IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3639

WILLIE THOMAS,

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-91-3961-J-6)

(June 17, 1994)

Before GOLDBERG, KING, and WIENER, Circuit Judges.

Per Curiam*:

Petitioner-Appellant Willie Thomas appeals the district court's denial of his petition for habeas relief based on a claim of ineffective assistance of counsel. The federal district court

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

did not hold an evidentiary hearing; neither did it have before it the transcripts of two state habeas evidentiary hearings held in October and December of 1990. These state hearings transcripts have now been made part of the record and are before us on this appeal. As Thomas' claim depends primarily on findings by the state court that are reflected in these evidentiary hearing transcripts, which findings are entitled to a presumption of factual correctness under 28 U.S.C. § 2254(d), we reverse and remand so that the district court may reconsider Thomas' claim in light of the state court's findings.

I

FACTS AND PROCEEDINGS

In 1975, while on parole for a prior conviction, Willie Thomas was indicted for the first degree murder of Euclid Michel, and was charged by bill of information for the armed robbery of Mrs. Frances LaFont.[1] As Louisiana's first degree murder statute had been declared unconstitutional, the indictment for first degree murder was amended to charge Thomas with second degree murder.

Thomas was represented by Ralph Barnett, who at the time had fifteen years experience and had been specializing in criminal defense. Prior to his representation of Thomas, Barnett had negotiated numerous pleas. On Barnett's advice, and pursuant to a plea agreement, Thomas pleaded guilty to one count of second degree

[1]On May 7, 1975, Thomas and three others robbed a store and took four hostages. One hostage was left outside the store after the hostage had a heart attack. The murder victim was one of the hostages taken.

murder and one count of armed robbery. As a result of his plea of guilty, Thomas was sentenced for second degree murder, under the then-current version of La. R.S. 14:30.1, to life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence for a period of twenty years))the mandatory sentence under that second degree murder statute.[2] Thomas did not, however, receive the maximum sentence for armed robbery: The sentence range for that offense was from five to ninety-nine years; and any sentence imposed for armed robbery would be without parole.[3] As he had anticipated, Thomas was sentenced to twenty years for the armed robbery conviction, to be served concurrently with his life sentence for murder. Although it appears that Thomas would become eligible for parole after serving twenty years of his life sentence for second degree murder, under Louisiana law at the time of Thomas' sentencing (as now)))specifically under La. R.S. 15:574.4(B)))Thomas is not eligible for parole consideration, even after serving twenty years, unless and until his life sentence is commuted by the Governor, upon recommendation of the Board of

[2]At present, La. R.S. 14:30.1 provides for life imprisonment at hard labor without benefit of parole, probation, or suspension of sentence.

[3]We do not speculate whether Thomas' primary motive for entering his plea might have been to limit his armed robbery sentence, as that sentence would be without parole. An armed robbery sentence not exceeding twenty years may have been the only true benefit Thomas thought he could gain by pleading guilty, so that he would be eligible for parole from both offenses when he had served twenty years of his life sentence for murder.

Pardons, to a fixed term of years.[4] But it was Thomas's understanding))and he asserts that his counsel and the court so informed him))that after serving twenty years, he would be paroled,[5] or at least would become eligible for parole.

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[4]LA. CONST. art. 4 § 5 (E); La. R.S. 15:572(A).

Thomas initially urged before the district court (in addition to his Sixth Amendment ineffective assistance of counsel claim) that his sentence was invalid and illegal because of a conflict in state law. The relevant version of La. R.S. 14:30.1 defines the sentence for second degree murder as life without benefit of parole, etc., for a period of twenty years; while La. R.S. 15:574.4(B) states that "[n]o prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years." Those statutes do appear to be in conflict. The district court held that Louisiana state courts have determined nevertheless that there is no conflict between L.A. R.S. 15:574.4(B) and sentences to life with less than the full term being imposed without benefit of parole, citing State v. Grant, 555 So. 2d 528 (La. App. 4th Cir. 1989), writ denied, 558 So. 2d 602 (La. 1990). If indeed that is the case, we note that interpretation of a state law by the state courts is given the utmost deference in a federal habeas proceeding. Seaton v. Procunier, 750 F.2d 366, 368 (5th Cir.) (citing Moreno v. Estelle, 717 F.2d 171, 179 (5th Cir. 1983), cert. denied, 466 U.S. 975, 104 S. Ct. 2353, 80 L. Ed. 2d 826 (1984)), cert. denied, 474 U.S. 836, 106 S. Ct. 110, 88 L. Ed. 2d 90 (1985). The district court correctly held that, even if Louisiana state law were in conflict, federal habeas review is available to a state prisoner only on the ground that he is in custody in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a).

