IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 93-2874

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CLIFFORD X. PHILLIPS,
aka Abdullah Bashir,

Petitioner-Appellant,

versus

JAMES A. COLLINS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court for the
Southern District of Texas
(CA-H-93-2932)

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(December 13, 1993)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.

B Y T H E C O U R T:

Before the Court are the application for certificate of probable cause to appeal and the motion for stay of execution of petitioner, Clifford Phillips aka Abdullah Bashir. The execution of petitioner, a Texas prisoner, is scheduled for December 15, 1993. The district court denied petitioner's petition for writ of habeas corpus under 28 U.S.C. § 2254 and entered an order finding that a certificate of probable cause should not be granted under the standards of *Barefoot v. Estelle*, 103 S.Ct. 3383 (1983).

Petitioner has filed a notice of appeal, application for certificate of probable cause, and motion for stay of execution.

The procedural history of this case is lengthy and somewhat complicated.

On February 15, 1982, petitioner was indicted by a Texas grand jury for the murder of Iris Siff in the course of committing and attempting to commit robbery of her in Houston, Texas, on the evening of January 12, or the early morning hours of January 13, 1982. Petitioner pleaded not guilty and was tried before a jury in the state district court in Harris County, Texas, where he was represented by two appointed counsel. On September 14, 1982, the jury found petitioner guilty as charged, and on the same day, following a separate punishment hearing, the jury affirmatively answered the three special issues submitted under Texas Code of Criminal Procedure article 37.071(b) as then in effect, and in accordance with Texas law the trial court imposed a sentence of death. Petitioner was represented on appeal by different counsel. The Texas Court of Criminal Appeals affirmed the conviction and sentence on October 16, 1985, and denied rehearing on December 18, 1985. *Phillips v. State*, 701 S.W.2d 107 (Tex. Crim. App. 1985). Represented by the same counsel who represented him on appeal to the Texas Court of Criminal Appeals, petitioner then filed an application for writ of certiorari with the United States Supreme Court. The Supreme Court denied the writ on June 23, 1986. *Phillips v. Texas*, 477 U.S. 909 (1986).

In July 1986, petitioner's execution was set for August 19,

1986. On August 13, 1986, petitioner, represented by two new counsel, filed in the state trial court, and in the Texas Court of Criminal Appeals, an application for writ of habeas corpus. The state trial court entered an order recommending that all relief be denied, and on August 15, 1986, the Court of Criminal Appeals entered an order denying relief and denying stay of execution.

On the same day, petitioner, through these same two counsel, filed an application for habeas relief under section 2254 in the United States District Court for the Southern District of Texas, which granted a stay of execution on August 18, 1986, though expressing concern at petitioner's "dilatory tactics and last minute filing." On December 10, 1986, the district court dismissed petitioner's section 2254 petition on the merits. No appeal was taken from this order. Sometime in March 1987, petitioner's execution was set for April 30, 1987. On April 28, 1987, petitioner filed a *pro se* motion in the federal habeas court asserting that he had only recently learned through friends of the court's December 10, 1986, order, and asking that it be set aside and that the execution be stayed. The state on April 29, 1987, filed an opposition, supported by affidavits, complaining of the last minute filing and asserting that petitioner's counsel had appeared with him in state court in March 1987 when the April 30, 1987, execution date was fixed, and that another attorney, James Rebholz (who is one of petitioner's present attorneys), had visited with him in prison on April 14 and 28. The district court entered a stay order on April 29, 1987. On May 5, 1987, the district court

vacated its December 10, 1986, order, finding that petitioner did not receive notice of that order in time to appeal. On June 3, 1987, petitioner, through new counsel, filed another petition under section 2254 in the same federal district court. This new petition raised new, unexhausted grounds. Over the state's objection, the new petition was consolidated with the original section 2254 petition, and the entire thus consolidated petition was dismissed for failure to exhaust state remedies on November 4, 1987.

On January 11, 1989, the state district court reset petitioner's execution date for March 30, 1989. On March 1, 1989, petitioner, through two new counsel, filed a new petition for habeas corpus in the state trial court and the Court of Criminal Appeals. This petition was some ninety pages in length, exclusive of numerous exhibits, and asserted some thirty-two grounds for relief. On March 23, 1989, the state trial court reset petitioner's execution for May 23, 1989; on May 18, 1989, execution was reset for June 23, 1989. In early June 1989, new counsel substituted for petitioner, the June 23, 1989, execution date was withdrawn, and it was ordered that there be an evidentiary hearing on petitioner's habeas application. The evidentiary hearing was ultimately conducted on December 4, 1992, at which petitioner was represented by the counsel who had come into the case in June 1989. Witnesses for both petitioner and the state testified at this hearing, and documentary evidence was introduced. Petitioner did

not testify at the hearing.[1] The state trial court did not restrict petitioner's evidence or the issues to be explored at the hearing. On May 12, 1993, the state trial court entered extensive findings of fact and conclusions of law on the basis of the evidence heard at the hearing, the papers before it, and the full record in the case. The state trial court recommended denial of all relief. It also rescheduled petitioner's execution date for August 17, 1993. The writ record was forwarded to the Court of Criminal Appeals.

