UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-7745
Summary Calendar

RICARDO DIAZ,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Department of Criminal
Justice,

Respondent-Appellee.

Appeal from the United States District Court for the
Southern District of Texas
(92 CV 102)

(March 20, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.[*]

GARWOOD, Circuit Judge:

Petitioner-appellant Ricardo Diaz (Diaz) appeals the district court's dismissal of his second 28 U.S.C. § 2254 habeas corpus petition. We affirm.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

In 1985, a Texas jury convicted Diaz of first-degree murder and sentenced him to forty years' imprisonment. The charges involved a confrontation at a bar, during which Diaz fatally shot the victim in the back.[1] After an appellate court affirmed his conviction, *Diaz v. State*, 769 S.W.2d 307 (Tex.App.SQSan Antonio 1989, pet. ref'd), Diaz unsuccessfully petitioned for a writ of habeas corpus twice in state court and once in federal court.[2] The instant federal petition, filed July 29, 1992, is Diaz's second. In it, Diaz alleges for the first time in federal court that the prosecution withheld exculpatory evidence that the deceased wielded a knife, improperly commented upon Diaz's post-arrest silence, and injected personal opinion into the closing argument. Further, Diaz claims, again for the first time, that the trial court erred in admitting evidence of his other offenses and in excluding certain evidence of the victim's violent and aggressive character.

Respondent filed a motion for summary judgment, arguing that Diaz had abused the writ under Rule 9(b) of the Rules Governing Section 2254 Proceedings by raising new grounds in a successive petition. Diaz responded twice to this motion. The magistrate judge to whom the case had been referred recommended granting the motion for summary judgment. Over Diaz's filed objections, the

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[1] The deceased's brother testified that the deceased was running away at the time he was shot. The location of the body and the wound supported this testimony.

[2] The state petitions were filed on January 18, 1991, and January 24, 1992. Both were denied without written order. The first federal petition was filed on May 14, 1990. It was dismissed on the merits on November 26, 1990.

district court dismissed the petition for abuse of the writ and denied Diaz's motion for a certificate of probable cause (CPC). Before ruling, however, the district court failed to send Diaz a Rule 9(b) letter alerting him that dismissal for abuse of the writ was pending. For this reason, we granted Diaz a CPC to appeal and directed the parties to brief whether the district court's failure to follow Rule 9(b) was harmless error.

Discussion

We review a district court's Rule 9(b) dismissal for abuse of discretion. *McGrary v. Scott*, 27 F.3d 181, 183 (5th Cir. 1994). Under Rule 9(b), the district court may dismiss as an abuse of the writ a successive section 2254 petition that asserts grounds of relief not raised in a prior petition. *United States v. Flores*, 981 F.2d 231, 234 (5th Cir. 1993) (28 U.S.C. § 2255 appeal); *see also McCleskey v. Zant*, 111 S.Ct. 1454, 1457 (1991). Once the state has met its burden of pleading abuse, the burden shifts to the petitioner to show cause and prejudice. *Sawyer v. Whitley*, 112 S.Ct. 2514, 2518 (1992). To establish cause, the habeas petitioner must provide a legitimate excuse for failing to include the new claim in a previous section 2254 petition. *McCleskey*, 111 S.Ct. at 1472. The habeas petitioner must demonstrate that some "external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented [the] petitioner from raising the claim." *Id.* Once the petitioner has established cause, he must show "`actual prejudice' resulting from the errors of which he complains." *United States v. Frady*, 102 S.Ct. 1584, 1594 (1982).

Even if a habeas petitioner cannot meet the cause and prejudice standard, a federal court may hear the merits of a successive petition if necessary to prevent a fundamental miscarriage of justice. *Sawyer*, 112 S.Ct. at 2518. In order to show a fundamental miscarriage of justice, a habeas petitioner must "establish that under the probative evidence he has a colorable claim of factual innocence." *Id*. at 2519 (internal quotation marks omitted); *see Jones v. Whitley*, 938 F.2d 536, 541 (5th Cir.) (explaining that a "`fundamental miscarriage' implies that a constitutional violation probably caused the conviction of an innocent person"), *cert. denied*, 112 S.Ct. 8 (1991). Under *Schulp v. Delo*, 115 S.Ct. 851 (1995), the petitioner must "show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent,'" meaning that "it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Id*. at 867. This need not be shown under a "clear and convincing" standard. *Id*.

