UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2071
Summary Calendar

ANTONIO GARCIA HERNANDEZ,

Petitioner-Appellant,

versus

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

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Texas
(CA-H-90-3971)

(March 29, 1993)

Before POLITZ, Chief Judge, DAVIS and JONES, Circuit Judges.

PER CURIAM:*

Antonio Garcia Hernandez appeals the dismissal of his second federal habeas petition. We affirm in part and vacate and remand in part.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Background

Hernandez is a Texas state prisoner serving 45 years for aggravated robbery. His conviction was affirmed on direct appeal. He has filed two state habeas proceedings which were denied without opinion. In his first federal habeas petition, which is not part of our record, Hernandez allegedly raised a claim of ineffective assistance of counsel based on counsel's failure to object to the state's for-cause challenge of a prospective juror. In this second federal habeas petition Hernandez advances claims of: (1) insufficient evidence; (2) ineffective assistance of counsel for, *inter alia*, failure to investigate; and (3) improper comment by the prosecutor about defendant's failure to testify. These claims were raised in the state habeas proceedings.

The state moved to dismiss the instant petition, contending that the insufficiency claim was an abuse of the writ and the ineffective assistance claim was successive. The state cites and relies on Rule 9(b) of the Rules Governing Section 2254 Cases. In addition, the state contends that the claim of improper prosecutorial comment was without merit. Hernandez responded to the motion. Without giving Hernandez notice that his claims might be dismissed pursuant to Rule 9(b), the district court granted the state's motion, dismissed the insufficiency and ineffective assistance claims under Rule 9(b), and rejected the remaining claim on the merits. Hernandez timely appealed.

Analysis

The Rule 9(b) Dismissals

Before the court may dismiss a habeas petition under Rule 9(b) the "petitioner must be given specific notice that the court is considering dismissal and given at least 10 days in which to explain the failure to raise the new grounds in a prior petition."[1] The notice should apprise the petitioner that (1) dismissal is being considered, (2) the petition will be dismissed automatically if he fails to respond, and (3) his response should present facts, not opinions or conclusions.[2]

We have strictly construed the notice requirement; while the state's motion to dismiss may put the petitioner on notice that it considers his petition an abuse of the writ, such does not satisfy the specific requirements of **Urdy**.[3] Harmless error analysis may apply, however, when the petitioner's response to a motion to dismiss presented facts the formal notice would have generated.[4] Hernandez' response to the motion presents primarily opinions and conclusions. His explanation does not provide a sufficient basis

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[1] **Urdy v. McCotter**, 773 F.2d 652, 656 (5th Cir. 1985).

[2] **Johnson v. McCotter**, 803 F.2d 830 (5th Cir. 1986). These procedural requirements were not overruled by **McClesky v. Zant**, 113 L.Ed.2d 517 (1991). **United States v. Gonzales**, No. 92-7308 (January 6, 1993).

[3] **Johnson**.

[4] **Brown v. Butler**, 815 F.2d 1054 (5th Cir. 1987); **Johnson**.

for application of the harmless error analysis.

Further, **McClesky v. Zant**[5] was decided while the motion to dismiss Hernandez' petition was pending. After **McClesky**, a petitioner faced with a possible Rule 9(b) dismissal must demonstrate cause for failing to raise the claims in the earlier petition and prejudice therefrom.[6] Both Hernandez' response (submitted prior to **McClesky**) and the district court's opinion (issued after **McClesky**) are predicated on pre-**McClesky** law. We vacate and remand the claims dismissed under Rule 9(b) to permit the district court an opportunity to comply with the **Urdy** notice requirement and, in turn, give Hernandez an opportunity to present facts demonstrating that his claims should not be dismissed in light of the teachings of **McClesky**.

The Improper Prosecutorial Comment Claim

We affirm the district court's dismissal of Hernandez' claim alleging improper comment by the prosecutor on his failure to testify at trial. Hernandez complains that the prosecutor improperly commented on his opting not to testify as follows:

> . . . And you have heard testimony that that gun was a firearm. There is no great contradiction from any of the evidence that you heard.

"A prosecutor's argument will be deemed a reference to defendant's failure to testify if (1) such comment is the prosecutor's manifest

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[5] 113 L.Ed.2d 517 (April 16, 1991).

[6] **Id.** **McClesky** does not distinguish between *pro se* petitioners and those represented by counsel. **Saahir v. Collins**, 956 F.2d 115 (5th Cir. 1992).

intent or (2) if it is of such a character 'that a jury would naturally and necessarily' interpret the comment as such."[7] When some other explanation for the comment is plausible, there is no such manifest intent.[8] The prosecutor is permitted to comment on the failure of the defense, as opposed to failure of the defendant to testify, to counter or explain the evidence presented.[9] A statement that the government's case has not been refuted is well within the range of closing argument permitted by the fifth amendment.[10] We agree with the district court that the prosecutor's statement challenged herein cannot reasonably be construed as a comment on Hernandez' failure to testify. The dismissal of that claim on the merits was proper and is affirmed.

For the foregoing reasons, we AFFIRM IN PART and VACATE AND REMAND IN PART for further proceedings consistent herewith.

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[7] **United States v. Soudan**, 812 F.2d 920, 930 (5th Cir. 1986), cert. denied, 481 U.S. 1052 (1987).

[8] **Rivera v. Collins**, 934 F.2d 658 (5th Cir. 1991).

[9] **Montoya v. Collins**, 955 F.2d 279 (5th Cir.), cert. denied, 113 S.Ct. 820 (1992); **Soudan**.

[10] **United States v. Valdez**, 861 F.2d 427 (5th Cir. 1988), cert. denied, 489 U.S. 1083 (1989).