

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-20266
USDC No. CA-H-94-1310

LEONARD R. CROOMS,

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

August 14, 1995

Before GARWOOD, BENAVIDES and PARKER, Circuit Judges.

BY THE COURT:

Leonard Ray Crooms requests a certificate of probable cause (CPC) to appeal the district court's dismissal of his fourth federal petition for habeas corpus as an abuse of the writ. A second or successive petition may be dismissed if the petitioner alleges new or different grounds and "the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Proceedings. We review the district court's decision to dismiss the petition pursuant to Rule 9(b)

for an abuse of discretion. Hudson v. Whitley, 979 F.2d 1058, 1062 (5th Cir. 1992).

The district court should have given Crooms notice that his petition was being considered for dismissal and that dismissal was automatic if he failed to show why he did not raise the new claims in his previous petitions. See United States v. Cullum, 47 F.3d 763, 764 (5th Cir. 1995)(§ 2255 case). Because it is not certain that Crooms would not be able to allege facts sufficient to prevent his claim from being dismissed under Rule 9(b), the court's error was not harmless. Id.

Crooms's request for CPC is GRANTED. Because no further briefing is necessary, the district court's judgment dismissing Crooms's petition is VACATED and the cause REMANDED for further proceedings. See Clark v. Williams, 693 F.2d 381, 381-82 (5th Cir. 1982). Crooms's motion to proceed in forma pauperis (IFP) is DENIED as unnecessary.