The state asserts in this appeal that Thomas "alleges that he is aggrieved because of a conflict in state law." Respondents' Brief at 4. But Thomas does not before this court reurge his claim that his sentence is illegal because of a conflict in state law; rather, he asserts that he was misinformed about relevant state law by the court and by his counsel, such that his plea was involuntary and the result of ineffective assistance of counsel. Therefore, Thomas has alleged a claim cognizable under 28 U.S.C. § 2254(a).

[5]Thomas apparently understood the court's statement that "the sentence is mandatory [for] the second degree murder, that you shall not be eligible for parole, probation, or suspension of sentence for twenty years," to mean that parole was mandatory after twenty years. December 1990 Hearing Transcript at 7-8 (emphasis added).

After serving fifteen years, Thomas contacted the Department of Corrections to ascertain his earliest parole date. Thomas was informed, consistent with La. R.S. 15:574.4(B), that he was not eligible for parole because he had received a life sentence.[6] In sum, Thomas is not eligible and never will be eligible for parole until and unless he applies for and is granted a commutation of sentence to a term of years.[7] (Thomas apparently never attempted to apply for commutation, presumably because he was unaware that commutation of his sentence was a prerequisite to parole eligibility.)

Thomas then requested post-conviction habeas relief in state court, arguing that the "misinformation" about parole eligibility after twenty years amounted to ineffective assistance of counsel, and that his plea was involuntary as a result.[8] He asserts that he would have gone to trial rather than accept a life sentence without

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[6]LA. CONST. art. 4 § 5 (E); La. R.S. 15:572(A).

[7]La. 15:574.4(B) ("No prisoner serving a life sentence shall be eligible for parole consideration until his life sentence has been commuted to a fixed term of years."); Louisiana v. Grant, 555 So. 2d 528, 530 (La. App. 4th Cir. 1989), writ denied, 558 So. 2d 602 (La. 1990).

[8]Thomas also makes a direct attack on his guilty plea, arguing that it was tendered upon a material mistake of fact and thus was not intelligent or voluntary on that ground as well. The Supreme Court has instructed that, if a defendant enters a guilty plea on advice of counsel, the voluntariness of the plea turns on whether the advice "was within the range of competence demanded of attorneys in criminal cases." Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985). Thus Thomas' habeas petition depends on ineffective assistance of counsel analysis, which subsumes the claim of involuntariness. Id.; see Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 674 (1984).

eligibility for parole. In support of his assertion, Thomas testified that he had been advised by counsel that the state could not prove the requisite intent element; moreover, he was not subject to the death penalty because Louisiana's first degree murder statute had been declared unconstitutional.

Thomas contends that after two state evidentiary hearings the state court found that he had indeed been affirmatively informed by his sentencing court and by his lawyer, Barnett, that he (Thomas) would be eligible for parole after serving twenty years of his life sentence. Although the state habeas court agreed, it concluded that Thomas in fact was already eligible for parole and could apply for it; thus Thomas was not "misinformed."[9] The state court did not determine, one way or the other, whether Thomas had been informed of the effect of La. R.S. 15.574.4(B), i.e., whether Barnett or the sentencing court or both had informed Thomas that his sentence would have to be commuted to a fixed term of years before he would become eligible for parole consideration.[10]

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[9]Specifically, the court stated, "The only thing that [Thomas] was told is what's in the form, and what the Judge told you when you were sentenced is that after twenty years you would be eligible for parole." December 1990 Hearing Transcript at 10. "You were never promised that you would paroled after twenty years. What you were told is that after twenty years -- you would not be eligible for parole for twenty years. After twenty years you would be eligible for parole." December 1990 Hearing Transcript at 13. The court then stated, "You are eligible for parole, you can apply for it now if you want to." Id.

