IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 93-3668
Summary Calendar

FLOYD CURLEY,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden and
RICHARD P. IEYOUB, Attorney
General State of Louisiana,

Respondents-Appellees.

Appeal from the United States District Court for the
Eastern District of Louisiana
(CA-93-1527-N)

(November 30, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

E. GRADY JOLLY, Circuit Judge:[*]

Curley appeals the district court's denial of his petition for habeas corpus relief, raising the same nine points of error that he raised on his direct criminal appeal to the Louisiana Supreme Court and in his habeas petition in federal district court. This court held Curley's petition in abeyance pending the outcome of Wilkerson

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

v. Whitley, 28 F.3d 498 (5th Cir. 1994)(en banc). We hold that Wilkerson disposes of the primary issues in this appeal, and that the other issues are without merit. Therefore, the judgment of the district court is affirmed.

I

On November 13, 1973, following a jury trial in state court in New Orleans, Louisiana, Floyd Curley was found guilty of aggravated rape committed on June 23, 1973. The jury, in its statutory discretion, recommended a verdict of guilty without capital punishment, and Curley was sentenced to life imprisonment. Some years later, in a state habeas proceeding, Curley was granted an out-of-time appeal directly to the Louisiana Supreme Court, which affirmed his conviction without written reasons on November 20, 1979.

Curley filed the present application for federal habeas relief in June 1993 and raised the same issues that he raised in his 1979 direct appeal in state court. The respondents argued, however, that Curley failed to file a motion to quash the jury venire at the time of trial and, therefore, federal habeas review is procedurally barred in the absence of a showing of cause and prejudice. The district court denied Curley's petition for habeas relief and denied a certificate of probable cause ("CPC").

Curley applied to this court for CPC, which we granted.

II

Curley raises the following nine issues on appeal:

1. Louisiana Revised Statutes section 14:42 (1966), the aggravated rape statute under which Curley was charged, convicted, and sentenced was then and subsequently has been held to be unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution because it allowed the jury unfettered discretion to choose between the death penalty and life imprisonment;

2. The grand and petit juries in the petitioner's case were unconstitutionally selected and impaneled by systematic exclusion of women and blacks from the juries in violation of the petitioner's rights to due process and equal protection of the law as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution;

3. The judge made impermissible comments on the evidence in the presence of the jury;

4. Hearsay evidence was introduced through a lab report;

5. Hearsay evidence of other crimes was admitted in evidence;

6. Prejudicial hearsay testimony of two police officers was introduced over objections of the defense;

7. Clothing was introduced into evidence without proper foundation, relevance, or identification being established by the prosecution;

8. The trial court improperly denied a mistrial requested by the defense prompted by prosecutorial misconduct during questioning of defense witnesses; and

9. The trial court improperly denied the defense's request to call a witness on surrebuttal.

III

In reviewing requests for federal habeas corpus relief, we review the district court's findings of fact for clear error, but review issues of law de novo. See Barnard v. Collins, 958 F.2d 634, 636 (5th Cir. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 990, 122 L.Ed.2d 142 (1993).

A

In his first point of error, Curley challenges the legality of his life sentence for the crime of aggravated rape in the light of Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), State v. Craig, 340 So.2d 191 (La. 1976)(Mandatory death penalty for aggravated rape invalidated in the wake of Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976) and defendant resentenced to twenty-year punishment for next lesser included offense.), and State v. Lee, 340 So.2d 180 (La. 1976)(following Craig). The statute under which Curley was convicted allowed the jury discretion to impose either a life sentence or the death penalty for the crime of aggravated rape. Although it is true that under Furman the discretionary imposition of the death penalty for aggravated rape became unconstitutional under the Louisiana statute, Furman did not nullify the penalty of life imprisonment for aggravated rape or for any other crime; Furman only affected the death penalty. A defendant, such as the

petitioner, who was convicted of aggravated rape committed at the time the presently challenged statute was in effect, could have been constitutionally sentenced to the next responsive verdict following death, which was life imprisonment. See Craig, 340 So.2d at 193; State v. Singleton, 268 So.2d 220 (La. 1972).[1]

