UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 94-20515

(Summary Calendar)

ROY JACKSON PIERCE,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA H 93 2580)

July 3, 1995

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

PER CURIAM:*

After pleading guilty in state court to cocaine possession and burglary, Roy Jackson Pierce filed a petition for writ of habeas corpus under 28 U.S.C. § 2254 (1988), alleging that the State had violated the conditions of his plea agreement. The district court dismissed his habeas petition and Pierce has appealed the dismissal. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

I

Roy Jackson Pierce plead guilty in a Texas court to one count of burglary of a habitation with intent to commit theft, for which he was sentenced to fifteen years' imprisonment, and one count of possession of cocaine, for which he was sentenced to ten years' imprisonment. The court ordered that the sentences run concurrently, and revoked Pierce's parole on a prior conviction. The prior conviction had carried a twenty-five-year sentence, the remaining sixteen years and eight months of which the court ordered Pierce to serve concurrent with his new sentences. Pierce later filed a motion in the trial court in which he alleged that the State had broken its promise in his plea agreement that he would receive credit for flat time served and good time earned on his prior twenty-five-year sentence. Based on these allegations, he moved to withdraw his guilty pleas or, alternatively, for a nunc pro tunc judgment ordering that his credit be restored. The trial court subsequently issued a nunc pro tunc judgment ordering that Pierce receive credit for all flat time served and good time earned on his twenty-five-year sentence.

When he did not receive his good-time credit, Pierce filed a petition for habeas corpus in state court, alleging that his guilty pleas were not knowing and intelligent because the prosecutor had induced the pleas by promising him that he would be credited with his accrued good time.[1] Pierce pointed to the nunc pro tunc

[1] Based on documentation provided by the State, the federal magistrate judge concluded that Pierce had been given credit for his flat time in accordance with the plea agreement. Pierce did not object to the magistrate judge's

judgment as evidence that the plea agreement had contained such a promise,[2] but the state habeas court obtained an affidavit from Pierce's attorney in which he stated that the prosecution made no representation to Pierce that the amount of time Pierce would have to serve on his prior sentence would be affected by his guilty plea.[3] Based on this affidavit, and with no mention of the nunc pro tunc judgment, the state court denied Pierce habeas relief. The Texas Court of Criminal Appeals affirmed.

Having exhausted his state remedies, Pierce petitioned for federal habeas relief. The magistrate judge found no support for Pierce's allegation, concluding that the nunc pro tunc judgment constituted evidence only that the state court had misinterpreted state law. The magistrate judge deferred to the state court's finding that the affidavit filed by Pierce's trial attorney

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finding, thereby forfeiting future review of this issue. *See Nettles v. Wainwright*, 677 F.2d 404, 410 & n.8 (5th Cir. 1982) (finding that party who fails to file written, specific objections to a magistrate's proposed findings and recommendations is barred "from attacking on appeal factual findings accepted or adopted by the district court except upon grounds of plain error or manifest injustice"). We agree with the district court that the State provided solid documentation that Pierce received credit for flat time served. *See also Edmond v. Collins,* 8 F.3d 290, 293 n.7 (5th Cir. 1993) (citing *Nettles*).

[2] Pierce agrees with the State that the nunc pro tunc judgment is invalid, *see infra* note 4, but contends that the judgment supports his claim because it was issued by the trial judge after a hearing on his motion to withdraw his guilty pleas, in which he argued that he was denied flat-time and good-time credit in violation of the plea agreement. Pierce argues that the trial court would not have gone to the trouble and expense of issuing the judgment if it did not believe that Pierce was incorrectly denied flat-time and good-time credit.

[3] The affidavit states:

On May 2, 1989, Mr. Pierce pled guilty pursuant to a plea agreement. The agreement stipulated that the sentences in the primary cases would run concurrent with a prior twenty-five year sentence.

It was never represented to Mr. Pierce that the primary cases would affect the amount of time that he had already served on the 25 year sentence.

Mr. Pierce believed that the primary cases would affect the 25 year sentence. I told him I did not know what the effect would be.

evidenced the terms of the plea agreement, and recommended dismissal of Pierce's petition. Over Pierce's objections, the district court adopted the findings and recommendations of the magistrate judge and dismissed the petition. Pierce appeals, claiming that the district court incorrectly accorded a presumption of correctness to the state court's finding that his attorney's affidavit evidenced the terms of the plea agreement.

II

Under 28 U.S.C. § 2254(d), "a federal court is to accord a presumption of correctness to findings of state court proceedings unless particular statutory exceptions to § 2254(d) are implicated." *Williams v. Collins*, 16 F.3d 626, 631 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 42, 129 L. Ed. 2d 937 (1994). "We review the district court's findings for clear error, but decide any issues of law de novo." *DeVille v. Whitley*, 21 F.3d 654, 656 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S. Ct. 436, 130 L. Ed. 2d 348 (1994).