[10]Although the state is correct that a court is not required to inform a defendant about parole eligibility, Hill v. Lockhart, 474 U.S. 52, 56, 106 S. Ct. 366, 369, 88 L. Ed. 2d 203 (1985), a determination that Thomas was informed that his life sentence would have to be commuted to make him eligible for parole consideration would rebut Thomas' assertion that he was told he

The state habeas court denied Thomas' petition in December 1990 based on its finding that he was told neither by the court nor by his counsel that parole after twenty years was mandatory, i.e., that he would be paroled after twenty years. The court did find, however, that Thomas was informed that he would be eligible for parole in twenty years. Having exhausted his state remedies, Thomas petitioned for habeas relief in federal court.

The district court determined that an evidentiary hearing was unnecessary. It reviewed the transcript of Thomas' guilty plea and concluded that the state court which sentenced Thomas had not informed him that he would be eligible for parole in twenty years.[11] Ultimately, the district court held that Thomas had failed to show any facts to support his claim that his counsel gave him erroneous

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would become eligible after serving twenty years of his life sentence. If that were true, we would conclude that Thomas was not "misinformed" about parole eligibility. An evidentiary hearing on this issue would be useless, however, for the record is devoid of evidence that Thomas was informed that his sentence would have to be commuted. Thomas categorically denied at the evidentiary hearing that he had ever been informed that he would have to get his life sentence commuted to become eligible for parole. The transcript of the October 1990 state evidentiary hearing reflects that Barnett had no independent recollection of any discussions with Thomas about the effect of his guilty plea, and his office files were destroyed by fire in 1981. The only evidence opposing Thomas' testimony is Barnett's testimony that he could surmise that he informed Thomas that it would be in his best interest to ask for a commutation to a fixed number of years. October 1990 Hearing Transcript at 12-13 ("I don't have any recollection of anything I told Mr. Thomas. I can surmise that I did. I was practicing fifteen years at that time.").

[11]The district court concluded that informing Thomas that he would not be eligible for parole for a period of twenty years was not the same as informing Thomas that he would be eligible for parole in twenty years. We agree with that analysis, but do not comment on the accuracy of the district court's finding.

advice which led to his guilty plea. Unfortunately, however, the state court record that was before the district court did not contain a transcript of either of the state evidentiary hearings held in 1990!

Thomas appeals to this court, arguing that the district court failed to accord the factual determinations made by the state court at the evidentiary hearing the presumption of correctness to which they were entitled under 28 U.S.C. § 2254(d). Thomas contends also that his plea was involuntary because he was misinformed by counsel and by the court that he would be eligible for parole after serving twenty years. Thomas requests that we vacate and set aside his conviction and sentence because they were obtained in violation of his Sixth Amendment right to effective assistance of counsel.

II

ANALYSIS

A. Standard of Review

A presumption of correctness applies to explicit or implicit findings of fact made by the state court on an ineffective assistance of counsel claim, i.e., whether Thomas was misinformed by his counsel of his parole eligibility.[12] "Such findings, unless they lack even fair support in the record, are binding upon [federal courts]."[13]

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[12]28 U.S.C. § 2254(d); Loyd v. Smith, 899 F.2d 1416, 1425 (5th Cir. 1990), cert. denied, ___ U.S. ___, 113 S. Ct. 2343, 124 L. Ed. 2d 253 (1993).

[13]Bass v. McCotter, 784 F.2d 658, 659 (5th Cir. 1986) (citing Dunn v. Maggio, 712 F.2d 998 (5th Cir. 1983), cert. denied, 465 U.S. 1031, 104 S. Ct. 1297, 79 L. Ed. 2d 697 (1984)).

Fact findings of a district court in a habeas corpus proceeding should not be set aside unless clearly erroneous.[14] The district court's conclusions of law are reviewed de novo.[15] The ultimate determination whether a defendant has received effective assistance of counsel presents mixed questions of law and fact, making our review of that determination de novo.[16]

B. Presumption of Correctness

Thomas argues that the district court failed to accord the factual determinations made by the state court at the evidentiary hearings a presumption of correctness under 28 U.S.C. §2254(d). Given the omission of the transcripts of the state court evidentiary hearings from the record before the district court, Thomas' assertion is correct.

