

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-40186  
Conference Calendar

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FONNIE HOLLY,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden,  
Louisiana State Penitentiary,

Respondent-Appellee.

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Appeal from the United States District Court  
for the Western District of Louisiana  
USDC No. 93-CV-711  
- - - - -  
(July 22, 1994)

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

PER CURIAM:\*

Fonnie Holly filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the district court alleging that his trial counsel had been ineffective and that the trial court had not admonished him properly under Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). The district court dismissed Holly's habeas petition as successive under Rule 9 of the Rules Governing § 2254 Cases.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Rule 9(b) provides that "[a] second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that 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 new claims that constitute an abuse of the writ unless the petitioner shows cause and prejudice for failing to raise those claims in a prior petition or shows that the failure to hear the claims will result in a fundamental miscarriage of justice. Sawyer v. Whitley, \_\_\_ U.S. \_\_\_, 112 S.Ct. 2514, 2518-19, 120 L.Ed.2d 269 (1992). A dismissal under Rule 9(b) will be reversed only for an abuse of discretion. Hudson v. Whitley, 979 F.2d 1058, 1062 (5th Cir. 1992).

Holly argues that the district court erred in dismissing his petition because a failure to hear his claims would result in a miscarriage of justice. Holly does not argue that his claims were not successive. Holly also has not argued that he had cause for bringing these claims again. Holly argues that without the alleged violations he would not have pleaded guilty to murder, but would have gone to trial and the jury would have found him guilty of manslaughter. To have his successive claims entertained, Holly must fit into the very narrow exception to Rule 9(b) - that the failure to hear his claims would result in a fundamental miscarriage of justice. See McCleskey v. Zant, 499 U.S. 467, 494-95, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991); Woods

v. Whitley, 933 F.2d 321, 323 (5th Cir. 1991). 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." 956 F.2d at 119.

Holly does not argue that he did not kill his wife, but simply argues that it was manslaughter not murder. Holly argues that he was provoked into killing his wife and that the killing resulted from a struggle and was in the "heat of blood." Holly admits to having seen his wife kissing another man earlier in the evening, that he and his wife had been arguing all evening, and that the gun discharged six times (all striking his wife) during the alleged struggle. This does not show that a reasonable jury would have entertained a reasonable doubt that Holly did not have the intent to kill his wife. Holly has not shown that the failure to reach the merits of his claim would result in a fundamental miscarriage of justice. See Montoya v. Collins, 988 F.2d 11, 12-13 (5th Cir.), cert. denied, 113 S.Ct. 1630 (1993). The district court did not abuse its discretion in dismissing this petition as successive.

AFFIRMED.