

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-3956
Conference Calendar

JOHN S. LINDSEY,

Petitioner-Appellant,

versus

JOHN P. WHITLEY, Warden
Louisiana State Penitentiary, and
RICHARD P. IEYOUB, Attorney General,
State of Louisiana,

Respondents-Appellees.

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Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 92-CV-2518-D (3)

- - - - -
June 24, 1993

Before POLITZ, Chief Judge, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:*

Appellant, John S. Lindsey, appeals the dismissal without prejudice of his habeas corpus petition for failure to exhaust state remedies. The issues in question were raised by Lindsey on direct appeal in a pro se brief that purported to supplement his appointed attorney's brief. The Louisiana First Circuit Court of Appeal did not address those issues. Lindsey challenged this

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

failure in his pro se application for writ of certiorari to the Louisiana Supreme Court, which denied the writ.

In order to exhaust state remedies, a petitioner must "fairly present" all of his claims to the highest state court. Castille v. Peoples, 489 U.S. 346, 351, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989); Satterwhite v. Lynaugh, 886 F.2d 90, 92 (5th Cir. 1989). The submission of a new claim to the state's highest court on discretionary review does not constitute fair presentation. Peoples, 489 U.S. at 351. If Lindsey's claims were not properly raised at the intermediate appellate court, they would be considered new claims in his petition for writ of certiorari. See Satterwhite, 886 F.2d at 93.

The First Circuit Court of Appeal was not obligated to consider the supplemental brief of a criminal defendant who was represented on appeal and whose counsel had briefed assignments of error. An appellant, like a criminal defendant, "does not have the right to be both represented and representative." State v. Benedict, 607 So.2d 817, 823 (La. App. 1st Cir. 1992); State v. Tucker, 604 So.2d 600, 605 (La. App. 2d Cir. 1992), cert. granted, 609 So.2d 212 (La. 1992); see State v. Bodley, 394 So.2d 584, 593 (La. 1981); Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975); United States v. Daniels, 572 F.2d 535, 540 (5th Cir. 1978). Because Lindsey was not entitled to hybrid representation, the issues in his pro se brief were not "fairly presented" to the state courts. The district court's denial of the habeas petition without prejudice is AFFIRMED.