Curley points out, however, that the aggravated rape statute, under which he was convicted, was amended by 1973 Louisiana Acts 125 and 126 to provide death as the only possible punishment for aggravated rape. He further points out that the death penalty for rape and other capital crimes as delineated in Acts 125 and 126 was later invalidated by Roberts v. Louisiana, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and Selman v. Louisiana, 428 U.S. 906, 96 S.Ct. 3214, 49 L.Ed.2d 1212 (1976). After the death penalty for aggravated rape had been invalidated by Roberts, all persons convicted of aggravated rape and also sentenced to death under the statute were resentenced by the Louisiana Supreme Court under the next lesser included offense, attempted aggravated rape. Each of these former death row felons was resentenced to twenty years.

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[1]In reality, the jury in Curley's case did not have the alternative of imposing the death penalty because the verdict form provided only for the following responses: "(1) Guilty without capital punishment or benefit of parole, probation, commutation or suspension of sentence[;] (2) Guilty without capital punishment[;] (3) Guilty of Attempt [sic] Aggravated Rape[;] (4) Guilty of Simple Rape[;] (5) Not Guilty." The alternative of a death sentence had been eliminated from the jury form by virtue of Singleton, which, in response to Furman, mandated the sentence of life imprisonment for defendants found guilty of aggravated rape.

Craig, 340 So.2d at 193-94. Curley, who was not sentenced to death, contends nevertheless that he is entitled to be resentenced to twenty years, but offers no substantive argument, other than simple fairness, i.e., that it is only fair that he should get as good a deal as those sentenced to death.

Any argument that Curley is entitled to be resentenced to twenty years is unpersuasive for the simple fact that he was not convicted or sentenced under the amended 1973 Louisiana Acts 125 and 126, which became effective July 2, 1973, some few days after he committed the crime on June 23, 1973. These July 1973 amendments were in effect, however, at the time of his trial and sentencing in November 1973. It is true that such an amendment that effects a change in responsive verdicts is usually viewed as procedural in Louisiana, thus mandating application of the law in effect at the time of the trial and sentence. See State v. Martin, 351 So.2d 92 (La. 1977)(citing State v. Williams, 43 So.2d 780 (La. 1950)). Ordinarily, these amendments would have applied to Curley's trial and sentencing conducted in November 1973. Louisiana's Act 126, however, contained a savings provision that did not permit the amended responsive verdict requiring death as the punishment for aggravated rape to be applied to crimes committed before the Act's effective date, July 2, 1973. As we have noted, although tried and sentenced in November, Curley was convicted of an offense that was committed on June 23, 1973. Thus, the old law applied and the court sentenced him in accordance with

Singleton; that is, the maximum penalty Curley could receive was the next responsive verdict, or life in prison. Therefore, Curley's life sentence for the crime of aggravated rape was constitutional, and, accordingly, we affirm the district court on this claim.[2]

B

In his second point of error, which encompasses several sub-issues, Curley argues that Louisiana law systematically excluded women and blacks from grand and petit jury service at the time of his trial.

(1)

Curley points out that the United States Supreme Court declared unconstitutional the Louisiana provision exempting women from petit jury venire while his case was pending on appeal. See Taylor v. Louisiana, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). He further argues that this court has held that Taylor should be applied retroactively to cases, such as his, that were pending at the time that it was issued, citing Leichman v. Secretary, La. Dep't of Corrections, 939 F.2d 315, 317 (5th Cir. 1991).

Recently, however, sitting en banc, we overruled Leichman in Wilkerson v. Whitley, 28 F.3d 498 (5th Cir. 1994). The Wilkerson

[2]We note that the Louisiana Supreme Court has addressed a similar situation in the same way, denying the petitioner any relief. See State v. Johnson, 429 So.2d 870 (La. 1983).

