

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3647
Conference Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

FREDDIE GUTIERREZ,

Defendant-Appellant.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. (CR-85-279-K; CA-91-4221)
- - - - -

March 19, 1993

Before KING, DAVIS, and SMITH, Circuit Judges.

PER CURIAM:*

A second or successive motion made pursuant to 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 governed by the applicable rules. Rule 9(b), Rules Governing § 2255 Proceedings. The decision to dismiss under Rule 9(b) lies within the sound discretion of the district court and

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

will be reversed only for an abuse of discretion. See Saahir v. Collins, 956 F.2d 115, 120 (5th Cir. 1992)(interpreting Rule 9(b) under § 2254).**

Gutierrez's claim of ineffective assistance of counsel was previously addressed on the merits. Unless a movant shows cause and prejudice, a court may not reach the merits of successive claims which raise grounds identical to grounds heard and decided on the merits in a previous motion, or new claims, not previously raised which constitute an abuse of the writ. Sawyer v. Whitley, ___U.S.___, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992)(interpreting Rule 9(b) under § 2254). To establish "cause," a movant must show that some external impediment prevented him from raising the claim in an earlier petition. McCleskey v. Zant, ___U.S.___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

Gutierrez makes no argument to establish "cause" for again raising his ineffectiveness claim. Gutierrez's second claim, that he was too distressed and traumatized to understand the consequences of his guilty plea, was not raised in a previous motion. Gutierrez alleges that his claim was not raised earlier because it was prepared by "an inmate who proclaimed to [know] the law and to be a good jailhouse lawyer." As the district court noted, Gutierrez has not demonstrated any justifiable cause for his not having raised this argument in the two previous

** Principles governing successive federal habeas corpus petitions also apply to successive § 2255 motions. See Sanders v. United States, 373 U.S. 1, 15, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963).

motions. Accordingly, this Court need not consider the issue of prejudice. McCleskey, 111 S.Ct. at 1474.

Even if a prisoner cannot meet the cause and prejudice standard, a federal court may hear the merits of the successive claims if the failure to hear the claims would constitute a "miscarriage of justice." Sawyer, 112 S.Ct. at 2518. The miscarriage of justice exception would allow successive claims to be heard if the movant established that under the probative evidence he has a colorable claim of factual innocence. Id. at 2519. Gutierrez pleaded guilty to the offense. He has neither alleged, nor demonstrated a claim of factual innocence. Accordingly, the appeal is DISMISSED.