

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 93-4095  
Conference Calendar

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GREGORY GENE MALLORY,

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. 3:92cv33

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(December 14, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

BY THE COURT:

Gregory Gene Mallory's notice of appeal is construed as a request for a certificate of probable cause (CPC). Fed. R. App. P. 22(b). This Court issues a CPC when the petitioner makes a substantial showing of the denial of a federal right. Barefoot v. Estelle, 463 U.S. 880, 893, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983).

Mallory argues that he received ineffective assistance of counsel. Mallory raised this claim in his response to the State's answer, but the claim was not addressed by the district court.

Mallory's response, which raised a new claim, should have been construed as a motion to amend his pleadings. See Sherman v. Hallbauer, 455 F.2d 1236, 1242 (5th Cir. 1972) (memorandum in opposition to motion for summary judgment raised new allegation and should have been construed as an amendment to complaint). Fed. R. Civ. P. 15(a) provides that, after responsive pleadings have been filed, leave to amend a party's pleadings, "shall be freely given when justice so requires." A district court's decision to grant or deny leave to amend is reviewed under the abuse-of-discretion standard. Davis v. United States, 961 F.2d 53, 57 (5th Cir. 1991). A court's "discretion is not broad enough to permit denial" if it "lacks a substantial reason to deny leave." Jamieson v. Shaw, 772 F.2d 1205, 1208 (5th Cir. 1985) (internal quotations and citations omitted). A pro se petitioner should be permitted to amend his petition when it is clear that there is a ground for relief. Gallegos v. La. Code of Criminal Procedure Art. 658, 858 F.2d 1091, 1092 (5th Cir. 1988).

Mallory alleged that his counsel was ineffective because he refused to pursue evidence that exculpated Mallory from the offenses and because counsel insisted that Mallory plead guilty although Mallory expressed a desire to go to trial.

Mallory also alleged that his counsel was ineffective because he did not notify Mallory of a hearing date resulting in his conviction for the intentional failure to appear in court.

To obtain habeas corpus relief on ineffective assistance grounds, a petitioner must demonstrate that his counsel's

performance was deficient and that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To demonstrate deficiency, petitioner must show that his counsel's actions "fell below an objective standard of reasonableness." Id. at 688. To demonstrate prejudice, in the context of a guilty plea, petitioner "must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." Hill v. Lockhart, 474 U.S. 52, 59, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985).

[W]here the alleged error of counsel is failure to investigate or discover potentially exculpatory evidence, the determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of the trial.

Young v. Lynaugh, 821 F.2d 1133, 1140 (5th Cir. 1987), cert. denied, 484 U.S. 1071 (1988).

Because Mallory's pleadings raised claims of ineffective assistance of counsel, the district court abused its discretion in failing to grant the amendment. Mallory's ineffective assistance of counsel claims are "adequate to deserve encouragement to proceed further." Barefoot, 463 U.S. 893 n.4 (internal quotation and citation omitted). The case is remanded for further consideration of the claim.

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The copy of the state court record provided to the Court does not reflect that Mallory raised the claim of ineffective assistance of counsel in his state post-conviction application. Mallory does not indicate whether he raised the claim in a separate application for post-conviction relief. The respondents conceded exhaustion of state remedies in their answer. However, Mallory raised the ineffective assistance of counsel issue after the answer was filed and, therefore, it is not clear whether the claim was exhausted in state court. Following remand, the district court is to direct the State to address whether the ineffective assistance of counsel claims have been exhausted.

If it is determined that this claim is exhausted, because Mallory is alleging that he is innocent of the offenses, the district court should then consider whether an evidentiary hearing is necessary. See Burnett v. Collins, 982 F.2d 922, 929 n.9 (5th Cir. 1993) (A petitioner is entitled to a federal evidentiary hearing if he can show cause for his failure to develop the facts in state-court proceedings and actual prejudice from that failure or if he can show that a fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing).

Mallory's motion for a certificate of probable cause is GRANTED. The decision of the district court is VACATED, and the matter is REMANDED to the district court for further proceedings.