IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-5275
Conference Calendar

WILLIAM BYRON HOLLIS, JR.,

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 Eastern District of Texas
USDC No. 9:92cv114

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June 24, 1993

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

PER CURIAM:*

William Byron Hollis, Jr., petitioner, was convicted by a jury for committing murder. Hollis has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court claiming that the state trial court erred by not instructing the jury with respect to "acting under the immediate influence of sudden passion." Hollis had filed an earlier federal habeas petition related to the same conviction. See

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Hollis v. Collins, No. 90-4742 (5th Cir. April 19, 1991) (unpublished). The district court dismissed the petition as an abuse of the writ.

Rule 9(b) of the Rules Governing § 2254 cases provides that "[a] second or successive petition may be dismissed . . . if new and different grounds are alleged, [and] . . . the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ." The district court may not consider the merits of the new claims unless the petitioner shows cause and prejudice for failing to raise those claims in the prior petition or shows that the failure to hear the claims will result in a miscarriage of justice. Sawyer v. Whitley, ___ U.S. ___, 112 S.Ct. 2514, 2518-19, 120 L.Ed.2d 269 (1992). This cause-and-prejudice standard is the same as the standard applied in state procedural default cases. McCleskey v. Zant, ___ U.S. ___, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991); Woods v. Whitley, 933 F.2d 321, 323 (5th Cir. 1991).

On appeal, Hollis has presented no justification for failing to raise the sudden passion jury instruction issue in his prior federal habeas petition. Hollis admits that he knew of the alleged error in the jury instructions when he presented his state habeas petition. See Hollis v. State, 673 S.W.2d 597, 599-600 (Tex. Ct. App. 1983). Absent a showing of cause, the Court need not examine the issue of prejudice. McCleskey, 111 S.Ct. at 1474.

The only way remaining for Hollis to have his claim entertained is if he can show that the failure to hear the claim

would result in a fundamental miscarriage of justice. See McCleskey, 111 S.Ct. at 1474. This is a very narrow exception. Id.; Woods, 933 F.2d at 323. In Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992), the Court said that "`fundamental miscarriage' implies that a constitutional violation probably caused the conviction of an innocent person." Hollis does not argue actual innocence. See Montoya v. Collins, 988 F.2d 11, 12-13 (5th Cir.), cert. denied, 113 S.Ct. 1630 (1993). Therefore, he cannot take advantage of this exception to the cause-and-prejudice rule.

AFFIRMED.