IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-10178

Summary Calendar

UNITED STATES of AMERICA,

Plaintiff-Appellee,

versus

ROBERT WILLIAM BONDURANT,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
(3:92-CV-1919-P(3:76-CR-157-F))

(October 26, 1994)

Before GARWOOD, HIGGINBOTHAM, and DAVIS, Circuit Judges.

PER CURIAM:[*]

Robert William Bondurant, who is serving a life sentence for kidnapping, appeals the district court's dismissal of his fifth 28 U.S.C. § 2255 motion. We affirm.

A.

At the outset, we reject Bondurant's contention that the district court improperly raised Rule 9(b) of the Rules Governing

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

§ 2255 Proceedings without a government motion. Rule 9(b)'s bar against successive or abusive petitions may be raised sua sponte. See United States v. Flores, 981 F.2d 231, 236 n.9 (5th Cir. 1993). After the court raised the issue, Bondurant had an adequate opportunity to explain why his fifth petition was not successive or abusive. The reasons he has given are not persuasive.

Half of his petition's six claims could have been brought in prior petitions, and because he has not stated any valid cause for his delay, the court below properly barred these claims. See McCleskey v. Zant, 499 U.S. 467, 494 (1991). Two of his claims -- that Rule 601 of the Federal Rules of Evidence is unconstitutional, and that the district court erred in ruling that the kidnapping victim, then five years old, was not competent to testify -- are based on facts he knew when he filed his first petition. Bondurant states that he lacked the legal knowledge to bring these claims earlier. However, ignorance of legal theories is not cause for delay. See Woods v. Whitley, 933 F.2d 321, 323-24 (5th Cir. 1991).

His third claim -- that he was entitled to a hearing to protect him from staging an ill-advised insanity defense -- is similarly barred. He bases this third claim on Pate v. Robinson, 383 U.S. 375 (1966), a case decided long before he filed his first petition. Although Bondurant has only recently discovered the case, his Pate claim is barred. Ignorance of legal theories potential claims is not cause. See Woods, 933 F.2d. at 323.

Bondurant's fourth claim -- that the principals at trial conspired against him -- was also properly dismissed. His first

petition already raised one part of this claim: his allegation that the judge, the prosecutor, the appointed attorney, a physician, and members of the Dallas County Medical Department drugged him at trial to impair his defense.

The remainder of his conspiracy claim should have been brought in earlier petitions. He states that he waited until his fifth petition to claim that these conspirators concocted a fraudulent insanity defense and that the district court increased his sentence based on a fraudulent physician's report because he had not been aware of some helpful legal theories. As noted above, this is not cause.

Bondurant's fifth claim -- that his appellate counsel was ineffective -- is repetitive of one of his earlier petition's claims of ineffective assistance of counsel. To the extent that his present claim challenges the competency of the counsel who represented him on appeal, a challenge he has never raised before, the claim is overdue. Bondurant states no cause for his failure to bring this claim in an earlier petition.

Bondurant's sixth claim is that 18 U.S.C. § 1201(g)(2), a new sentencing provision that became effective about 11 years after he was sentenced, violates his due process and equal protection rights. He argues that he would have received a lighter sentence under this new provision. Yet because the provision directs the U.S. Sentencing Commission to increase the punishment for kidnapping, Bondurant cannot show prejudice under McCleskey.

Finally, Bondurant has not shown that our reliance on the cause and prejudice bar to his six claims will "result in a fundamental miscarriage of justice." McCleskey, 499 U.S. at 494. Accordingly, the district court properly dismissed his fifth habeas petition.

B.

The two motions that Bondurant has filed in this appeal are denied.

His "motion to supplement the record" does not seek to supplement the record at all. It challenges the validity of the indictment (which is already in the record), an argument he raised below only after the court dismissed his petition. Accordingly, we construe Bondurant's motion to supplement the record not as a motion but as a seventh argument in his habeas petition. Because the district court has not yet had a chance to consider this seventh argument, we reject it without prejudice to Bondurant's raising it in a subsequent petition, if he can show cause and prejudice for not having raised it in earlier petitions.

Bondurant's second appellate motion is his motion "to supplement appellant's appeal by virtue of discovery in receipt of the volumes of the record on appeal." The "motion" simply supplements some of the arguments raised in his § 2255 motion and challenges the indictment raised in his first "motion." It is less a motion than a supplemental brief on the merits of his § 2255 motion. We have considered and rejected these supplemental arguments.

Accordingly, we deny Bondurant's two motions and we affirm the judgment.