

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-8026
Conference Calendar

REV. EDDIE RAY HARRIS,

Petitioner-Appellant,

versus

STATE OF TEXAS ET AL.,

Respondents--Appellees.

- - - - -
Appeal from the United States District Court
for the Western District of Texas
USDC No. CR W-90-CV-286
- - - - -
(January 21, 1993)

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

PER CURIAM:*

Three of Harris's four claims were previously addressed on their merits.** When a petitioner fails to allege new or different ground for relief in a subsequent petition, this Court may review the merits of the successive claim "if the failure to hear them would result in a miscarriage of justice." Sawyer v. Whitley, ____ U.S. ____, 112 S.Ct. 2514, 2518, 120 L.Ed.2d 269 (1992). Harris has made no showing of innocence other than his own declaration that he did not commit the crime. Thus, the

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

** These claims were: (1) a 5,000-year sentence constitutes cruel and unusual punishment, (2) mental incompetence, and (3) exclusion of psychiatric testimony.

district court properly dismissed three of Harris's claims as successive.

Harris's fourth claim, that he did not commit the crime, was not previously addressed on its merits; however, it constitutes abuse of the writ. A claim raised in a subsequent federal habeas petition must be dismissed for an abuse of the writ unless the petitioner demonstrates "cause " for not raising the issue in the previous petition and "prejudice" if the court fails to consider the new point. Woods v. Whitley, 933 F.2d 321, 323 (5th Cir. 1991). To establish "cause," a petitioner must show that some external impediment prevented him from raising the claim in an earlier petition. McCleskey v. Zant, ____ U.S. ____, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

Harris alleges that his fourth claim was not raised earlier because he did not write the writ petition himself. The district court concluded that this allegation was without merit because Harris did not allege that he was unaware of the claim, only that it was not included because someone else filed the petition for him. Harris was aware of the factual basis of the claim he now raises. In 1990, he raised this claim in a state habeas proceeding which was denied without written order. Ex Parte Harris, Application No. 8,547-03. Harris has failed to establish cause sufficient to prevent him from presenting this claim in his previous habeas petitions. Accordingly, this Court need not consider the prejudice considerations. McCleskey, 111 S.Ct. at 1474.

The district court did not abuse its discretion when it determined that Harris abused the writ. Harris did not establish that an external impediment prevented him from raising the claim that he did not commit the crime earlier; therefore, the district court's decision is AFFIRMED.