UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-11048
Summary Calendar

JIMMY LEE HAMMON,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director, Texas Dept. of Criminal Justice, Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court
For the Northern District of Texas
(1:94-CV-96-C)

(May 24, 1995)

Before POLITZ, Chief Judge, SMITH and WIENER, Circuit Judges.

PER CURIAM:[*]

Jimmy Lee Hammon, proceeding *pro se* and *in forma pauperis*, seeks habeas corpus relief from his conviction for rape. We affirm the dismissal of the petition for abuse of the writ.

In exchange for the state's commitment not to seek the death penalty Hammon pled guilty to one count of rape in Texas state court. He was sentenced to life imprisonment. Although there was no direct appeal, Hammon filed multiple applications for state post-conviction relief and two federal habeas petitions, one

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

claiming that his guilty plea was involuntary and that his attorney was ineffective due to failure to investigate, and the other contesting revocation of parole for aggravated sexual assault on his grandmother. Hammon then filed the instant habeas petition alleging that (1) only a jury could render a conviction of a capital crime, (2) the state was not authorized to waive the death penalty, and (3) his lawyer was ineffective because of ignorance of the above points of law, failure to advise him accordingly, and a conflict of interest -- the attorney was Hammon's probation officer in an earlier theft case. The state moved for a dismissal pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases and Hammon sought to withdraw his petition. The district court dismissed the petition without prejudice but the state requested reconsideration, contending that the dismissal should have been with prejudice because the petition was abusive. The district court agreed and modified its judgment accordingly. Hammon timely appealed and we granted a certificate of probable cause.[1]

To obtain consideration of a ground for relief first raised in a second or subsequent habeas petition, the petitioner must show cause for not raising the ground earlier and prejudice if it is not considered; otherwise the claim must be dismissed as an abuse of the writ under Rule 9(b).[2] The district court must give the

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[1]Hammon moved to strike the state's brief, contending that no brief is required unless a certificate of probable cause issues. We granted a CPC. The motion to strike is denied.

[2]**McCleskey v. Zant**, 499 U.S. 467 (1991); **Saahir v. Collins**, 956 F.2d 115 (5th Cir. 1992).

petitioner specific notice that it is considering such a dismissal and at least 10 days in which to explain the delay in raising the new ground;[3] under our precedents, the state's motion in itself does not constitute adequate notice.[4] The district court did not provide the requisite notice to Hammon. The error, however, was harmless. Hammon necessarily knew the facts relevant herein at the time of his first petition and he is charged with constructive knowledge of the applicable legal theories.[5] Responding to the state's efforts to secure a Rule 9(b) dismissal, Hammon invoked his **pro se** status. We previously have held that lack of counsel does not justify dereliction in raising habeas claims.[6] It is certain that Hammon cannot establish cause.[7] We may consider a new ground otherwise barred by Rule 9(b) to avoid a fundamental miscarriage of justice.[8] We are convinced that no issue of actual innocence is implicated herein and that exception is not pertinent.

AFFIRMED.

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[3]**Williams v. Whitley**, 994 F.2d 226 (5th Cir.), cert. denied, 114 S.Ct. 608 (1993).

[4]E.g. **United States v. Cullum**, 47 F.3d 763 (5th Cir. 1995); **Johnson v. McCotter**, 803 F.2d 830 (5th Cir. 1986); **Urdy v. McCotter**, 773 F.2d 652 (5th Cir. 1985).

[5]**Saahir**.

[6]**Id**.

[7]Cf. **Johnson** (inadequate notice of Rule 9(b) dismissal constitutes harmless error where successive petition claims ineffective assistance of counsel).

[8]**Schlup v. Delo**, 115 S.Ct. 851 (1995).