

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30455
Summary Calendar

LEONARD BASTIDA,

Petitioner-Appellant,

v.

JOHN P. WHITLEY, Warden,
Louisiana State Penitentiary 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-94-1734-E)

(January 23, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Petitioner Leonard Bastida appeals from the district court's dismissal of his petition for a writ of habeas corpus under 28 U.S.C. § 2254. Dismissal was granted on the grounds that Bastida's petition was a successive petition, and because Bastida had failed

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

to demonstrate cause and prejudice or factual innocence. We affirm the judgment of the district court.

I. FACTUAL AND PROCEDURAL BACKGROUND

Following a jury trial for armed robbery, Leonard Bastida received a ninety-nine year sentence of imprisonment without the benefit of parole, probation, or suspension of sentence. The Louisiana Supreme Court affirmed Bastida's conviction and sentence on direct appeal, and the United States Supreme Court denied Bastida's writ of certiorari. Bastida then unsuccessfully exhausted his state court remedies.

Bastida has previously filed a federal habeas corpus petition, asserting that he was mentally incompetent to stand trial, that African-Americans were systematically excluded from his jury, and that his sentence constituted cruel and unusual punishment. Bastida's petition was rejected by the district court, and we denied his application for a certificate of probable cause. In this second habeas petition, Bastida makes the following allegations: 1) African-Americans and women were excluded from his jury; 2) the trial court's handwritten minutes of his sentencing inaccurately reflected that he was continually present during jury selection; 3) he was not present during a substantial portion of the jury selection; and 4) the Louisiana Supreme Court did not give the same consideration to his pro se application for supervisory writs as it gives to pleadings drafted by counsel.

The state moved to dismiss Bastida's petition for abuse of the writ under Rule 9(b)¹ because of Bastida's successive habeas filings. The district court ordered Bastida to file a response to the 9(b) dismissal contentions. In his response, Bastida stated that he would drop his challenge regarding the jury exclusion of African-Americans, as Bastida admitted that it had previously been denied by a federal habeas court. Bastida also argued that he was previously unable to protest the exclusion of women from his jury because the existing law at the time of his first habeas petition did not recognize such a claim. Similarly, Bastida stated that his indigence prevented him from obtaining a copy of his trial transcripts until after the disposition of his first federal habeas petition; thus, without the transcripts, Bastida claims that he was unable to raise his other current challenges in the initial habeas petition.

The district court determined not only that the claim of jury exclusion of African-Americans was repetitive, but also that Bastida should have brought his other current claims in his prior federal habeas petition. The district court also stated that Bastida did not demonstrate cause and prejudice for the failure to

¹ Rule 9(b) of the rules governing § 2254 cases provides:

A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

28 U.S.C. § 2254.

consider the claims, and that Bastida made no showing of factual innocence. Thus, the district court dismissed Bastida's petition with prejudice. Bastida appeals from this determination.

II. STANDARD OF REVIEW

In a federal habeas corpus proceeding, we review the district court's legal determinations de novo. See Johnson v. Puckett, 929 F.2d 1067, 1070 (5th Cir. 1991).

III. ANALYSIS AND DISCUSSION

Bastida argues that the district court improperly dismissed his habeas petition with prejudice for abuse of the writ. Specifically, Bastida contends that the district court should have allowed him to amend his petition by deleting his claim of racial bias in the jury selection and by allowing him to keep his other claims. Moreover, according to Bastida, the cause and prejudice analysis should not apply because his other claims were not available to him at the time of his first habeas petition.

We disagree with Bastida's contentions. As we have previously described:

Whether a successive federal habeas petition raises grounds identical to those already heard and decided on the merits in a previous petition, **or raises new grounds not raised in the previous petition**, a federal court may not reach the merits thereof unless the petitioner shows cause and prejudice.²

² Thus, Bastida is incorrect in his contention that a petition alleging new claims is not subject to the cause and prejudice standard, even if the new claims were not available to Bastida at the time of his first habeas petition.

Duff-Smith v. Collins, 995 F.2d 545, 546 (5th Cir. 1993) (emphasis added); see also Woods v. Whitley, 933 F.2d 321, 323 (5th Cir. 1991) ("[A] petitioner's serial habeas petition must be dismissed as an abuse of the writ unless he demonstrates that there was 'cause' not to have raised the point in a previous federal habeas petition, and 'prejudice' if the court fails to consider the new point."). To demonstrate cause, the petitioner must show that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in the initial petition. See Murray v. Carrier, 477 U.S. 478, 488 (1986). To demonstrate prejudice, Bastida must show that the improprieties upon which he bases his claims "infect[ed] his entire trial with error of constitutional dimensions." United States v. Frady, 456 U.S. 152, 170 (1982). Absent demonstrated cause and prejudice, "the failure to raise a claim in a prior habeas petition may be overlooked only when a constitutional violation probably has resulted in the conviction of one innocent of the crime.'" Duff-Smith, 995 F.2d at 546 (quoting Kirkpatrick v. Whitley, 992 F.2d 491 (5th Cir. 1993)).

Bastida agrees that his claim of racial exclusion from the jury was denied in his first habeas petition. Thus, Bastida cannot make a showing of cause on this claim because it was previously raised and adjudicated. Moreover, Bastida effectively abandoned his racial exclusion claim on appeal by asserting that he would have dropped the claim if the district court had given him the opportunity.

With regard to his claim of gender exclusion from the jury, Bastida asserts that the challenge was not available to him until a change in the law enabled him to raise the issue. Assuming *arguendo* that this change in the law is sufficient to demonstrate cause, Bastida has still failed to demonstrate prejudice. Simply put, Bastida has not indicated how the alleged exclusion of women from his jury affected his trial or rendered his judicial proceedings unfair. See Williams v. Whitley, 994 F.2d 226, 233 (5th Cir. 1993) (noting that the fair cross-section requirement is not premised on the belief that a disproportionate jury is necessarily unfair in a particular criminal trial). Bastida offers no evidence to demonstrate that an alleged exclusion of women from his jury affected his trial, and we cannot locate any relevant evidence upon our own review of the record. We conclude that Bastida's gender exclusion claim was properly dismissed.

In addition, Bastida's claims of an inaccurate minute entry and the lack of consideration given to his pro se application must also be dismissed for the failure to meet the prejudice requirement. Even assuming that the inability to procure his trial transcripts constitutes sufficient cause for the failure to raise these claims in his first habeas petition, Bastida does not indicate how the allegedly erroneous entry in the minutes established an error of "constitutional dimension." Similarly, Bastida offers no explanation or evidence regarding how the Louisiana Supreme Court's review of his pro se application was different from its review of pleadings filed by counsel.

Finally, with regard to Bastida's claim that he was not present during a substantial portion of jury selection, we find that Bastida could have raised this claim without the benefit of his trial transcripts. Bastida clearly knew what had occurred during jury selection and, therefore, the basis for the claim was present when Bastida filed his first habeas petition. Thus, a credible showing of cause has not been made. Moreover, similar to his previous claims, Bastida also fails to demonstrate prejudice on this challenge, as he does not indicate how his alleged absence from jury selection affected his trial in any manner.

Having failed to satisfy the cause and prejudice standard on any of his claims, Bastida must rely on the "factual innocence" exception. Unfortunately, this exception is also unavailing for Bastida. He fails to present evidence demonstrating that he is innocent of the armed robbery conviction, and, interestingly, he also fails to even **claim** that he is innocent of the crime. Thus, no relief is available to Bastida under this exception to the cause and prejudice standard.

IV. CONCLUSION

For the foregoing reasons, the district court's dismissal of Bastida's habeas corpus petition is AFFIRMED.