This Court has held that a district court should not summarily dismiss a habeas petition under Rule 9(b) without giving the petitioner an opportunity to respond to the allegations of abuse. *Brown v. Butler*, 815 F.2d 1054, 1057 (5th Cir. 1987): "At a minimum . . . 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." *Urdy v. McCotter*, 773 F.2d 652, 656 (5th Cir. 1985). Such notice must inform the petitioner that dismissal is being considered, that dismissal will be automatic if petitioner fails to

respond, and that the response should present facts rather than conclusions or opinions. *Id.*

In this case, the district court itself did not furnish Diaz with the specified formal notice and opportunity to respond. This Court has previously observed that a district court's failure to provide the petitioner with the required notice before dismissal under Rule 9(b) may be harmless error in certain circumstances. *Williams v. Whitley*, 994 F.2d 226, 230 n.2 (5th Cir.), *cert. denied*, 114 S.Ct. 608 (1993). *See, e.g., Byrne v. Butler*, 847 F.2d 1135, 1138 (5th Cir.) (finding harmless error where "dismissal would be nearly certain"), *cert. denied*, 108 S.Ct. 2918 (1988); *Matthews v. Butler*, 833 F.2d 1165, 1170 n.8 (5th Cir. 1987) ("Failure to notify the petitioner may be harmless error in cases where there are no facts that the petitioner could allege to prevent his claim from being dismissed under Rule 9(b).").

Our review of the record convinces us that the district court's failure to fully abide by the mandates of the notice requirement was harmless error in this case. Diaz was in effect notified three times of the state's allegations of abuse, and each time he responded. In his filings before the magistrate judge, the district court, and this Court, Diaz has consistently recognized, but failed to meet, his obligation to establish cause and prejudice to avert dismissal. Moreover, Diaz has not shown this Court, despite our instruction to brief the issue of harmless error, what he would have shown had the district court sent him a 9(b) letter. Rather, he has simply and repeatedly reasserted that his ignorance of the law at the time of his first federal petition should excuse

his neglect. It is well established, however, that a *pro se* petitioner's ignorance of the law is not an excuse for failing to raise new claims in a prior petition. *See United States v. Flores*, 981 F.2d 231, 236 (5th Cir. 1993); *Saahir v. Collins*, 956 F.2d 115, 120 (5th Cir. 1992). No external impediments prevented Diaz from raising his claims in the first petition; indeed, most of his claims had already been raised on direct appeal. *See McCleskey v. Zant*, 111 S.Ct. 1454, 1472 (1991) (requiring the petitioner to use reasonable and diligent efforts to include all relevant claims in the first petition). Accordingly, there are no facts which Diaz could allege to establish cause.[3]

Finally, we do not find that a fundamental miscarriage of justice would result from a failure to entertain Diaz's second petition. Our review of the record persuades us that Diaz has failed to establish a colorable claim that constitutional error has probably resulted in the conviction of an innocent person. Diaz claims that, because of the alleged errors, he was unable to "present his theory of self defense." These errors, however, were properly rejected on direct appeal. At trial, the jury was fully apprised of, and instructed on, the defense's theory. Diaz and four of his cousins who witnessed and participated in the fight testified that Diaz acted in self-defense and that the victim was the aggressor and wielded a knife. Diaz also was allowed to testify to prior specific acts of violence by the victim.

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[3] Accordingly, Diaz was not entitled to an evidentiary hearing. *See Woods v. Whitley*, 933 F.2d 321, 323 (5th Cir. 1991) (no evidentiary hearing required where petitioner cannot show cause as a matter of law).

Nevertheless, after hearing evidence that the victim was shot in the back while running away from Diaz, the jury reasonably rejected the claim of self-defense. Diaz has clearly failed to demonstrate the likelihood of a fundamental miscarriage of justice.

Based on our review of the record, we find that even if the district court had given Diaz an opportunity to respond to allegations of abuse, he would not have been able to show any facts to properly avert dismissal under Rule 9(b). Accordingly, we are unable to say that the district court abused its discretion in dismissing Diaz's second section 2254 petition.

Conclusion

For the foregoing reasons, the judgment of the district court is

AFFIRMED.