UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-3962
Summary Calendar

JAMES EARL COOLEY,

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 92 2234 A)

(August 25, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Petitioner James Earl Cooley (Cooley) appeals the district court's denial of his petition for habeas corpus relief challenging his continued incarceration for a 1972 Louisiana murder conviction.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Because the district court dismissed Cooley's petition prematurely, we vacate and remand for further proceedings.

Facts and Proceedings Below

In April 1972, Cooley pleaded guilty to murder without capital punishment in a Louisiana state court and was sentenced to a term of life at hard labor. He did not appeal his conviction or sentence. At the time of his conviction, it apparently was a common practice for the governor of Louisiana to commute by statute the sentences of inmates serving life terms after the inmate had served ten years and six months with good behavior.[1] In 1975, the Board of Paroles instituted more formal and detailed procedures for review of parole applications. In 1979, the Louisiana legislature repealed the statute which allowed the governor to commute sentences.

In 1983, Cooley filed his first state habeas corpus action, raising claims that his guilty plea was involuntary, that the state had breached the plea agreement, and that he had received ineffective assistance of counsel. His claims centered around his contention that, in pleading guilty, he had relied on a promise by his defense attorney that he would serve only ten years and six months with good behavior if he agreed to the life term at hard

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[1] *See, e.g., Smith v. Blackburn*, 785 F.2d 545, 546-47 (5th Cir. 1986) ("[In 1965], a prisoner sentenced to life imprisonment in Louisiana could apply for commutation of his sentence after ten years and six months. The governor had discretion to commute the sentence to time served, but the state concedes that, if the prisoner's behavior had been good, his case was automatically submitted to the governor who would usually commute the sentence.") (internal footnotes omitted).

We will refer to such a sentence as a "ten-six life sentence."

labor. He alleged that this time period had expired and he had not been released. The Louisiana state court denied his petition. The Louisiana Supreme Court summarily affirmed.

In 1987, Cooley requested a copy of his plea proceedings from the state trial court. By the time of his request, however, the court stenographer's original notes had been destroyed; a transcript of the proceedings from those notes had never been prepared.

In 1992, Cooley filed this action in the United States District Court for the Eastern District of Louisiana. In his federal petition, he claimed for the first time that, in addition to the promises by his defense counsel, the state judge presiding over his plea proceedings had promised him a ten-six life sentence.[2] In a traverse to the state's response to his petition, Cooley asserted that several of his relatives present at his plea hearing could testify that the trial judge told Cooley in open court that he would only have to serve ten years and six months. The district court, without holding an evidentiary hearing, summarily refused to credit Cooley's claims and denied his petition. Cooley appeals.

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[2] Although Cooley did not raise the claim that the trial judge misinformed him about the actual length of his sentence in his state habeas proceedings, the state implicitly conceded that he had exhausted his state remedies. The defense of non-exhaustion is subject to being waived if the state fails to raise it at the proper time. *McGee v. Estelle*, 722 F.2d 1206, 1213 (5th Cir. 1984) (*en banc*). Waiver may be implicit or explicit. *Id*.

Discussion

I. Circumstances of Cooley's Guilty Plea

On appeal, Cooley seeks a reversal of the denial of his petition for habeas corpus relief or, in the alternative, an evidentiary hearing to determine whether his attorney or the state trial judge promised him a ten-six life sentence if he would plead guilty to murder without capital punishment. A prisoner who pleads guilty based upon a promise made by the state is entitled to habeas relief if that promise is subsequently broken. *McNeil v. Blackburn*, 802 F.2d 830, 832 (5th Cir. 1986). Such a promise may be made by a district attorney, defense counsel, or, presumably, the trial judge. *Id*. Habeas relief is not available, however, for a petitioner who pleads guilty in reliance on parole laws in effect at the time of his plea if a change occurs "either in those laws or in the manner in which discretion is exercised by state officials charged with administering the parole laws." *Id*.

Our Court has had occasion to address the repercussions of the former ten-six life sentence practice in Louisiana procedure.

