IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8425
(Summary Calendar)

EROY EDWARD BROWN,

Petitioner-Appellant,

versus

JAMES A. COLLINS,

Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Texas
(W-92-CA-310)

(March 15, 1994)

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

Petitioner-Appellant Eroy Edward Brown contests the district court's dismissal of his second petition for writ of habeas corpus on grounds of abuse of the writ. Brown also filed motions with this court seeking appointment of counsel and supplementation of the record on appeal. Finding no reversible error in the district

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

court's dismissal of Brown's petition, we affirm. Finding no merit in Brown's motions for appointment of counsel and supplementation of the record on appeal, we deny those motions.

I

FACTS AND PROCEEDINGS

In 1985 a Texas jury convicted Brown of robbery and found as true the allegations in the indictment that Brown had been convicted of two prior felonies, thus supporting the enhanced sentence of 90 years imprisonment. The conviction and sentence were affirmed on direct appeal, and the Texas Court of Criminal Appeals denied discretionary review.

Presently before us is an appeal from the dismissal of Brown's second federal habeas petition,[1] in which he raised, as grounds for habeas relief,: 1) a Batson[2] violation, and 2) a claim that the pen packets used as the basis for enhancing his sentence were improperly admitted into evidence.

The State moved to dismiss the petition for abuse of the writ. In response to the magistrate judge's order to show cause why the State's motion should not be granted, Brown claimed that ineffective assistance of counsel at trial and on appeal was sufficient justification for filing the second petition. The

[1] In his first federal petition, Brown insisted that the trial court erred in denying the motion to quash the indictment and in failing to suppress identification testimony. The district court dismissed the petition on the merits, and we denied Brown's request for CPC.

[2] Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Batson was decided while Brown's direct appeal was pending.

magistrate judge recommended the dismissal of Brown's petition for abuse of the writ.

After receiving Brown's objections to the magistrate judge's report, the district court independently reviewed the record, adopted the magistrate judge's report, dismissed the petition, and granted CPC and IFP.

II

ANALYSIS

A. Abuse of the Writ

A second habeas petition may be dismissed if "the judge finds that the failure of the petitioner to assert th[e] grounds in a prior petition constitute[s] an abuse of the writ." Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Cases. We review for abuse of discretion the district court's dismissal for abuse of the writ. See Saahir v. Collins, 956 F.2d 115, 120 (5th Cir. 1992).

In McCleskey v. Zant, 499 U.S. 467, 493, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991), the Supreme Court held that the cause-and-prejudice standard from state-procedural-default determinations is the appropriate standard for determining when failure to raise an issue in an earlier federal habeas petition constitutes abuse of the writ.

> [T]he petitioner bears the burden of showing cause and prejudice. The requirement of "cause" in the abuse of the writ context is based on the petitioner's obligation to conduct a reasonable and diligent investigation aimed at including all relevant grounds for relief in his first federal habeas petition. "If what the petitioner knows or could discover upon reasonable investigation supports a claim for relief in a federal

> habeas petition, what he does not know is irrelevant."

Drew v. Collins, 5 F.3d 93, 96 (5th Cir. 1993) (citations omitted), petition for cert. filed, (Jan. 5, 1994) (No. 93-7373). As the cause-and-prejudice standard is conjunctive, a petitioner's failure to show either prong pretermits the need for consideration of the other prong. See McCleskey, 499 U.S. at 502.

In his second federal petition and on appeal, Brown acknowledges that counsel made timely objections to the admissibility of the pen packets and to the prosecution's peremptory strikes which prevented the remaining blacks from serving on the petit jury. Brown does not argue that he did not have knowledge of these issues at the time he filed his first federal habeas petition. Aside from addressing the merits of the grounds raised in his second petition, Brown argues here, as he did in the district court, that he received ineffective assistance of counsel at trial and on appeal. Brown apparently believes either that his ineffective-assistance-of-counsel claim is sufficient cause to justify his failure to raise the two issues in his first federal petition or that the dismissal of the second petition was based on procedural default and his ineffective-assistance claim is sufficient cause and prejudice to overcome that default. In other words, he appears to argue that the two issues raised in the second petition were defaulted by appellate counsel's failure to raise them on the direct appeal in state court.

Even assuming that Brown received ineffective assistance of counsel, this alleged cause does not explain why Brown was unable

to raise the Batson and pen-packets issues in his first federal habeas petition. See Johnson v. Hargett, 978 F.2d 855, 859 (5th Cir. 1992), cert. denied, 113 S.Ct. 1652 (1993). Therefore, as there was no external impediment to raising the issues earlier, Brown has failed to show cause under McCleskey. See McCleskey, 499 U.S. at 493-94.

Even so, a federal court could still entertain Brown's second petition if failure to do so would result in "a fundamental miscarriage of justice," that is, in an "extraordinary instance[] when a constitutional violation probably has caused the conviction of one innocent of the crime." Id., 499 U.S. at 494. Brown does not suggest that he is actually or factually innocent of the crime; neither do we discern any indication that a "fundamental miscarriage of justice" will occur if we decline to consider Brown's petition.

Accordingly, we hold that the district court did not abuse its discretion in dismissing Brown's second federal petition for abuse of the writ. See Saahir, 956 F.2d at 120.

B. Motions

Brown has filed with this court two motions, one for appointment of counsel and another for supplementation of the record. "The rule of the Fifth Circuit Plan Under the Criminal Justice Act, § 2 permits this Court to appoint counsel to persons seeking relief under § 2254 where `the interests of justice so require and such person is financially unable to obtain representation.'" Schwander v. Blackburn, 750 F.2d 494, 502

(5th Cir. 1985). Although Brown is proceeding IFP, "the interests of justice" do not require appointment of counsel in this case. See id. at 502-03.

In his second motion, Brown requests that the record from the state proceedings be added to the record on appeal. The magistrate judge ordered the State to file, along with its response to Brown's federal petition, the relevant documentation of the state court proceedings. There is no indication that the State failed to comply with that order or that the state court records are not included in the record on appeal. Neither motion is meritorious, so we deny both. And, for the reasons set forth above, the district court's dismissal of Brown's habeas petition is AFFIRMED.