

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-10323  
Conference Calendar

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ROBERT DALE HARRISON,

Defendant-Appellant.

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Appeal from the United States District Court  
for the Northern District of Texas  
USDC No. 3:94-CV-107 (3:88-CR-T)  
- - - - -  
(July 22, 1994)

Before POLITZ, Chief Judge, and JOLLY and DAVIS, Circuit Judges.

PER CURIAM:\*

Robert Dale Harrison argues that his 28 U.S.C. § 2255 motion should not have been dismissed pursuant to Rule 9(b) because he was not aware of the controlling law at the time that he filed his first § 2255 motion.

"Rule 9(b) of the Rules Governing Section 2255 Proceedings provides that a section 2255 motion may be dismissed for abuse of the procedure, but Rule 9(b) does not define 'abuse.'" United States v. Flores, 981 F.2d 231, 234 (5th Cir. 1993). In the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

context of 28 U.S.C. § 2254 petitions for habeas corpus relief, a second or subsequent habeas petition which raises a claim for the first time is generally regarded as an abuse of the writ.

McCleskey v. Zant, 499 U.S. 467, 470, 111 S.Ct 1454, 113 L.Ed.2d 517 (1991). However, the failure to raise a ground in an initial habeas petition will be excused if the petitioner can show cause for his failure to raise the claim, as well as prejudice from the errors which form the basis for his complaint, or that the refusal to hear the claim will result in a fundamental miscarriage of justice. Id. at 493-95. This Court applies the McCleskey test to § 2255 motions. Flores, 981 F.2d at 234-35. A district court's decision to dismiss a motion for abuse of procedure is reviewed for an abuse of discretion. Saahir v. Collins, 956 F.2d 115, 120 (5th Cir. 1992).

The "cause" prong of the McCleskey test requires the movant to show that "some objective factor external to his defense prevented him from raising the claim in the initial motion." Flores, 981 F.2d at 235 (citation omitted). Ignorance of the legal significance of the facts supporting the claim does not constitute "cause" because it is not an objective factor external to the defense. Id. at 236.

The cases relied upon by Harrison, which held that a pro se petitioner must have actual knowledge of the claim at the time of filing his first motion, have been overruled in light of McCleskey. See Saahir, 956 F.2d at 118-19. Harrison cannot rely on his ignorance of the law to establish "cause."

Because Harrison has not shown cause for failing to raise his claims in his first motion, the issue will be addressed only if failing to do so will result in a fundamental miscarriage of justice. Flores, 981 F.2d at 236. A miscarriage of justice is indicated if a constitutional violation probably resulted in the conviction of an innocent person. Id. "Actual innocence" in this context is factual, as opposed to legal innocence, resulting from a constitutional violation. Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992) cert. denied, 113 S.Ct. 1652 (1993). To show "actual innocence," a defendant is required to show that "there is a fair probability that, in light of all the evidence, a reasonable trier could not find all the elements necessary to convict the defendant of [a] particular crime." Id. at 860.

Harrison has not asserted that he is innocent of the drug offense for which he was convicted. His argument that he was incorrectly found to be a "leader" or "organizer" within the meaning of the sentencing guidelines has no bearing on his "actual innocence." Harrison has not made a colorable claim of factual innocence and, thus, has not demonstrated that the failure to hear the claim will result in manifest injustice. The district court did not abuse its discretion in dismissing Harrison's motion pursuant to Rule 9(b).

AFFIRMED.