> "A petitioner who pleaded guilty in reliance on Louisiana law in effect when the governor had the power to, and usually did, commute sentences has no constitutional right to a pardon or early parole based on the Louisiana law in effect at the time of his plea and sentence. There is no implied warranty that state law will not change.
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> "However, the state's failure to keep a plea bargain it has made to induce a defendant to enter a guilty plea is reason for granting a writ of habeas corpus, for a plea bargain is not merely a contract between the defendant and the state but, in addition, induces the accused to waive important constitutional rights." *Smith v. Blackburn*, 785 F.2d 545, 548 (5th Cir. 1986) (internal footnotes omitted).

The availability of habeas relief turns on whether the

petitioner's guilty plea was induced by an actual promise regarding the length of his sentence or by a mere understanding, prediction, or estimate of the time to be served. In order to merit relief on such a basis, the petitioner must normally prove the exact terms of the alleged promise; when, where, and by whom the promise was made; and the identity of an eyewitness to the promise. *Blackledge v. Allison*, 97 S.Ct. 1621, 1630 (1977); *Smith v. McCotter*, 786 F.2d 697, 701 (5th Cir. 1986). Summary dismissal of a petitioner's allegation that a promise was made and not honored should occur only when the allegations appear frivolous or false when viewed against a record of the plea hearing. *Blackledge* at 1630-31.

The Louisiana Supreme Court has denied post-conviction relief where the defendant pleaded guilty based on an expectation that he would serve only ten years and six months of his life sentence. *State v. Dunn*, 408 So.2d 1319 (La. 1982). Following a discussion of the repealed statute which had allowed the ten-six life sentence, the court observed that, even under that sentence, the commutation of a sentence was discretionary:

> "The repealed statute did not, however, provide for automatic consideration of commutation of life sentences by the governor. Moreover, this practice by the Department of Corrections was mandated neither by statute nor by the Constitution, and therefore never acquired the effect of law. [The repealed statute] created a statutory right that permitted prisoners to apply for commutation of their life sentences and provided the procedure therefor. Defendant may still exercise that right under the [new] rules established by the Board of Pardons . . . . We conclude, therefore, that defendant knowingly and voluntarily entered his guilty plea, and the repeal [of the former statute] has not operated to deprive defendant of any statutory or constitutional right." *Dunn*, 408 So.2d at 1322.

We have likewise distinguished between a promise and a mere

understanding in determining an inmate's eligibility for habeas relief. *Harmason v. Smith*, 888 F.2d 1527, 1529 (5th Cir. 1989) (a mere understanding that the petitioner would receive a lesser sentence in exchange for pleading guilty "will not abrogate that plea should a heavier sentence actually be imposed"); *McNeil v. Blackburn*, 802 F.2d at 832 ("It is equally clear that a mere understanding on the part of the petitioner that he would serve only ten years and six months is not a promise or a plea bargain that will entitle him to habeas relief."). *See also Self v. Blackburn*, 751 F.2d 789 (5th Cir. 1985).

It is not clear from the record before us whether the statements allegedly made to Cooley regarding the length of his sentence were couched in terms of a promise or merely an understanding or prediction. Language in Cooley's federal habeas petition indicates the former, language in Cooley's state habeas petition indicates the latter.[3] Cooley raised claims involving the

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[3] The district court relied primarily on Cooley's state habeas materials in denying his petition for habeas relief. In his state petition, Cooley phrased his claim ambiguously: "Was relator's conviction obtained by a plea of guilty unlawfully induced with the *understanding, appreciation and/or promise* he would only serve ten-years and six-months [sic] for parole release?" (Original emphasis omitted; emphasis added.) Cooley also claimed:

> "Counsel stated that at the end of 10½ years relator *would be considered* for parole release, and if conduct while in prison was deemed to be good, relator would be released. [Counsel] advised relator that to initiate this process, relator should write to the Warden of Angola and the application would then be forwarded to the Governor if conduct was good." (Emphasis added.)