Court found that the retroactivity of Taylor is still controlled in its application by Daniel v. Louisiana, 420 U.S. 31, 95 S.Ct. 704, 42 L.Ed.2d 790 (1975). Announced within a week of Taylor, Daniel held that Taylor could not be applied retroactively to "convictions obtained by juries empaneled prior to the date of [Taylor]." Daniel, 420 U.S. at 32, 95 S.Ct. at 705. We therefore apply the law that prevailed at the time Curley's conviction became final. Wilkerson, 28 F.3d at 506-07.

Curley's conviction became final in 1979 when the Louisiana Supreme Court affirmed his conviction without opinion. State v. Curley, No. 64,788 (La. Nov. 20, 1979)(per curiam). In 1979, Daniel represented the controlling law regarding Taylor's application. Thus, Taylor cannot be applied retroactively to Curley's case because his jury was impaneled before Taylor was rendered. Curley's challenge to the exemption of women from his petit jury is, therefore, without merit, and we affirm the district court on this claim.

Curley additionally challenges the selection of the grand jury that indicted him, arguing that under the rationale of Taylor, exclusion of women from the grand jury violated his rights to due process and equal protection under the Sixth and Fourteenth Amendments. Under the provisions of the Louisiana Constitution and the criminal procedure code in effect at the time of Curley's trial, women were exempted from jury service, not excluded from service. The Wilkerson Court reasoned that Taylor only declared

that the Louisiana exemption of women from petit juries was unconstitutional and did not decide that the exemption of women from the grand jury was unconstitutional. Wilkerson, 28 F.3d at 503. In short, Wilkerson held that the Supreme Court has never declared that exemption of women from grand jury duty is unconstitutional. Id. Furthermore, even if the grand jury selection procedure were now declared unconstitutional, Curley would not, in this habeas petition, be entitled to claim the benefit of a new rule. See Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1061, 103 L.Ed.2d 334 (1989). We therefore affirm the district court's ruling on this claim.

(2)

Curley further challenges the composition of his grand and petit juries by claiming that blacks were illegally excluded from both panels. He claims that blacks were systematically excluded from the petit jury venire, even though one black man served on his petit jury. The district court found that Curley did not meet his burden of proving purposeful discrimination and denied his claim, citing Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). We believe the district court erred when it applied Batson's "purposeful discrimination" analysis to petitioner's "systemic discrimination" case. First, Curley does not allege or argue "purposeful discrimination" within the Batson context. Instead, he seems to be alleging that blacks as a class were generally excluded from jury service. Furthermore, even if this

analysis were proper, Batson, as a new constitutional rule, would not apply retroactively to benefit Curley. See Teague, 489 U.S. at 295, 109 S.Ct. at 1067.

Secondly, Curley challenges his indictment, and hence, his conviction, by claiming that blacks unconstitutionally were excluded from the grand jury that indicted him. The district court also summarily dismissed Curley's claims on this point, erroneously relying on Batson. The general rule applicable to the claim that Curley is alleging is that "[a] state court conviction cannot stand if it is based on an indictment of a grand jury or the verdict of a petit jury from which black persons were excluded because of their race." Gibson v. Blair, 467 F.2d 842, 844 (5th Cir. 1972) (citing Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972))(other citations omitted).

In response to Curley's racial discrimination assertion, the state contends that Curley procedurally defaulted this claim because he did not move to quash the indictment or the jury venire on this ground. The state further argues that Curley has not shown how he suffered unconstitutional discrimination by having only one black person serve on his petit jury. Curley counters that he should be given the opportunity to present evidence on this claim.

