

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 04-14279

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
January 18, 2006
THOMAS K. KAHN
CLERK

D. C. Docket No. 04-01428 CV-T-23-MSS

KENNETH LEBLING,

Petitioner-Appellant,

versus

SECRETARY FOR THE DEPARTMENT OF
CORRECTIONS, ATTORNEY GENERAL
OF FLORIDA,

Respondent-Appellee.

Appeal from the United States District Court
for the Middle District of Florida

(January 18, 2006)

Before EDMONDSON, Chief Judge, ANDERSON and FAY, Circuit Judges.

PER CURIAM:

Appellant filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The district court reviewed the petition and concluded: “Lebling represents

on page three in his petition that he had re-submitted a motion for post-conviction relief to the state courts, which is still pending. Consequently, this action is premature.” The district court then sua sponte dismissed the petition as premature.

A comparison of the claims raised in the §2254 petition and the then pending state court motion demonstrates that those claims raised in the §2254 petition are not involved or included in the claims raised in the state court matter.

Consequently, as the government concedes, it is apparent now that the claims in Lebling’s §2254 petition were fully exhausted and ripe for review. The dismissal was a result of a misunderstanding and error.

The government urges other grounds for our affirmance of the dismissal and now suggests further discovery is necessary to determine if the petition is barred for being successive. All of these arguments should be presented to the district court in the first instance.

The order of dismissal is vacated and the matter remanded to the district court for further consideration.

VACATED and REMANDED.