

August 31, 2004

Charles R. Fulbruge III
Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-20258
Summary Calendar

TERRO SMITH,

Petitioner-Appellant,

versus

DOUG DRETKE, DIRECTOR,
TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Texas
(04-CV-372)

Before DAVIS, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:*

Terro Smith (Smith), Texas prisoner # 875683, seeks a certificate of appealability (COA) to appeal the district court's dismissal of his 28 U.S.C. § 2254 petition as time-barred. Smith filed the petition to challenge his 18-year sentence for aggravated sexual assault of a child. Smith argues that it was error for the district court to sua sponte dismiss his petition

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

O R D E R
No. 04-20258

-2-

as time-barred, without giving him an opportunity to present argument opposing dismissal.

In order to obtain a COA, Smith must show that jurists of reason would find it debatable whether his petition states a valid claim of the denial of a constitutional right and whether the district court was correct in its procedural ruling. Slack v. McDaniel, 529 U.S. 473, 484 (2000). Smith has satisfied this burden.

Accordingly, IT IS ORDERED that COA be granted on Smith's claim that he is entitled to equitable tolling due to mental incompetency, VACATE the district court's denial of 28 U.S.C. § 2254 relief, and REMAND to the district court for further proceedings. See Dickinson v. Wainwright, 626 F.2d 1184, 1186 (5th Cir. 1980). COA is denied as to any remaining issues.

COA GRANTED IN PART, DENIED IN PART; VACATED AND REMANDED.