UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-3584
Summary Calendar

MELVIN BAHAM,

Petitioner-Appellant,

VERSUS

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary, 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 2656 I)

September 10, 1993

Before DAVIS JONES and DUHÉ, Circuit Judges.

PER CURIAM:[1]

I.

In 1983, Melvin Baham (Baham) pleaded guilty to charges of armed robbery and was sentenced to 33 years imprisonment. After exhausting state remedies, Baham filed a 28 U.S.C. § 2254 petition in federal district court, alleging that his plea was involuntary

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

and that the record failed to reflect the basis underlying his sentence as required by state law. The district court denied relief and this Court affirmed in 1988.

Baham and the state filed separate motions in state court to correct an illegal sentence on May 31 and July 28, 1989, respectively. Baham was resentenced on October 30, 1989, to reflect that his sentence was to be served without benefit of parole, probation, or suspension of sentence as required by state law for defendants convicted of armed robbery.[2] Baham was resentenced by the same judge who imposed the original sentence.

After again exhausting state remedies, **see State ex rel. Baham v. Smith**, 578 So.2d 925, 925 (La. 1991), Baham filed this § 2254 petition, alleging (1) that the district court did not offer adequate justification for making the original sentence more severe upon correction and (2) that the sentencing judge was under the mistaken impression that Baham was subject to being sentenced as an habitual felon.

The district court ordered Baham to show cause why his second § 2254 petition should not be barred by Rule 9, Rules Governing § 2254 Cases. Baham responded that he failed to raise the issues in his first petition because of his "ignoran[ce] of the law" and

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[2] Louisiana law, which was in effect at the time of both sentencings, mandates that individuals convicted of armed robbery be sentenced "without benefit of parole, probation or suspension of sentence." **See** La. Rev. Stat. Ann. 14:64 (West 1986). Correction of an illegal sentence can occur even after the sentence is affirmed on appeal. **State v. Fraser**, 484 So.2d 122, 124 & n.4 (La. 1986).

because a change in state law required a showing on the record for the basis of his corrected sentence.

The district court held that Baham's claim that the trial judge unlawfully enhanced his sentence was not barred by Rule 9(b) because it arose after his first petition was decided. Addressing the merits, the district court held that, because Baham requested that the sentence be corrected, he could not be heard to complain when the judge complied with his request. Further, the district court held that the reason for the correction was apparent, because it was required by Louisiana law. The district court also held that any failure by the state court to state reasons for imposing the sentence it selected was a mere failure to follow state sentencing procedures and not a ground for § 2254 relief.

The district court held that Baham failed to show cause for failing to raise his second argument in his first § 2254 petition. The district court also held that Baham provided neither evidence nor argument that he was actually innocent. Alternatively, the district court rejected this claim on its merits, noting that, although Baham was not charged as a multiple offender, the state judge was entitled to consider Baham's prior felony, which was undisputed, for purposes of sentencing.

Baham filed a "Motion for Reconsideration," which was served within 10 days of the district court's judgment and was thus a Rule 59(e) motion. **see Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.**, 784 F.2d 665, 667-70 (5th Cir.) (en banc), **cert. denied**, 479

U.S. 930 (1986). The district court denied the motion. Baham filed a timely notice of appeal.

II.

A.

Baham's corrected sentence falls within the statutory range provided by La. Rev. Stat. Ann. 14:64 (West 1986). Nevertheless, Baham contends **pro se** that it violates his due process rights under **Hicks v. Oklahoma**, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed. 2d 175 (1980), and **North Carolina v. Pearce**, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969). Relatedly, he argues that the resentencing judge failed to follow Louisiana law by not making findings regarding the intent of the judge who imposed the original sentence.

Hicks held that due process is violated when a sentencing judge or jury is unaware of discretionary sentencing alternatives. **Hicks**, 447 U.S. at 346. To receive an evidentiary hearing on a **Hicks** claim, a habeas petitioner must raise "a genuine issue as to the sentencing judge's knowledge and understanding of sentencing discretion." **Payton v. Whitley**, 941 F.2d 1321, 1322 (5th Cir. 1991). In this case, the resentencing judge had no discretion with regard to parole, probation, or suspension. However, the judge had discretion to lower the term of the prison sentence. If, for example, he determined that the original sentencing judge intended to allow parole eligibility, he could impose a sentence of a lesser term of years without benefit of parole to reflect that intent.

State v. Desdunes, 579 So.2d 452 (La. 1991). Or if he could not determine the intent of the original sentencing judge, he would be free to "make an independent determination of an appropriate sentence, not to exceed the term of years originally imposed, to be served without the benefit of parole." **Desdunes**, 579 So.2d 452 (La. 1991). Baham is not entitled to a hearing on this claim, because he has not pointed to any evidence that the resentencing judge was unaware of his discretionary sentencing alternatives.