In a letter to his former defense attorney in 1982, Cooley wrote:

> "It was my understanding that after I had

state trial judge in his federal petition which he did not allege in his state petition. It is possible that, although his defense counsel merely predicted the length of his sentence, the trial judge may have promised Cooley a ten-six life sentence.

In other cases in which we have considered this question, the record of the challenged plea hearing has been available, and we have been able to resolve the issue upon that evidence. Here, the record of Cooley's plea proceedings has been destroyed. However, Cooley alleges that three of his relatives, who were present in the

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> completed ten and one-half years, and I maintained good conduct, I would be considered for release on parole. I reached my 10-6 date on September 1, 1981[,] and nothing happened. . . .
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> "My specific reason for writing to you all these years later is to question your memory about my change of plea. Wasn't it agreed that I would be considered for release after ten-years and six-months [sic] as the law was then in effect? To your recollection, did the Assistant District Attorney ever object in any way to my plea of guilty and the 10-6 provision?"

The district court interpreted this letter as demonstrating that Cooley either did not remember what was said at his plea hearing or that the state trial judge had made no representations concerning his sentence because the information would have been included in the letter or his state habeas application.

The record is not so clear on this point as the district court's analysis suggests, however. In Cooley's state habeas petition, he expressed his belief that he had been promised a ten-six life sentence: "counsel advised relator that a life sentence, at that time, was a period of ten-years and six-months [sic] with good conduct in prison" and he "was apprised of when he would be released if he met certain criteria." Cooley's federal habeas petition is even more explicit:

> "Cooley avers he was informed by, both, the trial court and his court[-]appointed counsel 'that in exchange for his guilty plea he would be sentenced to "Life Imprisonment[,]" defined as 10 years six months imprisonment, and that after serving 10 years six months of life with good behavior he would be automatically released from prison.'"

trial court at the time of his guilty plea, are prepared to testify that the trial judge promised Cooley he would only have to serve ten years and six months with good behavior. The state has offered no evidence to contradict this. Although one of the two prosecuting attorneys is still alive, there is no evidence that the state has made any attempt to ascertain whether this attorney has any recollection of Cooley's plea proceedings.

The district court denied Cooley's federal petition on its face without seeking affidavits or testimony at an evidentiary hearing from either Cooley or the state. This action was premature because Cooley's allegation was not wholly implausible: the ten-six life sentence was an accepted procedure in Louisiana at the time of Cooley's plea; Cooley asserted that he had witnesses to the trial judge's promise regarding his sentence; and the state produced no record or affidavit to the contrary.

Because there was no definitive evidence to the contrary, and because Cooley was not afforded an evidentiary hearing at either the state or federal level, we vacate the district court's denial of Cooley's petition for federal habeas relief and remand for further proceedings consistent with this opinion.[4] We observe

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[4] Cooley contends that he was deprived of effective assistance of counsel because his attorney promised him that, if he pleaded guilty to murder without capital punishment, he would serve only ten years and six months with good behavior. Because we remand the question of whether Cooley was indeed promised a ten-six life sentence, we do not resolve his Sixth Amendment claim.

We note, however, that Cooley bears the burden of proving both that his counsel's performance fell below an objective standard of reasonableness and that the deficient performance caused him to plead guilty. *Strickland v. Washington*, 104 S.Ct. 2052, 2064-65 (1984); *Hill v. Lockhart*, 106 S.Ct. 366, 370-71 (1985). In assessing counsel's decisions, we afford counsel's

that, while the district court's denial of Cooley's petition without supporting evidence was premature, this does not necessarily preclude the court from resolving the case on summary judgment after exploring the issues through affidavits or witness testimony.

II. Remand Considerations

We note, for possible guidance in further proceedings, two considerations that may become relevant.

A. Good behavior

Release after ten years and six months appears to have been premised at all times upon Cooley's good behavior while imprisoned.[5] Despite instructions from our Court, neither party has addressed whether Cooley maintained good behavior in prison. A note on his inmate prison record indicates that he escaped from prison on November 24, 1973, and was captured sometime that same day. Cooley received a two-year consecutive sentence for this offense, to begin "if [and] when he is commuted on the Life Sentence by the Governor." His prison record reflects that he

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performance a high degree of deference. *Strickland* at 2065.

