

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-30237
Conference Calendar

DANNY MCCRAY MATHERLY,

Petitioner-Appellant,

versus

34TH JUDICIAL DISTRICT COURT,
DEPARTMENT OF CORRECTIONS,
State of Louisiana, 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 93-1550 "F" (6)
- - - - -
(September 22, 1994)

Before KING, SMITH, and BENAVIDES, Circuit Judges.

PER CURIAM:*

Danny McCray Matherly filed a petition for habeas corpus pursuant to 28 U.S.C. § 2254 attacking his October 2, 1990, conviction for attempted murder. Respondents filed an answer asserting that Matherly had not exhausted his state remedies.

The district court construed Matherly's federal habeas petition as raising three grounds: (1) that the trial court read

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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

the wrong statute during the plea colloquy; (2) that he received the ineffective assistance of counsel; and (3) that the sentence imposed was a violation of the plea agreement. The district court found that Matherly had exhausted his state remedies with respect to the third claim, but had a petition raising the first two issues pending in state court.

The exhaustion concept of 28 U.S.C. § 2254 requires an applicant to "fairly apprise the highest court of his state of the federal rights which were allegedly violated" and to do so "in a procedurally correct manner." Deters v. Collins, 985 F.2d 789, 795 (5th Cir. 1993). A federal habeas petition will be dismissed if state remedies had not been exhausted to any of the federal claims. Rose v. Lundy, 455 U.S. 509, 519, 102 S. Ct. 1198, 71 L. Ed. 2d 379 (1982).

Matherly's federal habeas petition admitted and the state record confirms the existence of the pending suit. As the state courts have not had a fair opportunity to pass on all Matherly's claims, the petition contains exhausted and unexhausted claims and the district court did not err in dismissing the claim without prejudice.

AFFIRMED.