UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3188
Summary Calendar

CHARLES DEAN,

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-92-3875 E)

(December 29, 1993)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

Charles Dean contends that the district court abused its discretion in dismissing his petition for habeas relief under 28 U.S.C. § 2254. We **AFFIRM**.

I.

Dean was convicted in a Louisiana state court for the first-degree murders of his mother and sister, and was sentenced to life imprisonment; the convictions and sentence were affirmed on appeal.

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[1] 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 Pursuant to that rule, the court has determined that this opinion should not be published.

Louisiana v. Dean, 487 So.2d 709 (La. Ct. App. 5th Cir.), *writ denied*, 495 So.2d 300 (La. 1986). Dean sought federal habeas relief in 1987; his application was denied, and he did not appeal.

In 1992, Dean filed a second federal habeas petition, claiming violations of due process as a result of the trial court's refusal to give two requested jury instructions.[2] Dean stated in the petition that these claims were the same as two of those raised in his original petition. The district court ordered him to show cause why the second petition should not be dismissed as successive under Rule 9(b) of the Rules Governing § 2254 cases in the United States District Courts.[3] In response, Dean reiterated the reasons given in the petition: that intervening jurisprudence made it clear that the district court had erred in denying his first petition; and that, without his knowledge, his counsel for the first petition had failed to appeal its denial.

The district court dismissed the second petition as successive. It concluded that Dean's reasons why the petition was not successive were unavailing; and that Dean's case was not one in which a constitutional violation had resulted in the conviction of

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[2] One instruction was that intoxication by drugs or alcohol negates the element of specific intent; the other, that, where intoxication is so severe as to result in insanity (the inability to distinguish right from wrong), it is irrelevant whether the intoxication is voluntary or involuntary. The Louisiana Court of Appeal held that any error in failing to give these charges was harmless. ***Louisiana v. Dean***, 487 So.2d at 712-13, 714-15.

[3] Rule 9(b), Rules Governing § 2254 Cases, provides, in relevant part: "A second or successive petition 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...."

one who is factually innocent. Dean appealed the dismissal; and the district court granted a certificate of probable cause.

II.

We review the dismissal of a habeas petition under Rule 9(b) for abuse of discretion. ***Hudson v. Whitley***, 979 F.2d 1058, 1062 (5th Cir. 1992). A petition is successive if it raises grounds identical to those raised and rejected on the merits in a prior petition. ***Kuhlmann v. Wilson***, 477 U.S. 436, 445 & n.6 (1986). Dean does not dispute that his second petition presents the same issues as the first. He contends instead, as he did in district court, that the second should not be dismissed, because it relies on federal law that has changed since his first petition was dismissed, and because he did not realize that his counsel had not appealed that denial. He also contends that he has presented a colorable claim of factual innocence.

A.

Dean's contention that changes in the law support his second petition is unavailing. The district court noted that the cases relied on in dismissing the first petition have not been overruled.[4] Further, the court's reading of the cases Dean characterized as "justify[ing] a shift" in the court's position was that those cases, largely from outside this circuit, "cannot be

[4] Dean does not dispute the district court's statement that none of the cases on which it relied have been overruled. Nor does he, in either his briefs on this appeal or his second petition, enumerate any case he contends has been overruled. His original § 2254 petition and the judgment disposing of it are not part of the record on this appeal.

characterized as amounting to changes in the law."[5] Dean neither disputes this conclusion in his brief, nor discusses those cases or their effect on the dismissal of his petition. He has not shown an abuse of discretion.

B.

Dean acknowledges that his second petition is an attempt to "secure a re-determination" of his claims by this court, presumably because he did not appeal the dismissal of his first petition. As our court held in ***Andre v. Guste***, 850 F.2d 259 (5th Cir. 1988), however, a petitioner is not entitled to obtain review of the issues raised in his first petition, simply by filing a second, identical petition. Needless to say, the failing to appeal denial of a prior petition does not shield a second petition from Rule 9(b) dismissal. ***Id.***

C.

Finally, a petitioner may be entitled to maintain an otherwise successive petition in the extraordinary case where it appears that a constitutional violation has resulted in the conviction of one who is factually innocent. ***Herrera v. Collins***, ___ U.S. ___, 113 S. Ct. 853, 862 (1993); ***Murray v. Carrier***, 477 U.S. 478, 495-96

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[5] These included, *inter alia*: ***Geschwendt v. Ryan***, 967 F.2d 877 (3d Cir. 1992) (en banc), *cert. denied*, ___ U.S. ___, 113 S. Ct. 472; ***Flowers v. Illinois Dept. of Corrections***, 962 F.2d 703 (7th Cir. 1992), *cert. granted and judgment vacated by* ___ U.S. ___, 113 S. Ct. 2954, *reversed on remand*, 5 F.3d 1021 (7th Cir. 1993); ***United States v. Dennison***, 937 F.2d 559 (10th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 886 (1992); ***Falconer v. Lane***, 905 F.2d 1129 (7th Cir. 1990); and ***Louisiana v. Johnson***, 541 So.2d 818 (La. 1989), *cert. granted and judgment vacated by* ___ U.S. ___, 113 S. Ct. 2926 (1993).

(1986); ***Kuhlmann v. Wilson***, 477 U.S. 436 (1986). A claim of factual innocence shields a successive petition from dismissal under Rule 9(b) if the petitioner demonstrates that there is a "fair probability that, in light of all the evidence, a reasonable trier [of fact] could not find all the elements necessary to convict the defendant of that particular crime." ***Johnson v. Hargett***, 978 F.2d 855, 860 (5th Cir. 1992), *cert. denied*, __ U.S. __, 113 S. Ct. 1652 (1993), *discussing* ***Kuhlmann***, 477 U.S. at 454.

Dean's claim of factual innocence is based on his contention that, at the time of the homicides, he was intoxicated by reason of voluntary drug use to such an extent that he was unable to form the specific intent to kill -- a necessary element for murder. In support of this claim, Dean's second petition discusses the evidence presented at trial in a few paragraphs, repeated verbatim in his appellate brief. As he did on his direct appeal, Dean bases his claim of factual innocence on the trial court's failure to give the requested instructions, *see supra* note 2 -- the error, if any, found harmless by the Louisiana Court of Appeal. ***Louisiana v. Dean***, 487 So.2d at 712-15. Dean, without citation to the record, acknowledges (without refuting) the evidence which contradicted his defenses of insanity and insanity by reason of voluntary intoxication. Further, as the district court noted, Dean continues to admit that he in fact killed his mother and sister. In light of this fact and the evidence that Dean possessed the requisite specific intent to kill his mother and sister, a reasonable jury could have found Dean guilty, even had the requested instructions

been given. *See* ***id.*** at 712-13, 714-15. (The jury was instructed on insanity as a defense; on the definition of specific intend, that the crimes of first- and second-degree murder and manslaughter are specific intent crimes; and that in order to convict the defendant, the state had to prove specific intent beyond a reasonable doubt. ***Id.*** at 712-713. And, the Louisiana Court of Appeal held that despite the lack of an instruction on the issue, Dean's contentions regarding voluntary intoxication by drugs and its influence on the defense of insanity were "more than adequately presented to the jury by the evidence, the voir dire examination, and by the arguments of counsel." ***Id.*** at 714.) We find no abuse of discretion in the district court's finding that Dean did not present a colorable claim of factual innocence. *See* ***Kuhlmann***, 477 U.S. at 454 & n. 17.

III.

For the foregoing reasons, the dismissal of Dean's habeas petition under Rule 9(b) is

AFFIRMED.