

**UNITED STATES COURT OF APPEALS
for the Fifth Circuit**

No. 93-8120
Summary Calendar
(SA-92-CA-573)

RAYMUNDO RODRIGUEZ MENDOZA,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director, TDC ET AL.,

Respondents-Appellees.

No. 93-8121
Summary Calendar
(SA-92-CA-574)

RAYMUNDO RODRIGUEZ MENDOZA,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director, TDC, ET AL.,

Respondents-Appellees.

No. 93-8122
Summary Calendar
(SA-92-CA-575)

RAYMUNDO RODRIGUEZ MENDOZA,

Petitioner-Appellant,

VERSUS

JAMES A. COLLINS, Director, TDC, ET AL.,

Respondents-Appellees.

Appeals from the United States District Court
for the Western District of Texas
(SA-92-CA-573, SA-92-CA-574 & SA-92-CA-575)

(May 4, 1994)

Before DAVIS, JONES, and DUHÉ, Circuit Judges.

PER CURIAM:¹

Appellant Raymundo Rodriguez Mendoza was convicted in state court of delivery of heroin in March 1976. He had been convicted of murder with malice in 1966 and had received a five-year sentence. He also had been convicted of burglary in 1970 and had received another five-year sentence. Based upon these two prior felony convictions, Mendoza's sentence was enhanced and he was sentenced to life for the 1976 conviction. Mendoza filed three separate federal habeas petitions in the district court attacking his 1976 conviction and the 1966 and 1970 convictions that resulted in his receiving an enhanced sentence. The district court dismissed all three petitions. The cases have been consolidated for appeal. We affirm the district court's dismissals of the petitions and deny Mendoza's motions to appoint counsel on appeal.

PROCEDURAL BACKGROUND

Mendoza's heroin conviction and sentence were affirmed on direct appeal in April 1977. Mendoza filed three applications for state habeas relief, which were denied without written opinions.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Mendoza then initially sought federal habeas relief in 1984, but his petition was dismissed without prejudice for failure to exhaust state remedies. Mendoza's fourth application for state habeas relief was denied in October 1989, and Mendoza filed another federal habeas petition on October 31, 1989.

In his 1989 federal habeas, Mendoza alleged that 1) trial counsel was ineffective; 2) a notice of appeal was not filed within ten days and he was denied the state statutory period of ten days to file a motion for a new trial or in arrest of judgment; and 3) his indictment was defective because it did not state that heroin is a controlled substance. The state moved to dismiss under Rule 9(a) of the Rules Governing Habeas Corpus Cases,² arguing that its ability to respond had been prejudiced by the delay of thirteen years from conviction to Mendoza's filing of the federal habeas petition. After an evidentiary hearing, the magistrate judge determined that the state had been prejudiced by Mendoza's delay. The magistrate judge recommended dismissal of the remaining claims on the merits.

In addition to his challenge to his 1976 heroin conviction, Mendoza also challenged his 1970 and 1966 convictions. He argued that his 1970 conviction was invalid because it was based on

² Rule 9(a) provides:

Delayed petitions. A petition may be dismissed if it appears that the state of which the respondent is an officer has been prejudiced in its ability to respond to the petition by delay in its filing unless the petitioner shows that it is based on grounds of which he could not have had knowledge by the exercise of reasonable diligence before the circumstances prejudicial to the state occurred.

illegally obtained evidence and because he was not advised of his right to appeal. The magistrate judge determined that Mendoza's claim regarding the illegally seized evidence was barred by Stone v. Powell, 428 U.S. 465 (1976), because Mendoza did not allege that he was denied a full and fair hearing on the issue in state court, and the state record reflected that a hearing was held on his motion to suppress. With respect to Mendoza's loss of his right to appeal, the magistrate judge noted that during the federal evidentiary hearing Mendoza admitted that the court advised him of his right to appeal and instructed counsel to file an appeal. The magistrate judge concluded that Mendoza could not argue that counsel abandoned the appeal because the state had been prejudiced by Mendoza's delay in bringing the claim. The magistrate judge recommended dismissal under Rule 9(a).

