

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 93-8388
Summary Calendar

UNITED STATES OF AMERICA, Plaintiff-Appellee,
versus
RICHARD HOMER TAYLOR, Defendant-Appellant.

Appeal from the United States District Court for the
Western District of Texas
(A-93-CA-52-JN(A-89-CR-2-01-JN))

(August 30, 1994)

Before SMITH, EMILIO M. GARZA, and PARKER, Circuit Judges.

PER CURIAM¹:

On January 18, 1989, Richard Homer Taylor ("Taylor") pleaded guilty to misapplication of bank funds by a bank officer in violation of 18 U.S.C. § 656, filing a false income tax return in violation of 26 U.S.C. § 7206(1) and bank fraud in violation of 18 U.S.C. § 1344. The district court sentenced Taylor to twelve years of imprisonment, and ordered him to pay a \$505,000 fine and restitution in the amount of \$19,099 to the F.D.I.C. and \$221,000 to Franklin Federal BanCorp. Taylor did not directly appeal.

¹ 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 Pursuant to that Rule, the Court has determined that his opinion should not be published.

On September 24, 1990, Taylor filed a Motion for Reduction or Modification of his Sentence pursuant to FED. R. CRIM. P. 35, suggesting that the court modify his sentence pursuant to 18 U.S.C. § 4205(b)(2) and enter an order directing that his sentences run concurrently. His motion was denied by the district court on October 19, 1990. On November 7, 1990, Taylor filed a letter with the court again requesting a modification of his sentence, which was also denied.

Proceeding *pro se*, Taylor filed a writ of *habeas corpus* pursuant to 28 U.S.C. § 2241 in the Northern District of Alabama on January 28, 1991. His writ was subsequently transferred to the Western District of Texas for consideration by the sentencing court pursuant to 28 U.S.C. § 2255. One of his four allegations was that he did not receive effective assistance of counsel. The magistrate recommended that Taylor's § 2255 motion be denied. After a *de novo* review, the district court adopted the magistrate's Report and Recommendation, and denied Taylor's motion.

On January 25, 1993, Taylor filed a second § 2255 motion, arguing that his counsel was ineffective for failing to "adequately disclose [his] correct & current financial information to the sentencing court" prior to the court's imposition of the fine. Taylor also requested that the court "amend and modify" his sentence. The magistrate recommended that the writ be denied because he did not adduce any evidence to show that he would be unable to pay a fine following his release from prison, he failed to object to the Presentence Investigation Report and his

ineffective assistance claim was barred on *res judicata* grounds. On April 30, 1993, the district court adopted the magistrate's Report and Recommendation, and denied the motion on its merits. On appeal, we AFFIRM the dismissal of Taylor's second § 2255 motion on alternative grounds.

DISCUSSION

Because we are reviewing Taylor's second § 2255 motion, we must first determine whether we can reach the merits of his claims. Rule 9(b) of the Rules Governing Section 2255 Proceedings 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.

This Court has held that a successive § 2255 motion previously decided on the merits cannot again be reached on the merits unless the movant shows "cause and prejudice." *Duff-Smith v. Collins*, 995 F.2d 545, 546 (5th Cir.), *cert. denied*, ___U.S.___, 113 S.Ct. 865, 125 L.Ed.2d 747 (1993). To establish cause for his neglect in raising the claim, the movant is required to show that some objective factor external to the defense impeded his efforts to raise the subsequently alleged argument in the first motion. *Id.* If a movant fails to demonstrate an objective factor, and if the factual and legal basis for the subsequently alleged argument was reasonably available to the movant at the time of the first filing, the movant's delay in raising it will not be excused. *Id.* When cause has not been established, the court need not consider

prejudice. *Sawyer v. Whitley*, 945 F.2d 812, 817 (5th Cir. 1991), *aff'd*, ___U.S.___, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). "Absent demonstrated cause and prejudice, 'the failure to raise a claim in a prior habeas petition may be overlooked only when a constitutional violation probably has resulted in the conviction of one innocent of the crime.'" *Duff-Smith*, 995 F.2d at 546 (quoting *Kirkpatrick v. Whitley*, 992 F.2d 491 (5th Cir. 1993)).

In his present § 2255 motion, Taylor again raises the claim of ineffective assistance of counsel, which was addressed on its merits in his first motion. Although he now alleges a different aspect of the claim, he has not demonstrated that an objective external factor impeded his ability to raise the new argument in his first motion, or that the factual or legal basis for the new argument was not reasonably available. See *Johnson v. McCotter*, 803 F.2d 830, 834 (5th Cir. 1986) ("[a] claim of ineffective assistance of counsel, once raised, litigated and rejected at an earlier habeas proceeding cannot be raised in a later proceeding merely by varying the factors allegedly demonstrating incompetency"). Therefore, Taylor's second motion founders on Rule 9(b) of the Rules Governing Section 2255 Proceedings.

CONCLUSION

Because Taylor did not meet the cause and prejudice requirement for his second § 2255 motion, and he did not show actual innocence, the district court should have dismissed Taylor's motion under Rule 9(b) on the ground that it was successive rather than reaching the merits of Taylor's claims. Accordingly, we

AFFIRM the district court's dismissal of Taylor's § 2255 motion on the alternate ground that Taylor failed to meet the requirements for a second or successive § 2255 motion in accordance with Rule 9(b) of the Rules Governing Section 2255 Proceedings. AFFIRM.