

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-3069
Conference Calendar

CHARLES E. MILLER,

Petitioner-Appellant,

versus

N. BURL CAIN, Warden,
Dixon Correctional Institute,
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. CA-92-3991 "D" (1)
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(December 14, 1993)

Before GARWOOD, JOLLY, and BARKSDALE, Circuit Judges.

BY THE COURT:

Charles E. Miller is serving a twenty-year Louisiana prison term for armed robbery. In 1987, Miller filed pro se in federal district court a document written on a form petition for federal habeas corpus relief. The only relief sought in the petition was a copy of his state trial transcript. The district court dismissed the petition with prejudice on the ground that Miller had not raised any errors that might lead to a reversal of his state conviction.

After obtaining his trial transcript through other means, Miller filed a federal habeas petition raising several

substantive challenges to the constitutionality of his conviction. The district court ordered Miller to show cause why his petition should not be barred under Rule 9 of the Rules Governing § 2254 Cases. Miller responded that the only purpose of his earlier petition had been to obtain copies of his court records, and that he had never directly attacked his conviction in federal court. The State urged that Miller's petition was barred by the doctrine of abuse of the writ, and that Miller had not exhausted state remedies with regard to the claims concerning his right to a jury trial, state due process violations, and ineffective counsel. Miller conceded that he had not exhausted his claim alleging state due process violations. Without addressing Miller's contention that his first petition had not sounded in habeas or the State's allegation that the waiver of jury trial and ineffective assistance of counsel claims had not been exhausted, the district court dismissed the petition with prejudice on the ground that it was successive.

Miller's "first federal habeas corpus petition" sought only a transcript of his trial to aid his challenge to his conviction in the state court system. This relief is not available in federal habeas corpus. See Rheuark v. Shaw, 547 F.2d 1257, 1258 (5th Cir. 1977). Miller's prior request for a transcript submitted on the form for use in pro se § 2254 petitions was not a habeas petition and was not a prior determination on the merits. See Rule 9(b).

Miller's motion for a certificate of probable cause is GRANTED. The district court's judgment denying habeas relief is VACATED. The case is REMANDED to the district court for a determination whether Miller has exhausted his state remedies. If Miller's petition presents both unexhausted claims and exhausted claims, Miller should be allowed the option of dismissing his habeas petition or waiving the unexhausted claims. See Rose v. Lundy, 455 U.S. 509, 522, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982).