

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8069
Conference Calendar

ROBERT J. ZANI,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,

Respondent-Appellee.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. A-92-CV-683
- - - - -

August 19, 1993

Before JOLLY, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:*

Robert Zani appeals the dismissal of his habeas corpus petition as abusive and repetitive. A district court may dismiss a "second or successive petition" for habeas corpus relief

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 petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

Rule 9(b), Rules Governing § 2254 Cases in the U.S. District Courts. This Court reviews dismissals pursuant to Rule 9(b)

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

under the abuse-of-discretion standard. See Saahir v. Collins, 956 F.2d 115, 120 (5th Cir. 1992).

"[T]he petitioner must (1) be `notified specifically of the fact that the court is considering . . . final disposition of the case' and (2) afforded at least ten days in which `to explain in writing . . . why he failed to raise new grounds in a prior petition.'" Daniels v. Blackburn, 763 F.2d 705, 707 (5th Cir. 1985)(citation omitted; internal brackets and ellipses omitted). "The form appended to Rule 9(b) gives the petitioner adequate notice of the possibility of summary dismissal and of his obligation to respond and to justify the filing of the successive petition." Id. The magistrate judge should have followed the procedure approved in Daniels before recommending dismissal of the petition.

Moreover, Zani's petition was neither abusive nor repetitive. First, this Court does not consider for abuse-of-the-writ purposes previous petitions that were dismissed without prejudice. Woods v. Whitley, 933 F.2d 321, 322, n.1 (5th Cir. 1991). Because Zani's previous petitions were dismissed without prejudice, his present petition is not an abuse of the writ. Second, a district court may dismiss a petition as repetitive "only if (1) the same ground presented in the subsequent application was determined adversely to the applicant on the prior application, (2) the prior determination was on the merits, and (3) the ends of justice would not be served by reaching the merits of the subsequent application.'" Young v. Puckett, 938 F.2d 562, 564, n.2 (5th Cir. 1991)(quoting Sanders v. United

States, 373 U.S. 1, 15, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963)).

Zani's first two petitions were dismissed for failure to exhaust state-law remedies and his third petition was dismissed for lack of subject-matter jurisdiction. The district court did not reach the merits of those petitions. Zani's present petition therefore is not repetitive of his earlier petitions.

VACATED AND REMANDED.