On June 10, 1993, a new attorney moved in the Court of Criminal Appeals to substitute himself for lead co-counsel for petitioner, which was granted, and asked the Court of Criminal Appeals to postpone action on the writ, which was granted, to July 9, 1993. On July 1, 1993, this new counsel moved for a stay of execution and asked the Court of Criminal Appeals to remand the case to the trial court for further development. The motion for remand asserted that there was a new issue, namely that a January 1971 New York court order adjudicating petitioner insane had never been formally set aside and thus tainted petitioner's instant 1982 felony murder conviction under the Texas case of *Manning v. State*, 730 S.W.2d 744 (Tex. Crim. App. 1987), which assertedly held that the existence of a previously unvacated determination of insanity altered the burden of proving sanity or insanity in a later

[1] Nor has petitioner filed any affidavits or given any testimony in any of the state or federal post-conviction proceedings as to anything relating to the merits of any of his claims. Nor did he do so at trial.

proceeding.[2] On July 8, 1993, the state trial court modified petitioner's execution date to September 21, 1993.

On September 8, 1993, the Texas Court of Criminal Appeals adopted the May 12, 1993, findings and conclusions of law of the state trial court, finding them "fully supported by the record," and on the basis of such findings and conclusions denied habeas relief. The Court of Criminal Appeals in the same order also denied the motion for remand and the motion for stay of execution.

On September 13, 1993, petitioner, through two new counsel, who are his present counsel, including Mr. Rebholz, filed in the state trial court and in the Court of Criminal Appeals still another state petition for habeas corpus, and on September 16, 1993, filed an amendment thereof, together with numerous exhibits and affidavits. The State of Texas filed a detailed response, likewise supplemented by numerous exhibits and affidavits, on September 17, 1993. On September 19, 1993, the state trial judge entered extensive findings of fact and conclusions of law based on all the records in the case, including the evidentiary hearing of December 4, 1992. The state trial court recommended that all relief be denied and forwarded the papers to the Texas Court of Criminal Appeals. On September 10, 1993, the Texas Court of Criminal Appeals entered an order denying relief, stating, *inter alia*, that "the findings and conclusions entered by the trial court are supported by the record and on such basis the relief sought is denied."

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[2] This claim has not been pursued.

On September 20, 1993, shortly prior to petitioner's scheduled September 21, 1993, execution, petitioner through present counsel filed the instant section 2254 petition in the district court below. Petitioner also filed at the same time a motion to proceed *in forma pauperis* (IFP) and motions for evidentiary hearing, discovery, disclosure of information, for exculpatory evidence, to proceed *ex parte*, and to appear as attorney in charge. Later that day, the district court entered an order staying petitioner's execution for thirty days and directed the parties to make specified filings. On September 30 petitioner filed a motion to enlarge the record. The full state trial and appellate and habeas records were filed in the district court. On October 4 petitioner filed an amendment to the writ to add an additional ground and a motion for production of documents. Also on October 4, the state filed its response to the writ and a motion for summary judgment with a supporting brief. On October 14 petitioner filed his reply to the state's motion for summary judgment. On October 20, 1993, the district court signed its extensive, 63-page memorandum and order granting the state's motion for summary judgment and finding that the section 2254 application should be dismissed. The court also granted the motion to proceed IFP and the motion to appear as attorney in charge, and denied all petitioner's other above-mentioned motions. By separate order entered the same day the district court, as requested in the state's answer and motion for summary judgment, issued an order determining that a certificate for probable cause should not be granted and that petitioner had

not made the showing required by *Barefoot*. Also on the same day, the district court entered a separate final judgment dismissing the writ.

On November 4, petitioner filed a motion for new trial (which raised nothing new) and a motion to disqualify the district judge. On November 10, the district court entered an order denying the motion for new trial. Petitioner filed a notice of appeal on November 18. On December 3 the district court entered order granting petitioner's earlier motion for appointment of counsel, and denying petitioner's motion for disqualification. Also on the same day the district court entered an order clarifying in one ultimately immaterial particular one of the reasons previously given for denying one of petitioner's claims.

Sometime following the district court's October 20 order and prior to November 16, petitioner's execution date was set for December 15, 1993.

