IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-41331
Conference Calendar

BENNY E. TRIMBLE,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
TDCJ-Institutional Division,

Respondent-Appellee.

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Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 6:93-CV-759
- - - - - - - - - - -
June 28, 1995

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

PER CURIAM:*

"[A] serial habeas petition must be dismissed as an abuse of the writ unless the petitioner has demonstrated `cause' for not raising the point in a prior federal habeas petition and `prejudice' if the court fails to consider the new point." Saahir v. Collins, 956 F.2d 115, 118 (5th Cir. 1992). Even if the petitioner fails to satisfy the cause and prejudice standard, this court may still entertain his serial petition to prevent a

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

"fundamental miscarriage of justice." Hudson v. Whitley, 979 F.2d 1058, 1063 (5th Cir. 1992). "The miscarriage of justice exception applies only to extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." Id. (internal quotations and citation omitted). A dismissal under Rule 9(b) of the Rules Governing 28 U.S.C. § 2254 Cases will be reversed only for an abuse of discretion. Id. at 1062.

The magistrate judge found that Trimble "was aware of all of the facts necessary to make his present ineffective assistance of counsel claim when he filed the initial petition for a writ of habeas corpus in this Court." The magistrate judge also found that Trimble had presented no evidence of factual innocence. The district court dismissed Trimble's petition, with prejudice, as an abuse of the writ.

On appeal, Trimble fails to address the dismissal of the ineffective-assistance allegations presented in his second habeas petition. Thus, these issues are abandoned. Hobbs v. Blackburn, 752 F.2d 1079, 1083 (5th Cir.), cert. denied, 474 U.S. 838 (1985). Instead, Trimble argues that his post-arrest confession was obtained in violation of his constitutional rights, and he did not receive a full and fair hearing on his motion to suppress the confession.

Trimble first raised these issues in his objections to the magistrate judge's report. Even if the district court erred by not construing this filing as an amendment to his petition, See McGruder v. Phelps, 608 F.2d 1023, 1025 (5th Cir. 1979),

dismissal was proper. First, Trimble was aware that the new claims were susceptible to dismissal under Rule 9(b).[**] Further, in both in his objections and on appeal, Trimble concedes that he is attempting to bring claims that have been previously resolved against him. "Unless a habeas petitioner shows cause and prejudice, a court may not reach the merits of . . . successive claims which raise grounds identical to grounds heard and decided on the merits in a previous petition[.]" Sawyer v. Whitley, 112 S. Ct. 2514, 2518, (1992) (internal citation and emphasis omitted) (citing Kuhlmann v. Wilson, 477 U.S. 436 (1986)). However, rather than advancing any argument regarding cause or prejudice, Trimble merely attempts to argue the merits of these claims yet again.

Although Trimble cannot meet the cause and prejudice standard, this court may hear the merits of his successive claims if the failure to hear those claims would constitute a "miscarriage of justice." See Sawyer, 112 S. Ct. at 2518. This very narrow exception "allow[s] successive claims to be heard if the petitioner `establish[es] that under the probative evidence he has a colorable claim of factual innocence.'" Id. at 2519 (quoting Kuhlmann, 477 U.S. at 454). Trimble has not alleged that he was innocent of the crime; thus, his claims do not implicate the actual innocence exception.

[**] Moreover, the district court's failure to give the required notice was harmless because there were no facts that Trimble could allege to prevent his claim from being dismissed under Rule 9(b). See Williams v. Whitley, 994 F.2d 226, 231 n.2 (5th Cir.), cert. denied, 114 S. Ct. 608 (1993).

APPEAL DISMISSED. *See* 5th Cir. R. 42.2.