

Pierce v. NH

CV-96-065-B 12/11/96

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Francis Pierce, Jr.

v.

Civil No. 96-065-B

State of New Hampshire

O R D E R

Petitioner includes three arguments in his habeas corpus petition that he raised in his state supreme court notice of appeal but declined to brief. The New Hampshire Supreme Court will not consider issues on direct appeal that are raised in a notice of appeal but not briefed. See Stone v. Perrin, 118 N.H. 109, 110 (1978). Thus, the New Hampshire Supreme Court has not yet had an opportunity to address three of the issues petitioner attempts to raise here. Ordinarily, this would require the dismissal of the petition for failure to exhaust state remedies. Picard v. Conner, 404 U.S. 270, 275-77 (1971). However, a habeas petition need not be dismissed for failure to exhaust state remedies "if it is clear that [the state habeas petitioner's] claims are now procedurally barred under [state] law." Gray v. Netherland, 116 S. Ct. 2074, 2080 (1996) (quoting

Castille v. Peoples, 489 U.S. 346, 351 (1989)). While it may be true, as the Magistrate Judge suggests, that petitioner is procedurally barred from raising the unexhausted claims in a state habeas petition because he failed to brief them on direct appeal, I cannot say that this is clearly the case. Petitioner claims that the three issues were not briefed because his appellate counsel was ineffective. If a state court is persuaded by this claim, it is conceivable that the court could recognize an exception to the general rule that issues raised in a notice of appeal but not briefed are waived. Accordingly, I agree with the Magistrate Judge's ultimate conclusion that the habeas corpus petition must be dismissed without prejudice because petitioner has failed to exhaust state court remedies with respect to three of the four issues he raises in the petition.

The Magistrate Judge's Report and Recommendation (document no. 11) is approved.

SO ORDERED.

Paul Barbadoro
United States District Judge

December 11, 1996

cc: Francis Pierce, Jr., pro se