Pierce claims that his guilty pleas are invalid because they were induced by false promises that he would not lose any of his accrued good time.[4] If a defendant's guilty plea rests to any significant degree on a promise made by the government, that

[4] The State correctly asserts that Pierce under Texas law lost all of his good-time credit upon pleading guilty to burglary and possession of cocaine. *See* Tex. Gov't Code Ann. § 498.004(b) (Vernon Supp. 1994) (stating that an inmate forfeits all good-time credit upon revocation of parole). Because the award or denial of good-time credit is an administrative decision left to the discretion of the Texas Department of Criminal Justice))Institutional Division, the nunc pro tunc judgment ordering an award of good-time credit was invalid. *See In re S.B.C.*, 805 S.W.2d 1, 6 (Tex. App.))Tyler 1991, writ denied) (holding that trial court has no authority to issue instructions or otherwise interfere with decision of agency regarding award or denial of good-time credit).

promise must be fulfilled. *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 496, 499, 30 L. Ed. 2d 427 (1971) (suggesting that defendants be allowed to replead if promise cannot be granted); *United States v. Palomo*, 998 F.2d 253, 256 (5th Cir.), *cert. denied*, ___ U.S. ___, 114 S. Ct. 358, 126 L. Ed. 2d 322 (1993). While "a voluntary and intelligent plea of guilty made by an accused person . . . may not be collaterally attacked," a plea agreement that was induced by unkept promises is involuntary and the conviction cannot stand. *Mabry v. Johnson*, 467 U.S. 504, 508, 509, 104 S. Ct. 2543, 2546-47, 2547, 81 L. Ed. 2d 437 (1984). "An unkept plea bargain is a basis for the grant of habeas relief if the petitioner can prove the existence of the allegedly broken plea." *Bonvillain v. Blackburn*, 780 F.2d 1248, 1251 (5th Cir.), *cert. denied*, 476 U.S. 1143, 106 S. Ct. 2253, 90 L. Ed. 2d 699. (1986). "To prove the existence of the plea bargain, the petitioner must prove: `1) exactly what the terms of the alleged promises were; 2) exactly when, where, and by whom such a promise was made; and 3) the precise identity of an eyewitness to the promise.'" *Id.* (quoting *Hayes v. Maggio*, 699 F.2d 198, 203 (5th Cir. 1983); *accord DeVille*, 21 F.3d at 658.

The district court accorded a presumption of correctness to the state court's finding that the attorney's affidavit rather than the nunc pro tunc judgment evidenced the terms of the plea agreement. Pierce contends that the state court's finding was not

entitled to such a presumption under § 2254(d),[5] arguing that (1) the record as a whole does not support the finding, (2) the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing, and (3) the material facts were not adequately developed at the state court hearing.[6]

Pierce contends that the record as a whole does not support the district court's determination that the State never promised him that he would receive credit for accrued good time. "If the record as a whole does not fairly support the finding, the finding is not entitled to the presumption of correctness." *James v. Whitley*, 39 F.3d 607, 609-10 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1704, ___ L. Ed. 2d ___ (1995); *accord Armstead v. Scott*, 37 F.3d 202, 206 (5th Cir. 1994), *cert. denied*, ___ U.S. ___, 115 S. Ct. 1709, ___ L. Ed. 2d ___ (1995). However, we are highly deferential to the state court's determination of whether the record fairly supports state court findings. *James*, 39

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[5] 28 U.S.C. § 2254(d) provides in pertinent part:

> In any proceeding instituted in a Federal court by an application for writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit))
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> . . . .
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> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
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> (3) that the material facts were not adequately developed at the State court hearing;
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> . . . .

[6] We liberally construe the briefs of pro se appellants. *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993).

F.3d at 610 (citing *Rushen v. Spain*, 464 U.S. 114, 120, 104 S. Ct. 453, 456, 78 L. Ed. 2d 267 (1983)). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Marshall v. Lonberger*, 459 U.S. 422, 432, 103 S. Ct. 843, 850, 74 L. Ed. 2d 646 (1983); *accord James*, 39 F.3d at 610. Both the absence of positive proof of the petitioner's claim and an ambiguous record provide fair support for a state court's finding. *James*, 39 F.3d at 610 (citing *Wainwright v. Goode*, 464 U.S. 78, 85, 104 S. Ct. 378, 382-83, 78 L. Ed. 2d 187 (1983)).

