IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-1524
Summary Calendar

REGINALD LYNN RANDALL,

Petitioner-Appellant,

VERSUS

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

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Texas
(CA3-91-0792-T)

(September 20, 1993)

Before GARWOOD, SMITH, and DeMOSS, Circuit Judges.

PER CURIAM:[*]

Reginald Randall appeals the denial of his state prisoner's petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2254. We vacate and remand.

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[*] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.

I.

Randall was convicted of two counts of murder and sentenced to life imprisonment. His conviction and sentence were affirmed on direct appeal, and he exhausted state habeas remedies.

Randall then filed the instant habeas petition, raising several issues, only one of which we need to reach, given our disposition of this case. The magistrate judge recommended that relief be denied but did not specifically address the issue of the improper invocation of the Fifth Amendment privilege, which is the only issue we reach. Randall filed objections to the magistrate judge's report, but the district court adopted the findings and conclusions of the magistrate judge. The district court denied Randall a certificate of probable cause ("CPC") to appeal, but this court granted CPC.

II.

A.

The state argues that the appeal should be dismissed because Randall abandoned all of his issues on appeal by failing to list them in his motions for CPC. The state correctly cites Anderson v. Butler, 886 F.2d 111, 113 (5th Cir. 1989), for the proposition that failure to raise an issue in an application for CPC is an abandonment of the claim.

The state is incorrect, however, in its assertion that Randall raised no issues in his CPC application. Randall filed a brief that fully addresses his issues on appeal. No mention of this

brief is included in the state's motion, although it is acknowledged in the state's brief.

We liberally construe the pleadings of pro se litigants. See Haines v. Kerner, 404 U.S. 519, 520 (1972). Randall's brief was sufficient to preserve his claims; the state's motion to dismiss is totally without merit.

B.

Randall contends that the state trial court denied him his right to compulsory process because it allowed defense witness Bobby Joe Nixon to refuse to testify by invoking his Fifth Amendment privilege against self-incrimination. As part of its case against Randall, the prosecution introduced the testimony of David Allen, one of Randall's fellow prisoners, who testified that Randall had admitted to the two murders that are the subject of this case. Randall intended to call Nixon to rebut Allen's testimony.

When Nixon was called to testify, however, he was in the process of being tried on an unrelated charge. Nixon was advised by the trial court of his Fifth Amendment right against self-incrimination, after which he decided not to testify.

During this colloquy, the trial judge made no specific inquiry as to the nature of the charges pending against Nixon, the questions to be asked of him, or the potential for self-incrimination. Randall's counsel stated that Nixon was being called as an impeachment witness only. Nixon, after having straightened out his

legal problems, executed an affidavit, following Randall's trial, indicating that he would testify in Randall's favor.

In United States v. Goodwin, 625 F.2d 693, 701 (5th Cir. 1980) (federal direct criminal appeal), we recognized that witnesses may not make blanket refusals to testify by asserting their Fifth Amendment rights "regardless of the questions to be asked by defense counsel." We held that "[t]he trial judge must make a proper inquiry into the legitimacy and scope of the witness' assertion of his Fifth Amendment privilege. A blanket assertion of the privilege without inquiry by the court, is unacceptable." Id.; see also United States v. Boyett, 923 F.2d 378, 380 (5th Cir.), cert. denied, 112 S. Ct. 53 (1991) (federal direct criminal appeal).

In this case, the trial court did engage in a passing inquiry outside of the presence of the jury, but no specific questions were asked. A question by the court that is representative of the general nature of the inquiry is as follows: "You feel like to testify may in some way incriminate you or raise matters that would be against you in your own trial or in cases that may come up against you?"

But in Goodwin, we stated that the trial court should make "a particularized inquiry, deciding, in connection with each specific area that the questioning party wishes to explore, whether or not the privilege is well-founded." 625 F.2d at 701 (internal quotation and citation omitted). While this standard is set forth in cases of federal direct criminal appeals, the same constitu-

tional standard applies to state trials being challenged in a federal habeas proceeding.

In this case, the trial court's passing inquiry was not sufficiently particularized to meet this standard. Nor does the state make any effort to justify the trial court's failure in this regard. As a result, Randall's Sixth Amendment right to compulsory process was infringed by an improper invocation, without further inquiry by the trial court, of Nixon's Fifth Amendment right against self-incrimination.

As noted by the state appellate court, Randall's conviction hinged on Allen's testimony. Accordingly, the error was not harmless. Accordingly, we vacate the denial of habeas relief and remand to the district court to determine an appropriate disposition of this matter in light of our conclusion.[1]

VACATED and REMANDED.

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[1] The State argues, for the first time on appeal, that this issue was not raised in the district court and that it was not exhausted in the state courts. The brief filed in support of the state's motion for summary judgment contradicts this. First, in a footnote the state recognized that the issue had been presented to the district court. That the state chose to treat the claim lightly does not negate its existence. Second, the state did not unequivocally assert that Randall had failed to exhaust his state remedies. Hence, the issue of exhaustion has been waived. See McGee v. Estelle, 772 F.2d 1206, 1212-13 (5th Cir. 1984) (en banc); Fitzpatrick v. Procunier, 750 F.2d 473, 475 (5th Cir. 1985).

The state contends, also for the first time on appeal, that the issue has been procedurally defaulted because there was no objection at trial. As the state did not raise procedural default in the district court, it also is waived. See United States v. Drobny, 955 F.2d 990, 995 (5th Cir. 1992) (§ 2255 case quoting Washington v. Watkins, 655 F.2d 1346, 1368 (5th Cir. Unit A Sept. 1981), cert. denied, 456 U.S. 949 (1982)).