In **Pearce**, the Supreme Court addressed judicial vindictiveness by trial courts against defendants who take successful appeals. When a trial court imposes a harsher sentence after a successful appeal, **Pearce** requires the court to set forth reasons justifying the increased sentence to overcome a presumption of vindictiveness. This prophylactic rule prevents actual vindictiveness as well as the appeal-chilling appearance of vindictiveness. **Pearce**, 395 U.S. 726; **United States v. Vontsteen**, 950 F.2d 1086, 1088-89 (5th Cir. 1992) (en banc). We have expressed doubt that the **Pearce** rule applies if the sentencing judge catches his own error, is not reversed or corrected by another court, and did not have to retry the case. **United States v. Cataldo**, 832 F.2d 869, 874 (5th Cir. 1987). The fact that both the State and Baham moved for resentencing further reduces the threat of judicial vindictiveness.

However, even if **Pearce** does apply, the record reflects adequate reasons for modifying the sentence. Correcting a sentence to execute original sentencing intent and to comply with the law justifies upward resentencing. **Cataldo**, 832 F.2d at 875. Here,

state law required that prison terms for armed robbery should be served without the benefit of parole. La. Rev. Stat. Ann. 14:64 (West 1986) We may presume that the original sentencing judge was aware of and intended to follow the law, i.e., that he meant for Baham's 33 year term of imprisonment to be served without the benefit of parole. Baham has pointed to no evidence in the record that rebuts this presumption. So the corrected sentence executes both state law and the original sentencing judge's intent. Therefore, Baham's **Pearce** claim has no merit.

In conjunction with his **Pearce** claim, Baham points to **Desdunes**, 579 So.2d at 452, which requires that the record reflect consideration by the resentencing judge of the intent of the judge who imposed the original sentence. However, a state's failure to follow its own sentencing procedures is not reviewable by federal habeas corpus. **Haynes v. Butler**, 825 F.2d 921, 924 (5th Cir. 1987).

B.

Baham next argues that his guilty plea was not knowing and voluntary because the trial court's original sentence was based on a mistaken belief that he was a candidate for sentencing as an habitual felon. He asks us to vacate his guilty plea or alternatively, remand to the court below for further proceedings to settle the contested facts.

Rule 9(b), Rules Governing § 2254 Cases, provides that a second or successive petition that raises new and different grounds may be dismissed if the judge finds that the failure of the

petitioner to assert those grounds in a prior petition constituted an abuse of the writ. The decision to dismiss under Rule 9(b) lies within the sound discretion of the district court and will be reversed only for an abuse of discretion. **See Hudson v. Whitley**, 979 F.2d 1058, 1062 (5th Cir. 1992). Such a claim must be dismissed as 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. **Sawyer v. Whitley**, ___ U.S. ___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992); **Woods v. Whitley**, 933 F.2d 321, 323 (5th Cir. 1991). The initial burden is on the state to plead writ abuse; the petitioner must then prove cause and prejudice. **Saahir v. Collins**, 956 F.2d 115, 118 (5th Cir. 1992).

The cause requirement demands that some objective factor external to the petitioner's defense prevented him from raising the claims in his prior petition, such as interference by government officials and the reasonable unavailability of the factual or legal basis for a claim. **McCleskey v. Zant**, ___ U.S. ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991); **Saahir**, 956 F.2d at 118. **Pro se** status or a failure to understand the law are not such factors. **Saahir**, 956 F.2d at 118-19. The abuse-of-writ analysis holds both **pro se** petitioners and those represented by counsel to a constructive-knowledge standard concerning awareness of their claims. **Id.** A petitioner is required to have conducted "a reasonable and diligent investigation aimed at including all

relevant claims and grounds for relief in the first federal habeas petition.

Baham's explanation that he was unlearned in the law and without counsel is insufficient to show cause. The district court also correctly rejected Baham's argument that the "courts below" did not allow him to develop the claims and that there remains a "factual dispute" on the issue. Baham fails to show that this claim was not based on facts clearly available to him when he filed his first federal petition. Because Baham has not shown cause, this Court need not address the prejudice prong. **Saahir**, 956 F.2d at 118.

Even if a petitioner cannot meet **McCleskey**'s "cause" and "prejudice" standard, a federal court may consider the merits of successive claims if the failure to consider them would constitute a "miscarriage of justice." **Sawyer**, 112 S.Ct. at 2518. The miscarriage-of-justice exception would allow successive claims to be considered if the petitioner has established sufficient evidence raising a claim of innocence. **Id.** at 2519. The district court correctly held that "[t]here is neither evidence nor argument that the conviction or sentence of an innocent person has occurred." The district court correctly rejected this claim as an abuse of the writ.

III.

For the reasons stated above the judgment of the district court is AFFIRMED.