UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 93-3130

(Summary Calendar)

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RONALD RICHBURG,

Defendant-Appellant.

Appeal from the United States District Court
For the Eastern District of Louisiana
(CA 92 3948 (CR 89 325 E1))

September 10, 1993

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Ronald Richburg appeals the district court's dismissal with prejudice of his second motion to vacate, set aside, or correct sentence under 28 U.S.C. § 2255 (1988). Finding no reversible error, we affirm.

In his first motion for relief under § 2255, Richburg claimed violations of Fed. R. Crim. P. 32 and miscalculation of his sentence by the probation officer. The district court denied

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

relief, and we affirmed on appeal. Richburg has now filed his second motion for relief under § 2255. In his second motion Richburg raises several new claims: (a) ineffective assistance of counsel at sentencing; (b) that the district court violated Fed. R. Crim. P. 32(a)(2) by failing to advise him of his right to appeal; and (c) that he was erroneously sentenced to four years supervised release. Richburg also claims, as he did in his first § 2255 motion, that the district court violated (1) Fed. R. Crim. P. 32(a)(1)(A), by failing to determine whether Richburg had had the opportunity to read his presentence report; and (2) Fed. R. Crim. P. 32(a)(1)(C), by failing to afford Richburg his right of allocution.

The district court ordered Richburg to state why the motion should not be barred as successive under Rule 9(b) of the Rules Governing Section 2255 cases.[1] Richburg responded that, at the time of his first § 2255 motion, he lacked the information that he needed to file a claim of ineffective assistance of counsel. Richburg claimed that the government removed him from New Orleans, preventing him from investigating his counsel's background and experience. Richburg further claimed that "as a *pro se* litigant, [he] had no actual or constructive knowledge of the facts in order to appreciate their legal significance." Record on Appeal, Vol. 2,

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[1] Rule 9(b) provides:

> 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.

at 324. Richburg failed to give any reason for not asserting his Rule 32(a)(2) claim in his first motion. Richburg stated that his sentencing claims dealing with supervised release are based on recent changes in the law of this Circuit. Finally, Richburg stated that his old Rule 32(a)(1)(A) and (C) "claims are encompassed by Counsel's failure to adequately represent [him] at sentencing." *Id.* at 325. The district court rejected these arguments and dismissed Richburg's motion with prejudice. Richburg appeals.

The district court held that Richburg has not shown cause[2] for failing to raise earlier his ineffective assistance of counsel claims. We agree. Neither Richburg's *pro se* status nor his ignorance of the facts and law underlying his claims constitutes cause. *See United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993). We also find Richburg's governmental interference argument unpersuasive. Richburg contends that he was unable to investigate his trial counsel's lack of experience practicing in federal court because the government removed him from New Orleans. Even assuming that to be true, it does not amount to cause for Richburg's failure to raise his claim of ineffective assistance of counsel in his first § 2255 motion. An ineffective assistance claim must be premised on errors by counsel which prejudice the defendant. *See Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 2064,

[2] *See McCleskey v. Zant*, __ U.S. __, ___, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517 (1991) (cause and prejudice requirement); *United States v. Flores*, 981 F.2d 231, 234-35 (5th Cir. 1993) (applying *McCleskey*'s cause and prejudice standard to § 2255 context).

80 L. Ed. 2d 674 (1984). Therefore, if Richburg has a claim for ineffective assistance of counsel, it is based on counsel's errors in representing him, and not on counsel's lack of experience. Richburg did not need to investigate whether his counsel had experience practicing in federal court, and therefore he has not shown cause. *See McCleskey v. Zant*, __ U.S. __, ___, 111 S. Ct. 1454, 1472, 113 L. Ed. 2d 517 (1991) ("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").

