

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-1678
Summary Calendar

JUAN PENA,

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
(1:92-CV-075-C)

June 2, 1993

Before JOLLY, DUHÉ, and BARKSDALE, Circuit Judges.

PER CURIAM:¹

Juan Pena, *pro se*, appeals the dismissal of his habeas petition. We **VACATE** and **REMAND**.

I.

In 1988, a state court jury found Pena guilty of murder; and he was sentenced to 60 years in prison. His conviction was affirmed on direct appeal. Pena twice filed state habeas

¹ 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 Pursuant to that rule, the court has determined that this opinion should not be published.

petitions; each was denied by the district court and then by the Court of Criminal Appeals. In May 1992, he filed for habeas relief in federal court pursuant to 28 U.S.C. § 2254. The substantive portion of his petition was an exact copy of his second state petition. In each of these three petitions, Pena cited 28 U.S.C. § 2250 and requested that portions of the record be temporarily loaned to him so that he could prepare his case with more specificity.

Upon motion by the State, Pena's petition was dismissed for failure to exhaust state remedies. The district court denied Pena's application for a certificate of probable cause, but it was granted by this court. This court further ordered that Pena be allowed to borrow a copy of the state court record and file a new brief within 30 days. However, only a few days later, the State filed a letter confessing error in its motion to dismiss and acknowledging that Pena had, in fact, exhausted his state remedies. It requested that the case be remanded for consideration of Pena's claims on the merits.

II.

The district court held that Pena failed to meaningfully exhaust state remedies, both because his petition was not sufficiently specific and because he did not follow the proper procedural standards. As conceded by the State, however, it is clear from the record that Pena pursued all avenues for redress in state court. Upon denial of each of his state habeas petitions, he appealed such denial to the Texas Court of Criminal Appeals, which

twice affirmed without written opinion. The district court erred in ruling that exhaustion procedures were not followed.

The district court may well be correct in stating that Pena's petition is not sufficiently specific.² We note, however, that the district court never addressed Pena's request for access to the record. On remand, it should consider that request and determine whether, as a petitioner granted leave to proceed *in forma pauperis*, Pena is entitled to have access to that record. See ***Walker v. United States***, 424 F.2d 278 (5th Cir. 1970). (As noted, this court ordered that he have access to it for appeal purposes.)

III.

Accordingly, the judgment is **VACATED** and **REMANDED** for further proceedings consistent with this opinion.

VACATED and REMANDED.

² Indeed, it is that lack of specificity which caused this court to grant Pena access to his state court record and an additional 30 days to file his brief. Of course, that time was cut short by the State's letter and the record's return to us for purposes of this review.