It has been suggested that this standard of review is the same as the clearly erroneous standard. Brantley v. McKaskle, 722 F.2d 187, 188 (5th Cir. 1984); O'Bryan v. Estelle, 714 F.2d 365, 402 (5th Cir. 1983) (Buchmeyer, J., dissenting) (citing Alderman v. Austin, 695 F.2d 124, 132-33 (5th Cir. 1983) (en banc) (Fay, J., dissenting) (quoting Wright v. North Carolina, 483 F.2d 405, 408 (4th Cir. 1973), cert. denied, 415 U.S. 936, 94 S. Ct. 1452, 39 L. Ed. 2d 494 (1974))), cert. denied, 465 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984); Panzavecchia v. Wainwright, 658 F.2d 337, 339 (5th Cir. 1981) (citing Baker v. Metcalfe, 633 F.2d 1198 (5th Cir.), cert. denied, ___ U.S. ___, 101 S. Ct. 2055, 68 L. Ed. 2d 354 (1981)).

[14]FED. R. CIV. P. 52(a); Amadeo v. Zant, 486 U.S. 214, 223, 108 S. Ct. 1771, 1777, 100 L. Ed. 2d 249 (1988).

[15]United States v. Woods, 870 F.2d 285, 287 (5th Cir. 1989).

[16]Lockhart v. McCotter, 782 F.2d 1275, 1279 (5th Cir. 1986) (citing Mattheson v. King, 751 F.2d 1432, 1438 (5th Cir. 1985)), cert. denied, 479 U.S. 1030, 107 S. Ct. 873, 93 L. Ed. 2d 827 (1987).

First, the state court did make explicit fact findings.[17] Second, although the district court mentioned the presumption of correctness, it did not discuss any specific fact findings made by the state court.[18] Finally))and most significantly))the state court's findings were not part of the record before the district court; as such, the district court had no opportunity to accord a presumption of correctness to such findings!

Although the transcripts of the state evidentiary hearings were not part of the record in the district court, they have been made part of the record on this appeal. The finding that Thomas was informed that he would be eligible for parole in twenty years,[19]

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[17]Specifically, Thomas relies on the state court's finding at the December 1990 evidentiary hearing that he had been informed that he would be eligible for parole in twenty years. The state refutes Thomas' characterization of the state court findings and argues that the state court found that Thomas had not been "misinformed" by the sentencing court. But the "finding" by the state court that Thomas was not misinformed was based on (1) a finding that Thomas was informed that he would be eligible for parole in twenty years, and (2) an erroneous conclusion that Thomas was eligible for parole. The state ignores the state court's express finding that Thomas was advised that he would be eligible for parole in twenty years.

[18]The district court may have treated the state court's "finding" of "effective assistance of counsel" as presumptively correct, but that determination is not a finding covered by § 2254(d)'s presumption of correctness; rather, it is a mixed question of law and fact and is subject to de novo review.

[19]This finding is not without support in the record. Of course, Thomas testified that Barnett told him that he would be eligible for parole in twenty years. Barnett's testimony at the state evidentiary hearing does not contradict Thomas', but indicates that even Barnett believed that Thomas would be "eligible" for parole in twenty years. Barnett paraphrased the "code book," stating that Thomas' sentence, "life imprisonment without benefit of parole . . . for a period of twenty years," effectively meant that Thomas "shall not be eligible for parole . . . for a period of twenty years." October 1990 Hearing

which is reflected in the transcripts of the state evidentiary hearings, is entitled to a presumption of correctness. Under 28 U.S.C. § 2254(d), the transcripts are reliable and adequate written indicia of the state court's findings.[20]

Thomas also contends that the state court erroneously concluded that he is eligible for parole. We agree. The state court asserted at the evidentiary hearing that Thomas was eligible for parole and could "apply for it now." The conclusion that Thomas is eligible for parole, reviewed de novo, is incorrect. As a matter of law, because Thomas received a life sentence and has not applied for and been granted a commutation of sentence, he was

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Transcript at 11. When asked whether he had had any discussions with Thomas concerning parole eligibility, Barnett stated that

> I am positive that we would not -- you can't get probation, and you can't get suspension after you serve twenty years. You can get paroled. I'm sure we discussed that. I don't know what the context of our discussion was.

Id. at 12.

Barnett also testified at the hearing that

> I think the law was quoted correctly by the court. It was read on one or two occasions, and it says; that you're eligible for parole, or you shall not be released or eligible until twenty years.

