

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-60366
Summary Calendar

RONNIE LEE FRANKLIN,

Petitioner-Appellant,

versus

EDWARD M. HARGETT, Superintendent,
Mississippi State Penitentiary

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Mississippi
(2:92-CV-0009-D-O)

(December 13, 1994)

Before DUHÉ, WIENER, and STEWART, Circuit Judges.

PER CURIAM:¹

Ronnie Lee Franklin appeals the district court's dismissal of his habeas petition for procedural default. Franklin raises double jeopardy and ineffective assistance of counsel claims, but his claims are time-barred under Mississippi's post-conviction statute, Miss. Code Ann. § 99-39-5(2) (1994). He argues that Mississippi's application of the procedural bar is arbitrary. We

¹ 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

vacate and remand to the district court to dismiss his petition without prejudice for failure to exhaust state remedies.

Franklin did not appeal the state circuit court's denial of his habeas petition. He cites Layton v. Carson, 479 F.2d 1275, 1276 (5th Cir. 1973), for the proposition that a petitioner need not appeal his petition to the state's highest court if that court recently rendered an adverse decision in an identical case and there is no reason to believe that the court will change its position. In Luckett v. State, 582 So. 2d 428, 430 (Miss. 1991), the Mississippi Supreme Court applied the procedural bar to a due process claim but not to double jeopardy and ineffective assistance of counsel claims. Franklin contends that Luckett made his appeal to the Mississippi Supreme Court futile.

The Mississippi Supreme Court has recognized an exception to procedural bars in post-conviction relief. The court will not apply a procedural bar when the error is plain and affects fundamental constitutional rights. Grubb v. State, 584 So. 2d 786, 789 (Miss. 1991); Smith v. State, 477 So. 2d 191, 195-96 (Miss. 1985). By applying the procedural bar in Luckett, that court determined that the exception did not apply to the double jeopardy and ineffective assistance of counsel claims raised in that case. The plain error exception, however, might apply to Franklin's case.²

² The state circuit court in which Franklin brought his state habeas petition noted that his double jeopardy claim was on all fours with Harris v. Oklahoma, 433 U.S. 682 (1977). The court nevertheless denied relief because it could not distinguish Luckett.

Because Franklin's case is not identical to Luckett, our case of Layton v. Carson is inapplicable. Franklin's failure to appeal his state habeas petition to that court constitutes failure to exhaust state remedies. The district court judgment is VACATED and the case is REMANDED to the district court to dismiss Franklin's petition without prejudice so that he may exhaust his state remedies.³

³ Franklin may still have a state court remedy even though his time to appeal the denial of his state court habeas petition has long since past. Mississippi bars second and successive habeas petitions. Miss. Code Ann. § 99-39-23(6) (1994). Nevertheless, the Mississippi Supreme Court applies its plain error exception to circumvent that bar. See Grubb, 584 So. 2d at 789. Thus, if Franklin's double jeopardy claim amounts to plain error, he still has a remedy in state court.