

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-50817  
Conference Calendar

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DONNIE ELBERT CAMPBELL,

Plaintiff-Appellant,

versus

WAYNE SCOTT, Director, Texas  
Dep't of Criminal Justice,  
Institutional Division, ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the Western District of Texas  
USDC No. W-94-CA-202  
- - - - -

June 30, 1995

Before JONES, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:\*

Donnie E. Campbell was convicted of aggravated assault with a deadly weapon and was sentenced to fifteen years imprisonment. His first federal petition for writ of habeas corpus was dismissed on the merits. Campbell filed a second federal petition which the district court dismissed as an abuse of the writ under Rule 9 of the Rules Governing § 2254 Cases.

This court reviews the district court's dismissal pursuant to Rule 9 for an abuse of discretion. McGary v. Scott, 27 F.3d

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

181, 183 (5th Cir. 1994). A claim raised in a subsequent federal habeas petition must be dismissed as successive or for an abuse of the writ unless the petitioner demonstrates "cause" for not raising the issue in the previous petition and "prejudice" if the court fails to consider the new point. Selvage v. Collins, 972 F.2d 101, 102 (5th Cir. 1992), cert. denied, 113 S. Ct. 2445 (1993).

To demonstrate cause Campbell must show that some external impediment prevented him from raising the issue in the first petition. Id. Campbell argues that he has demonstrated cause because he was proceeding pro se in the first petition and did not understand the legal significance of the underlying facts of his current claim. Proceeding pro se does not constitute an external factor that prevented Campbell from discovering the legal significance of his current claims. Saahir v. Collins, 956 F.2d 115, 118-19 (5th Cir. 1992). Campbell also contends that he did not deliberately withhold the issue in order to obtain a procedural advantage and, therefore, his failure to raise the issue in the prior petition should be excused. Abuse of the writ, however, is not confined to instances of deliberate abandonment. McGary, 27 F.3d at 185. Campbell has failed to demonstrate cause for failing to raise the issue in his prior petition.

Failure to raise the issue may still be excused, however, if Campbell can demonstrate a fundamental "miscarriage of justice." Smith v. Collins, 977 F.2d 951, 958 (5th Cir. 1992), cert. denied, 114 S. Ct. 97 (1993). This is a very narrow exception

that implies that the alleged constitutional violation probably has caused an innocent person to be convicted. McGary, 27 F.3d at 184. In the context of a noncapital sentencing issue, the petitioner must show that but for the constitutional error he would not have been legally eligible for the sentence received. Smith, 977 F.2d at 959.

Campbell was subject to a sentence of two to twenty years imprisonment, see Tex. Penal Code Ann. §§ 12.33(a), 12.42(a) (West 1994), 22.02 (West 1991), and he received a fifteen-year sentence. Campbell was legally eligible for the sentence and, therefore, cannot demonstrate a fundamental "miscarriage of justice." The district court did not abuse its discretion by dismissing his second petition for an abuse of the writ.

AFFIRMED.