United States Court of Appeals,

Fifth Circuit.

No. 92-4559

Summary Calendar.

Clinton ANDERSON, Petitioner-Appellant,

v.

John P. WHITLEY, Warden, Louisiana State Penitentiary, Respondent-Appellee.

July 23, 1993.

Appeal from the United States District Court for the Western District of Louisiana.

Before GARWOOD, JONES, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

Petitioner, Clinton Anderson, is serving a life sentence for second degree murder in the Louisiana state penitentiary. Anderson appeals the district court's dismissal with prejudice of his successive petition for a federal writ of habeas corpus. We affirm, albeit for different reasons than those relied upon by the district court.

I

The jury that convicted Anderson was impaneled under a system of jury selection wherein women were selected for service only if they had filed a written statement of willingness to serve. While Anderson's conviction was pending on direct appeal, that system of jury selection was held to be unconstitutional, in *Taylor v. Louisiana,* 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed.2d 690 (1975). However, Anderson's conviction was affirmed on appeal, because of the Supreme Court's holding that *Taylor* would not be applied retroactively "to convictions obtained by juries empaneled prior to the date of that decision." *See Daniel v. Louisiana,* 420 U.S. 31, 32, 95 S.Ct. 704, 705, 42 L.Ed.2d 790 (1975). Anderson then sought federal habeas relief. He argued that under *Taylor* he was entitled to reversal of his conviction because the jury which convicted him was unconstitutionally impaneled. Anderson's petition was denied because of the non-retroactivity rule announced in *Daniel.*

In *Griffith v. Kentucky,* 479 U.S. 314, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987), the Supreme

Court held that, when it sets forth a new rule for the conduct of criminal prosecutions, that rule must be applied retroactively to all cases, state or federal, then pending on direct review or not yet final. *See id.* at 328, 107 S.Ct. at 716. Anderson then filed the instant petition for the writ of habeas corpus, relying again on *Taylor v. Louisiana* and claiming that his jury was unconstitutionally impaneled. Anderson claimed that, in light of *Griffith*, *Taylor* was applicable to his case, since his conviction was pending on direct appeal when *Taylor* was decided.

The district court dismissed Anderson's petition with prejudice, because it failed to raise any ground for relief which had not already been rejected on its merits in a prior petition. *See* 28 U.S.C. § 2244(b) (1988); Rule 9(b), Rules Governing Section 2254 Cases in the United States District Courts. Citing the plurality opinion in *Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986) (plurality opinion), and our decision in *Sawyer v. Whitley*, 945 F.2d 812 (5th Cir.1991), *aff'd*, --- U.S. ----, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992), the district court stated: " "If the petitioner raises a claim that a federal court has already considered in a previous *habeas corpus* petition, we may review the merits of the successive claim only when "the prisoner supplements his constitutional claim with a colorable showing of factual innocence." ' " Record on Appeal at 78. Because Anderson made no colorable showing of factual innocence, the district court dismissed Anderson's petition with prejudice.

Anderson appeals. He argues that dismissal of his petition was improper, even though he made no colorable showing of factual innocence, because a change in the law occurred between his first petition and the instant one which requires reconsideration of the merits of his claim. According to Anderson, under *Griffith* the non-retroactivity rule announced in *Daniel* is no longer valid, and *Taylor* must now be applied retroactively to reverse his conviction. Anderson contends that he is entitled to raise his claim under *Taylor* a second time because of the intervening change in the law worked by *Griffith.*

II

Our recent decision in *Williams v. Whitley*, No. 92-3361, --- F.2d ---- (5th Cir. June 21, 1993), 1993 WL 216266, controls our disposition of this appeal. There, as here, a state prisoner

raised a *Taylor* claim which had been rejected on its merits in a prior petition for a federal writ of habeas corpus.[1] *See id.,* at ---- - ----. Like Anderson, the petitioner argued that his petition was controlled by *Taylor* because of the change in the law worked by *Griffith. See id.* at ---- - ----. We held that the petitioner was not entitled to consideration of the merits of his successive petition unless he showed either cause and prejudice, or that a fundamental miscarriage of justice would result from failure to entertain his claim. *See id.* at ----, ----. We assumed *arguendo* that the petitioner had made a showing of cause, but we held that he was not entitled to consideration of his claim, because he had alleged neither actual prejudice nor that a miscarriage of justice would result from failure to entertain his claim. *See id.* at ---- - ----.

The same standard applies here. Assuming *arguendo* that Anderson has shown cause, he fails to meet the cause and prejudice standard, because he has neither alleged nor demonstrated actual prejudice resulting from the exclusion of women from his jury venire. Neither does Anderson allege or show that a miscarriage of justice would result from failure to entertain his claim. Because Anderson has shown neither actual prejudice nor miscarriage of justice, in light of *Williams* we conclude that Anderson is not entitled to consideration of the merits of his petition. *See Williams,* at ----.

III

For the foregoing reasons, we **AFFIRM.**

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[1]Anderson contends that the district court's dismissal of his first habeas petition, relying as it did on the non-retroactivity rule stated in *Daniel,* prevented the adjudication of his *Taylor* claim on its merits. To the contrary, the determination that *Taylor* did not entitle Anderson to relief was a determination on the merits. *See Williams,* at ---- n. 3 (holding that rejection of *Taylor* claim on the basis of *Daniel* was a determination on the merits).