

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-2246
Summary Calendar

HENRY L. CARTER,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director, Texas
Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1706)

(December 30, 1993)

Before POLITZ, Chief Judge, GARWOOD and BARKSDALE, Circuit Judges.

POLITZ, Chief Judge:*

Henry L. Carter appeals dismissal of his habeas corpus petition under Rule 9(b) of the Rules Governing Habeas Corpus Cases. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Convicted by a Texas jury of five counts of aggravated robbery, Carter was sentenced in 1977 to one life sentence and four concurrent 99-year sentences. He withdrew his appeal before it was heard, allegedly on the advice of counsel. He filed a federal habeas petition which was dismissed without prejudice for failure to exhaust state remedies. He was then unsuccessful in an attempt to secure state collateral relief.

In 1981 Carter filed a second federal habeas petition urging ineffective assistance of counsel, insufficiency of the evidence supporting his conviction, defects in his indictments, and a claim that constitutionally infirm Louisiana convictions were used to enhance his sentences. That petition initially was denied by the district court. On appeal we vacated and remanded for an evidentiary hearing. On remand the district court vacated four of the five sentences as illegally enhanced but rejected habeas relief as to one of the 99-year sentences which Carter presently is serving. On appeal after remand we affirmed.

Shortly thereafter the instant petition was filed. In this petition Carter complains of: (1) defects in the indictment, (2) ineffective assistance of counsel, (3) an illegal denial of a motion for an out-of-time appeal of his conviction, and (4) the state court's failure to timely appoint appellate counsel. The district court dismissed as successive the ineffective assistance and defective indictment claims under Rule 9(b), similarly dismissing the remaining claims as abusive because Carter has long

been aware of the facts and legal predicates for same. Carter timely appealed.

Analysis

Both the ineffective assistance of counsel and defective indictment claims previously have been heard and rejected. The remaining arguments were readily available to Carter at the time of his previous petitions but were not raised. Carter made no attempt, either before the district court or in this appeal, to show the cause and prejudice or fundamental miscarriage of justice necessary to excuse the successive or abusive elements of the present petition.¹ In this ruling the trial court did not err.

There is one issue which gives us cause for pause. The district court did not provide Carter with the requisite "notice that the court is considering [a 9(b)] dismissal and . . . 10 days in which to explain the failure to raise the new grounds in a prior petition."² As in **Johnson v. McCotter**, however, Carter responded to the state's detailed Rule 9(b) motion, as well as to the magistrate judge's recommendation, but never "explain[ed] why he did not raise the present grounds . . . in his prior petition."³ He similarly failed to provide any explanation for his reiteration of arguments which previously had been raised and rejected. While

¹See **Sawyer v. Whitley**, 112 S.Ct. 2514 (1992); **McCleskey v. Zant**, 499 U.S. 467 (1991).

²**Urdu v. McCotter**, 773 F.2d 652, 656 (5th Cir. 1985).

³803 F.2d 830, 833 (5th Cir. 1986).

we caution and remind the district court of the necessity to observe the Rule 9(b) notice requirement, in this instance the total absence of facts which might have prevented dismissal makes clear the harmlessness of the district court's error.⁴

The district court's Rule 9(b) dismissal is AFFIRMED.

⁴**Id.**