Mendoza alleged that the 1966 conviction could not be used to enhance his sentence because the enhancement paragraph of the heroin indictment cited an incorrect cause number. He also alleged that he was denied counsel, that he was not read his Miranda rights, and that physical force was used to obtain his statement. Mendoza further alleged that his counsel was ineffective because counsel did not object to the admission of the coerced statement and advised Mendoza not to appeal. Finally, Mendoza challenged the sufficiency of the evidence. The magistrate judge recommended dismissal on the merits of Mendoza's claims that his confession was coerced and that counsel was ineffective because he did not object to the confession. The magistrate judge further determined that

the heroin indictment with the clerical error in the enhancement paragraph was not invalid because the offense conduct and its date were properly described in the indictment, and the correct cause number was presented at trial. The magistrate judge also concluded that Mendoza's twenty-two year delay in presenting the remainder of his ineffective-assistance claims and his claim of insufficiency of the evidence prejudiced the state. The magistrate judge recommended dismissal under Rule 9(a).

The district court adopted the magistrate judge's recommendations on all claims and dismissed the petition in June 1990. Mendoza sought permission to file a late appeal in January 1991. The district court granted the motion for leave to file a late appeal, but we determined that the district court had no authority to do so and dismissed the appeal. Mendoza then filed a Rule 60(b) motion in the district court, which was denied. Mendoza filed an appeal, and we dismissed the appeal as frivolous, rejecting Mendoza's argument that ineffective assistance of counsel caused him to lose his right to appeal.

In 1992, Mendoza filed the present three federal habeas petitions challenging his 1976, 1970, and 1966 convictions.³ Mendoza challenged his 1976 and 1970 convictions on the same grounds as alleged in his 1989 petition. He challenged his 1966 murder conviction on four of the same grounds he had asserted in the 1989 petition and raised two new claims. 1) that he was denied

³ The magistrate judge and the district judge who reviewed the 1989 petition were assigned to review the new habeas petitions.

the effective assistance of counsel because counsel failed to locate and subpoena two witnesses and 2) that Mendoza was convicted on the basis of illegally seized evidence resulting from an illegal arrest and search.

The state answered and moved to dismiss all three petitions for abuse of the writ under Rule 9(b) of the Rules Governing Habeas Corpus Cases.⁴ Mendoza responded that he was filing the new petitions because habeas counsel failed to file an appeal of the dismissal of the prior petition and because Mendoza did not receive a full and fair hearing of his claims in state court. After reviewing Mendoza's Rule 9 questionnaires and the findings made in the previous habeas petition, the magistrate judge recommended that the petitions be dismissed for abuse of the writ because Mendoza was asserting the same claims made in his previous federal habeas petition and he did not assert any new grounds justifying a reconsideration of the earlier determinations. The magistrate judge noted that Mendoza had raised a new ineffective-assistance claim that should also be barred under Rule 9(a) and new Fourth Amendment claims subject to preclusion under Stone. Finally, the magistrate judge determined that Mendoza's claims of ineffective assistance of habeas counsel were without merit. The district

⁴ Rule 9(b) states:

Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

court agreed and dismissed the petition. It issued a certificate of probable cause. Mendoza appeals.

DISCUSSION

I. Common Claims

A. Appellate Jurisdiction

The district court entered judgments dismissing each of Mendoza's petitions on January 13. Thus, Mendoza's notices of appeal were due to be filed on Friday, February 12. Because February 15 was Presidents' Day, a federal holiday, Mendoza's filing on February 16 was one day late. See Fed. R. Civ. P. 6(a).

As a pro se prisoner, Mendoza's notices of appeal are deemed filed when delivered to prison authorities for forwarding to the court clerk. See Houston v. Lack, 487 U.S. 266, 276 (1988). A notice of appeal filed one day late is presumed to have been timely delivered to the prison authorities. See United States v. Young, 966 F.2d 164, 165 (5th Cir. 1992) (holding that pro se prisoner's notice of appeal is presumed to have been timely delivered to the prison authorities when filed with the court two days late). Thus, Mendoza's notices of appeal were timely.