We must first address whether the default bars our consideration of his claim. In Harris v. Reed, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), the Supreme Court fashioned a presumption to the effect that a state procedural

default would bar federal habeas relief only if the last state court reviewing a petitioner's claim "clearly and expressly" relied on the state procedural bar to deny the petitioner's relief. In rejecting Curley's direct criminal appeal, the Louisiana Supreme Court simply affirmed his conviction without an opinion, and at first blush, it would appear that Curley's state procedural default would not bar federal habeas relief. Since Harris, however, the Supreme Court has further explicated the Harris standard in its decision, Coleman v. Thompson, 501 U.S. ___, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In Coleman, the Court stated that the Harris presumption applies only when it appears on the face of the decision that the state court decided the case based on federal law, yet failed to state clearly and expressly that its judgment rests on a state procedural bar. Id. at 2557-58.

Turning to Curley's petition, he appealed based on several state and federal grounds. The state countered with several arguments based on state law and a few based on federal constitutional law. In response to Curley's racial discrimination claim, the state asserted that he was procedurally barred from objecting to his grand jury indictment and petit jury venire because he did not file a motion to quash the indictment or the venire. The Louisiana Supreme Court decision did not specifically address any of these arguments with its simple affirmance. Thus, we cannot say that the decision "fairly appear[s] to rest primarily on federal law or to be interwoven with federal law." Id. at 2557.

Neither can we conclude that the state judgment rested primarily on federal grounds simply because the grounds for the decision are unclear. Id. at 2558. Therefore, according to Coleman, the Harris presumption does not apply in this case.

Instead, Curley's case fits a somewhat contrasting per se presumption that the Court recognized in Coleman. The Court stated that

> [i]n all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or can demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Id. at 2565 (emphasis added). Because Curley did not move to quash the grand jury indictment and the petit jury venire pursuant to an independent and adequate Louisiana state rule, we are thereby precluded from reviewing his claim unless he can meet one of the exceptions. Curley must demonstrate cause for default and actual prejudice resulting from unconstitutional impanelment of his grand and petit juries, or he must demonstrate that the failure to consider these claims will result in a fundamental miscarriage of justice.

In Curley's appeal he fails to raise any reasons establishing cause for his procedural default. Surely Curley cannot claim ignorance of unconstitutional racial discrimination as a basis for a contemporaneous objection, nor can he can argue that a such an

objection would have been futile. To the contrary, "perceived futility of presenting an objection in the state courts cannot alone constitute sufficient cause . . . nor is failure to anticipate a change in the law sufficient." Bates v. Blackburn, 805 F.2d 569, 576 (5th Cir.), cert. denied, 482 U.S. 916, 107 S.Ct. 3190, 96 L.Ed.2d 678 (1986). Moreover, a "futility" argument would be meritless because the unconstitutionality of systemic exclusion of blacks from grand and petit juries had been addressed conclusively before his trial. See Alexander v. Louisiana, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972); Gibson v. Blair, 467 F.2d 842, 844 (5th Cir. 1972). Therefore, Curley cannot contend that his reasons for failing to file the motion to quash would have been so novel as to excuse compliance with the rule. See Bates, 805 F.2d at 575. Since he has not established sufficient cause for his procedural default, we need not consider the matter of prejudice. McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

Furthermore, Curley does not contend that failure to consider this claim will result in a fundamental miscarriage of justice. For a court to grant a habeas petition based on this reason, the petitioner must show that a "constitutional violation has probably resulted in the conviction of one who is actually innocent." Murray v. Carrier, 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986). Curley makes no claim that he is innocent of the crime of aggravated rape. Moreover, our examination of the

record does not convince us that a claim of innocence would be colorable. Therefore, our refusal to address his claim on this issue will not result in a fundamental miscarriage of justice. See McGary v. Scott, 27 F.3d 181, 184 (5th Cir. 1994).

Thus, because he does not meet the exceptions outlined in Coleman, federal habeas review of his procedural default claims is barred.

C

Curley's remaining points of error question whether he was denied a fair and impartial trial as a result of improper judicial and prosecutorial conduct and evidentiary errors. These issues do not rise to the level of constitutional injury. We therefore AFFIRM the district court's dismissal of these claims.

IV

For the reasons stated above, the denial of Curley's petition for habeas corpus relief is, in all respects,

A F F I R M E D.