

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30084
Summary Calendar

GERALD C. NUCCIO,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary, et al.,

Respondents-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
(CA-93-3776-N-3)

(October 25, 1994)

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

Per curiam:¹

Gerald C. Nuccio (Nuccio), a Louisiana state prisoner, filed a *pro se* federal *habeas corpus* petition asserting that an unconstitutional prior conviction was used to adjudicate him an habitual offender. The district court determined that the *habeas* petition was successive, that Nuccio failed to establish cause

¹Local 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

justifying his successive petition, and that he had not demonstrated actual innocence. *Habeas* relief was denied and final judgment was entered accordingly. We affirm.

FACTS

Nuccio was convicted by a jury of armed robbery in 1981. He was adjudicated a habitual offender, based on his 1977 conviction for being an accessory after the fact to a burglary. Nuccio received a 50 year term of incarceration without benefit of probation, parole or suspension of sentence. His conviction and sentence were affirmed on direct appeal.² The respondents admit that state remedies have been exhausted.

Nuccio filed this *habeas* petition attacking his 1981 conviction, contending that his 1977 guilty plea to accessory after the fact was not knowing and voluntary because he was not informed of the elements of the charged offense, and that his guilty plea was unconstitutional because he was not provided with effective assistance of counsel.

The district court sent Nuccio a Rule 9 response form with an attachment indicating that the district court's records reflected that he had previously filed two federal *habeas* petitions, both of which challenged his 1981 state conviction for armed robbery. One petition was dismissed upon the merits and affirmed by this Court; the other was dismissed without prejudice on Nuccio's own motion. Because neither of the prior federal *habeas* petitions contained the grounds raised in the instant petition, Nuccio was warned that his

²*State v. Nuccio*, 454 So.2d 93, 96 (La. 1984).

present petition might be barred by Rule 9(b) for abuse of the writ. Nuccio responded, stating that he could not have raised his claim earlier because he "did not possess a legal or factual basis for the claim. It was not until he received the 1977 guilty plea transcript, after 1986, that a factual and legal basis for the present claim was established."

The respondents answered, *inter alia*, that Nuccio was in violation of Rule 9. The respondents also filed an opposition to Nuccio's *habeas* petition, asserting that Nuccio was aware of the factual basis underlying his current contentions as early as 1981 and that Nuccio had not demonstrated actual innocence.

The district court denied Nuccio's petition, and Nuccio appealed. The district court granted leave to appeal *in forma pauperis*, and a certificate of probable cause.

CAUSE AND PREJUDICE

Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Proceedings provides that "[a] second or successive petition may be dismissed if the judge finds" that "new and different grounds are alleged" and that "the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." The district court may not consider the merits of new claims which constitute an abuse of the writ unless the petitioner shows cause and prejudice for failing to raise those claims in a prior federal *habeas* petition, or shows that the failure to hear the claims will result

in a fundamental miscarriage of justice.³ Such a miscarriage occurs when a constitutional defect has probably caused the conviction of an innocent person.⁴ This cause-and-prejudice standard is the same as the standard applied in state procedural-default cases.⁵

A dismissal under Rule 9(b) will be reversed only for an abuse of discretion.⁶

Nuccio's claims present new issues not raised in his first two *habeas* petitions. However, Nuccio has not shown any cause for not raising them in his first federal *habeas* petition. "In order to demonstrate cause, the petitioner must show that the failure to raise the claim in his first petition was due to some objective external factor...."⁷ "Such factors include interference by government officials as well as the reasonable unavailability of the factual or legal basis for a claim."⁸ The "petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal

³*Sawyer v. Whitley*, ___U.S.___, 112 S.Ct. 2514, 2518-19, 120 L.Ed.2d 269 (1992).

⁴*Hudson v. Whitley*, 979 F.2d 1058, 1063 (5th Cir. 1992).

⁵*McCleskey v. Zant*, 499 U.S. 467, 494-96, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); *Woods v. Whitley*, 933 F.2d 321, 323 (5th Cir. 1991).

⁶*Hudson*, 979 F.2d at 1062.

⁷*Johnson v. Hargett*, 978 F.2d 855, 859 (5th Cir. 1992) (internal quotation and citation omitted), *cert. denied*, 113 S.Ct. 1652 (1993).

⁸*Saahir v. Collins*, 956 F.2d 115, 118 (5th Cir. 1992).

habeas petition."⁹

Nuccio's assertion that he did not have access to his 1977 guilty plea transcript is factually frivolous. During Nuccio's 1981 armed robbery trial, his lawyer challenged the 1977 guilty plea, which the state anticipated using for impeachment purposes, and filed the transcript into the record as Nuccio's exhibit. On January 28, 1982, Nuccio's attorney filed a Motion to Withdraw Guilty Plea, arguing that Nuccio's guilty plea was unconstitutional because it was not knowing and voluntary, and because Nuccio was innocent. The motion was denied by the state court. On February 19, 1982, Nuccio's attorney filed a Motion to Dismiss Multiple Offender Bill, again arguing that Nuccio's 1977 guilty plea was "not knowingly, freely and voluntarily entered." A copy of the guilty plea transcript was attached to the motion. The motion was denied.

In 1984, the Louisiana Supreme Court, when affirming Nuccio's armed-robbery conviction and sentence, included a copy of the 1977 transcript in the published opinion.¹⁰

Nuccio's first federal *habeas* petition was filed in 1986, and this Court affirmed its dismissal on October 12, 1988.¹¹ The record amply demonstrates that Nuccio's 1977 guilty plea transcript was available to him prior to the filing of his first *habeas* petition. Thus he has failed to show cause, as defined by *McCleskey*, for

⁹*Id.*

¹⁰*Nuccio*, 454 So.2d at 104.

¹¹*Nuccio v. Butler*, No. 88-3064 (5th Cir. Oct. 12, 1988).

failing to raise this issue in his first petition, because no external force or lack of available facts precluded him from asserting his claim in a prior federal *habeas* petition.

Likewise, Nuccio's assertion of actual innocence regarding his 1977 conviction is unavailing. To prevail in the context of a sentencing claim, Nuccio must "show that but for the constitutional error, he would not have been legally eligible for the sentence he received."¹²

Nuccio was sentenced as a habitual offender after being convicted of armed robbery. Notwithstanding the habitual offender law, under Louisiana law, armed robbery is punishable by imprisonment for not less than five years and for not more than 99 years, without benefit of probation, parole, or suspension of sentence.¹³ Thus, with or without the application of the habitual offender provision involving the complained of 1977 conviction, Nuccio was eligible for the sentence received. He is not entitled to relief on his claim of innocence.

CONCLUSION

The district court's denial of *habeas* relief is AFFIRMED.

¹²*Smith v. Collins*, 977 F.2d 951, 959 (5th Cir. 1992), cert. denied, 114 S.Ct. 97 (1993).

¹³See *State v. Sepcich*, 473 So.2d 380, 388 (La.App. 1985); LA. REV. STAT. ANN. § 14:64(B) (West 1976).