

UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 92-7308  
Summary Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JORGE GONZALEZ,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Southern District of Texas  
(CA-L-92-38 (CR-L-88-510))

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(January 6, 1993)

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:<sup>1</sup>

Jorge Gonzalez appeals the dismissal of his third motion for relief under 28 U.S.C. § 2255. We **VACATE** and **REMAND**.

I.

Gonzalez, convicted by a jury of both conspiracy to possess more than five kilograms of cocaine with intent to distribute and the corresponding substantive offense, was sentenced, *inter alia*,

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<sup>1</sup> Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

to 136 months in prison. His conviction was affirmed on direct appeal, *United States v. Gutierrez-Guajardo*, No. 89-2315 (5th Cir. Jan. 29, 1990); he filed two related suits for civil damages; and the § 2255 motion before us today is at least his third such motion.

In his most recent § 2255 motion, Gonzalez raised three issues: 1) the trial court lacked jurisdiction to hear his case, 2) he was denied effective assistance of counsel, and 3) he was convicted on the basis of evidence obtained pursuant to an unlawful arrest. The motion was filed on March 23, 1992, and summarily dismissed the next day. We interpret the district court's ruling that the jurisdictional issue is "patently frivolous" to be a dismissal under Rule 4(b), and the ruling that the motion "is clearly an abuse of § 2255" to be a dismissal of the other two issues under Rule 9(b).<sup>2</sup>

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<sup>2</sup> The Rules Governing Section 2255 Proceedings for the United States District Courts read, in pertinent part:

**Rule 4. Preliminary Consideration by Judge**

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**(b) Initial consideration by judge.** The motion ... shall be examined promptly by the judge .... If it plainly appears from the face of the motion and any annexed exhibits and the prior proceedings in the case that the movant is not entitled to relief in the district court, the judge shall make an order for its summary dismissal and cause the movant to be notified. Otherwise, the judge shall order the United States Attorney to file an answer ... or to take such other action as the judge deems appropriate.

**Rule 9. Delayed or Successive Motions**

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## II.

Gonzalez contends that he is entitled to an evidentiary hearing on his illegal arrest and ineffective assistance of counsel claims;<sup>3</sup> and that the district court erred in raising abuse of the writ on its own motion, and in dismissing without Gonzalez having the opportunity to respond.

Of course, it is "entirely proper for the district court to raise on its own motion the issue of a repetitive petition or abuse of the writ". *Shoust v. Whitley*, 927 F.2d 205, 207 (5th Cir. 1991). Once the issue has been raised, either by the government or the court, the burden is on the petitioner to show, by a preponderance of the evidence, that he has not abused the writ. *Jones v. Estelle*, 722 F.2d 159, 164 (5th Cir. 1983), *cert. denied*, 466 U.S. 976 (1984). Gonzalez contends that he is entitled to an evidentiary hearing in order to meet that burden. However, we have held that this burden will not require an evidentiary hearing "if the district court determines as a matter of law that petitioner has no chance of justifying the successive petition". *Id.*<sup>4</sup>

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**(b) Successive motions.** A second or successive motion 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 these rules.

<sup>3</sup> In his appellate brief, Gonzalez does not raise the jurisdictional issue; therefore, we consider it abandoned.

<sup>4</sup> This court recently recognized in *Saahir v. Collins*, 956 F.2d 115, 119 (5th Cir. 1992), that the Supreme Court's decision in *McClesky v. Zant*, \_\_\_ U.S. \_\_\_, 111 S.Ct. 1454 (1991), overruled

In this case, the district court made such a determination. But, we are bound by our clear precedent requiring certain procedural safeguards before summary dismissal of a § 2255 motion: "At a minimum . . . the petitioner must be given specific notice that the court is considering dismissal and given at least 10 days in which to explain the failure to raise the new grounds in a prior petition", *Urdy v. McCotter*, 773 F.2d 652, 656 (5th Cir. 1985), or "that a successive claim was not determined previously on the merits". *Jones v. Estelle*, 692 F.2d 380, 385 (5th Cir. 1982). We do not read recent decisions on abuse of the writ, such as *McClesky v. Zant* to change this.

III.

Accordingly, we **VACATE** and **REMAND** for further proceedings consistent with this opinion.

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both *Shoust v. Whitley* and *Jones v. Estelle* to the extent that they establish different standards for abuse of the writ by *pro se* petitioners and those represented by counsel. We do not read this to have any affect on the procedure established by those cases.