UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2226
Summary Calendar

EUGENE ALAN STEPHENS,

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-89-3018)

June 2, 1993

( )

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

POLITZ, Chief Judge:*

Convicted of aggravated robbery in Texas state court, Eugene Alan Stephens unsuccessfully sought state habeas relief for ineffective assistance of counsel. The instant petition for

---

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

federal habeas relief was denied based on the findings made in the state habeas proceedings. For the reasons assigned we vacate and remand for an evidentiary hearing.

Background

Following his state court conviction Stephens filed a state habeas petition contending that his trial counsel was constitutionally ineffective for failure to investigate his alibi defense, even declining to interview alibi witnesses. A new attorney was appointed to represent Stephens just before the habeas case was called for trial. Habeas counsel's request for a continuance in order that he might confer with his client and arrange for witnesses was summarily denied. The habeas hearing proceeded and the state court made findings of fact which were accepted by the Texas Court of Criminal Appeals in its denial of the writ application.

Stephens invoked 28 U.S.C. § 2254 and seeks federal habeas relief for ineffective assistance of counsel in his state trial. The federal court *a` quo* granted the state's motion to dismiss, relying on the factual findings made by the state habeas court. Stephens timely appeals, contending that the state court findings were not entitled to the statutory presumption of correctness[1] because he had not been afforded a full and fair hearing by the state habeas court.

Analysis

[1] 28 U.S.C. § 2254(d).

The government asserts that Stephens' challenge to the state court hearing is raised for the first time on appeal and we therefore should not consider it. We generally do not review issues which are raised for the first time on appeal. We may consider an issue, however, which "involves only a question of law that can be determined on the face of the record,"[2] if "injustice might otherwise result"[3] from our failure to consider it.

Under 28 U.S.C. § 2254(d), the factual determinations of a state habeas court which has conducted a hearinag on an issue "shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear" that one or more of seven exceptions exists, including

> that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding.[4]

The presumption of correctness may attach to findings which are made only on the basis of competing affidavits.[5] Rather than adhering to a hard and fast rule, we opt to inquire "in each case

---

[2] **Long v. McCotter**, 792 F.2d 1338 (5th Cir. 1986).

[3] **Singleton v. Wulff**, 428 U.S. 106, 121 (1976).

[4] 28 U.S.C. § 2254(d)(2), (6).

[5] **Lincecum v. Collins**, 958 F.2d 1271 (5th Cir.), cert. denied, 113 S.Ct. 417 (1992); **May v. Collins**, 955 F.2d 299 (5th Cir.), cert. denied, 112 S.Ct. 1295 (1992); **Buxton v. Lynaugh**, 879 F.2d 140 (5th Cir. 1989), cert. denied, 497 U.S. 1032 (1990).

whether [the hearing conducted] is appropriate to the resolution of the factual disputes underlying the petitioner's claim."[6]

For example, in **May** we concluded that findings based on a "paper hearing" were entitled to the presumption of correctness because the state judge reviewing the affidavits had presided over the trial, witnessed the demeanor of the affiants, and "formed a view as to their veracity."[7] Similarly in **Buxton**, we approved such a hearing when the habeas judge was also the trial judge, thus able to evaluate competing versions of the actual events at trial, essential to assessing the credibility of the affiants.[8] Recently, in **Jernigan v. Collins**,[9] we found that a state habeas hearing was full and fair because the petitioner "was a party to the proceeding, and he was represented by counsel. Furthermore, the court afforded him every opportunity to be heard."

Stephens' appointed counsel was given no time to prepare for the hearing or to contact witnesses.[10] He was not afforded a fair

---

[6] **May**, 955 F.2d at 312 (considering whether affidavits alone are sufficient on claim of prosecutorial misconduct).

[7] **Id.** at 314. The affidavits were from trial witnesses who purported to recant their trial testimony.

[8] In **Buxton**, the state court had to make a credibility determination between affidavits submitted by defendant's two trial counsel, both of whom had appeared before the state judge during the proceedings.

[9] 980 F.2d 292, 297 (5th Cir. 1992).

[10] Under Texas law, petitioner and his counsel should have been given at least three days advance notice of the hearing on the

opportunity to counter the live testimony of Stephens' trial counsel and the affidavit of an investigator.[11] Although the state judge who conducted the evidentiary hearing and reviewed the affidavits also presided at the criminal trial, the potential alibi witnesses never appeared before that judge. Stephens' opportunity to be heard was severely circumscribed;[12] he was not given a fair chance to develop and present the material facts underlying his ineffective assistance claim. He did not receive a full, fair, and adequate hearing. He is entitled to no less. We, perforce, must VACATE and REMAND for an evidentiary hearing on Stephens' ineffective assistance claim.[13]

---

habeas petition. Tex. Code Crim. P. art. 11.07(4). Violation of the state procedural rule, in and of itself, does not warrant federal habeas relief. In this case, however, the failure to provide adequate notice severely handicapped counsel's ability to perform the duties for which he had been appointed.

[11] In **Meeks v. Cabana**, 845 F.2d 1319 (5th Cir. 1988), we found the hearing to be full, fair, and adequate when it was limited to a narrow question and the most important witnesses appeared before the state judge. In this case, however, only the government's most important witness appeared before the judge; Stephens was deprived of an opportunity to present his most important witnesses.

[12] A federal evidentiary hearing may be required if the habeas petitioner did not receive a full and fair hearing in state court and "the failure to obtain such a hearing did not result from the petitioner's inexcusable neglect." **Young v. Herring**, 938 F.2d 543, 560 (5th Cir. 1991).

[13] Stephens also filed a motion for production of the state court records. These are included in the record on appeal; that motion is therefore denied as moot.