

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-7320
Summary Calendar

JOHN PEYTON ALEXANDER, II,

Petitioner-Appellant,

versus

DR. LEE ROY BLACK, Commissioner,
Mississippi Dept. of Corrections,

Respondent-Appellee.

Appeal from the United States District Court
For the Southern District of Mississippi
(CA-J-91-0005(B))

(March 8, 1993)

Before POLITZ, Chief Judge, SMITH and EMILIO M. GARZA, Circuit
Judges.

PER CURIAM:*

John Peyton Alexander, II appeals the denial of his

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

application for a writ of habeas corpus. The district court determined that Alexander procedurally defaulted and failed to establish cause therefor. We affirm.

Background

In 1975 Alexander, then a student at Vanderbilt University, spent his summer break working at a country club in Jackson, Mississippi. During the course of the summer he became romantically involved with an older married woman who belonged to the club. The affair came to an abrupt end when her husband learned of it. Alexander returned to school distraught and eventually dropped out. He then returned to the Jackson area and sought work at other country clubs without avail. He felt his applications were being unfairly rejected due to the husband's intervention. Angered, Alexander began sending copies of love letters received in the trust to members of the country club. When his paramour sued him, Alexander secured a handgun, went to the country club, and shot her to death. A Mississippi jury convicted Alexander of murder and the Mississippi Supreme Court affirmed the conviction and life sentence. Alexander did not pursue further relief in the state courts.

Alexander commenced the instant action in 1991. He seeks federal habeas relief pursuant to 28 U.S.C. § 2254 for errors which he claims occurred in his trial. Before reaching the merits of his claim, we must determine, as did the district court, whether those claims still admit of plenary review. The district court

determined that Alexander's failure to pursue relief from these asserted trial errors in Mississippi caused a procedural default. Alexander complains of this determination, as well as the procedures employed below.

Analysis

We initially address Alexander's claims of procedural error. He contends that the magistrate judge and district judge, to whom his habeas petition first was assigned, failed to recuse themselves in a timely manner. He also claims that he was misled by the court into thinking that the judge's law clerks had been appointed counsel for him and that he wrote letters detailing his legal strategy to them before his mistaken view was corrected. Alexander did not raise these contentions in the district court and, lacking any development below, we cannot consider them.¹

Alexander first asserts that his privilege against self-incrimination and his right to effective assistance of counsel were violated when letters he wrote to his attorneys were given to defense and state psychiatrists. Next, he assails his conviction as having been obtained in violation of his sixth amendment right of confrontation. Lastly, he argues that the double jeopardy clause proscribed his prosecution after a grand jury found him insane. Before reviewing these questions we must consider the effect of Alexander's failure to first raise them in state court.

¹ **United States v. Smith**, 915 F.2d 959 (5th Cir. 1990).

We are obliged to find the claims procedurally defaulted where the state courts have so held,² or where it is plain that given the opportunity they would do so.³ While the Mississippi courts have not expressly held that these claims are procedurally defaulted -- for the rather obvious reason that they have never been presented to those courts -- we think it clear that they would so hold if afforded an opportunity. The Mississippi Uniform Post-Conviction Relief Act⁴ provides a three-year statute of limitations. That Act provides exceptions in cases where a movant establishes that an intervening decision of the Supreme Court of Mississippi or of the United States would have adversely affected the outcome of his case, or that newly discovered evidence, not reasonably discoverable at the time of trial, would be practically conclusive of a different outcome at trial.⁵

A habeas petitioner is not free to bypass an available and adequate state remedy in favor of plenary federal review. There are only two instances in which the federal courts may overlook a procedural default and proceed to weigh relief on the merits: first, where the petitioner can demonstrate cause for the failure

² **Harris v. Reed**, 489 U.S. 255 (1989).

³ **Teague v. Lane**, 489 U.S. 288 (1989).

⁴ Miss. Code Ann. § 99-39-5 (Supp. 1992).

⁵ Alexander has brought no such decision to our attention, nor are we aware of one.

to raise the issue previously and prejudice resulting therefrom; second, where failure to consider the claim would, despite its untimely nature, result in a fundamental miscarriage of justice.⁶

We are mindful, but dubious, of Alexander's explanations for his failure to raise these arguments at trial: that the prosecution's creation of a circus atmosphere in which he was "tried in the papers" caused him to lose his sanity and that his attorney's ostensibly ineffective assistance provided at trial caused him to forgo state remedies. The district court rejected these allegations. While likewise circumspect, we also note that Alexander has wholly failed to present any explanation, fanciful or otherwise, for his failure to raise the same arguments in a collateral proceeding. Nor do we find a basis for concluding that our failure to address these claims would result in a "fundamental miscarriage of justice."

Finally, Alexander contends that the cumulative effect of the asserted errors warrants federal habeas relief. This court recently addressed a similar contention in **Derden v. McNeel**.⁷ There we determined that the cumulative effect of errors may, on occasion, warrant relief under the due process clause. Each error so combined, however, must be of constitutional dimension and each

⁶ **Saahir v. Collins**, 956 F.2d 115 (5th Cir. 1992). (Fundamental miscarriages warranting review of defaulted claims are quite limited, typically involving constitutional violations which probably resulted in the conviction of an innocent man.)

⁷ No. 90-1230 (5th Cir. Dec. 2, 1992) (*en banc*).

error must otherwise be subject to habeas review. As noted, none of Alexander's arguments are properly before us on habeas review.

The judgment of the district court is AFFIRMED.