UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-4071
Summary Calendar

JOHN EARL CHOICE,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(CA-6:89-367)

(February 11, 1994)

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

PER CURIAM:*

John Earl Choice appeals the dismissal without prejudice of his habeas corpus petition for failure to exhaust state remedies. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

A Texas jury found Choice guilty of aggravated robbery and he was sentenced to prison for 50 years. The conviction was affirmed on direct appeal. After his petition for discretionary review was denied by the Texas Court of Criminal Appeals, Choice filed 11 unsuccessful petitions for writ of habeas corpus in state court. He ultimately was cited for abuse of the writ and the clerk of the Court of Criminal Appeals was instructed to decline to accept any further filings unless Choice demonstrated that the filing contained contentions never previously made and Choice explained why he could not previously have done so.

The instant application for federal habeas followed. Adopting the magistrate judge's report the district court dismissed the action. Choice filed a timely Fed.R.Civ.P. 59(e) motion seeking reconsideration.[1] The earlier dismissal was vacated and the matter was referred to the magistrate judge for reconsideration. Two issues were presented on remand: (1) whether the state knowingly introduced false testimony at trial, and (2) whether Choice received ineffective assistance of counsel on appeal.

During the second consideration by the magistrate judge the state filed a motion to dismiss arguing, *inter alia*, that the state courts had had no opportunity to pass on Choice's false testimony claim because Choice previously had presented no allegation or

[1]The motion included affidavits from Choice's mother and brother attesting that in August 1987 they learned that another individual had committed the robbery for which Choice had been convicted and they accompanied this individual to the Longview, Texas district attorney's office where he confessed to the robbery.

evidence on that issue. The magistrate judge recommended dismissal without prejudice on this ground; the district court agreed. Choice timely appealed.

Analysis

Before seeking federal habeas relief a state prisoner must exhaust state remedies.[2] A petitioner may be relieved of this requirement if the pursuit thereof would be futile.[3] Choice acknowledges that his current claims have not been litigated in any state forum, contending that his citation by the Texas Court of Criminal Appeals for abuse of the writ foreclosed state avenues, rendering pursuit of relief in state court futile.

Choice's argument fails to persuade. The citation for writ abuse explicitly excepts any petition Choice files where the issue raised was not and could not reasonably have been raised in previous applications and presents important questions of law.[4] Significantly, Choice now advances several reasons for failing to address the claims in question in his original federal habeas petition.[5] We view these arguments to be of the genre required to

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[2]28 U.S.C. § 2254(b); **Picard v. O'Connor**, 404 U.S. 270 (1971).

[3]**Deters v. Collins**, 985 F.2d 789 (5th Cir. 1993).

[4]Indeed, after his citation the state courts reached the merits of at least one of Choice's state petitions on precisely that basis. See **Ex parte Choice**, 828 S.W.2d 5 (Tex.Crim.App. 1992) (*en banc*).

[5]For example, Choice explains that he could not have secured the affidavits because he had lost contact with his brother and because his family's time was consumed by the search for his missing son.

overcome the bar against new state petitions upon which Choice bases his claim of futility.[6] We do not consider the pursuit of state remedies to be futile.

Choice seeks appointment of counsel. There is no right to counsel in section 2254 proceedings.[7] When justice demands counsel may be appointed. We perceive no such situation herein. Choice has demonstrated his ability to advocate his cause. The issue raised is neither complex nor novel. The "newly discovered" evidence may be presented and ruled on. The motion for appointment of counsel which was carried with the case is now denied.

AFFIRMED.

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[6]The order allows Choice to file meritorious new claims if they could not have been raised in a previous petition.

[7]**Johnson v. Hargett**, 978 F.2d 855 (5th Cir. 1992), cert. denied, 113 S.Ct. 1652 (1993).