UNITED STATES COURT OF APPEALS

For the Fifth Circuit

No. 94-20007

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

NAGI GEORGE RAYA,

Defendant-Appellant.

Appeal from the United States District Court
For the Southern District of Texas

(CR-H-89-250; CA H 93-3544)

(October 31, 1994)

Before JONES, BARKSDALE, and BENAVIDES, Circuit Judges.

PER CURIAM:[*]

Nagi George Raya appeals the district court's sua sponte denial of his second post-conviction motion in which he alleged that he received ineffective assistance of trial counsel. See R.

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Pursuant to that Rule, the Court has determined that this opinion should not be published.

1, 238-39, 268-86. The district court found that the motion should be denied as successive because Raya could have raised the ineffective assistance of counsel claim in his first motion. R. 1, 238. As an alternative basis for its holding, the district court noted the unreasonable and unexplained delay of more than two years between the denial of Raya's first motion and the filing of the second motion. Id.; see Rule 9 of the Rules Governing § 2255 Proceedings. Raya argues that he should have been provided with notice and an opportunity to be heard before his case was dismissed pursuant to Rule 9(b). Blue brief, 8-12. We vacate and remand.

Rule 9(b) dismissals are reviewed for abuse of discretion. U.S. v. Flores, 981 F.2d 231, 234 (5th Cir. 1993). Section 2255 and § 2254 motions are governed by similar rules. See id. In Urdy v. McCotter, 773 F.2d 652, 656 (5th Cir. 1985), a § 2254 case, the Court held that "the petitioner must be given specific notice that the court is considering dismissal and given at least 10 days in which to explain the failure to raise the new grounds in a prior petition." See Bates v. Whitley, 19 F.3d 1066, 1067 (5th Cir. 1994). "[A]dequate notice must inform the prisoner: (1) that dismissal is being considered; (2) that dismissal will be automatic if there is no response that explains his failure to raise new grounds in a prior petition; and (3) that in order to avoid dismissal, the petitioner must present to the court facts rather than opinions or conclusions." Urdy, 773 F.2d at 656 (citing Jones v. Estelle, 692 F.2d 380, 384-86 (5th Cir. 1982)). "The notice requirement is met by providing the petitioner with the information

conveyed by the form appended to Rule 9(b)." Urdy, 773 F.2d at 656.

The Government concedes that the district court should have provided Raya with notice and an opportunity to be heard but argues that this Court may affirm the district court's order because the error was harmless. See Red brief, 5-6. The Government argues that the record indicates that dismissal is virtually certain and because there are no facts to prevent his claim from being dismissed. Id. at 6 (citing Byrne v. Butler, 847 F.2d 1135, 1138 (5th Cir. 1988); Matthews v. Butler, 833 F.2d 1165, 1170 n.8 (5th Cir. 1987)).[1]

Raya argues that there are facts outside the record which would enable him to explain his failure to pursue his ineffective assistance of counsel claim in his first post-conviction motion. Reply brief, 2-3. Matthews is inapposite because the petitioner in that case was provided with the Rule 9(b) notice. Matthews, 833 F.2d at 1168-69; see Reply brief, 4-5.

This Court's holding in Byrne was based on the presence of facts in the record from which the Court was able to determine that it was "unequivocally clear" that the petitioner was aware, at the time he filed his first petition, of both the facts and the law giving rise to the claim for relief raised in the second habeas petition. Byrne, 847 F.2d at 1139. Raya contends that Byrne is inapposite because the record in that case was more fully developed

[1]See Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992) (McCleskey v. Zant, _ U.S. _, 111 S. Ct. 1454, 113 L. Ed. 2d 517 (1991), overruled Matthews to the extent that it distinguished, for abuse of writ purposes, between pro se petitioners and those represented by counsel).

than the record in the instant case. Reply brief, 5. We agree.

Our holding in Byrne is, in large part, based on the similarities between the issues raised in the first petition and the issues raised in the second petition. 847 F.2d at 1138-39. In the instant case, Raya's first petition raised legal issues respecting the statute under which he was convicted. See R. 1, 203. In his second petition Raya argues that he received ineffective assistance of trial counsel because his lawyer failed to advise him properly regarding his likelihood of conviction. See R. 1, 277-82. Byrne is not controlling because it is not "unequivocally clear" that Raya had access to the facts and law pertinent to his ineffective assistance of trial counsel claim at the time he filed his first post-conviction motion. The district court's order is VACATED and the cause REMANDED with instructions that Raya be provided with notice and an opportunity to show cause and prejudice for failing to raise his ineffective assistance of counsel claim in his first post-conviction motion.