Id. at 15. Barnett testified that, in 1975, a defendant had to serve at least twenty years before becoming eligible for parole. Id. at 17 ("I think the law was, is that you'd be eligible -- you could not be eligible for parole until you served at least twenty years. Before that time, it was almost an unwritten code that if you behaved yourself, you'd be eligible in [ten years and six months].").

[20] Ardister v. Hopper, 500 F.2d 229, 233 (5th Cir. 1974); see O'Bryan v. Estelle, 714 F.2d 365, 402 n.8 (5th Cir. 1983) (Buchmeyer, J., dissenting), cert. denied, 465 U.S. 1013, 104 S. Ct. 1015, 79 L. Ed. 2d 245 (1984).

not and is not eligible for parole.[21]

We are therefore constrained to remand for the district court to reconsider Thomas' habeas petition in light of the state court's findings. We leave to the district court the first opportunity to address the merits of Thomas claim, i.e., assuming that Thomas was "misinformed" by counsel or by the court or by both that he would be eligible for parole after serving twenty years of his life sentence, whether such misinformation about parole eligibility constitutes ineffective assistance of counsel and thereby destroys the voluntariness of his plea.[22] Neither do we specify the remedy

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[21]Louisiana v. Grant, 555 So. 2d 529, 530 (La. App. 4th Cir. 1989) ("[A] defendant sentenced to life imprisonment shall not be eligible for parole consideration until his sentence is commuted to a fixed term [of years]."), writ denied, 558 So. 2d 602 (La. 1990).

[22]The state first frames the issue as whether Thomas' counsel failed to advise him of the commutation process, then correctly asserts that the state is not required to inform a defendant about the parole consequences of his plea. But Thomas does not contend that his plea was "involuntary" simply because counsel failed to supply him with any information about his parole eligibility date. Instead, Thomas bases his claim that his plea was involuntary as a result of ineffective assistance of counsel on Barnett's affirmatively supplying him with erroneous information about parole eligibility. The United States Supreme Court has recognized in Hill v. Lockhart that these are separate and distinct issues. 474 U.S. at 56.

We are aware that other courts have made this distinction and have concluded that misinformation of parole consequences is ineffective assistance of counsel. See Czere v. Butler, 833 F.2d 59, 63 n.6 (5th Cir. 1987) (citing Strader v. Garrison, 611 F.2d 61, 63 (4th Cir. 1979) (misinformation of parole consequences is ineffective assistance of counsel); O'Tuel v. Osborne, 706 F.2d 498, 499 (4th Cir. 1983) (defendant informed that he would be eligible for parole in ten years but was not eligible until he had served twenty years); Cepulonis v. Ponte, 699 F.2d 573, 577 (1st Cir. 1983) (commenting that counsel's "misinformation [regarding parole eligibility] may be more vulnerable to constitutional challenge than mere lack of information")). See also Holmes v. United States, 876 F.2d 1545, 1552, 1552 n.8 (11th

to be applied if the district court should determine that Thomas did indeed receive ineffective assistance of counsel, i.e., whether the district court should vacate only the second degree murder conviction or should vacate both the second degree murder and armed robbery convictions.[23]

III

CONCLUSION

The district court's denial of Thomas' habeas petition is REVERSED, and the case REMANDED for proceedings consistent with this opinion.

Cir. 1989) (adopting Fourth Circuit's rationale in Strader that counsel providing misinformation concerning parole consequences is deficient); Garmon v. Lockhart, 938 F.2d 120, 121 (8th Cir. 1991) (counsel's performance was deficient in that minimal research would have alerted him to correct parole eligibility date); United States v. Ternullo, 510 F.2d 844 (2nd Cir. 1975) (remanding for hearing and with instructions to grant writ if counsel misinformed defendant that he would be eligible for parole in two years rather than in five).

[23]Thomas appears to be quite satisfied with his guilty plea to armed robbery and his twenty-year sentence on that charge))he does not attack either on appeal. Thomas apparently seeks to retain the benefit of his plea of guilty with respect to the armed robbery conviction, while hoping to be relieved of the deleterious aspects of his plea to second degree murder, i.e., no eligibility for parole in the absence of a commuted sentence. But vacatur of only Thomas' second degree murder conviction may not be proper if Thomas' guilty plea to both offenses was gained a result of ineffective assistance of counsel.