The matter is now before us on petitioner's application for certificate of probable cause and motion for stay of execution, together with the state's response thereto. The full record in the district court below, as well as the full record of the state trial and appellate proceedings and the state habeas proceedings, is before and has been reviewed by this Court.

The relevant facts as established at petitioner's trial and the procedural history of the case are fully and accurately set forth in the district court's extensive opinion. See also the opinion of the Texas Court of Criminal Appeals on direct appeal.

The district court addressed each of petitioner's contentions and rejected them in her thorough and well-reasoned opinion. No good purpose would be served by our simply going over the same ground. Essentially for the reasons stated by the district court,[3] we conclude that petitioner's claims are all without merit, and that as to none of them has petitioner made a substantial showing of entitlement to habeas relief so as to warrant our issuance of a certificate of probable cause. *Barefoot*.

As the district court correctly noted, most of petitioner's claims are barred either as new rules under *Teague v. Lane*, 109 S.Ct. 1060, 1069-1078 (1989), or by procedural bar for failure to raise, or properly raise, at trial, there being no showing of either cause or prejudice to avoid such procedural bar. Moreover, on their merits, for the reasons explained by the district court, these claims are likewise unavailing. This is generally consonant with the determinations of the state trial court and the Court of

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[3] As the district court acknowledged in her December 3 order, one of the reasons given in her October 20 order for denial of petitioner's *Batson* claim (first raised in any forum by petitioner's October 4, 1993, amendment) was incorrect, namely that petitioner's convictions became final on direct appeal before *Batson* was handed down. However, as the district court correctly recognized, since there was no complaint whatever in the trial court with respect to the strikes in question, the law of this Circuit is clear that an essential element of a proper *Batson* claim is lacking. *See, e.g., Wilkerson v. Collins*, 950 F.2d 1054, 1063 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 3050 (1993). *See also United States v. Pofahl*, 990 F.2d 1456, 1465 (5th Cir.), *cert. denied*, 114 S.Ct. 266 (1993). Further, Texas law is clear that petitioner's failure to object in the trial court, even though the case was tried before *Batson*, bars relief. *Matthews v. State*, 768 S.W.2d 731 (Tex. Crim. App. 1989) (en banc). Accordingly, procedural default bars the claims, also. *See Teague v. Lane*, 109 S.Ct. 1060, 1067-68 (1989). Petitioner has shown neither cause nor prejudice so as to avoid the procedural default.

Criminal Appeals in the state habeases.

We agree with the district court in rejecting petitioner's attacks on the state court habeas fact findings, as well as on the fact findings of the state trial court respecting the out of court hearing (out of the jury's presence) on the admissibility of petitioner's confession, the motion for change of venue, and the rulings on juror challenges.[4]

Petitioner's principal challenge is to the adequacy of the December 1992 state habeas hearing and its associated findings. Petitioner was represented there by counsel who had been counsel for him ever since June 1989. Counsel was not restricted in the evidence that could be presented. That hearing encompassed, and indeed focused on, alleged ineffective assistance of counsel in, among other things, failing to adequately investigate for mitigating evidence, including evidence encompassing petitioner's mental condition and witnesses who would speak to his good character, and also matters respecting his 1975 New York conviction, on his plea of guilty, to the voluntary manslaughter killing of his son. Moreover, petitioner and his counsel had had since February 1989 a consulting psychologist's report on petitioner suggesting essentially the same things petitioner attempted to prove by reports based on examinations made in late August 1993 and early September 1993. Petitioner may not piecemeal

[4] We realize (as the district court below plainly did) that as to these mattersSQparticularly the confession and the matter of adequacy of representationsSQthe ultimate conclusions of the state courts, as opposed to the findings of historic fact, are in no sense binding on us.

his evidence in this fashion, and no good cause is shown which would permit him to do so. *See Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992). Nor do these late 1993 examinations provide a clearly superior basis for evaluating petitioner's mental state at the time of the offense in question as compared to the May 1982 examination by Dr. Hunter and the September 1982 examination by Dr. Fason. We note that Dr. Fason was selected by petitioner's counsel because he was known to be a defense-oriented psychiatrist. Also Dr. Hunter's reports reflect that he had available the 1970, 1972, and 1975 reports of the New York psychiatric evaluations and was also aware of petitioner's drug use on the day in question. Petitioner's counsel cannot be found to have been inadequate on the basis of not further pursuing psychiatric evaluations.

