was required to sentence him to the most serious penalty - 50 years. See State v. Smith, 340 So.2d 247, 249 (La. 1976).

For the foregoing reasons, the district court's dismissal of Crochet's petition for a writ of habeas corpus is

DISMISSED.