Pierce insists that the state-court documents, namely his motion to withdraw his guilty pleas, the judgment nunc pro tunc, and the affidavit from his trial attorney, support his contention that he was promised his good-time credit in return for his guilty pleas.[7] The state court, however, put more weight on the affidavit from Pierce's attorney, in which the attorney stated that no representations were ever made to Pierce as to how new convictions would affect the time remaining on his twenty-five-year sentence. The state court's finding as to the plea agreement is supported by the record as a whole because it is supported by an affidavit from Pierce's attorney, *see Sawyers v. Collins*, 986 F.2d 1493, 1504 (5th Cir.) (accepting affidavit from petitioner's attorney as dispositive of all issues of material fact in state proceeding),

[7] Pierce argues that his attorney's affidavit does not refute his contention that he was "counseled on his ability to retain good time credit," and therefore cannot support the state's finding of no broken plea bargain. He further argues that the affidavit actually supports his allegation because it demonstrates his interest in keeping his good-time credit.

and Pierce cannot counter the affidavit with either positive proof, *see James*, 39 F.3d at 610 (holding that state-court findings are supported by record if petitioner cannot offer positive proof to counter state court's inferences from record), *cert. denied*, ___ U.S. ___, 113 S. Ct. 2405, 124 L. Ed. 2d 300 (1993), or direct evidence, *see Lincecum v. Collins*, 958 F.2d 1271, 1279-80 (5th. Cir.) (holding consideration of competing affidavits or affidavit contradicting conclusory allegations of petitioner adequate support for state-court finding), *cert. denied*, ___ U.S. ___, 113 S. Ct. 417, 121 L. Ed. 2d 340 (1992).

Pierce also contends that the factfinding procedure employed by the state court was not adequate to afford a full and fair hearing and, in the alternative, that the state court's hearing did not adequately develop material facts. Section 2254(d) provides that federal courts owe no deference to state court determinations made under either circumstance. *See* § 2254 (according a presumption of correctness to state-court determinations made "after a hearing on the merits of a factual issue, . . . unless the applicant shall otherwise establish *or* it shall otherwise appear . . . (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing; [or] (3) that the material facts were not adequately developed at the State court hearing").

"State courts do not necessarily have to hold live evidentiary hearings for the presumption [of correctness] to attach, but may, in appropriate circumstances, resolve factual disputes on the basis

of written affidavits." *Lincecum*, 958 F.2d at 1279 (citing *May v. Collins*, 955 F.2d 299, 315 (5th Cir.), *cert. denied*, 504 U.S. 901, 112 S. Ct. 1925, 118 L. Ed. 2d 533 (1992)). "[I]t is necessary to examine in each case whether a paper hearing is appropriate to the resolution of the factual disputes underlying the petitioner's claim." *May*, 955 F.2d at 312 (finding paper hearing appropriate if conducted by trial judge). Although different judges presided over Pierce's original trial and the state court's hearing, the state court hearing was appropriate given that Pierce provided no direct evidence to support his allegation. *See Lincecum*, 958 F.2d at 1279-80 (holding that defendant's conclusory allegations, absent any concrete evidence, do not mandate live evidentiary hearing). We recently held that a so-called "paper hearing" may be sufficient to resolve a petitioner's allegation that his guilty plea was induced by false promises. *See Armstead*, 37 F.3d at 208 (holding that attorney's affidavit, requested by court and contradicting petitioner's false promise allegations, was dispositive of coercion issue). Thus, we hold that Pierce did receive a full and fair hearing on his allegations. Furthermore, if an affidavit "soundly refutes" a petitioner's allegation, then no material issues of fact are left unresolved by the affidavit. *Sawyers*, 986 F.2d at 1504. Because the affidavit filed by Pierce's attorney soundly refutes Pierce's allegation, we find that the state court hearing adequately developed the material facts.

As none of the exceptions listed under § 2254(d) apply, the district court properly accorded a presumption of correctness to

the state court's finding that the attorney's affidavit rather than the nunc pro tunc judgment evidenced the terms of the plea agreement.[8] Thus, the district court properly dismissed Pierce's petition for federal habeas relief.

III

For the foregoing reasons, we AFFIRM the district court's denial of habeas relief.

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[8] Pierce further contends that the evidence of the contents of his plea agreement should have been further developed by the district court in an evidentiary hearing.

> The circumstances . . . under which federal evidentiary hearings must be held are nearly identical to the circumstances under which federal habeas courts do not defer to state court findings of fact, and, although the two issues are distinct, we have recognized that a federal court's determination that a § 2254(d) exception applies will entitle a petitioner to an evidentiary hearing. Conversely, a finding that one of the § 2254(d) exceptions does *not* apply should normally preclude the necessity for an evidentiary hearing . . . .

Black v. Collins, 962 F.2d 394 (5th Cir.) (citations omitted), *cert. denied*, 504 U.S. 992, 112 S. Ct. 2983, 119 L. Ed. 2d 601 (1992).