Moreover, there is clearly sufficient support for the state trial court's findings that petitioner adequately investigated the New York manslaughter conviction, and likewise there was no showing of meaningful prejudice for not investigating it further. As to investigation of favorable character witnesses or the like, the evidence was uncontested that petitioner gave his counsel no leads that were not followed up and found to be unhelpful. Indeed, the only lead that petitioner gave was to mention his mother, and that he did not want her involved. Counsel did, however, attempt to contact some family members without finding anything useful. Further, counsel had access to and examined the state's files, and these showed, among other things, five prior convictions (in addition to the manslaughter of petitioner's son), three of which

were felonies, numerous arrests and the like, and other adverse information, including, for example, a probation officer's report that findings had been entered against petitioner for child abuse in connection with the serious brain injury to his young daughter.

While we recognize certain inconsistencies between certain aspects of petitioner's trial counsel's testimony at the evidentiary hearing and certain affidavits of his that were in the record, these matters are not crucial and are to some extent understandable in light of the lapse of time. Nothing which has been shown is sufficient to undermine our confidence in the outcome of the trial, or in the fact findings of the state habeas court. The record reflects that trial counsel vigorously represented petitioner throughout. Given the evidence against petitioner, counsel's strategy in seeking a change of venue and to suppress petitioner's confession was logical and vigorously pursued, albeit unsuccessfully. Similarly, counsel was not aided or given leads by petitioner in respect to mitigating evidence and nevertheless did perform certain investigation in that respect, although it was not fruitful. Independent psychiatric examination, in addition to that by the psychiatrist appointed by the court, was also procured.

We conclude that the district court correctly rejected petitioner's claims of ineffective assistance of counsel, as well as his other claims. Moreover, for the reasons stated, there was no need for an evidentiary hearing or for further discovery as requested by petitioner. The state court fact findings were adequately supported and petitioner demonstrated no good cause for

failure to further develop the facts in the state court proceedings. Nor do we believe that any showing of manifest miscarriage of justice has been made. *See Keeney, supra*.

The trial evidence overwhelmingly establishes that petitioner, then forty-seven years old, intentionally killed Iris Siff while in the course of robbing and attempting to rob her on the evening of January 12 or the early morning of January 13, 1982. The trial evidence likewise amply supports the jury's affirmative answers to each of the three punishment special issues. Similarly, the evidence in the trial hearing, out of the jury's presence, as to petitioner's confession clearly establishes that it was made knowingly, voluntarily, without improper inducement, and without invasion of his rights under *Miranda* and its progeny or under the Fifth or Sixth Amendments. Further, the trial evidence (including the venue hearing and *voir dire*) reflects that petitioner's constitutional rights were not violated by denial of the requested change of venue, that the presumption that the jury was impartial was not rebutted, and that he received a fair trial. No evidence (such as testimony, affidavits, reports or other documents, or the like) tendered by petitioner in connection with any of his various post-conviction motions contradicts or casts doubt on any of the trial evidence (including the venue and confession hearings) and nothing petitioner has so tendered undermines our confidence in the trial outcome or the constitutional sufficiency and fairness of the process by which it was reached.

Finally, petitioner's complaint that the district court was

disqualified or should have granted his motion to disqualify herself is wholly without merit and, most generously considered, borders on the frivolous. The motion was not filed until November 4, well after the court had denied relief on October 20. Nevertheless, the essential basis for the motion was that petitioner's counsel had been orally informed by a law clerk for Chief District Judge Norman Black on September 20 that the district court, Judge Rosenthal, had decided to deny the requested stay and would be issuing an order to that effect. Judge Rosenthal never did issue such an order, but instead entered an order granting a thirty-day stay. As her October 20 opinion reflects, she then proceeded to meticulously consider the state trial and habeas records and each and every one of petitioner's claims, disposing of them in a thorough and well considered 63-page opinion and order. Petitioner also complains in this respect that Judge Rosenthal on October 20, in a separate order, denied a certificate of probable cause, even though he had not then applied for a certificate of probable cause. However, the state in its response and motion for summary judgment had asked Judge Rosenthal to deny a certificate of probable cause, and petitioner in his reply to the state's response and motion for summary judgment had not asserted that this should not be acted on until he formally filed a CPC motion. Absolutely no prejudice whatever is shown to inure to petitionersQexcept possibly the inability to further delay proceedingssQby the timing of Judge Rosenthal's order respecting a certificate of probable cause. None of these matters even arguably remotely approaches

grounds for disqualification or recusal, whether or not such grounds are limited to matters extrajudicial.

In conclusion, essentially for the reasons stated by the district court in her memorandum opinion, we agree with her that petitioner has not made a substantial showing of entitlement to federal habeas relief and that under *Barefoot* the district court correctly denied a certificate of probable cause, and we likewise determine that a certificate of probable cause should not issue. For the same reasons, we deny petitioner's application for stay of execution.

Accordingly, the application for certificate of probable cause is DENIED, and the appeal is DISMISSED.

The application for stay of execution is DENIED.