

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8761
Summary Calendar

BRANDON LEE MOON,

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
Western District of Texas
(EP-92-CA-364)

(May 2, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

PER CURIAM:

Petitioner-appellant Brandon Lee Moon (Moon) was convicted of two counts of aggravated sexual assault in the 327th District Court of El Paso, Texas, on January 20, 1988. He filed several applications for state writ of habeas corpus. On December 2, 1992,

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Moon filed a petition for writ of habeas corpus in the district court, presenting thirteen grounds for relief from his convictions.

On September 10, 1993, the magistrate judge, in response to the state's motion for such relief, found that Moon had failed to present his eleventh and twelfth grounds to the appropriate state court, thus failing to exhaust his state remedies.¹ The magistrate judge recommended that Moon's mixed petition be dismissed without prejudice. The district court adopted the report and recommendation of the magistrate judge and dismissed Moon's petition without prejudice. The district court granted CPC on October 28, 1993.

Moon now appeals and argues that the district court erred in finding that ground eleven of his federal habeas petition was not presented before the state court. Moon does not challenge the court's finding that ground twelve² was not presented to the state court.

A state prisoner is required to exhaust all available state remedies before applying for federal habeas relief. *Satterwhite v. Lynaugh*, 886 F.2d 90, 92 (5th Cir. 1989). The exhaustion requirement is satisfied when the substance of the federal habeas corpus claim has been fairly presented to the highest state court. *Picard v. Connor*, 92 S.Ct. 509 (1971); *Satterwhite*, 886 F.2d at 92.

¹ Moon had failed to avail himself of earlier opportunities afforded him by the magistrate judge to withdraw these two claims, thus avoiding a failure to exhaust dismissal.

² This ground was basically an assertion that the state prosecutor in his closing argument to the jury wrongfully engaged in unsworn testimony bolstering the credibility of the state's witnesses.

For a claim to be exhausted, the state court must have been apprised of the facts and the legal theory upon which the petitioner bases his assertion. *Burns v. Estelle*, 695 F.2d 847, 849 (5th Cir. 1983). A federal habeas petitioner has failed to exhaust his state remedies when he relies on a legal theory different from that which he relied upon in state court or when he makes the same legal claim to a federal court, but supports the claim with factual allegations that he did not make to the state court. *Dispensa v. Lynaugh*, 847 F.2d 211, 217-18 (5th Cir. 1988). A petition containing both exhausted and unexhausted claims constitutes a mixed petition and must be dismissed. *Rose v. Lundy*, 102 S.Ct. 1198 (1982).

Ground eleven in Moon's federal petition alleges that he received ineffective assistance of counsel because his counsel incorrectly advised him that notes or reports of a psychologist *used to assist in reconstructing memory* during the time frame of the offense would be available to the prosecution, thereby preventing him from obtaining the services of such an expert. In his state application, however, Moon alleged that he received ineffective assistance of counsel because his counsel incorrectly informed him that if he requested psychiatric or psychological testing, the evaluation by the court-appointed psychiatrist or psychologist would be available to the prosecution. He alleged in state court that his motion for the appointment of such an expert to examine him "for the purpose of determining [his] competency to stand trial" was thus abandoned upon the advice of counsel.

The basis of Moon's ineffective assistance of counsel claim in

the state court was different from the claim he now presents. He alleged in state court that, based upon his counsel's erroneous advice, he was denied the appointment of an expert *to determine his competency to stand trial*. He never presented a claim to the state court that he desired the appointment of an expert *to assist him in memory reconstruction*. The district court did not err in finding that ground eleven in Moon's federal petition was not presented to the state court.

Moon further argues that the district court erred in not finding that grounds eleven and twelve in his federal petition were excluded from the exhaustion requirement. He contends that attempting to relitigate the issues in state court would be futile because the state courts have either failed to address or summarily dismissed his *other* claims.

"The exhaustion requirement is excused only in those 'rare cases where exceptional circumstances of peculiar urgency' mandate federal court interference." *Deters v. Collins*, 985 F.2d 789, 795 (5th Cir. 1993) (citation omitted). Thus, the exhaustion requirement is excused if seeking state remedies would be futile. *Id.* at n.16.

Moon has not demonstrated that seeking state remedies would be futile. He has shown neither "an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect [his] rights." § 2254(b). As this case does not present "exceptional circumstances of peculiar urgency," the district court did not err in dismissing Moon's petition.

Moon also contends that grounds eleven and twelve should be excluded from the exhaustion requirement because it would be a miscarriage of justice to force him to choose between delaying his federal petition to present the claims in state court or abandoning the claims, and because he is "actually innocent" of the offenses. If an applicant bypasses state appellate processes, he will not be deemed to have met the exhaustion requirement absent a showing of either cause and prejudice or that the failure to consider his claims will result in a fundamental miscarriage of justice. *Deters*, 985 F.2d at 795.

Moon has not established that the failure to consider his claims will result in a fundamental miscarriage of justice. He has not shown that seeking state remedies would be futile or that the available state corrective process would be ineffective to protect his rights. Further, although he asserts his innocence in his brief, he did not raise it in the district court and has made no showing of factual innocence. See *Yohey v. Collins*, 985 F.2d 222, 225 (5th Cir. 1993). There is no indication of a fundamental miscarriage of justice.

Moon's motion to expedite the appeal is DENIED AS MOOT, and the district court's judgment is AFFIRMED.