

Hall v. Cunningham

CV-97-207-B 06/29/98

UNITED STATE DISTRICT COURT  
FOR THE DISTRICT OF NEW HAMPSHIRE

Larry Hall

v.

Civil No. 97-207-B

Michael Cunningham

**O R D E R**

Larry Hall has filed a habeas corpus petition raising several federal questions that he listed in his state court notice of appeal but omitted from the brief he filed with the New Hampshire Supreme Court.

New Hampshire Supreme Court Rule 16(3)(b) requires an appellant to specify the "questions presented for review" in his brief. Because Hall failed to list any of his federal law issues in his state supreme court brief, he failed to present these claims to the court for decision. Accordingly, his petition must be dismissed. See Ford v. Zavaras, No. CIV. A. 97-Z-842, 1998 WL 236211, at \*1, 5 (D. Colo. May 1, 1998) (copy attached).

The New Hampshire Supreme Court has consistently ruled that an appellant waives any argument that is presented only in a notice of appeal. See, e.g., State v. Hale, 136 N.H. 42, 45 (1992); Woodman v. Perrin, 124 N.H. 545, 550 (1984); State v. Perkins, 121 N.H. 713, 715 (1981). Accordingly, it might be argued that Hall should not be required to exhaust state court

remedies because exhaustion would be futile. See, e.g., 28 U.S.C. § 2254(b)(1)(B)(i) (West Supp. 1998) (exhaustion not required "if there is an absence of available State corrective process"); see also Duckworth v. Serrano, 454 U.S. 1, 3 (1981). I reject this argument because it is conceivable that the New Hampshire Supreme Court could make an exception to the waiver rule in this case if it were to accept Hall's claim that he failed to raise the federal law issues in his brief because his appellate counsel was ineffective.<sup>1</sup>

Hall's habeas corpus petition is dismissed without prejudice so that he may exhaust his state court remedies.

SO ORDERED.

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Paul Barbadoro  
Chief Judge

June 29, 1998

cc: Sven Wiberg, Esq.

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<sup>1</sup> Although I have authority to deny a habeas corpus petition on the merits even though the petitioner has failed to exhaust his state court remedies, see 28 U.S.C.A. § 2254(b)(2) (West Supp. 1998), I decline to exercise that authority here without first giving Hall an opportunity to present his claims in state court.