

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9082
Conference Calendar

JAMES DEWAYNE MCHENRY,

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
USDC No. 3:91-CV-0213-R
- - - - -
(December 14, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

PER CURIAM:*

James Dewayne McHenry argues that he was denied effective assistance of counsel because his trial lawyers failed to explain to him that an appeal was not automatic and failed to file a notice of appeal. McHenry supplied for the first time in the district court three affidavits to support his claim.

Under 28 U.S.C. § 2254(b) and (c), habeas relief may not be granted unless the petitioner has exhausted his state remedies.

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Federal-state comity requires that the State have "the initial opportunity to pass upon and correct alleged violations of its prisoners' federal rights." Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971) (citation and internal quotation marks omitted). For Texas state prisoners, "[t]he exhaustion doctrine requires that the Texas Court of Criminal Appeals be given the opportunity to review and rule upon the petitioner's claim before he resorts to the federal courts." Richardson v. Procnier, 762 F.2d 429, 431 (5th Cir. 1985).

Although McHenry raised the ineffective-assistance-of-counsel claim in his state habeas proceedings, he has not presented the affidavits to any Texas state court, either by direct appeal or by application for habeas relief. In Brown v. Estelle, 701 F.2d 494, 495 (5th Cir. 1983), the Court held that the exhaustion requirement is not satisfied if a petitioner advances a new factual claim in the federal court. In reaching its holding, the Court noted that the petitioner's ineffective-assistance claim was in a stronger evidentiary posture than it was in the state courts because he presented affidavits not presented in the state court. Id. The Court further noted that the petitioner's claim of ineffective assistance in the federal court depended on factual allegations outside the record on his direct appeal and in his state habeas proceedings. Id. at 495-96.

Likewise, although McHenry argues otherwise, the affidavits that McHenry presented in the district court corroborate his argument that his lawyers failed to inform him that a direct

appeal of his conviction was not automatic. As such, they place his claim in a stronger evidentiary posture than it was in the state court. The affidavits were outside of the record of his state habeas proceedings. Consequently, he has failed to exhaust his state remedies as to this claim. Moreover, McHenry fails to demonstrate that he is barred from rearguing the claim in the Texas courts. This Court has held that if one or more of a petitioner's claims is unexhausted, the entire petition should be dismissed. Burns v. Estelle, 695 F.2d 847, 853 (5th Cir. 1983) (citing Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 329 (1982)).

The district court erred by denying McHenry's petition on its merits. Unless the "exhaustion" requirement is waived, "federal courts defer to the state so that its courts can first pass on claims that the state has denied a person his constitutional rights." McGee v. Estelle, 772 F.2d 1206, 1211 (5th Cir. 1984). Thus, the district court's dismissal of McHenry's suit is AFFIRMED AS MODIFIED to reflect a dismissal without prejudice for failure to exhaust state remedies. See Bouchillon v. Collins, 907 F.2d 589, 591 (5th Cir. 1990).