

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50162
Summary Calendar

RAMSEY BLAKE HARRELL,

Petitioner-Appellee,

versus

GARY L. JOHNSON, DIRECTOR, TEXAS DEPARTMENT
OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION,

Respondent-Appellant.

Appeal from the United States District Court
for the Western District of Texas
(MO-96-CV-131)

November 21, 1997

Before WIENER, BARKSDALE, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:*

The Director of the Texas Department of Criminal Justice, Institutional Division, appeals the district court's denial of his FED. R. CIV. P. 59(e) motion to alter or amend the judgment, contending that the court abused its discretion by dismissing Ramsey Blake Harrell's habeas petition without, rather than with, prejudice. Harrell did not file a brief in opposition.

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 R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

The summary judgment constituted a judgment on the merits. See *Powell v. United States*, 849 F.2d 1576, 1579 (5th Cir. 1988); 10A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 2719, at 7 (1983). Accordingly, the judgment should have provided for dismissal with prejudice. We therefore **MODIFY** the judgment to reflect the dismissal as being with prejudice and **AFFIRM** the judgment as modified.

AFFIRMED as MODIFIED