

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-10712
Summary Calendar

VAN LEE BREWER,

Petitioner-Appellant,

versus

WAYNE SCOTT, Director,
Texas Dept. of Criminal Justice,
Institutional Division,

Respondent-Appellee.

Appeal from the United States District Court for the
Northern District of Texas
(3:93-CV-1422-P)

(December 22, 1994)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

Van Lee Brewer, a Texas state prisoner convicted of sexual assault, filed the instant federal petition for habeas corpus. Brewer alleged the following grounds of relief: (1) that his waiver of counsel was involuntary; (2) that he was denied the right to compel the attendance of certain witnesses at trial; (3) that the jury charge was fundamentally defective; (4) that two witnesses

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

committed perjury; and (5) that the state suppressed favorable evidence. R. at 24, 39, 45, 57, 64, 74, 76. The State responded to the petition, addressing Brewer's contentions on their merits. Id. at 150-64.

The magistrate judge determined, sua sponte, that Brewer had failed to exhaust his state habeas remedies with respect to his first two grounds for relief because he "never raised this legal theory in any of the state habeas proceedings." The magistrate judge recommended that Brewer's petition be dismissed. The district court adopted the magistrate judge's report and recommendation, and dismissed Brewer's petition for failure to exhaust state habeas remedies.

We granted Brewer's request for a certificate of probable cause (CPC) to appeal the district court's dismissal of his petition for failure to exhaust. We then ordered the State to brief whether Brewer sufficiently had exhausted his state remedies with respect to his first two grounds for relief.

The State has filed a letter brief in response to this court's order. The State states that Brewer sufficiently has exhausted his state remedies by presenting the grounds for relief in a habeas application, which was forwarded directly to the Court of Criminal Appeals. Id. The State further states that "it appears that the Court of Criminal Appeals considered the new application as a supplement to the application then before it and rejected it along with the application."

The exhaustion requirement is satisfied when the substance of the federal habeas corpus claims has been fairly presented to the highest state court. Picard v. Connor, 404 U.S. 270, 275, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971); Deters v. Collins, 985 F.2d 789, 795 (5th Cir. 1983). The habeas corpus applicant generally must present his claims before the state courts in a procedurally proper manner according to the rules of the state courts. Dupuy v. Butler, 837 F.2d 699, 702 (5th Cir. 1988).

We have concluded that Brewer sufficiently has exhausted his state remedies. As acknowledged by the State, Brewer presented his first two grounds for relief to the Texas Court of Criminal Appeals as a supplemental application for habeas corpus. Even if Brewer failed to exhaust his claims, however, the State's assertion of such is a waiver of the exhaustion requirement. See Felder v. Estelle, 693 F.2d 549, 554 (5th Cir. 1982). Accordingly, we VACATE the district court's dismissal of Brewer's petition, and REMAND the case to the district court for consideration on the merits.

VACATED and REMANDED.