B. Habeas Jurisdiction

The magistrate judge questioned whether Mendoza was "in custody" with respect to his 1966 murder conviction and 1970 burglary conviction. Mendoza is presently in custody pursuant to his 1976 conviction for delivery of heroin. He has served his sentence for the 1966 and 1970 convictions.

A petitioner is entitled to habeas relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. 2254(a). Mendoza alleges that an enhanced sentence was invalidly imposed for his 1976 conviction because his two prior convictions resulting in the enhancement were obtained in violation of his constitutional rights. We have "recognized a habeas petitioner's right to challenge a prior conviction for which sentence had been completed when that conviction is used to enhance a subsequent sentence." Allen v. Collins, 924 F.2d 88, 89 (5th Cir. 1991). Therefore, Mendoza's present custody status is sufficient to meet the jurisdictional requisites of § 2254(a).

C. Ineffective Assistance of Trial Counsel

Mendoza reasserts his ineffective-assistance claims. With regard to his 1976 conviction, Mendoza argues that the state cannot assert prejudice from delay as a defense because the state failed to respond to the claims made in his 1984 state habeas petition. In his challenge to his 1970 and 1966 convictions, Mendoza argues that the state did not carry its burden of proving prejudice.

The district court found that the present petition presented the same claims that the court had previously addressed and dismissed Mendoza's claims under Rule 9(b). However, in 1989 the district court had dismissed Mendoza's claims pursuant to Rule 9(a). Because the 1989 claims were not dismissed on the merits, Rule 9(b) does not apply.

Nonetheless, Mendoza is barred from raising these claims under

the doctrine of issue preclusion. Under this doctrine, a party is prevented from relitigating issues if 1) the issue is identical to the one involved in the prior litigation; 2) the issue has been actually litigated in the prior proceeding; and 3) the determination of the issue in the prior litigation was a critical and necessary part of the judgment in the earlier proceeding. Terrell v. DeConna, 877 F.2d 1267, 1270 (5th Cir. 1989).

Although the district court may have erred in dismissing the ineffective-assistance claims for abuse of the writ under Rule 9(b), we may affirm a ruling on any proper ground, regardless whether the district court relied on that ground. See Bickford v. International Speedway Corp., 654 F.2d 1028, 1031 (5th Cir. 1981). The district court's prior determination that the state had been prejudiced by Mendoza's delay in bringing his claims is binding on Mendoza in the present petitions and precludes the court from reviewing the claims on the merits.

D. Speedy Trial

Mendoza argues for the first time on appeal that his federal habeas counsel was ineffective because he failed to argue that Mendoza was denied a speedy trial for his 1976, 1970, and 1966 convictions. Issues not raised in the district court may not be raised for the first time on appeal. Self v. Blackburn, 751 F.2d 789, 793 (5th Cir. 1985).

II. 1976 Heroin Delivery Conviction

A. Defective Indictment

Mendoza argues that the district court abused its discretion

by dismissing under Rule 9(b) his claim of a defective indictment. Although Mendoza admits that in his previous habeas petition he alleged that the indictment charging him was defective, he argues that he raises for the first time the contention that his indictment did not put him on notice as to the "type of delivery" the State must prove.⁵

A federal court may not reach the merits of a successive federal habeas petition unless the petitioner shows cause and prejudice as to why he did not raise the new grounds in the previous petitions. Duff-Smith v. Collins, 995 F.2d 545, 546 (5th Cir.), cert. denied, 113 S. Ct. 3069 (1993). To establish cause, the petitioner must show that the failure to raise the claim in his first petition was due to some objective external factor. Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992).

Mendoza cannot demonstrate cause for his failure to present this claim in an earlier petition. He had knowledge of the contents of the indictment at the time that he filed his previous federal petition because he argued that it failed to allege an essential element of the offense. Further, Mendoza cannot rely on his trial counsel's failure to object to the sufficiency of the indictment because counsel's alleged omission did not preclude Mendoza from raising the issue in his previous petition. Nor can Mendoza argue that his lack of knowledge of the legal basis for challenging the indictment is sufficient to constitute cause. See

⁵ His previous petition alleged that the indictment charging him was defective because it did not "explain why heroin is a controlled substance."