The district court also rejected Richburg's argument that his claims concerning supervised release were based on a change in the law. We agree that Richburg has not demonstrated cause for failing to raise these claims sooner. Richburg contends that he was convicted of a class C felony, which gives rise to only three years of supervised release, and that the district court erroneously sentenced him to four years supervised release. Richburg argues that this claim is based on a recent change in the law, and cites *United States v. Kelly*, 974 F.2d 22 (5th Cir. 1992). Even assuming that *Kelly* represents a change in the law, it is not applicable here, and therefore does not show cause for Richburg's failure to raise his claim earlier. In *Kelly* we overturned a five year term of supervised release because it exceeded the maximum term of supervised release provided by statute. *See id.* at 24. Richburg's four year term of supervised release does not exceed the statutory

maximum.[3] Therefore, *Kelly* does not support Richburg's claim, and he has not pointed to any change in the law which amounts to cause for his failure to raise his claim in his first motion.

Richburg also claims that the imposition of a term of supervised release is not allowed under 18 U.S.C. § 924. Richburg argues that this claim is premised on a recent change in the law, and cites *United States v. Allison*, 953 F.2d 870, 875 (5th Cir. 1992). Richburg's reliance on that decision is misplaced, since the portion of that opinion concerning supervised release was revised on rehearing to make clear that supervised release is available under 18 U.S.C. § 924. *See United States v. Allison*, 986 F.2d 896, 897 (5th Cir. 1993). Because *Allison* does not support Richburg's claim, he has not shown a change in the law which amounts to cause for his failure to raise that claim in his first § 2255 motion.

Richburg failed to offer any reason for failing to raise his claim under Rule 32(a)(2) in his prior motion. Therefore, Richburg failed to show cause for not raising that claim sooner.

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[3] Richburg pleaded guilty to possession with intent to distribute 117 grams of cocaine base, the weight of which included packaging. According to the presentence investigation report, the actual weight of the cocaine base was 20.84 grams. 21 U.S.C. § 841(b)(1)(B) calls for a sentence of at least four years supervised release for possession with intent to distribute "5 grams or more of . . . a substance . . . which contains cocaine base." *See* 21 U.S.C. § 841(b)(1)(B)(iii) (West Supp. 1993). Furthermore, Richburg's offense is a Class B felony. *See* 21 U.S.C. § 841(b)(1)(B) (calling for a sentence of not more than 40 years' imprisonment); 18 U.S.C. § 3559(a)(2) (West Supp. 1993) (classifying as a Class B felony any offense with a maximum term of imprisonment of 25 years or more but less than life). A Class B felony gives rise to a period of supervised release of not more than five years. *See* 21 U.S.C. § 3583(b) (West Supp. 1993).

Richburg's old Rule 32 claims were dismissed by the district court because there was no showing of factual innocence. Although the district court reached the proper result, it should have considered whether Richburg had demonstrated cause and prejudice. *See Sawyer v. Whitley*, __ U.S. __, ___, 112 S. Ct. 2514, 2518, 120 L. Ed. 2d 269 (1992) ("Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of . . . claims which raise grounds identical to grounds heard and decided on the merits in a previous petition." (citation omitted)); *United States v. Williams*, 994 F.2d 226, 232 (5th Cir. 1993). Richburg has not shown cause for raising these claims a second time. He states only that these claims "are encompassed by Counsel's failure to adequately represent the petitioner at sentencing." Record on Appeal, Vol. 2, at 325. Richburg may mean by this that he would have known to raise the supervised release claims in his first motion if he had received better representation at sentencing.[4] As we have already stated, Richburg's ignorance of the facts and law underlying his claims does not constitute cause. *See Flores*, 981 F.2d at 236. Therefore, Richburg has not shown cause for raising his Rule 32 claims a second time.

Because Richburg has not shown cause, we need not consider whether he has shown prejudice from the errors of which he complains. *See Flores*, 981 F.2d at 236. However, although Richburg has not shown cause, his claims would be heard if failing

[4] Richburg may have meant that he only presented these claims in support of his ineffective assistance claim. In that event as well, Richburg's motion was properly dismissed with prejudice.

to do so would result in a fundamental miscarriage of justice. *See id.* A fundamental miscarriage of justice would be shown if a constitutional violation probably caused Richburg to be convicted of a crime of which he is innocent. *See id.* Because Richburg does not assert his innocence, he has not shown that a miscarriage of justice is threatened here. Consequently, the district court did not err by dismissing Richburg's motion with prejudice.

For the foregoing reasons, we **AFFIRM**.