

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-10477

(Summary Calendar)

TRAVIS CARTER, JR.,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director, Texas
Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(4:93 CV 634Y)

(November 25, 1994)

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

PER CURIAM:*

Travis Carter, Jr., was convicted of aggravated sexual assault with a deadly weapon. Carter challenged the constitutionality of that conviction by means of a petition for a federal writ of habeas corpus, which was filed in accordance with 28 U.S.C. § 2254 (1988). The district court dismissed the petition under Rule 9(b) of the

* Local Rule 47.5.1 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rules Governing § 2254 Cases,¹ holding that Carter should have included his claims in a federal habeas petition that he had filed two years earlier. Carter appeals the district court's dismissal of his petition, arguing that the court erroneously found that it concerned the same conviction that was the subject of the prior federal habeas petition.

I

Travis Carter, Jr., was convicted of aggravated sexual assault and was sentenced by a Tarrant County district court to forty-five years' imprisonment. Approximately nine months later, Carter was convicted of aggravated sexual assault with a deadly weapon by the same Tarrant County district court and received a sixty-year sentence. The two convictions were for separate offenses.

Carter subsequently filed a petition for a federal writ of habeas corpus challenging the first conviction, but the district court dismissed the petition. More than two years later, Carter filed a petition for a federal writ of habeas corpus challenging the second conviction. The district court dismissed the second petition under Rule 9(b) of the Rules Governing § 2254 Cases,² adopting a magistrate judge's finding that Carter should have included in the first petition the claims he raised in the second

¹ 28 U.S.C. foll. § 2254 (1988).

² Rule 9(b) states that:
A second or successive petition 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 petitioner to assert grounds in a prior petition constituted an abuse of the writ.

petition.

Carter appeals the district court's Rule 9(b) dismissal of his second federal habeas petition, arguing that the magistrate judge mistakenly believed that the second petition concerned the same conviction as the first petition.³ In lieu of a response brief, the State Attorney General's Office has submitted a letter stating that: "The Director is constrained to concede that the dismissal of Carter's petition under Rule 9(b) was inappropriate. The conviction attacked in Carter's first federal petition was different from that attacked in his subsequent petition."

The State bears the burden of pleading abuse of the writ under Rule 9(b). *McCleskey v. Zant*, 499 U.S. 467, 494, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991) ("When a prisoner files a second or subsequent application, the government bears the burden of pleading abuse of the writ."). Acknowledging that the State attorney "was in error in pleading abuse of the writ," the State now withdraws its plea.

II

We therefore REVERSE the district court's dismissal of Carter's federal habeas petition and REMAND to that court for further proceedings consistent with this opinion.

³ The Rules Governing § 2254 Cases allow petitioners to challenge two completely separate convictions by the same court in a single petition, but do not require them to do so. Rule 2(d) of the Rules Governing § 2254 Cases states that: "A petition shall be limited to the assertion of a claim for relief against the judgment or judgments of a single state court (sitting in a county or other appropriate political subdivision)." *Id.* Thus, Rule 2(d) "permits, but does not require, an attack in a single petition on judgments based upon separate indictments or on separate counts even though sentences were imposed on separate days by the same court." Rule 2(d) advisory committee's note (emphasis added).