United States v. Flores, 981 F.2d 231, 236 (5th Cir. 1993) (ignorance of the legal significance of the facts supporting a claim does not constitute "cause" because it is not an objective factor external to the defense). Mendoza's final argument that his habeas counsel's failure to raise the claim in a previous petition establishes cause must also fail. An error by habeas counsel cannot constitute cause.⁶ Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S. Ct. 1652 (1993).

Absent demonstrated cause and prejudice, the failure to raise a claim in a prior habeas petition may be overlooked to prevent a "fundamental miscarriage of justice." McCleskey v. Zant, 111 S. Ct. 1454, 1471 (1991). A "fundamental miscarriage of justice" implies that a constitutional violation probably has resulted in the conviction of an innocent person. Id.; Williams v. Whitley, 994 F.2d 226, 233 (5th Cir.), cert. denied, 114 S. Ct. 608 (1993). Mendoza's challenge to the sufficiency of the indictment does not advance a colorable showing of innocence because he does not argue that he did not deliver the heroin. The district court did not abuse its discretion in dismissing Mendoza's defective indictment

⁶ Mendoza argues throughout his appeals that he has established cause and prejudice sufficient to overcome the state's claim of abuse of the writ because his habeas counsel failed to file a response to the state's motion, failed to object to the magistrate judge's recommendations, and failed to file an appeal or advise Mendoza to do so. As stated above, Mendoza cannot rely on these alleged errors by habeas counsel to establish cause. Further, a successive or barred petition cannot be used "solely for the purpose of resurrecting the right to appeal" as a result of the petitioner's failure to file an appeal following the dismissal of the initial petition. Schouest v. Whitley, 927 F.2d 205, 207 (5th Cir. 1991).

claim.

B. Right to File Notice of Appeal and Motion for New Trial

Mendoza alleged that a notice of appeal was not filed within ten days and that he was denied his state statutory period of ten days to file a motion for a new trial or in arrest of judgment. Mendoza raised the same claim in 1989 and the district court dismissed it on the merits. Thus, the district court in this case properly dismissed the claim under Rule 9(b) for abuse of the writ.

C. Brady Violation

Mendoza argued for the first time in his response to the state's motion to dismiss that he was denied his rights under Brady v. Maryland, 373 U.S. 83, 86 (1963), because the prosecutor deliberately failed to produce an informant at trial who Mendoza argues would have confirmed that he was entrapped by the government. The district court did not address the Brady claim. Mendoza's response to the state's motion should have been construed as a motion to amend his petition. See Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972) (memorandum in opposition to motion for summary judgment raising new allegation should have been construed as an amendment to the complaint).

Even if the district court erred in not construing Mendoza's response as a motion to amend the complaint, such an error was harmless. A district court may deny leave to amend if the amendment is futile. Jamieson v. Shaw, 772 F.2d 1205, 1208 (5th Cir. 1985)

Mendoza's allegations did not establish a Brady violation. To

establish a Brady violation, a petitioner must show that 1) the prosecution suppressed or withheld evidence, 2) the evidence was favorable, and 3) the evidence was material to the defense. United States v. Stephens, 964 F.2d 424, 435 (5th Cir. 1992). Mendoza admits that he was aware of the informant's name prior to trial and that his counsel attempted to locate the informant. Further, Mendoza has not demonstrated that the informant would have provided evidence favorable to the defense. The informant testimony would not have established an entrapment defense because Mendoza admitted in his pleadings that he had drug connections and that he contacted an individual who possessed heroin for distribution. Mendoza also acknowledged his participation in the delivery. See Skero v. State, 866 S.W.2d 336, 339 (Tex. Ct. App. 1993) (under Texas law, the defense of entrapment is available if the criminal design originated in the mind of government officials or their agents, and they induced a defendant to commit a crime that he would not otherwise commit).

III. 1970 Burglary Conviction

Mendoza raises the same Fourth Amendment claims as in his 1989 petition. In 1989 the district court dismissed these claims under Stone v. Powell, and it dismissed the present petition raising the Fourth Amendment claims as successive under Rule 9(b).

