

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1840
Conference Calendar

ROBBY LYNN VAUGHN,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal
Justice, Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Northern District of Texas
USDC No. 5:92-CV-100-W
- - - - -
(October 28, 1993)

Before POLITZ, Chief Judge, and SMITH and WIENER, Circuit Judges.

BY THE COURT:

Robby Lynn Vaughn seeks a certificate of probable cause and leave to proceed on appeal in forma pauperis. Vaughn contends that the district court erred in dismissing his habeas corpus petition "for a highly technical procedural default." He argues that the magistrate judge acknowledged that he had carefully pleaded his case in state court and that, "given the opportunity, there was no reason he could not have done the same in his federal petition."

We agree that the district court erred in concluding that Vaughn's pleadings were conclusional. Vaughn's assertion that counsel had failed to investigate and to call witnesses was

sufficient to state a Sixth Amendment violation. Moreover, even upon the magistrate judge's determination that the pleadings were conclusional, the admonition that Vaughn had failed to amend his pleadings was unreasonable. It was not clear from the magistrate judge's order that Vaughn was expected to file amended pleadings. Moreover, Vaughn made every effort to clarify his complaint. In Vaughn's response demonstrating exhaustion, he stated with particularity that counsel had failed to consult with him before the trial, had not visited the scene of the offense where counsel could have determined that the allegations against him were an impossibility, and had no knowledge of two eye witnesses because counsel failed to investigate and interview witnesses. The district court should have liberally construed Vaughn's "response," filed after responsive pleading by the respondent, as a request to amend, Fed. R. Civ. P. 15, and granted it. See Cooper v. Sheriff, Lubbock County, Tex., 929 F.2d 1078, 1081-82 (5th Cir. 1991); see Haines v. Kerner, 404 U.S. 519, 520-21, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972).

Accordingly, we GRANT a certificate of probable cause and leave to proceed in forma pauperis, VACATE the judgment of the district court, and REMAND for further proceedings. See Clark v. Williams, 693 F.2d 381, 381-82 (5th Cir. 1982).