Cooley was facing the death penalty for the crime of murder. The state's evidence against him included his own inculpatory statements. A plea bargain is not invalid merely because it is induced by fear of receiving the death penalty or because in agreeing to the plea bargain the defendant averts the possibility of receiving the death penalty. *Spinkellink v. Wainwright*, 578 F.2d 582, 608 (5th Cir. 1978) (citing *Brady v. United States*, 90 S.Ct. 1463, 1468 (1970)), *cert. denied*, 99 S.Ct. 1548 (1979). Moreover, a prediction regarding the availability of a ten-six life sentence would have been consistent with the parole laws and practice in force at that time.

[5] Cooley does not contend that good behavior was not a condition for a ten-six sentence.

would not be allowed to earn credit for good behavior for time served prior to his escape. Even if he were promised a ten-six life sentence, Cooley arguably would not be entitled to habeas relief if he does not meet the condition upon which the allegedly promised commutation of that sentence was based, that he maintain good behavior while in prison.

B. Rule 9(a)

The state claims for the first time on appeal that Cooley's federal habeas petition should be barred by Rule 9(a) of the Rules Governing Section 2254 Cases.[6] This rule, governing delayed petitions, provides:

> "A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred."

The language of Rule 9(a) directs our focus to the prejudice to the state in defending the habeas corpus action rather than in retrying the defendant should habeas relief be granted. For a delay to count against a habeas petitioner, the state must "(1) make a *particularized* showing of prejudice, (2) show that the prejudice was *caused* by the petitioner having filed a late petition, and (3) show that the petitioner has not acted with reasonable diligence as a matter of law." *Walters v. Scott*, 21 F.3d 683, 686-87 (5th Cir.

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[6] Because the state did not raise this issue below, it is not properly before us on appeal. *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161 (5th Cir. 1992). We therefore do not resolve the appeal on this basis but leave open the possibility that the state may wish to pursue the issue on remand.

1994) (original emphasis; internal footnote omitted).

The state claims that it has been prejudiced by Cooley's delay in filing the current action. Cooley's defense attorney died in 1981. The trial judge and one prosecuting attorney involved in the plea proceedings are also deceased, but the record does not reflect then they died. In addition, the notes and records of his plea proceedings have been destroyed and cannot be reconstituted; the record does not reflect when the notes of the plea proceedings were destroyed. We observe, however, that the notes of the proceedings apparently were not extant in 1987 when Cooley requested a copy of his plea hearing.

It is unclear whether relevant prejudice was caused by unreasonable delay on Cooley's part. Cooley may be able to excuse much of the time between his guilty plea in 1972 and the filing of his federal petition in 1992. He was not eligible for the disputed relief for approximately ten years and six months following his guilty plea.[7] His incarceration was elongated by a two-year sentence for his subsequent conviction for escape, consecutive to his murder sentence. Cooley may also be able to account for the period from 1983 to 1985 on the basis that his state habeas action was then pending. There follows, however, a period of seven years, between the final denial of his state habeas petition in 1985 and his filing of the current petition in the district court in 1992.

On the record before us, it seems likely that no unreasonable

[7] The record reflects that Cooley received credit toward a potential ten-six life sentence for the time served while awaiting trial.

delay caused the prejudice attributable to the death of Cooley's defense counsel. His attorney died in 1981, before Cooley would have been eligible for release. *See Walters v. Scott*, 21 F.3d at 688 ("The court reporter may have died the day after Walters's trial concluded, in which case the reporter's unavailability would certainly not be attributable to Walters's delay in bringing his habeas petition."). Upon remand, should the state wish to pursue its Rule 9(a) claim, the state bears the burden of showing, *inter alia*, when the trial judge and prosecuting attorney died, as well as when the record of Cooley's plea proceedings was destroyed.

Conclusion

For the reasons discussed above, the judgment of the district court denying Cooley's petition for habeas corpus relief is vacated and the cause is remanded for further proceedings not inconsistent with this opinion.

VACATED and REMANDED