The district court erred in dismissing Mendoza's claims as successive under Rule 9(b) because it had not previously decided the Fourth Amendment claims on the merits. Nonetheless, Mendoza's claims are precluded because he is attempting to relitigate the

Stone issue previously decided by the district court. See Terrell, 877 F.2d at 1270. We may affirm the district court's ruling on any proper ground. See Bickford, 654 F.2d at 1031.

IV. 1966 Murder with Malice Conviction

A. Sufficiency of the Evidence

Mendoza argues that the evidence was insufficient to establish his guilt beyond a reasonable doubt because the state did not prove his specific intent to kill the victim. Mendoza raised this claim in the previous federal petition, and the district court dismissed it under Rule 9(a). Mendoza is precluded from challenging the district court's findings under Rule 9(a) in the present petition. See Terrell, 877 F.2d at 1270.

B. Prosecutorial Misconduct

Mendoza argues that the prosecutor's remarks concerning extraneous offenses were prejudicial and contributed to the jury's determination of guilt. In his petition, Mendoza referred to the prosecutor's remark in the context of his ineffective-assistance claims and in his argument concerning his alleged coerced confession. Mendoza did not raise the claim as a separate issue in the district court and, therefore, it is not subject to review. See Self, 751 F.2d at 793.

C. Coerced Confession

Mendoza contends that the district court's dismissal under Rule 9(b) of his claim of a coerced confession will result in a miscarriage of justice. Mendoza has failed to show the colorable claim of actual innocence necessary to establish a "fundamental

miscarriage of justice". To establish "actual innocence," a petitioner is required to show that "there is a fair probability that, in light of all of the evidence, a reasonable trier could not find all the elements necessary to convict the defendant of that particular crime." Johnson, 978 F.2d at 860. Mendoza did not specify the contents of his statement in his petition or other pleadings. Mendoza also makes the contradictory arguments that his statements resulted in his conviction while arguing that the same statements did not establish his guilt. Mendoza offers no other evidence of his innocence.

D. Ineffective Assistance of Counsel

Mendoza argues that his trial counsel was ineffective for failing to call two material witnesses at trial. The district court dismissed this claim under Rule 9(a) based on its finding in the previous habeas proceeding. This particular ineffective-assistance claim, however, was not raised in the previous proceedings. Nonetheless, "'[a] claim of ineffective assistance of counsel, once raised, litigated and rejected at an earlier habeas proceeding cannot be raised in a later proceeding merely by varying the factors allegedly demonstrating incompetency.'" Johnson v. McCotter, 803 F.2d 830, 833 (5th Cir. 1986) (quoting McDonald v. Estelle, 590 F.2d 153, 155 (5th Cir. 1979)).

Nor has Mendoza demonstrated cause and prejudice for failure to raise the claim earlier. Because Mendoza knew that his counsel had failed to call these witnesses at the conclusion of his trial in 1966, he had knowledge of the factual basis for his claim at the

time that he filed his habeas petition in 1989. See Saahir, 956 F.2d at 118. Mendoza's ignorance of the legal theory supporting his claim at that time does not establish cause. See Flores, 981 F.2d at 236.

E. Fourth Amendment Violations

Mendoza raises Fourth Amendment violations in the context of his 1966 conviction for the first time in his present petition. Mendoza argues that his trial counsel's failure to provide effective assistance at trial and failure to appeal establishes the cause and prejudice necessary to overcome Rule 9(b).

The record indicates that Mendoza was aware of the factual basis for these claims at the conclusion of his trial. Counsel's failure to file an appeal did not preclude Mendoza from raising the claims in his earlier habeas petition. Mendoza has not shown cause for his failure to raise these claims in his first habeas petition. Nor has Mendoza shown that the court's failure to review these claims will result in a miscarriage of justice.

V. Motion for Appointment of Counsel

Mendoza filed motions for appointment of counsel on appeal. Counsel should be appointed for habeas appeals if the interests of justice require it. See Schwander v. Blackburn, 750 F.2d 494, 502 (5th Cir. 1985). Because we find that the cases do not present complex issues and that Mendoza has adequately presented his claims, the appointment of counsel is unnecessary.

CONCLUSION

For the foregoing reasons, the district court's dismissals of

Mendoza's habeas petitions are AFFIRMED. Motions to appoint counsel on appeal are DENIED.