UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 92-3857
Summary Calendar

LIONEL J. FORET, Jr.,

Plaintiff-Appellant,

VERSUS

JOHN P. WHITLEY,

Defendant-Appellee.

Appeal from the United States District Court
For the Eastern District of Louisiana
(91 CV 1649 E)

March 17, 1993
Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[1]

Lionel J. Foret, Jr., **pro se**, appeals the dismissal of his habeas corpus petition. Foret asserts that the district court erred in dismissing his petition as an abuse of the writ, that the application of **McCleskey v. Zant** to his petition was an ex post facto violation, and that the district court applied an incorrect standard in reviewing his claim. We find no merit in Foret's arguments and affirm the dismissal of his petition.

I.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Lionel J. Foret, Jr., a Louisiana state prisoner, filed a **pro se** application for writ of habeas corpus challenging his life sentence. In particular, Foret's petition argues that a Louisiana statute, which provides that a prisoner serving a life sentence is not eligible for parole until the sentence is commuted to a fixed term, violates his constitutional rights. La. Rev. Stat. Ann. 15:574.4(B) (West 1992).

The district court dismissed the case on the merits. Without reaching the merits on appeal, this Court remanded the case to the district court to determine if Foret's petition should be dismissed as an abuse of the writ. **Foret v. Whitley**, 965 F.2d 18, 20 (5th Cir. 1992). The district court found that Foret did not show cause for his failure to include these claims in his earlier habeas petition, and the court dismissed Foret's petition as an abuse of the writ. Foret appeals that dismissal.

II.

A.

Foret argues that the district court erred in dismissing his application as an abuse of the writ under 9(b) of the Rules Governing Section 2254 Cases. Dismissal "under Rule 9(b) lies within [the district court's] sound discretion, and will be reversed only for an abuse of that discretion." **Hudson v. Whitley**, 979 F.2d 1058, 1062 (5th Cir. 1992).

After the State has raised the issue of successive application, the writ petitioner has "[t]he burden to disprove abuse." **McCleskey v. Zant**, ___ U.S. ___, 113 L.Ed.2d 517, 545, 111 S.Ct. 1454 (1991). "To excuse his failure to raise the claim

earlier, [Foret] must show cause for failing to raise it and prejudice therefrom . . . ." **Id.** If Foret cannot show cause, his failure to raise the claim earlier "may nonetheless be excused if he . . . can show that a fundamental miscarriage of justice would result from a failure to entertain the claim." **Id**.

"The cause standard requires the petitioner to show that some objective factor external to the defense prevented him from raising the claim in the previous petition. Such factors 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) (citation omitted).

In explaining why he failed in 1982 to include these claims in his writ application, Foret asserts: (1) that a reasonably diligent person would be unaware that 15:574.4(B) would apply to his life sentence under La. Rev. Stat. Ann. 40:966 (West 1992) to bar parole eligibility; (2) that his resentencing gave him the impression that he would be eligible for parole; (3) that it would have been unreasonable for him to apply for parole at that time; and (4) that the state statute on post-conviction relief requires attacking the conviction and sentence, not just the sentence. Foret brought these same reasons before the district court, and he fails to explain how the district court abused its discretion.

Foret's first reason is unpersuasive. The factual and legal bases for his claims were reasonably available to Foret in 1982. Both statutes at issue were in effect. Further, Louisiana cases

acknowledged that a life sentence had to be commuted to a fixed term before a prisoner was eligible for parole. **State v. Wilson**, 362 So. 2d 536, 539 n.3 (La. 1978) (heroin distribution case).

Foret's resentencing also is not "cause" for his failure to raise these arguments in his earlier petition. The Louisiana Supreme Court set aside Foret's sentence because the sentencing court erred in viewing 40:966(B)(1) as providing no alternative to a life sentence. **State v. Foret**, 380 So. 2d 62, 63 (La. 1980). The Louisiana Supreme Court noted that, at the time the crime was committed, the statute did not preclude "eligibility for suspension of sentence and probation." However, parole was never mentioned in the statute, and the resentencing court expressly refused to comment on parole. Thus, resentencing was not an "external factor" justifying Foret's failure to bring his parole claims on his earlier writ application.

Foret's understanding of the proper time to apply for parole also is not an external factor that can be measured objectively. His personal belief might have been reinforced by the understanding of the prison populace, but he has failed to identify a particular statute or regulation that prevents parole application before the exhaustion of post-conviction relief. **See Saahir**, 956 F.2d at 118-19 (inadequacy of petitioner's own legal research is not an external factor under **McCleskey**).

Foret's fourth reason concerns La. Code Crim. Proc. Ann. art. 924 (West 1984): "An application for post conviction relief is a petition . . . seeking to have the conviction and sentence set aside." Even if Foret could not bring his parole-eligibility

claims in the same state proceeding as his article 924 claims, this does not explain why he did not bring both types of claims in his first application to federal court. Further, Louisiana law casts doubt on Foret's assertion that the statute prevents a post-conviction challenge to the sentence alone. See La. Code Crim Proc. Ann. art. 882 (West Supp. 1992) ("An illegal sentence may be corrected at any time . . . . Nothing in this article shall be construed to deprive any defendant of his right, in a proper case, to the writ of habeas corpus.").

Because his reasons for cause are not persuasive, the district court did not abuse its discretion in holding that Foret failed to show cause. **See Saahir**, 956 F.2d at 119 (if petitioner had researched diligently, he "should have known" of the claims' legal theories).

Even though Foret failed to show cause for his neglect, his claims are reviewable if failure to review would result in "a fundamental miscarriage of justice." **McCleskey**, 113 L. Ed. 2d. at 545. "A `fundamental miscarriage' implies that a constitutional violation probably caused the conviction of an innocent person." **Saahir**, 956 F.2d at 119. Foret does not argue that he was innocent on either of his convictions. He argues, however, that it is fundamentally unfair to bar his claims, since he did not deliberately withhold them. "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." **McCleskey**, 113 L. Ed. 2d at

547. Any harsh result from failing to show cause is ameliorated by the fundamental-miscarriage-of-justice exception. **Id**. at 545-46. The application of the abuse-of-writ doctrine is not fundamentally unfair.

B.

Foret argues that applying **McCleskey**'s cause-and-prejudice test to his case constitutes an **ex post facto** violation. The issue is settled in this circuit that "**McCleskey** is applied retroactively." **Hudson**, 979 F.2d at 1063. Foret's argument is meritless.

C.

Foret also contends that the district court subjectively analyzed his reasons for failing to assert his present claims in his earlier writ application and thus violated **McCleskey**. Under **McCleskey**, "the question is whether petitioner possessed, or by reasonable means could have obtained, a sufficient basis to allege a claim in the first petition and pursue the matter through the habeas process . . . ." **McCleskey**, 113 L. Ed. 2d at 547.

A review of the "Order and Reasons" reveals that the district court analyzed Foret's alleged "causes" by viewing the state law as it stood at the time of Foret's sentencing and resentencing and by determining whether Foret could have obtained knowledge of the parole laws applicable to his situation by reasonable means. The court found that "[n]o external force prevented" Foret from applying for parole at or before his first

federal application. The district court, by providing an objective analysis, did not err.

AFFIRMED.